

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

EMPLOYEE

CASE NO.

UD1363/2011, MN1463/2011  
WT547/2011

against

EMPLOYER

under

**UNFAIR DISMISSALS ACTS, 1977 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: Mr J. O'Connor

Members: Mr G. Andrews  
Mr J. Flavin

heard this claim at Killarney on 11th April and 8th and 9th July 2013

### **Representation:**

Claimant : Mr Paddy Whelehan, Philip O'Sullivan & Company, Solicitors,  
14 Denny Street, Tralee, Co Kerry

Respondent : Ms Caroline McEnery, Hr & Business Solutions, Causeway,  
Tralee, Co. Kerry

The determination of the Tribunal was as follows:

### **Claimant's Case**

Prior to commencing employment with the respondent in March 2007 the claimant had gained managerial and administrative experience in a supermarket some twenty kilometres distance from the respondent's location. That experience included dealing in human resources. The respondent which consisted of a husband and team also operated a medium sized supermarket in the same county. Initially the claimant was assigned duties at the delicatessen counter and on the checkout tills and she agreed that the title of her position was that of sales assistant. She described her early relationship both with her colleagues and the respondent as very good. She found them friendly and supportive. Within five months of her commencement the claimant accepted an offer from the respondent to join the management team in running the shop. She regarded that as a promotional move but her title within the shop remained unchanged.

The claimant's relationship with management and the respondent began to deteriorate once the claimant observed and then commented on what she regarded as unprofessional practices in the shop. In citing some examples of these alleged shortcomings and inappropriate behaviour the claimant told the Tribunal she was increasingly feeling uncomfortable in the way the supermarket was run. When she brought her concerns to the respondent the response was negative, unwelcome and at times hostile. She heard the respondent tell her in effect that they could do what they wished and she felt her job was threatened by their remarks. It was her impression that the respondent wanted to get rid of her. When she sought her correct pay for working public holidays and overtime the response from the owners was a threat to close the shop rather than pay her and others their proper wage. In March 2009 her employment status changed from a full time employee to that of part time.

Apart from those detailed concerns the claimant also felt singled out for adverse treatment from the respondent. She was denied a contract or a statement on her terms and conditions of employment despite requesting them. Management eventually offered her a contract but she was still dissatisfied with some aspects of it. The claimant was also furnished with a disciplinary and grievance procedure. She told the Tribunal that at no stage did she submit her grievances in writing to the respondent. Besides she had no one to go to to air those grievances.

The claimant maintained she was not given her proper statutory breaks considering her working hours, her access to toilet facilities was restricted, and she was not given a chair at her work place and therefore forced to stand for long periods. That in turn added to her back pain. The claimant was also subjected to insulting and belittling comments from the respondent when she raised those issues. During the winter of 2010/11 the heating system in the shop was not turned on with the result that she severely felt the effects of the lower temperatures at the time.

In the claimant's view the issuing of a first verbal warning to her was unjust and it was eventually removed from her personnel work file. A further verbal warning followed in January 2011 again relating to her perceived performance. The claimant viewing that as a ridiculous action refused to accept that warning. By that stage she realised that this type of treatment was not going to stop as she was constantly waiting for the next abuse. That feeling left her upset and ill. When she visited her general practitioner and related her ailments to him he recommended that she take a number of weeks off and away from the shop. A medical certificate issued to that effect and the respondent reacted unsympathetically to that. An issue concerning the amount of the claimant's pay was raised at the time resulting in an underpayment into her account. By now the claimant had had enough of such treatment. The situation with her employer was causing her undue stress and was affecting not only her working environment but also many other aspects of her life.

In telling the Tribunal that her involuntary decision to hand in her notice was impulsive the claimant felt that for the sake of her well being she had to take that action. The claimant added that she should have taken that option two years earlier.

A consultant psychiatrist examined the claimant twice in July 2011 following a referral to him by her general practitioner. That practitioner had declared her fit to return to work from 28 March 2011. The psychiatrist agreed with the contents of letters written by that practitioner that previous March and April. He also read his own medical report compiled on 12 August 2011. While he accepted there is always another side to a story and that he could only relay what the claimant told him regarding her work situation with the respondent he felt that at the time her only option was to remove herself from that situation.

## **Respondent's Case**

A co-owner of the shop who described himself as a very approachable person told the Tribunal that he talked on a daily basis to all available staff. That included the claimant when both were present in the shop. He viewed the claimant as a good worker who always seemed very happy. At no time did the claimant raise complaints or grievances with him nor did he comment adversely on her work performance or position. On the contrary whatever the claimant asked of him regarding her work situation she was given it. He certainly never asked her to act as manager in the shop.

This witness did not attend to administrative and technical matters in the running of this business and while he was aware of medical certificates relating to the claimant he did not know their details. The co-owner stated that he did everything "by the book" and denied engaging in unprofessional practices.

A manager of the shop outlined her interaction with claimant regarding this case. For some of that period she was the assistant manager. When a manager became absent due to maternity leave the claimant at times worked in a supporting managerial role but was not promoted. That support was no longer needed when another person was recruited to the managerial team. The claimant never showed any interest in acquiring a trainee managerial role.

This witness acknowledged she was approached on a number of occasions from the claimant on several issues. There was a good working relationship between them and the witness did her best to resolve the raised issues. In addition she tried to facilitate the claimant with rosters and to sort out sick pay for her. All her statutory rest periods were granted to her. On 11 February 2011 this witness had a telephone conversation with the claimant regarding her work situation. At the time the claimant was absent on medical grounds and the witness felt the situation was going well. However, within a few minutes of that call this witness received a text message from the claimant announcing her intention to resign. In response the manager phoned the claimant and asked her to reconsider that decision. Some days later she received a short note from the claimant confirming her resignation effective from 18 February 2011.

## **Determination**

To involuntarily resign your employment is a serious decision and needs serious justification for a constructive dismissal claim to succeed. In this case the claimant acting impulsively and it seems with undue haste left her employment with the respondent. At the time she perceived her work situation as untenable and took a decision with far reaching consequences. There is no doubt she acted in what she regarded to be her best interest.

That decision became less impulsive when the respondent asked her to reconsider her decision but after a couple of more days she confirmed her intention to resign. The claimant had experience in human resources and had a copy of the grievances procedure. Such procedure was not formally used and that alone gives the message that she did not exhaust all reasonable efforts in submitting her complaints and grievances to the respondent. While some of her grievances might have merit her non-use of a formal approach to those grievances damages her case. That damage together with her impulsive decision and her experience in human resources all contribute to this case not succeeding.

The claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

The appeal under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 does not apply in constructive dismissals case and must therefore fall in this case.

The Tribunal is satisfied that the adduced evidence from both parties favours the respondent in the appeal under the Organisation of Working time Act, 1997. Accordingly, the appeal under that Act falls.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)