

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE *-claimant*

UD1070/2011
RP1423/2011

Against

EMPLOYER *-respondent*

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. McGrath B.L.

Members: Ms A. Gaule
Mr. Noel Dowling

heard this claim at Dublin on 25th February 2013.

Representation:

Claimant: Mr. Stephen O' Sullivan BL instructed by Ms Marian McGee
Solicitor, Sheridan Quinn, Solicitors, 29 Upper Mount Street, Dublin 2

Respondent: Mr. John Barry Management Support Services (Ireland) Ltd,
The Courtyard, Hill Street, Dublin 1

Determination:

The Tribunal has carefully considered the evidence adduced. The claimant is bringing a claim under the Unfair Dismissals Acts saying that she was constructively dismissed in and around October 2010 by reason of the unreasonable behaviour of her employer with whom she had worked for over three years.

The claimant commenced employment with the company known as FS in and around March 2007. The claimant worked in security and was assigned shifts in different sites from week to week. It is common case between the parties that the claimant worked in J House on an almost permanent basis for the year of 2008. Unfortunately, FS Ltd. lost the contract with J House towards the end of 2008 and at the beginning of 2009 the claimant was effectively back to the position of 'floating' employee and getting assigned work as it fell available in different sites around Dublin.

The Tribunal accepts that after a year in the relative comfort of a singular site assignment it was difficult for the claimant to re-adjust to the uncertainty of being placed at different sites around the city.

The employer known as FS was taken over by the respondent company under a transfer of undertaking in an around July 2009. This had no impact on the claimant's contract of employment.

There is a conflict in the evidence as regards the pattern of work assignments in 2009. The claimant is adamant that she was chasing work at the time and that she rang her immediate manager looking to get rostered for shifts as she was anxious to work up as many hours as she had been working in 2008.

The respondent on the other hand is making the case that it would appear to their analysis of the rostering history that the claimant was very often unavailable for work and that the huge drop in earnings and days worked was as a result of the claimant's refusal to work or unavailability to work. The Tribunal cannot know which version of events is correct.

At around about the same time as the transfer of undertaking the claimant did let her employer know that she was pregnant and would be out on maternity leave from February 2010.

As it happens the claimant went out on extended sick leave before the end of 2009 and was not coming back to work until in and around October 2010 after the conclusion of her maternity leave. The Tribunal notes the employer went out of their way to facilitate her getting her maternity benefit. Having had what she believed to have been a difficult year in the workplace in 2009, the claimant was anxious that her position should be regularised and in particular made it known both through her union representative and her solicitor that she needed to be reinstated to a 39 hour week and at the very least the claimant was looking for regular shifts of up to twenty hours a week at a suitable site.

It is common case that the claimant was offered a two week and a six week position out in Loughlinstown on her return to work in October 2010. The claimant refused this offer of work as the travel and long hours would be unsuitable where she had no childcare arrangements in place.

The claimant was giving conflicting signals in this regard. On the one hand she wanted to return to full time employment but on the other she did not seem to be able to organise a domestic arrangement suitable to such long hours.

The Tribunal fully accepts that the respondent company could not guarantee the type of work the claimant seemed to be looking for i.e. of the type she had enjoyed in J House.

There can be no doubt that the claimant along with the other seven thousand employees of the respondent company knew that the nature of the employment included flexibility, an ability to travel and a willingness to work unsocial hours as and when required. In theory, the claimant knew all this. In practice she did not want to avail of work which she believed would be overly disruptive.

In constructive dismissal type cases there is an onus on the employee to demonstrate that the respondent has behaved in such a way that the claimant could not reasonably be expected to

continue in the workplace.

The Tribunal believes that the claimant has not established this to have been the case. The claimant had made no complaint within the workplace as to her dissatisfaction with the level of work she was being given during 2009. It is only in 2010 that she raises this issue and only then in advance of her return to the workplace. In any event she never does return to the workplace as she believes she will never get work suitable to her new needs and she tenders her resignation in and around October 2010.

In the circumstances the claimant has not made her case and the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

The claimant was not made redundant and her claim under the Redundancy Payments Acts, 1967 to 2007 also fails.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

PRELIMINARY DETERMINATION
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Determination with respect to Preliminary issue:

The Tribunal has heard evidence adduced as a preliminary issue raised before dealing with the substantive matter of Unfair Dismissals Acts, 1977 To 2007 dismissals and Redundancy Payments Acts 1967 to 2007.

In order to qualify for relief under the Unfair Dismissals Acts, 1977 To 2007, the claimant is obliged to ensure that the Offices of the Employment Appeals Tribunal are in receipt of the appropriate T1A document within six months of the date of termination. This time can be extended to one year when exceptional circumstances prevented the claimant from meeting the six month deadline.

The respondent states that the claimant resigned her position at the end of October (25th or 26th) 2010 and that therefore the T1A dated 11th May 2011 is two to three weeks out of time.

There is a letter dated the 25th of October 2010, which was written by the claimant tendering her resignation. In her evidence, the claimant stated that she had indeed written the letter but that

she had not actually sent it until about the 29th of November having to firstly organise to have same printed up.

It is noted that the date of receipt of the letter is not stamped on the letter so it is difficult for the Tribunal to know which version of events is more accurate.

What is clear from the paperwork provided is that the form P45 gives a date of the 13th of November 2010 as being the date for the termination of employment. The claimant received her final pay including holiday pay some two weeks after this date.

There is no written record of the negotiations between the parties through October and November. The claimant had been taking unpaid leave (following her Statutory period of Maternity leave) and was anxious to return to work and secure employment suitable to her needs and the employer was trying to facilitate that.

On balance, the Tribunal is inclined to accept the claimant's evidence that although she had talked in terms of her inability to work the hours being suggested to her, she was hopeful that her employer would eventually find work that met her needs on returning to the workplace. As the claimant was on unpaid leave the situation could have been allowed to go on until the claimant could be accommodated.

The respondent took the claimant's refusal to work an assigned job as a blanket refusal to work at all. This assumption led to the termination of the claimant's employment by way of P45 which takes the date of termination to be the 13th of November 2010.

The claimant's T1A dated 11th of May 2011 is therefore within time and the claims can proceed.

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This _____

(Sgd.) _____
(CHAIRMAN)