

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:  
Employee – claimant

CASE NO.  
UD713/2007

against

Employer - respondent

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms B Glynn

Members: Mr T Gill  
Mr T Kennelly

heard this claim at Limerick on 23rd July, 7th October 2008 and 12<sup>th</sup> February 2009

#### **Representation:**

Claimant: Ms Sheila O’Riordan BL, instructed by:  
Kieran O’Brien  
O’Brien & Associates  
Mill House  
Henry St  
Limerick.

Respondent: Ms Kiwana Ennis BL, instructed by:  
Ms Ciara Tunney  
William Fry  
Solicitors  
Fitzwilton House  
Wilton Place  
Dublin 2

The determination of the Tribunal was as follows:

A preliminary issue arose at the outset of this hearing on time limits.

Following submissions and evidence from the claimant and with no objection from the respondent the Tribunal determined that the claimant’s application for redress under the Unfair Dismissals Acts was submitted, albeit to the Rights Commissioners office within the stipulated six months from the date of her cessation of employment with the respondent.

## **Claimant's Case**

The claimant, who is a Polish citizen, commenced employment as a general operative with the respondent in May 2004. Up to September 2006 the claimant was very happy working at the respondent company. She described her relationship with her supervisor as normal and liked the general manager. That working relationship with the respondent adversely changed from that time onwards when the son of the owner, the maintenance engineer, became visible and active in her working life.

According to the claimant, the maintenance engineer, who had no supervisory role over her attempted to give her instructions on her work practices. She felt his attitude and approach to her was discriminatory and biased against her. Such discrimination and negative behaviour consisted of interfering with her gloves, breaks, and coffee cups and "scolding" her for talking at work. She added that it was the small things that this person did that made her life "horrid".

The claimant approached both her supervisor (the production manager) and the general manager about her complaints towards the son of the owner. She got an assurance that the matter would be addressed. However, the situation did not improve to her satisfaction and she eventually tendered her resignation and left the respondent company in January 2007.

The second witness for the claimant gave evidence that he commenced working for the respondent company in June 1989 and finished in January 2006. He finished working for the respondent company because he wanted to earn more money elsewhere. During the claimant's tenure of employment the witness was employed as a charge hand and was in charge of seven employees including the claimant. He reported to a supervisor and the claimant reported to him. He was satisfied with the claimant's work at all times.

The witness gave further evidence that the claimant operated a machine along with another employee during her working day. The witness taught the claimant how to operate the machine. He recalled that a health and safety book was provided to show how to operate the machine but was not sure if it was provided to all employees. The book was printed in English only.

Under cross examination the witness confirmed that he showed the claimant how to operate the machine and agreed that he would never place a drink on top of the machine as it could be dangerous. He confirmed that he might have left gloves that were worn by him while operating the machine on top of the machine, but could not see any danger in this especially if the machine was turned off.

## **Respondent's Case**

The first witness for the respondent gave evidence that he is employed as a production manager for the respondent company. He is responsible for health and safety issues and commenced employment in 1999. The company manufacture radiators for tractors and employ between 35 and 45 people on the factory floor. He became the claimant's supervisor in early 2006 and scheduled her day-to-day work. He monitored production and would spend approximately one hour per day on the factory floor.

The production manager gave evidence that disposable gloves have to be worn by all employees operating machines and a bin is provided for the disposal of gloves. In October 2006 written rules were provided to all employees who operate machines. Included in these rules was that no clothing

was to be left on machines and employees were also told this on an ongoing basis. The rules were provided in English and Polish but there were no written rules prior to October 2006. He told the claimant and other employees not to leave gloves on the machines, and that he would put gloves in the bin if he found them on machines. He also told the claimant and two other employees not to leave cups of coffee on the machines.

The production manager gave further evidence that he allocated overtime to employees. He allocated overtime to the claimant but she was only available every second Saturday. The claimant did overtime for a short period but then approached him and told him she could not do any more overtime. If the claimant had sought overtime from him and was dependable it would have been available to her.

In October 2006 the production manager was approached by the claimant and was told that she felt uncomfortable working with the maintenance engineer. The maintenance engineer would have brief contact with the claimant on a day-to-day basis changing machine settings. The production manager contacted the general manager and a meeting then took place between the claimant and the general manager. The production manager was told by the general manager after the meeting that there was to be zero further contact between the claimant and the maintenance engineer. The claimant reported to the production manager afterwards and there was zero contact between her and the maintenance engineer.

At the beginning of December 2006 the claimant handed her notice to the production manager. She gave three weeks notice excluding the Christmas holidays and the claimant did not inform the production manager that she was leaving because of the maintenance engineer.

Under cross-examination the production manager confirmed that there was a manual in English but not in Polish prior to October 2006. He agreed that rules were formalized in October 2006 and that the issue of gloves being left on machines is an ongoing problem. He does not agree that the claimant was unfairly dismissed and did not see her upset after an encounter with the maintenance engineer. He agreed that early morning overtime was available, but had no recollection of the claimant being available to work early mornings. He confirmed that the claimant had a good work record, was never disciplined during her employment and does not know why she became unhappy in her employment.

In reply to questions the production manager confirmed that the claimant operated a machine with a co-worker. He confirmed that this co-worker worked early morning overtime regularly from April 2005 until September 2005. He does not recall if the claimant requested overtime in 2005. He confirmed that the maintenance engineer is employed as a toolmaker and has no authority over any employees.

The maintenance engineer gave evidence that he was unaware of any problem with the claimant. His role was to maintain machinery in the factory, including changing machine settings as required. This included changing the settings on the machine the claimant worked at; the frequency of this varied, and so the maintenance engineer's time spent in direct contact with the claimant was sporadic, from many times during a day, to no contact for weeks. The maintenance engineer had no supervisory role and had no involvement in the allocation of overtime.

The maintenance engineer believed that he and the claimant had a good relationship initially, but this had cooled and he did not know why. He was surprised when the general manager called him to the office and told him that the claimant felt uncomfortable around him. He agreed to follow the

general manager's instruction that future communication with the claimant would be directed through the production manager.

On the issue of disposable gloves the maintenance engineer agreed that if he saw them lying on machines he throw them in the bin; but he did not target the claimant. He was the Health and Safety Officer and gloves on machines constituted a fire hazard.

The general manager gave evidence that the issue regarding coffee cups on machines had involved three members of staff, including the claimant. The production manager had resolved that issue during the time the claimant was still an employee. The issue of gloves on machines was an ongoing one of general housekeeping for employees working with machines. Health and safety information was translated for the claimant, though not at the beginning of her employment. The general manager contended that the claimant was adequately trained on the machines she was to operate. When the claimant notified the company of her pregnancy she was moved to the Fin machine, which required the least amount of physical labour.

Overtime was allocated by the production manager, where required, and was allocated to who was available and to who was consistently available. The claimant had not raised the issue of overtime allocation with the general manager.

On 25<sup>th</sup> October 2006 the general manager was informed by the production manager that the claimant was upset and he asked to see her. She was visibly upset and said that she felt uncomfortable around the maintenance engineer. The general manager asked for a specific complaint but none was given. He told her that in the absence of a complaint there could be no investigation. As a precaution, he established a procedure whereby if the claimant had a problem with her machine she would notify the production supervisor, who would relay the information to the maintenance engineer, and the claimant would not be present while he tended to the machine. The claimant was agreeable to this arrangement and seemed happy with it.

The general manager did not receive any further complaint from the claimant and he was surprised when told that the claimant had given her notice. He was also surprised that she was giving so much notice, that she was coming back for two days after the Christmas holidays to finish it and that she had no job to go to. He was satisfied that the production manager had asked her to stay on. He was unaware of why the claimant was leaving.

### **Determination:**

In this case the claimant is claiming constructive dismissal. A constructive dismissal will occur when an employee terminates a contract of employment in circumstances in which, because of the employer's conduct, either the employee was entitled to terminate the contract without notice, or it was reasonable for the employee so to determine it. Accordingly, the question of constructive dismissal must therefore be considered under two headings, 1) Entitlement, and 2) Reasonableness.

#### **Entitlement:**

The Tribunal has always emphasised that there must exist a mutual need for trust and confidence in the continuing relationship of employer and employee. This was put succinctly in Brady –v- Newman UD330/1979 when the Tribunal said, "As an employer is entitled to expect his employee to behave in a manner which would preserve his employer's reasonable trust and confidence in him, so also must the employer behave". The claimant gave evidence that she commenced work with

the respondent in May, 2004 and was happy therein until September, 2006 when a new maintenance engineer (ME) commenced work therein. The claimant gave evidence that the ME discriminated against her from that date onwards in both his conduct and attitude towards her and singled her out for unfair treatment over and above other employee's. She said that she felt uncomfortable around him. The claimant gave evidence that she complained and reported the ME on three occasions to the general manager. (GM) She cited examples of discrimination as his constant removal of gloves from the top of her machine, his removal of coffee cups from her machine, his removal of her coat from the overhead pipes and his refusal to give her overtime. In direct examination the ME admitted that he did indeed remove the claimant's gloves from the top of the machine but said that he did so in respect of other employee's also. He denied that he removed her coffee cups from the machine. In respect of the coat hanging on the pipes, he informed the Tribunal that he informed the production manager (PM) that such clothes should be removed as they impeded his work on the machinery. He also gave evidence that he had nothing to do with overtime as this was a matter for the PM. He informed the Tribunal that he was the maintenance engineer for the company and looked after the machinery. He had no supervisory role over the claimant. He further gave evidence that he was called to the office of his general manager, on one occasion only in respect of a complaint made by the claimant about him. His evidence was that he was stunned to be told of the complaint. He could offer no explanation as to why the claimant had reported him to the PM. Thereafter steps were put in place so that the ME and claimant would not encounter each other.

The production manager (PM) then gave evidence and informed the Tribunal that employees were not permitted to leave the gloves on top of the machines, but he constantly had to remind all employees of this rule. He also stated that he had told the claimant on one occasion, and other employees on several occasions, not to leave coffee on the machine. He also gave evidence that he reprimanded the claimant on one occasion in respect of hanging clothes on the pipes. He confirmed that he alone was responsible for the overtime, and explained that overtime was not a regular feature, and depended on the orders the company received. He confirmed that the claimant looked for overtime in 2006, but informed him that she could not work evenings and could only work every other second Saturday. He confirmed that in around October, 2006 the claimant informed him that she was uncomfortable with the ME. His evidence was that this was the only occasion in which she mentioned this to him. He reported the matter to the GM. Thereafter, a meeting was arranged with the GM and the outcome of the meeting was that steps would be put in place to ensure zero contact between the parties. He said when she handed in her notice he asked her to reconsider, but she did not do so, nor did she furnish any reasons for leaving.

The GM gave evidence thereafter, and confirmed that he had been contacted on one occasion only in respect of the claimant's complaint against the ME. At that meeting, while the claimant informed him that she was uncomfortable with the ME she was unable to elaborate further and was further unable to give any examples of the conduct of the ME which led to this uncomfortable feeling. The GM said that he explained to her that he could not instigate a full disciplinary investigation into the matter on the evidence before him unless the claimant elaborated further. The claimant was still unable to do so. Thereafter the GM contacted the PM and steps were put in place so that the claimant and maintenance engineer would have zero contact with each other. He also gave evidence that the leaving of the gloves on the machinery together with coffee cup was an ongoing housekeeping problem with all employees.

Considering all of the above, it is clear that the conduct of the employee did not entitle her to take the steps she subsequently took, in that she only lodged one official complaint against the ME, and at the meeting with the GM as to the specifics of her complaint, was unable to do so. In the

circumstances the employer could do no more. It is clear that the employer did endeavour at length to get to the bottom of the matter, but was unable to do so by the lack of co-operation of the employee.

Reasonableness:

Here the conduct of both parties must be examined. The Tribunal has always emphasised that the claimant must have acted reasonably in terminating the contract. Employees will be expected to pursue their grievance through the grievance procedures laid down in the contract of employment or in the Company/Union Agreement before taking the step of resigning. In this case, as set out above, the claimant made only one formal complaint in respect of the ME. In addition, when she met with the GM, in relation to the complaint, apart from stating that the ME made her feel uncomfortable, was unable to put the matter any further. It is clear from the evidence that the GM endeavoured to get to the bottom of the matter, but was unable to do so by the claimant's inability to explain fully the reason for her complaint. In the absence of reasons or specific examples the GM was unable to carry out an investigation. In the circumstances the claimant effectively blocked her own complaint from being progressed further, and her subsequent decision to resign was not alone unreasonable, but extremely puzzling.

No evidence was given that the claimant brought to the GM's attention the fact that she felt that she was being discriminated against by the ME by his removal of her gloves from the machine, removal of coffee cups and removal of her coat from the overhead pipes, all of which matters were given in evidence by the claimant as instances of the ME's discriminating conduct against her.

In the circumstances, it is clear that the claimant acted extremely unreasonably in her dealings with the respondent in handing in her notice on the basis of one complaint made to the respondent's company, which the respondent had attempted to deal with but was unable to do so due to the claimant being unable to clarify or furnish details in respect of same.

Having carefully considered all the evidence and the submissions made the Tribunal is of the opinion that the claimant was not constructively dismissed and therefore her claim must fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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