

Correcting Order
EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE

- Claimant

CASE NO.
UD1194/2011
RP1563/2011
MN1290/2011
WT490/2011

against

EMPLOYER

- Respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey B.L.

Members: Mr R. Prole
Mr P. Woods

heard this claim at Dublin on 9th November 2012 and 8th April 2013

Representation:

Claimant:

Respondent:

The determination of the Tribunal was as follows:

This is a correcting order and amends the original order dated 7th May 2013.

The claimant and her husband were married on the 13th January 2010 and not, as stated on the original order, the 13th January 2011.

The claimant's husband passed away on the 30th January 2010 and not, as stated on the original order, the 30th January 2011.

The claimant contacted the respondent company on the 26th July 2010 and not, as stated on the original order, the 26th July 2011.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

Marie McMahon, 5, Shantall Drive, Beaumont, Dublin 9
- *Claimant*

CASE NO.

UD1194/2011
RP1563/2011
MN1290/2011
WT490/2011

against

Woodgrey Limited, Unit 1A, Malahide Road Industrial Park, Coolock, Dublin 17
- *Respondent*

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey B.L.

Members: Mr R. Prole
Mr P. Woods

heard this claim at Dublin on 9th November 2012 and 8th April 2013

Representation:

Claimant: Mr. Ronan Killeen B.L. instructed by:
Killeen, Solicitors, 14, Mountjoy Square, Dublin 1.

Respondent: J.J. Fitzgerald & Co. Solicitors, Friar Street, Thurles, Co. Tipperary

The determination of the Tribunal was as follows:

Background:

The claimant was employed as an Office Clerk in the respondent company. It was a small company with only four employees. The claimant's husband was the Managing Director. He passed away on the 30th January 2011. They had married on the 13th January 2011. The claimant went absent on sick leave due to the upset and stress of the situation. The silent partner in the company (RD) took up the position of Managing Director.

Claimant's Case:

She paid monthly visits to her doctor and was prescribed anti-depressants. She was not paid while absent on sick leave.

On the 26th July 2011 she contacted the respondent company and spoke to FS the store man. She was informed she was not allowed onto the premises, even to pick up personal items. When attending her optician for an eye test it transpired her P60 was incorrect and her details had not been forwarded to revenue on a P35 form. She again contacted the respondent to speak to RD but she never got to speak to him.

The claimant instructed her solicitor to write to the respondent's solicitor concerning the matter as she felt she had no alternative but to leave the employment. The claimant's employment ended on the 30th March 2011.

The claimant stated that she had been certified fit to return to work in July 2010. She told the Tribunal that her husband's shares in the company had been transferred to her but was unsure of the date this occurred. She gave evidence of loss. She had no written contract of employment.

The store man (FS) gave evidence. He was subpoenaed to be a witness by the claimant. He was no longer with the company having been made redundant in June 2012. The claimant came to the premises in July 2010 and stated that she was there to work. RD had gone abroad for 7-8 weeks. He believed that the claimant knew that RD was abroad. Prior to leaving he had locked his office but told FS that if the claimant arrived she could work in the annex where there was a desk and a computer. FS informed the claimant of this but she did not enter the building. He did not stop her entering the building. Previously she had worked at desks both in the office and in the annex.

A few days later the claimant returned with a letter which he refused to sign. He said he would pass on the letter. He contacted RD who said that the claimant could work at the desk provided. He could not recall if he said that RD would contact the claimant.

The witness was cross-examined. The claimant had returned a third time with the letter a few days later and brought a witness to sign it in front of him. He spoke to the claimant on the phone on occasion while she was on sick leave. On one occasion she said that she was discontinuing sending in sick certificates as she was the boss and would send them to herself. He did not deal with the sick certificates, they went directly to RD. The claimant had normally worked mornings at the office.

Respondent's Case:

RD gave evidence. He and the late Managing Director had invested in the business together in 1995 with a 49% to 51% division of shares. The Managing Director held the majority

control. They also bought the premises together in equal shares. He worked elsewhere. The Managing Director worked at the company already and had been given first option to buy by the previous owner. The business paid the mortgage on the building which was the only income he received from the business. He had no involvement in the day to day running until 2009 due to the Managing Director's illness. The business did well until 2009/2010. Debts were increasing and RD was considering closing as it was unprofitable. Only RD and one employee remain with the company.

He received sick certificates from the claimant for 2-3 months after January 2010, but nothing after mid-April. There was no contact from the claimant about returning to work except for her visits while he was away. He had expected her to appear while he was away so he made sure there was a place for her to work. He moved the fax machine and photocopier out of his office so she could access them. The claimant had removed her personal items from the office after the Managing Director's death. He did not receive any calls to his mobile phone from the claimant. There were legal representatives on both sides regarding the business and so RD did not think it was appropriate to contact the claimant directly.

After the claimant came to the office in July he contacted the Department of Social Protection. An official there confirmed that the claimant was on illness benefit and that was to continue until 30th October 2010. He did not believe that she intended to return to work.

In 2007 the Managing Director asked RD if he would agree to him using the business as collateral for a property in Spain. RD had agreed to give his consent as the building was worth three times what the property in Spain was worth and he believed that the Managing Director's half of the premises would cover it. RD was now being pursued in the High Court for the debt of the Spanish property, just under €154k, which he believed should have been paid on the Managing Director's death. The business premises was no longer worth much and would be difficult to sell at this time.

He had an agreement with the Managing Director that each of them would have first access to the other's shares in the event that one of them died, which was to be exercised within three months. RD had sought to do this within the time but his letters were ignored or another issue put in reply.

A letter from the claimant's solicitor dated 22nd November 2010 stated that the claimant had been refused access to work on 26th July 2010. A P60 was sought for 2010, but RD could find no evidence of any payment to the claimant in 2010. The claimant submitted a fitness to work certificate on 24th January 2011. After clarification the Managing Director's pension has been paid to the claimant.

The witness was cross-examined. He held 49% of the company shares. He had appointed his wife co-director. He had assumed he would be the shareholder. He did not contact the claimant. He thought it was up to her to return. They were in contact, but not about her returning to work. He expected her to return while he was away in order to build a claim. He did not reply to the fitness certificate as he did not believe she really intended to return.

Solicitors were dealing with the situation. The claimant was never dismissed.

Determination:

The claims under the Redundancy Payments Acts, 1967 to 2007, Minimum Notice and Terms of Employment Acts, 1973 to 2005, and Organisation of Working Time Act, 1997, were withdrawn during the hearing.

Having considered all of the evidence the Tribunal is of the view that the claimant has failed to show that she was constructively dismissed. There was an acrimonious history between the parties and a lack of communication on both sides once their respective solicitors got involved and indeed before that. The claimant's contention that she was available to return to work from 26th July 2010 when she says she turned up but was effectively excluded from the premises is not accepted by the Tribunal. Her own witness gave evidence to the contrary and the Tribunal prefers his evidence. Her credibility was seriously undermined by the fact that she was in fact receiving social welfare payments up until October 2010.

It appears to the Tribunal that the claimant was in effect trying to build a case against the company. She was not in a position to return to work at the alleged time as she was claiming social welfare. The claim under the Unfair Dismissals Acts, 1977 to 2007, fails.

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This _____

(Sgd.) _____
(CHAIRMAN)