

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:  
EMPLOYEE – *claimant*

CASE NO.  
UD1967/2011  
MN2009/2011  
WT788/2011

Against

EMPLOYER – *respondent*

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: Ms N. O'Carroll-Kelly BL

Members: Mr A. O'Mara  
Mr G. Whyte

heard this claim at Trim on 27th February 2013

Representation:  
\_\_\_\_\_

Claimant(s):

Respondent(s):`

The determination of the Tribunal was as follows:-

The dismissal was in dispute in this case and accordingly the claimant's case was heard first.

### **Background:**

The claimant was employed as a child minder by the respondent company which operated a crèche and Montessori business. She commenced her employment in June 2006. She was contracted to work five days per week, Monday to Friday 7.20am – 4.30pm or 8.30am – 6pm with a 30 minute lunch break and two 15 minute breaks. The claimant earned €404.00 per week. This remained unchanged during her employment. The employment was uneventful until June 2011 when the directors of the company sought a 10% pay cut from the staff which the claimant refused consent to. The employment ended in September 2011.

### **Claimant's Case:**

At a meeting on Tuesday 7<sup>th</sup> June 2011 the directors of the company, a husband and wife team,

informed the staff that due to the downturn in the economy the crèche was not doing well and a 10% pay cut was required from all employees. The claimant received a letter which requested her to sign at the bottom to accept and acknowledge its contents. She was asked to sign and return it the following day.

The claimant felt that she was as busy as usual and regularly worked extra unpaid hours during the week. The claimant had asked for a pay rise three years previously but had been refused. She did not think it was reasonable to take a 10% pay cut after working for the same money for five years. She was the second longest serving employee. The next day she asked the Director/Manager (henceforth referred to as “the Manager”) of the crèche if she could have more time to think about it. The Manager told her to take the weekend. The Co-Director (the Manager’s husband) rang the claimant and asked her what her difficulty was. She explained that she did not think it was reasonable to take a pay cut after five years without an increase and that she worked extra hours without recompense. He asked her to sign by Monday or she would not have a job. She asked if he meant she would be dismissed and he said no but the crèche would have to close.

By the following Monday, 13<sup>th</sup> June 2011, the claimant had decided not to accept the pay cut. She informed the Manager on Tuesday. Her Wednesday and Thursday shifts were switched which interfered with a course that she attended on Wednesdays. She asked the Manager why her shifts were changed and she was told that she didn’t have to explain to her. The claimant felt intimidated and scared about going to work.

She received a further letter dated Thursday 16<sup>th</sup> June 2011. The letter stated that “...any replies not received we take as non acceptance on this proposal” and “We are now nearly three years into an economic downturn and this is the first salary decrease that has been reluctantly introduced to employees. Other cost effective measures may need to implemented (sic) to sustain the viability of the business and secure as many jobs as possible. No further action isrequired from yourself on the matter.”

The claimant worked normally on Friday 17<sup>th</sup> June 2011. After 5pm the claimant asked about her shifts for the following week as she had not seen the roster. She was unsure as her shifts were changed that week. The Manager arrived at around 5.45pm and invited the claimant into the office. The Manager told the claimant that she was not required to work on Monday or Tuesday of the following week due to some children being on holidays. The claimant was shocked. She asked why the Manager was changing her contract and stated that she worked five days per week. The Manager told her “not anymore”. The claimant understood that another employee had been refused leave for the following Monday. The claimant said that she would be seeking advice and the Manager replied that she should.

The claimant was very upset all weekend. On Monday she decided to go to work as she had not received enough notice and she wanted the change put in writing as she was afraid that if she did not attend it would be used to dismiss her. The Manager was not present when she arrived. She asked the assistant manager to arrange a meeting for her with the Manager. The Manager’s husband, the Co-Director, arrived a short time later and asked her why she was

there. The claimant explained that why and said that what they were doing was unfair. He told her that they only had to give her 24 hours' notice to change her shifts and that she should wait for the Manager in her car. After initially refusing she went to wait in her car.

She met the Manager when she arrived and asked for the change to her shifts in writing. The Manager refused so she asked for a witness to be present to hear the Manager say she was not required on Monday or Tuesday. The chef came to the meeting. The Manager said that the claimant was not required that day or the next and that the claimant had refused to leave the building when asked. The Manager then asked the claimant to leave. The claimant left and went to her GP. She was very upset. She submitted an illness certificate for that week and continued on sick leave until she submitted her resignation on 26<sup>th</sup> September 2011. She was later diagnosed with depression. The claimant gave evidence of loss.

The claimant was cross-examined. She accepted that there may have been a drop in numbers compared to previous years, but she believed that there were more babies which meant a lower ratio of carers per child. She believed that the crèche had babies under one year old in the baby room where she worked. She understood that a drop in numbers would lead to a drop in income. She denied that the Co-Director said the pay cut would be temporary. Five of the seven employees at the meeting accepted the pay cut. The other employee who refused to take a pay cut went on sick leave on 21<sup>st</sup> June 2011 and never returned to work there. She did not accept that if she did not accept the pay cut other means would have to be found to reduce her salary.

She believed that she had verbally invoked the grievance procedure when she asked for a colleague to be with her at the meeting with the Manager. She did not make any formal complaint. The claimant believed that while she was on sick leave the Manager followed her in her car. She reported it to the Gardai, but it did not go any further. This confirmed her decision not to return to work.

### **Respondent's Case:**

The Director and Manager of the crèche gave evidence. She and her husband opened the crèche in 2005. The business went well until there was a reduction in numbers in 2010. Their accountant advised them to cut costs in 2011. She was reluctant to let anyone go. She wanted to keep all the staff they had in case numbers went up again.

There were no babies under one year old in the baby room where the claimant worked. She considered taking in babies under one in 2010/2011. The claimant and another employee minded 1-2 year old babies. The ratio for that room was one carer to every five children. In 2009 there were 7-8 children in that room. At the beginning of 2011 this had dropped to 4 or 5 and by March 2011 this dropped to 3 to 4. In June the Montessori closed for the summer. That summer there were 15 children and 7 staff members. There were no extra hours being worked at that time.

They called a meeting and asked the staff to take a 10% pay cut and indicated that this would

increase again when the situation improved. Three employees returned their letter agreeing to the pay cut the following day. She did not say anything to the claimant or put pressure on her to sign. She sent a further letter the following week as she wanted to know the situation.

They had to look at the numbers in each room in order to reduce costs. The following week there would only be three children in the claimant's room so she decided to ask the claimant to come in Wednesday to Friday only. She would have rotated the off days with other employees. On Friday she approached the claimant at approximately 5pm and told her that due to the numbers in the baby room she did not need her on Monday and Tuesday. The claimant was quiet and said she would be getting advice. The Manager said "ok, see you Wednesday".

The claimant arrived into the crèche the following Monday morning demanding a meeting with the Manager. The Manager's husband went to the crèche first and asked her to wait in her car. When she arrived she asked the claimant why she was there. The claimant wanted it in writing that she was not required for Monday and Tuesday. The Manager said that was no problem and asked the claimant if she wanted to discuss the situation. She believed that they had discussed it on Friday. She said that she had to reduce costs and with the low numbers in the room her hands were tied. The claimant suggested that she stop getting the windows' cleaned. The claimant asked for a witness to hear what was said to her. The chef witnessed her telling the claimant that she wasn't needed until Wednesday. The claimant said "you'll regret this" and left. The claimant did not invoke the grievance procedure.

Later that day the claimant's mother brought a sick certificate on behalf of the claimant. The claimant's mother brought sick certificates weekly after that until the claimant's resignation. When she asked after the claimant the claimant's mother said she was "still the same". The Manager did not think it was appropriate to contact the claimant as her sick certificate cited "stress". The claimant was not replaced. They did not have the numbers in the room and they thought the claimant would return. The pay decrease was reversed for the remaining staff in September 2011.

The Manager disputed ever following the claimant around the town and was upset by the accusation.

The Manager was cross-examined. She believed that she had not treated anyone differently after the pay cut was requested. She agreed that it did not say in the letter that the pay cut was temporary but contended that it had been said in the meeting. The crèche did not take in babies under one year old prior to the claimant leaving.

In 2009 the crèche had 45 children. The maximum capacity was 50. They also operated a Montessori for three hours a day and a summer camp. In 2010 the numbers reduced to approximately 35 children and in 2011 this reduced to 30. In the summer this would reduce to 15 children. The numbers had dropped the year before also. At that time she reduced the hours of one employee to three days' per week. She did not want to make anyone redundant as parents like to have consistency in the crèche. It was a bad sign for a crèche to have high turnover of staff.

The contract did not state that the claimant's hours could be changed with 24 hours' notice. She did not ask the claimant to leave the premises on the Monday she came in. In her letter dated 26<sup>th</sup> September 2011 the claimant stated she sought to invoke a grievance at the meeting on Monday 20<sup>th</sup> June 2011. The Manager disputed this in her reply on 24<sup>th</sup> October 2011. The claimant only wanted it put in writing that she was not required on the Monday and Tuesday. She knew she was unhappy about her hours being cut but the Manager could not return her hours. The claimant did not contact her during her sick leave to say that she had a problem.

She agreed that the claimant's contract did not allow for the claimant's hours to be reduced. She did not want to make anyone redundant. She decided to reduce the claimant's hours as the baby room was low in numbers and not because she refused the pay cut. The other employee who left was replaced in September. She did not reduce the hours of the other employee in the baby room as the claimant left. No one else was told that their hours were going to be cut. Staff holidays had to be covered as well. There was no issue with the claimant's performance.

The Co-Director gave evidence. He is not involved in the day to day running of the crèche. He keeps track of the finances. The crèche carried forward its start-up debts into the following years. €14,000 was still outstanding going into 2011. This was added to a loss of €15,000 in 2011. Some parents didn't pay their fees for a number of months. The couple take very little income from the business. Their accountant advised them to cut costs. They had to keep to the HSE ratios. They did not want to lose employees. Their business relied on word of mouth.

On 7<sup>th</sup> June 2011 he explained the financial situation to the staff. He asked them to take a temporary 10% pay cut. At the time he did not know how long it would last. He did not want to scare the staff into leaving.

On 20<sup>th</sup> June 2011 he went to the crèche as the assistant manager was concerned when the claimant arrived unscheduled. He asked the claimant to come out of the baby room. He spoke to her on the porch and asked her to wait for the Manager in her car which she initially refused. The claimant was agitated.

The witness was cross-examined. He agreed that the claimant was the first to have her hours cut. They did not want to make redundancies or lay off employees. He did not say how long the cut would last as he did not know.

### **Determination:**

The claims under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, and the Organisation of Working Time Act, 1997, were withdrawn at the outset of the hearing.

The claimant is alleging she was constructively dismissed from her employment with the respondent company. Section 1 of the Unfair Dismissal Act defines constructive dismissal as:

*“...the termination by the employee of his contract of employment with his employer whether prior notice of the termination was or was not given to the employer in the*

*circumstances in which, because of the conduct of the employer the employee was or would have been entitled or it was or would have been reasonable for the employee to terminate the contract of employment without giving prior notice of the termination to the employer”*

The burden of proof, which is a very high one, lies with the claimant. She must show that her resignation was not voluntary. The legal test to be applied is “an and or test”. Firstly, the Tribunal must look at the contract of employment and establish whether or not there has been a significant breach going to the root of the contract. If the Tribunal is not satisfied that there has been a significant breach of the contract it can examine the conduct of both the employee and employer together with all the circumstances surrounding the termination to establish whether or not the decision of the employee to terminate the contract was a reasonable one.

The claimant made her claim for constructive dismissal under the following heading:

Unilateral alteration of her contractual terms (cut of her working week from five days to three days.)

The claimant commenced work at the respondent crèche in 2006. She worked there without issue until June 2011. On the 9<sup>th</sup> June the Manager called a staff meeting to discuss the respondent’s financial situation together with normal business matters. The claimant stated that the Manager informed the staff that she intended to introduce a 10% pay cut. The claimant was given a letter of consent to sign. The respondent stated that she asked her staff to consider a 10% pay cut and that it was in no way being forced upon them. The letter dated, 7<sup>th</sup> June, 2011 states “*We have decided that a salary reduction is absolutely necessary at this time. We regret to inform you your monthly basic salary will be reduced by 10% which will take effect and be deducted from your next pay date....*” Based on the wording of that letter the Tribunal prefers the claimant’s evidence and find that the staff members were not given a choice at the meeting of the 9<sup>th</sup> June. The respondent also stated that the pay cut was only a temporary measure. The claimant stated that that was never put to her. The letter of the 7<sup>th</sup> June is silent on that matter. The Tribunal prefers the claimant’s evidence but find that nothing turns on the matter one way or the other.

The claimant refused to sign the letter of consent and informed the Manager that she would not be doing so on the 10<sup>th</sup> June, 2011. The following Monday the claimant’s shifts were changed for the first time in five years. On Friday the 17<sup>th</sup> June, the claimant was informed that she would not be required to work on Monday or Tuesday of the following week. That amounted to a 40% reduction in her wages. The claimant’s contract of employment states “*Your normal working week will be 5 days, Monday to Friday*”. For the previous five years that claimant had worked Monday to Friday. The claimant was concerned that she did not have those instructions from the manager in writing so she attended for work on Monday morning. When she arrived at her workplace she asked for meeting with the Manager so that she could have her instructions in writing. She asked why the Manager had altered the terms of her contract. She was told that it was because some of the children were on holidays. The claimant became very distressed due to the Manager’s treatment of her. When she left she went to

her GP and following that meeting was certified unfit for work. The claimant furnished the respondent with sick certificates on a weekly basis until 28<sup>th</sup> September, 2011. She lodged her claim on the 6<sup>th</sup> October, 2011.

The legal test the claimant must satisfy is an onerous one. Firstly, the claimant must show that there has been a significant breach going to the root of the contract, which said breach prevented the claimant from carrying out her contractual duties. It is very clear from the evidence that the claimant was singled out following her refusal to sign the letter of consent. The respondent's counsel even put it to her that because she had refused to give her consent she had placed herself in a better position than those who had signed it and therefore the respondent had to treat her differently and find another way to make the cuts. Following her refusal to sign the consent the respondent attempted to unilaterally alter the terms of her contract by reducing her working days from five to three and thus reducing her remuneration by 40%. That is a breach of her contract. It is a breach that goes to the root of her contract. It is a breach which prevented her from carrying out her contractual duties.

The Tribunal find that the claimant was constructively dismissed and according her claim under the Unfair Dismissals Act, 1977 to 2007 succeeds. The Tribunal awards her the sum of €10,000.00.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

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