

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE *-claimant*

CASE NO.
UD1790/2010

against
EMPLOYER *-respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr D. MacCarthy S. C.

Members: Mr J. Browne
 Mr F. Dorgan

heard this claim at Wexford on 23rd April 2012, 19th June 2012, 20th June 2012, 28th August 2012 and 29th August 2012

Representation:

Claimant:

Respondent:

Background:

The claim before the Tribunal was one of constructive dismissal.

Claimant's Case:

It was the claimant's evidence that she commenced employment with the respondent on 22nd November 1997 as a part-time shop assistant working four days per week. She did not receive a contract of employment at that time. In 1998 the claimant was offered a full-time position which she accepted. At that time the claimant's duties included carrying out a small amount of ordering from two or three companies. From in or around 2000 the claimant began to attend trade shows.

In 2004, the then manager left her position and the claimant was approached by DA (a director at the time) about taking on the manager's role. It was proposed that the claimant would take on responsibility for the shop in conjunction with a colleague MD. MD was to have responsibility for accounts and other duties. The claimant was to take responsibility for front of house matters, compiling rosters, recruitment, ordering, purchasing, as well as training and managing staff. The claimant received a pay increase when she accepted this role and from that time she was referred to as manager by other members of staff. She attended tradeshow

abroad. BA who was a director was usually in attendance at the tradeshows in addition to the claimant.

In or around 2006 the respondent opened a second premises and the claimant also managed the holiday entitlements and other matters for the staff in those premises. The director's son (S) was also involved in the business by this time but the claimant and MD had been told that he was answerable to them.

The claimant began to feel uneasy in her employment and from the time of August 2008 began to keep a diary. This followed from the time that BA berated her for organising cover for a shift following an operation. BA was annoyed that the claimant had not asked S to arrange this cover. The claimant could not understand this.

DA asked the claimant and her colleague MD to attend individual meetings in January 2009. After her meeting MD informed the claimant that the meeting was relating to a pay cut and taking on extra duties. The claimant was subsequently asked by DA to reduce her salary and the claimant told him she would consider the matter. However, the following week her wages were cut without her knowledge. When the claimant raised this issue with DA, he said that it was an error on the part of the accountant.

The claimant's colleague MD did not accept the pay cut and subsequently left the respondent's employment in January 2009. As a result from that time S held the keys to the office and when he was on leave the keys were given to another member of staff who had commenced employment as a shop assistant in 2007. The claimant had to report to this employee if she required access to the office. DA again asked the claimant had she considered accepting a reduction in pay and the claimant told him she had not yet made a decision. He said in that case the company could not afford to retain her. The second shop was semi-closed at this stage and a number of staff had been let go.

The claimant continued with her duties until April 2009. It was the claimant's case that from the time of April 2009 the managerial duties which she had performed for a number of years were removed from her. A substantial number of diary entries from 2009 and 2010 pertaining to this issue and others were opened in detail to the Tribunal.

The claimant was provided with a contract of employment with an attached job description on 29th March 2010 at 5.15pm which she was asked to return the following day. In letter dated 2nd April 2010 the claimant informed the directors that she could not sign the contract as she had concerns regarding the job title and description as stated in the contract. The contract described the claimant's position as a general shop assistant.

A meeting was subsequently held on 26th April 2010 to discuss these issues. At the meeting the claimant raised the issue that many responsibilities were removed from her over a period of time. The claimant had not raised these concerns previously as she had felt intimidated by S and BA, while DA ignored her. The respondent's minutes of the meeting indicated that the directors had stated that the title and responsibilities of "manager" were not removed from the claimant as she had never held such a role. The claimant confirmed at the meeting that she carried out the duties as stated in the job description for general shop assistant but she stated that she carried out additional duties that were not listed. The claimant was to revert regarding the job description by 7th May.

Due to the way she was treated when she returned to work after this meeting, the claimant attended her doctor on 30th April 2010 and was subsequently absent on sick leave from her employment.

The claimant informed the directors by letter dated 6th May 2010 that she was writing in relation to the request by the respondent's human resources consultant at the meeting, that she would prepare a job description for the role of manager. Having given the matter careful consideration the claimant stated that she believed it would not be appropriate to compile the job description at that time.

A written response to this letter was received from the directors dated 10th May 2010 and stated that the claimant had been asked to add any other duties that she felt accurately reflected her post but that she was not asked to complete a job description for the role of manager, as at no stage did she hold such a post, as no such post existed.

The claimant responded by letter dated 16th June 2010 stating that she could not understand why so many of her duties and responsibilities had been taken away from her. The claimant also wrote letter dated 29th June 2010 stating amongst other things, that following the meeting of the 26th April 2010, she underwent systematic bullying by S, which took place while the directors were abroad. The claimant stated in the letter that she had attempted to discuss with S how he was treating her, but he refused. The claimant further stated that she was made to hand over files which were necessary to carry out her job and was given various menial tasks to do. At 5.20pm on Thursday, 29th April 2010, S approached her work area and removed all other documents to do with her job. The claimant wrote that her position was now untenable. The claimant received a response from the company which stated that as soon as she was medically fit to return to work the respondent suggested holding a meeting to include all affected parties to address the issues.

The claimant responded by letter dated 12th July 2010 stating that as the respondent had not dealt with her concerns as raised in her letter dated 29th June 2010, she was left with no choice but to resign. The claimant subsequently filed a claim for constructive dismissal. The claimant gave evidence of loss and of the impact of the work situation on her health.

During cross-examination the claimant reiterated that she never had a contract until one was offered to her in March 2010. She did not sign it and had difficulties with her job description. She agreed with DA to revise the job description at the meeting of 26th April but stated that it was so obvious in her last week of employment that her job title had been taken from her and she was treated so badly in that week that she had no option but to leave. Asked about her final week the claimant said that she had an altercation with BA regarding free stock which was given to her on trial. BA said that "this never happens, you don't get free stock, other staff put the items on sale." The next day the claimant telephoned BA regarding orders for the week, DA answered the phone, as they were both in Spain. DA said he would have BA call the claimant back but she never did. Asked why she resigned the claimant stated that it was probably on advice from her doctor and her solicitor. Asked again why she said her job had been taken from her, she said S was doing her work.

The claimant said that while doing basic cleaning of her own area and dusting was part of her normal duties, S had asked her to Hoover the place from top to bottom, clean the kitchen, empty filing cabinets and remove rubbish. She felt this was all done to demean her in front of staff and customers. She felt he might have been doing it on instruction from his mother because she

overheard a telephone conversation they were having.

Asked if the previous manager had responsibility for monies she agreed that she had. The claimant did not hire staff on her own and sometimes did training but others did it as well. She was aware that S was unwell and had informed his mother of same; she assumed the situation had been addressed; she respected him but had not got his respect back.

A human resources consultant (KR) gave evidence that she attended the meeting on 26th April 2010 with the claimant whom she had been advising for about six months by that time. She became aware the claimant was keeping a diary but had not suggested this to the claimant.

Shortly after this meeting, the claimant contacted her stating that she could not prepare a role for what the work she was doing, as it was not her role. They had spoken after the meeting of 26th April 2010 and the claimant provided the HR consultant with notes which the consultant then used along with her own notes to compile an account of the meeting. She sent a copy to the claimant who was in complete agreement with them. This record of the meeting was opened to the Tribunal. The HR consultant believes the account to be an accurate reflection of the meeting that was held and it was her understanding at the time that the claimant was asked to prepare a job description for the manager's role. The claimant was clear that her duties and responsibilities were that of a managerial role and that over time they were gradually removed from her.

During cross-examination the HR consultant stated that the meeting was conducted informally but at times there were slightly heated exchanges. The meeting finished amicably and the claimant was to draw up a job description. They began to work on this, until the claimant contacted her to say that she could not possibly go ahead with drawing up the job description, due to the way she was being treated on her return to work.

TM gave evidence that she commenced employment with the respondent as a shop assistant in 1995 and left the company in 2004. TM recalled the staff being called together for the announcement that the claimant was the new manager. TM provided details of her pay as a shop assistant to the Tribunal.

MD gave evidence that she commenced employment as a shop assistant in November 1997. Over time she took on the dual role of shop assistant as well as accounts duties including stock control. When the previous manager departed MD was informed by the directors that the claimant was taking over as manager of the shop floor with MD continuing in her role. A week later she was approached by BA who asked if she was upset that the claimant had been given the manager's role since they had both commenced employment in the same year. MD told BA that she was not upset as she preferred working "behind the scenes." The duties they would both carry out were clarified a week later and at that meeting they were told that S would be working in the shop and would be answerable to both of them. Both she and the claimant were generally left to run the shop. MD stated that her pay was the same as the claimant's and provided details of her pay to the Tribunal.

The claimant held weekly staff meetings, distributed duties and any curriculum vitae received were given to the claimant who interviewed for staff with MD or with BA. MD stated that both she and the claimant were consulted about pay rises for staff and bonuses as well as having input into the recruitment of new staff members.

MD was approached by DA on 9 January 2009 who berated her for how she was performing her duties although she had worked there for twelve years and was never previously disciplined.

MD was then informed that she could continue to do accounts work but would also have to carry out a store-man's role which was physical hard work. MD would not have been capable of such work. She would previously have overseen such a position. In addition to this she was informed that her pay was being cut by 40% and this was put into effect without her agreement. MD felt her position was untenable and resigned, subsequently bringing a claim against the company. At the time she departed the claimant was the manager. During her employment BA referred to the claimant as the Floor Manager when speaking to MD.

BL gave evidence that she was employed by the respondent from September 2008 until July 2010. She was interviewed for the position by the claimant and MD and she understood the claimant to be the manager and the staff referred to her as such. Indeed the witness herself referred to the claimant as manager in front of the directors and was not corrected otherwise. She confirmed that the claimant drew up rosters and managed annual leave and other days off. If the witness had an issue with the roster she went to the claimant about it. BL provided details of her pay to the Tribunal.

In the final year of her employment other staff did the displays and took orders, duties which the claimant had carried out up until that time. At the end of November 2009 the claimant was on annual leave. The witness recalled one particular day when she referred to the claimant as manager to both BA and S and she was told by S that the claimant was no longer to be addressed as manager. The witness recalled seeking clarification on this. The claimant was removed from her section and told to clean stock as well as cleaning the shop and toilets. By that time the claimant was spoken at, rather than to, by S. At the commencement of her employment BL had taken instruction from the claimant but towards the end of her employment S began to give her instructions.

JD gave evidence that she was first employed by the respondent for almost one year between 2006 and 2007. At that time the claimant was manager and interviewed JD with BA. It was the claimant who informed JD that she had secured the position. The second time she was employed by the respondent was about two weeks before the claimant left her employment and on that occasion JD was interviewed by BA. From what JD observed at that time the claimant no longer had a position. JD could not believe how the claimant was being treated and what tasks she was being asked to do by S. For example the claimant was asked to Hoover flights of stairs and clean out filing cabinets. JD did not feel the claimant still had the position of manager and she observed that the claimant was neither spoken to nor treated in a nice manner. BL provided details of her pay to the Tribunal.

Dr D for the claimant gave evidence that he saw the claimant on 20th July 2010 as a referral from her G.P. He felt that the claimant suffered a mild to moderate depressive illness which was being managed, he was of the opinion that stress in the workplace was the cause of her anxiety. The stress also exacerbated an existing condition.

Under cross examination he said that these were symptoms you would expect from the situation the claimant was in, but once the book was closed she would be able to move on.

The Tribunal was advised by the respondent's representative that S would not be in attendance.

Respondent's Case:

Dr PD for the respondent said that he compiled an independent assessment report in July of 2012. He said that while Dr D was calling her symptoms an illness he was saying that it was a normal reaction to an unfortunate situation. The claimant did experience anxiety, poor sleep and was finding the Tribunal sittings stressful.

DA gave evidence that he was a director of the business while the claimant worked there. He was involved in providing the contract to employees as he was aware of a need for compliance in employment law. He hired a HR consultant FB to provide contracts for all employees. The claimant expressed concern with her contract and a meeting took place in April 2010. The claimant brought a HR consultant with her. The meeting ended with a suggestion that the claimant would come back to the respondent by 7th May with what she considered to be her job description.

Under cross examination DA said that the issue of intimidation was raised at the meeting but as the meeting ended amicably nothing was done about it. He thought that if she did mention intimidation it was related to her job description and responsibilities that she felt were being taken away from her. S was a gentle person and BA would not hurt a fly. DA had no recollection of FB interjecting or ending the meeting as was in the claimant's diary of events.

FB gave evidence that she was a HR consultant and was given instructions to provide terms and conditions for the employees of the respondent. All the titles/job descriptions were as general shop assistants. DA called her to say that the claimant had concerns with her terms and asked that she meet the claimant. FB took brief notes at the meeting. Her recollection was that it was a robust meeting with the claimant outlining her concerns about her job title and responsibilities being taken from her. The claimant did say she felt intimidated, BA had shouted at her and DA ignored her but FB had no recollection of S being mentioned except maybe something about a show in Birmingham. FB felt they were going around in circles, the core issues were her duties and title. It was agreed that the claimant would set out her duties and meet again on 7th May.

Under cross examination FB said that the word intimidation was used and conceded that S was discussed because his name appeared in her notes.

BA gave evidence that she is owner and director of the business. She was in charge of the shop and gave her son (S) duties. All staff did cleaning and everybody cleans the canteen and toilet. BA had no recollection of a telephone call with S where the claimant was then told to Hoover and clean. She was the main person who accepted curriculum vitae and different members of staff would help with interviews. Each employee did their own ordering of stock but BA had overall responsibility. Free samples of stock were pooled and given to staff, so she did approach the claimant when she noticed an order which asked to please send a sample. The claimant suggested to BA that S take over some duties, she handed over rostering to him. BA said she had a good relationship with the claimant; she could not imagine intimidating her and did not shout at her.

Under cross examination BA said that any of the staff would be called manager if a member of the public came in looking for one.

BA did not recall a complaint of intimidation at the meeting.

Determination

The Tribunal addressed the case under three strands.

1. Issues involving DA and the contract of employment.
2. The complaints against DA.
3. The complaints against S.

On strand one we find for the respondent. The claimant was unwilling to sign the new draft contract for a number of reasons; principally that it misdescribed her status and function. DA arranged a meeting to discuss the issues, to which the claimant brought a human resources consultant to assist her. The respondent company also had a human resources consultant present, and the two professionals discussed matters in detail. In our view the respondent tried to discuss the issues fairly and fully, and the meeting ended with the claimant being invited to submit her own draft job description. She did not follow through on this and she resigned, partly for other reasons.

On strand two we make no finding as none of the witnesses have persuaded us that the complaints were valid or invalid.

On strand three we find for the claimant. Her complaints against S became more serious as time went by, particularly in the last week of her employment. The Tribunal gave consideration to the extent to which S' conduct could be attributable to the company. He was a member of the family which effectively owned the business, but his own status within the managerial structure was unclear. The claimant's case was that she was a manager, and at one stage she had a supervisory role over him. We do, however, attach importance to his position as a director of the company, and therefore find that his conduct is attributable to the company.

S did not give evidence to the Tribunal, and the claimant's evidence was therefore uncontroverted. The Tribunal finds his "*conduct*" towards her was such as to come within the definition of constructive dismissal as set out in S.1 of the Act of 1977:

" ..because of the conduct of the employer, the employee was or would have been entitled, or it was or would have been reasonable for the employee, to terminate the contract of employment without giving prior notice of the termination to the employer,"

The Tribunal finds that the claimant was constructively dismissed within the meaning of this definition.

In the circumstances reinstatement and re-engagement are not appropriate. The Act provides for compensation "*as is just and equitable having regard to all the circumstances.*" We have regard to her earnings capacity, her state of health and other factors, and take the view that the sum of €30,000 would meet the case.

The Tribunal awards the claimant compensation in the amount of €30,000 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)