

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE - *claimant*
against

UD1260/2011

EMPLOYER - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms F. Crawford B.L.

Members: Mr M. Noone
Mr J. Flannery

heard this claim at Dublin on 13th November 2012 and 20th March 2013

Representation:

Claimant: Cronin & Co, Solicitors, 20 Donabate Town Centre, Main
Street, Donabate, Co Dublin

Respondent: Mr Finian Finn, Denis I. Finn, Solicitors, 5 Lower Hatch
Street, Dublin 2

The determination of the Tribunal was as follows:-

Claimant's Case

The claimant told the Tribunal that she began employment as a nursery employee. She received a contract of employment from the respondent to sign along with many papers but she did not understand most of it as her English was not good. She successfully completed her probation.

She could not recall being absent from work due to illness prior to going on her maternity leave. She may have been absent on one or two occasions and lived near the crèche. She did not inform her employer that she had back problems after her maternity leave. Her maternity leave commenced in June 2009 and ended on the 4th January 2010. She then said that she told her employer about her back problem when she returned to work.

As part of her work duties she had to lift children and change many nappies each day. The employer did not do anything to help her. She felt the respondent could have treated her better. She suffered from problems with her back on a daily basis. At the start she thought that her

back problems could be related to her pregnancy but it was not the case. Her daughter attended the crèche and she was given discount for her. The room that she worked in was the worst room in the crèche and she asked to go to a better room that was bigger

She was assigned to the baby room where the children were smaller. When she lifted heavier children she felt more pain. She asked to be placed in the baby room permanently but she was told that this was impossible because she had to help in the other rooms as well. Two employees worked in the baby room. Her employer could have chosen someone else. She felt pressurised to attend work even though she was ill. She sometimes felt she was unfairly treated by her employer.

She complied with the respondent's rules relating to illness. She provided medical certificates where necessary. She had a problem with her stomach and she was absent from work for ten days. She did not have any support from her employer regarding family issues.

Her employer shouted at her due to her absence in work, as she was needed at the crèche. She was not treated in the same way as her colleagues. Other staff members were ill for periods of time and one of her colleagues was absent for three months. There were no disciplinary procedures in her contract. She did not understand the disciplinary procedure regarding sickness. She was stressed and ill but the respondent did not understand her. After she suffered back pain the respondent treated her very badly and this made her stress worse. The stress was a factor in her decision to leave the respondent and she felt she had no other option. She never suffered from arthritis. She informed the respondent at a disciplinary hearing that she did not have arthritis even though this was documented in a doctor's letter dated 27th July 2010. The issues would have been resolved if the employer reverted to the doctor. The doctor that compiled the letter died two weeks ago.

She was not treated in the same way as her colleagues and she did not think that this was fair. There was never a problem for her colleagues if they reported late for work. Her colleagues were praised for work they undertook and she was not. Two colleagues had a 50% discount for their children in the crèche and she had a 25% discount for her child.

She requested a transfer to a crèche near her home. She was told that if she had a problem with her back that she would have a problem in another area and if she missed work due to back pain how could she continue to work at another location. She felt that it would be better for her to transfer to a Crèche near her house. She was not treated fairly at the disciplinary hearing. Prior to the disciplinary hearing held on the 5th November 2010 she did not receive a copy of the hand book. She did not receive any documents prior to the hearing and was not given a fair opportunity to prepare for the hearing.

The claimant brought her cousin to the meeting on the 5th November 2010 who acted as an interpreter. She was not given a copy of the support review at the hearing. She was surprised that this document was used at the hearing. She only received a copy of the hand book after she asked for it. She was not given an opportunity to consider documents and to file an appeal within five days.

Her employer could have made it easier for her to understand the disciplinary process. She felt she had no other choice other than to walk away from her employment. Her termination affected her financially and she did not seek other employment after she submitted her resignation due to her back problem. She is not one hundred per cent well and her problem

continues.

In cross examination she stated that maybe she would have continued working if she had not resigned. She did not receive any support in work. She did not appeal the warning that she received after the disciplinary hearing held on the 5th November 2010 as she did not know about the appeal; she was not informed about it. It was untrue to say that she was aware that she had a right of appeal.

She stated that she loves children and when she commenced working in the crèche she had no English. Her cousin who worked in the crèche is still an employee. She was never given important papers in front of her cousin and she was just told to sign the documents.

Sometimes it took her two hours to get to work as she moved to a new house while pregnant. Prior to her maternity leave she was late infrequently. She did request a move to a crèche closer to her home. She never missed work without real justification. She attended the meeting to discuss her attendance. She recalled receiving a formal verbal warning. When she was ill her child was taken care of in the crèche. Sometimes she was five/ten minutes late. Her level of absenteeism increased due to her back problems.

She agreed that she recalled asking her employer if she could dismiss her so that she could claim social welfare benefit as she did not have a choice and no one was heeding her. She said that it was because her employer did not want to see her in work. Following the refusal she was on a further two months sick certificate but stated it had nothing to do with the refusal. Asked about late arrival after her return she stated that she didn't have credit on her phone on one occasion only. She did receive her first warning in writing but didn't fully understand it and didn't understand the right to appeal, it was not explained to her.

Respondent's case:

TC the former centre manager gave evidence of the claimant being late on three occasions over a seven day period. On the first occasion the claimant telephoned ahead but then they ended up ringing her. Because of the child to minder ratios required it was necessary to have the correct number of people present and even if it was the cook, someone would have to be drafted in if an employee failed to turn up. TC never received a complaint from the claimant except when she was given a 25% discount for her child. The claimant wanted more but TC made enquires for her and that was the rate applicable at the time, it may have been more in previous years but she didn't know.

Under cross examination TC denied ever shouting at the claimant, she may have shown annoyance but it was for arriving late, not when genuinely on sick leave. All employees were treated the same. Every effort was made to make sure the claimant understood and she always said that she did. The claimant wasn't asked to re-consider her resignation as TC knew that she wanted to go.

AB HR business partner gave evidence of the contract, stating that two copies would be sent to the employee, one would be retained and one sent back to the respondent. This practice has now been amended with it now being done in-house. She stated that the claimant also signed off on an induction sheet and would have a hand book.

AB would have met with the claimant on several occasions and while she might have to speak slowly was sure that the claimant understood the conversations. AB was the person who conducted the disciplinary meeting of 5th November and told the Tribunal that no reasons for the claimants lateness were given except for, having to get up early every morning and then get a train and a bus. These were issues for the claimant to manage and could not be taken as genuine reasons for being late, therefore a written warning issued. The letter contained the right to appeal but no appeal was requested.

Under cross examination and regarding vacancies in other locations closer to the claimant's home, TC said that there was a need for consistency and while she didn't tell the claimant she wouldn't get a position she did say that she couldn't see any other crèche hiring her.

She was aware that the claimant had asked to be let go from her job and claim Social Welfare because C from the crèche had telephoned her and asked what she should do, it was something she had never been asked to do before. TC hoped that the disciplinary meeting would resolve issues and stated that the claimant's doctor had advised that she was fit to resume her position.

Determination:

The Tribunal carefully considered the evidence adduced during the course of the two day hearing and the submissions made on behalf of the parties.

The claim comes before the Tribunal as a claim for unfair dismissal and the Tribunal must decide if the claimant has been constructively dismissed. In assessing the matter, the Tribunal has assessed the evidence adduced in the matter and the relevant legislation. The onus is on the claimant to prove that she did not voluntarily resign from her employment and the termination was due to the conduct of the respondent, leaving the claimant with no alternative but to resign from her employment or otherwise that it was a reasonable act for the claimant to resign from her employment.

It is for the Tribunal to consider the actions and behaviour of the respondent and to determine if the actions were so unreasonable that it was reasonable to expect that the claimant would not tolerate the behaviour and thus resign. The conduct of the respondent is crucial.

In this instance, there were issues with regards to lateness of the claimant attending work but the respondent confirmed that this was not part of the decision for the commencement of the disciplinary process which was to investigate "the failure of the claimant to comply with the company grievance on sickness" (as per the letter of the 26th October 2010).

The claimant had a poor standard of English and the policies of the respondent (Absence Policy and Bullying and Harassment Policy) had not been translated for the claimant. It was also stated that the claimant had not received a copy of the documentation. It is noted obiter that the Absence Policy provided to the Tribunal included UK legislation, however the Tribunal was told that there was a policy specific for this jurisdiction.

The claimant was never sent to be medically assessed by a doctor or occupational health expert on behalf of the respondent despite this option being contained in the Absence Policy

documentation provided.

Following the disciplinary meeting, the claimant was given a first written warning. This was not appealed. The Tribunal concludes (from past decisions of the Tribunal) that this is not a bar on the claimant maintaining a claim of constructive dismissal.

The claimant sent a resignation letter on the 24th November 2010 and gave her last day of work on the 31st December 2010. Following the resignation letter, there were no efforts to communicate with the claimant or to ask her to review her decision.

In all the circumstances, the Tribunal finds that the claimant was constructively dismissed from her employment and therefore her claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds.

The claimant seeks compensation from her employer as set out in the T1A. The Tribunal heard that the claimant has had a subsequent knee operation and it was submitted on behalf of the claimant that the loss claimed was limited to 12 months from the termination.

Taking all circumstances into consideration, the Tribunal awards the claimant the sum of €7,200.00.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)