

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.

Employee UD616/2007

against

Employer

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms P. McGrath

Members: Mr. T. O'Sullivan  
Mr. S. O'Donnell

heard this claim at Dublin on 8th November 2007  
and 23rd January 2008

Representation:

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Claimant :

Mr Eddie Farrelly, B.L. instructed by Augustus Cullen Law, Solicitors, 7  
Wentworth Place, Wicklow Town

Respondent :

Mr Don Culleton, Local Government Management Services  
Board, 35/39 Ushers Quay, Dublin 8

The determination of the Tribunal was as follows:-

The fact of dismissal was in dispute in this case

#### **Claimant's case:**

The claimant commenced her employment with the respondent in July 2002 as Assistant Staff Officer, Grade 4. Following an interview in April 2005, she obtained first place on a panel for a post of Acting Staff Officer, Grade 5 and she felt she was entitled to the next such vacancy that arose. She became aware through a colleague that a vacancy had arisen in Bray and that this post had not been advertised but the work was being done by a member of staff, Grade 4, from within

that office. She then contacted the head of the Bray office and her union and having gone to extreme lengths she was subsequently offered the Acting Grade 5 post in Bray. The claimant had concerns about her appointment as the person who had been in the post in the meantime would now have to move out of this position whereas if the vacancy had been filled in the correct manner this would not have arisen. The claimant moved to the finance department in Bray on 15<sup>th</sup> August 2005 and found that she did not have sufficient work allocated to her. She found this to be a strange experience having come from a very busy office when she had worked in the planning department. She approached the head of the finance department and asked for clarification of her role, asked about training courses and requested additional work. His suggestion of her having a back up function and taking work from others did not amount to her having extra work and up to five hours out of the seven she was unoccupied. She outlined offensive comments made by a work colleague and directed towards her and she felt frustrated and embarrassed by comments he made in relation to members of the public who frequented the office.

She found her work situation stressful and contacted the Town Clerk at the end of September 2005. Having told the Town Clerk of her upset at her lack of work and the fact that she had previously worked in an Acting Grade Staff Officer role she told the claimant she might be in a position to transfer her on a temporary basis. The claimant also raised the matter of the offensive comments by the work colleague and it was suggested to have this dealt with by the Personnel Officer. The claimant was surprised by the reaction received when she mentioned this work colleague. She told the Town Clerk she was going to her doctor and would take some days off work. Her doctor certified her unfit to work for six weeks due to stress. As she had not been contacted by the respondent during the period of her sick leave she had a meeting with the Personnel Officer on 24<sup>th</sup> October 2005. She again raised the issues in relation to her work and the offensive comments from the work colleague and requested him to deal with these matters. He gave an assurance that training would be provided. At a further meeting on 3<sup>rd</sup> November 2005 she was assured that the issues in relation to the work colleague had also been dealt with however she was not given details as to how the matter had been resolved. There was to be no change to her role and she felt her skills and experience were not being utilised fully. When she brought up the possibility of a transfer it was denied that this had ever been previously mentioned.

The claimant then asked that a Rights Commissioner seek to resolve the matter and prior to a hearing in January 2006 the parties were urged to try and resolve the matter and it was felt that they had not exhausted all procedures and asked for an internal enquiry. A report was issued on 5<sup>th</sup> October 2006 wherein it was recommended that the claimant should return to her substantive post at Grade 4 and that the work colleague send her a written apology. She applied for other positions that arose but was not successful. The matter was referred back to a Rights Commissioner and when a hearing was eventually arranged for 19<sup>th</sup> January 2007 the parties were again urged to resolve matters. At a meeting on 24<sup>th</sup> January 2007 the claimant's legal representative indicated she was considering resigning. She formally tendered her resignation by way of letter dated 26<sup>th</sup> January 2007. There was a noticeable difference in her assessment at interviews from April 2005 to March 2006 and she could not understand how this was possible since she had an additional qualification. By way of letter dated 15<sup>th</sup> February 2007 the respondent stated that her permanent position of Assistant Staff Officer, Grade 4 remained open to her and that any support necessary would be provided on her return to work. The claimant felt that the relationship between herself and the respondent had broken down and if she went back to her substantive post she would have to work with a gentleman with whom she had previously "fought" to get her temporary position in Bray. She confirmed her resignation by letter dated 19<sup>th</sup> February 2007. The work colleague who

had directed the offensive comments sent her a written apology dated 30<sup>th</sup> January 2007. Evidence was then given in relation to the claimant's efforts to obtain alternative employment.

### **Respondent's case:**

It was the respondent's case that an "Acting Up" post is temporary and appointments are made where another staff member is absent on e.g. maternity leave or sick leave. An employee appointed to such a post would not automatically be left in that post. That post would have to be advertised as permanent and all eligible staff given the opportunity to apply. The claimant had in the previous year "acted-up" as a Staff Officer while another employee was on Maternity Leave and prior to that employee returning to work the claimant would have been written to and she would have returned to her original position in the planning department. She had discussions with the claimant in relation to her duties in the temporary position in Bray. Following the claimant's appointment to the post in Bray in August 2005 she was aware that the Personnel Officer made contact with the claimant in relation to her duties and in relation to a complaint about inappropriate behaviour from a work colleague. She was assured that training would be put in place. The internal procedures were not fully invoked.

The claimant was asked to re-consider her position and that she would be welcome to return to work and these assurances were repeated to her. The first Rights Commissioners hearing was adjourned to allow the internal mechanism to be explored fully. Discussions took place between the legal representatives however there were no other "Acting Up" posts vacant at that time and it would not be the norm to move between departments in an "Acting Up" position. If such post did exist in another department the next candidate on the panel would have the right to be called. An investigation team set about to investigate the claimant's complaints and its findings were issued in October 2006. The claimant did not appeal those findings. Her temporary position as Acting Staff Officer ended on 29<sup>th</sup> September 2006 and she was informed that she would be returning to her permanent post of Assistant Staff Officer. As she had been on sick leave for a period of twelve months she was referred for independent medical examination, in accordance with the respondent's Absenteeism policy, with a view to establishing a possible date to return to work. The claimant was told that the respondent would assist her in every way possible to help her get back to work on a phased basis. The second Rights Commissioner hearing was also adjourned to allow the parties to resolve matters. Following the claimant submitting her resignation the respondent, by way of letter dated 15<sup>th</sup> February 2007 invited her to meet with them with a view to discussing her returning to her permanent Assistant Staff Officer, Grade 4 post. The claimant confirmed her resignation decision by letter dated 19<sup>th</sup> February 2007.

### **Determination:**

The claimant has to show that it was reasonable for her to terminate her employment because of the conduct of the employer.

The Tribunal believes the claimant's version of events that preceded her appointment to Bray County Council. The claimant's appointment was not straightforward, and she had to push to get her rightful opportunity.

A number of problems arose during the course of her temporary post. Distasteful comments from one individual certainly made her day-to-day job more uncomfortable.

The issue of the level of tasks being given to the claimant, whilst frustrating, was being reacted to in the preliminary weeks in a twelve to eighteen month contract. It is worth noting that the claimant had no entitlement to a particular type of work in a temporary position. This was not her permanent post wherein the job is defined by contract or practice. This is not the same situation as the more usual case which we see in the Employment Appeals Tribunal wherein a person returns to her permanent job (say at the end of Maternity leave) to find her job has been whittled away and there is only the more menial of tasks to be carried out.

At no time was the claimant's salary reduced to reflect the fewer tasks she had to complete in her working day.

Ultimately the claimant invoked the grievance procedure and also went to the Rights Commissioner. The employer conducted a fulsome investigation into the complaints brought and a right of appeal from their findings which was not invoked under the grievance procedure but which was sought to be brought before the Rights Commissioner again. In addition the claimant was out on extended sick leave.

In tandem with this lengthy procedure (and both side were guilty of inordinate delays at different stages), the parties did talk to one another and the nature and extent of these talks was opened to the Tribunal.

Just prior to the publication of the report (October 2006), the claimant's temporary position had in fact terminated in accordance with custom and practice. At this point the claimant was bound to return to her position at grade 4 in Planning in Wicklow County Council which was something she had done heretofore in her career when taking up a temporary post in environment.

The claimant was unwilling to return to her permanent or substantive post. A number of reasons seem to have been behind this decision. By now Mr O'B the gentleman with whom she had an initial falling out in the Summer of 2005 over her active pursuit of the temporary appointment was to be her direct boss. In addition, she felt that she had lost any ground that she had covered in respect of promotion opportunities, experience and general career advancement. However this fear was subjective and the Tribunal cannot guess as to the path her career would have taken had she returned to her workplace as soon as her health allowed.

From October 2006 the respondent employer encouraged the claimant to return to work as soon as she was fit and able to do so. There was an invitation to return on a phased basis and the Tribunal accepts from the overall tenor of the correspondence was to facilitate a return to work. This opportunity was not availed of.

In all the circumstances the claimant has not established that her decision to terminate her employment was reasonable and the Tribunal does not find that the employer's conduct was such that she had no alternative other than to resign.

The claimant has therefore failed to make out her case under the Unfair Dismissals Acts, 1977 to 2001 and the claim for constructive dismissal fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

