

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIMS OF:

CASE NO.

EMPLOYEE

MN619/2009

WT266/2009

UD611/2009

against

EMPLOYER

EMPLOYER

under

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

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr E. Murray

Members: Mr D. Hegarty  
Mr D. McEvoy

heard this claim at Cork on 10th March 2010

Representation:

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Claimant :

Mr. John Boylan, McNulty Boylan & Partners, Solicitors,  
26-28 South Terrace, Cork

Respondent :

Ms Edel Kennedy, ESA Consultants, The Novum Building,  
Clonshaugh Industrial Estate, Dublin 17

The determination of the Tribunal was as follows:-

This case came before the Tribunal by way of a claim for unfair dismissal of the Claimant on or about the 17<sup>th</sup> of February 2009.

The Claimant said that she was a Chartered Accountant and commenced her employment with the Respondents on the 23<sup>rd</sup> of February 2007. The company was a start up company and she was appointed to the position of Head of Finance. The main activity of the Respondent company was the administration of employee share plans. The company had business clients in the UK, the US and China and the headquarters was in Clonakilty, Co. Cork.

Investment was required in the business and she described how she was involved in the raising of funds amounting to 3.6 million dollars through an accountancy firm. She felt that she was central to this fundraising. Her work went well and she was complemented both by the auditors and the Board of Directors. In 2007 she was paid a bonus of €7500.00 and given a pay rise. This was within 6 months of joining. She got a further €15,000.00 bonus in June 2008.

She had no performance or disciplinary problems during the course of her employment with the company. In December 2007 she became pregnant.

On the 28<sup>th</sup> of February 2008 she formally announced her pregnancy to the CEO of the company. From that time on she said she felt “annihilated” at work. She felt that she was being left out of decision making, she felt that her work load was increased and that unreasonable demands were made of her. She remembers one particular conversation with the CEO in which she was asked “I wonder if this is the place for you”.

She approached the local operations manager and told him that she felt “left out” and that her work load was excessive and that she was finding it impossible to meet expectations. Not only did he not give her any comfort or alleviate her work load, but he asked her could she take on the extra responsibility of doing further fundraising before having her baby. She was shocked. She felt that this was impossible.

Communication from the Chief Executive Officer in the United States which previously had been very frequent, stopped completely. She did not attend any board meetings after the announcement of her pregnancy. On the 28<sup>th</sup> of February 2008 she discovered that the CEO was already in the process of recruiting a temporary replacement for her.

She left in June to have her baby, and her baby was born in July. She took her statutory maternity leave. She was not paid while on maternity leave and the due date for the return to work was the 30<sup>th</sup> of April 2009. On the 30<sup>th</sup> of January 2009 she was asked to attend a meeting with the CEO and the new Chairman of the company. The meeting was arranged for the 17<sup>th</sup> of February 2009 at the offices of a firm of accountants in Cork. The Claimant had never met the new Chairman on a one to one basis previously.

At this meeting to her surprise she was told that matters were not working out on the operational side of the company and the company was looking to combine the finance and operations activities of the company and that this would result in her being made redundant. The Chief Executive Officer was going to propose this change to the Board. She was shocked. She became very upset as she felt that the finance role in the company couldn't possibly be redundant as the company was a growing company and financial management was central to its activities. She was told that she could apply if she wished for the new role as combined Operations Officer and Chief Finance Officer but it was clearly conveyed to her that the company did not consider her suitable for this role and that in essence she would be wasting her time. She offered to do a diminished role but this was ruled out. The meeting became somewhat heated and she became emotionally distressed and left.

She received the job description sometime later but didn't apply for the job as she felt it was made clear to her that there was no point. She was replaced temporarily by Mr. D who ultimately was replaced by Mr. H, who now holds the position of joint finance/operations head.

There was no cross examination of the Claimant.

Evidence was given by the Chairman of the company. He described how he and a number of investors were induced to invest in the Respondent company because of their background in financial services. The investment was predicated on the transfer of some fifty-eight clients bearing a fee income of 1.7 million dollars to the company from another institution and this had been provided for in the prospectus upon which he relied. Having made the investment it emerged that the transfer of these clients was not going to happen and consequently he found that he had to fund raise to make the company viable. He pursued and procured this investment and if he had been unable to raise the necessary funds the company would certainly not have survived and his investment and that of his friends would have been lost. It would undoubtedly also have given rise to litigation with the original promoters of the company.

The company however continued to make losses and in January 2009 he became Chairman of the company. He set about cutting costs in the company and in the course of that cost cutting a number of significant changes were made. He managed to obtain 1.2 million dollars in cost savings including the savings arising from the redundancy of the Respondent. He appointed Mr. H (who had been filling the Claimant's role in the Claimant's absence) as joint Operations/Finance Director. Mr. H had extensive experience in the financial services industry and if he had not appointed Mr. H the company would not have survived.

He remembered the meeting of the 17<sup>th</sup> of February and there is little issue between the parties with regard to how that meeting proceeded. He acknowledged that he communicated to the Claimant that he did not consider her suitable for the new role, and it would be unlikely that she would be appointed to it. He had no personal difficulty with the Claimant, she was a competent accountant but did not have the skill set that was now required.

He denied that the Claimant was responsible for the initial fundraising but acknowledged that the funds were raised (primarily by him) while she was in finance. He did not give any consideration to giving her a diminished role in the company. He took the action that he did in order to maintain the viability of the company.

Evidence was given by the Operations/Finance Director of the company, Mr. H. He described that when he took over from the person that replaced the Claimant the company was in crisis and the share holders were upset at the potential loss of their investment, and the company was losing about €300,000.00 per month.

He said the financial structure had been well set up by the Claimant and that a junior accountant was now able to carry most of that workload. His objective was to keep jobs in Clonakilty and make the company viable. A number of people were made redundant but he acknowledged that some of these had come from the Share Administration side of the business and that the former Chief Operations Officer had been removed as such but had been retained on a commission basis. He said that salaries were reduced and overall salary costs were now less than they were two years ago.

## **Determination**

In an e-mail produced to the Tribunal dated the 18<sup>th</sup> of February 2009 from the Chief Executive Officer of the Respondent to the Claimant it is made clear that if the Claimant is not successful in procuring the re-structured position of "SVP,FO" that her position would be redundant. On the same date it was made clear to her by the Chairman that the company did not regard her as being a viable candidate for the re-structured role.

Consequently the Claimant was given notice of dismissal for the purported reason of redundancy on the 18<sup>th</sup> of February 2009. At that time she was on maternity leave. Consequently she was on Protective Leave as defined in Section 21 (1) (b) of the Maternity Protection Act 1994. Section 23 of that Act provides that any purported termination of an employee's employment while the employee is absent from work on Protective Leave shall be void.

Furthermore, the Tribunal is unanimously of the view that the Respondent in this instance made a tactical business decision that the employment of Mr. H would be qualitatively more advantageous to the company than the continuing employment of the Claimant, and it is clear that the role that the Claimant had was not redundant but was re-labelled. The Respondent gave no consideration to the re-employment, even in a diminished role of the Claimant.

In all the circumstances the Tribunal is satisfied having regard to all of the foregoing that the Claimant's dismissal was unfair, that compensation is the most appropriate remedy, and that the Claimant has made all reasonable efforts to mitigate her loss.

The Claimant was in receipt of €1900.00 gross per week and in the circumstances the Tribunal awards the sum of €49,400.00 to the Claimant. No award is being made under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and the Organisation of Working Time Act, 1997.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd) \_\_\_\_\_  
(CHARMAN)