

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

Employee

CASE NO.

UD602/2007

MN435/2007

against
Employer

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001
UNFAIR DISMISSALS ACTS, 1977 TO 2001**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms M. McAveety

Members: Mr. M. Flood
Mr P. McAleer

heard this claim at Cavan on 4th March 2008

Representation:

Claimant(s) : Mr. Declan Ferry, Assistant Organiser, SIPTU, Ashe Street, Cavan Town,
Co. Cavan

Respondent(s) : In person

The determination of the Tribunal was as follows:-

Respondent's Case:

One of the co-owners (known as RC) gave evidence on behalf of the respondent. He explained that he and his wife (known as GC) purchased the premises on March 1st 2006 from the previous owner. This owner had previously employed the claimant.

The witness stated that the original premises was closed for a period of five months for refurbishment and the shop was relocated to smaller premises on-site. There had been no complaints about this location by the staff. The refurbished premises re-opened on December 12th 2006.

The witness stated that the claimant had applied for the position of Manager but had been unsuccessful. After this her attitude seemed to change and she seemed to have a grievance. When asked, he stated that the claimant had been the longest serving member of staff. When asked, he said that he had four full time staff and two staff working in the new delicatessen department. The first day of the re-opening had been a good day, the atmosphere was pleasant and the store was very busy.

At around 3 p.m. the deli staff were finished their shift. Sandwiches had been prepared and the cold deli food was displayed. GC called on the claimant and one other staff member to show them what to do if a customer wanted a sandwich that had not been pre-prepared. The claimant asked GC why was she being shown how to perform the task and GC replied that she wanted the task performed correctly. The claimant replied that she did not want to be told and was not making sandwiches. GC stopped the conversation as customers were present and asked to speak to the claimant in the office when she was free.

The witness stated that he was present in the office when the claimant came in. When the claimant was asked, she said that she had no problem. He replied that she had said that she would not make sandwiches as it was not her job and had mentioned her union. The claimant told the witness that she did not have to perform any duty that she was not already performing. He told her that it was a small shop and everyone had to work. She replied that she was not doing it and walked out. She returned and requested her wages owed, her P45 and a letter. He told her to return on Friday for her wages and her P45.

The following day he heard that the claimant was working in a hardware shop near his premises. On December 14th 2006 the claimant entered the premises with a friend and requested her P45, her wages owed and a letter to say she had been let go. He told her she would not get the letter. He told the Tribunal that her parents came into the premises on December 12th or 13th and abused him stating he had sacked their daughter. He replied that he had not.

On cross-examination he stated that he had previously been self-employed, employing a few staff. When asked, he stated that a new Manager commenced employment with the respondent on December 26th 2006. When asked, he stated that there had been a turnover of staff in the first year he, and his wife, had owned the premises. When asked, he stated that he could not recall if he had asked the claimant to apply for the position of Manager. He agreed that the claimant had been a keyholder of the premises. She had been a good worker but had an attitude problem. When put to him, he said that the claimant had discussed the possibility of redundancy with other staff but had not asked him. When asked, he said that the conversation in the office had lasted about five minutes and the claimant had mentioned her union. When asked he said the claimant had no contract of employment. When asked, he said that the claimant had been employed as a shop assistant and had not previously worked in a deli. When asked, he said that the claimant had said that she may as well leave.

When asked by the Tribunal, he stated that it was the first he had heard about the claimant's union and had not asked the claimant to leave after she had mentioned it. He had never told the claimant to leave. She had not been given a written job description. When asked by the Tribunal, he stated that he had not told the claimant to get her coat and go. He stated, when asked, that the claimant had been "paranoid" about her union and her rights.

The second co-owner, and wife of the first witness, (GC) gave evidence on behalf on the respondent. She stated that on December 12th 2006 the claimant had attended work but was not in good form. She approached the claimant and another member of staff to show them how to prepare a sandwich for a customer. The claimant did not want to be shown. The witness said that she was shocked at her answer. It seemed to deaden the good atmosphere of the premises re-opening. She asked her to come to the office when she had a moment. The witness went to the office and told her husband (RC) what had occurred with the claimant. RC asked the claimant on her arrival what the problem was and was told there was no problem. The claimant said that she was not performing the task, had not done it before and had spoken to her union representative.

On cross-examination she stated that she had called the claimant aside to call her to the office. When asked, the witness stated that the claimant had been flexible with duties she had not performed in the past while the witness and her husband had been on leave. When asked, she said that the claimant had been paid all her entitlements. When asked, she said that she could recall telling the claimant to take her belongings.

Claimant's Case:~

The claimant gave evidence. She stated that she had worked on the premises for four years and had had no problems with the previous owner.

She explained that the previous Manager had left and RC had asked her to apply for the position. She had applied for the position but was unsuccessful. Her role in the premises included working on the cash register, ordering stock, replenishing stock, price changing and cleaning.

On December 12th 2006 she arrived for work as usual. GC approached her and informed her she would have to make sandwiches and clean up afterwards. She informed GC that she could not do it as under Health and Safety procedures you could not handle fresh food and money at the same time. She was told that she would have to do it. She went to the office and was informed by RC that she would have a new contract, a new lower rate of pay and would not be paid for her breaks. She informed him that she would have to speak to her union representative. When she mentioned this she was told to get her coat and go. She asked was she being fired and asked for a letter of dismissal. She was informed she would receive a letter, her P45 and monies owed the following day. She left and returned again asked for a letter, GC replied no and said the office was closed.

She stated that she was very distressed as it was two weeks before Christmas. She contacted a friend who owned a hardware store nearby and told them her plight. She was offered a position as another member of staff was on sick leave. She was made permanent in the position in January 2007.

On cross-examination she stated that she had no written contract of employment but had a verbal contract. When asked, she stated she had not spoken to her union representative prior to the meeting of December 12th 2006. She again stated that the problem she had was dealing with fresh food and money at the same time. She stated that she was earning the same wages as with the respondent but did not get any overtime.

Determination:

Having heard the conflicting evidence both the claimant and the respondent the Tribunal finds, by a majority decision, that the claimant was not unfairly dismissed. Therefore the claims under the Unfair Dismissals Acts, 1997 to 2001 and the Minimum Notice and Terms of Employment Acts, 1973 to 2001 fails.

The dissenting opinion of the third member of the Tribunal states as follows:

As there was a direct conflict in the evidence given by the claimant and the first witness for the respondent as to what took place and to what was said in the shop and in the office on December 12th 2006 it is down to a judgement of who was more credible in the 'witness box'. One has to say there were faults on both sides. I think the claimant was unhappy with not being chosen for the Manager's post, but was certainly had a point about handling food then taking cash. But the

critical point in this case was had the claimant walked out or was she told to go. I believe she was told by the respondent's first witness to go and the "straw broke the camels back" was when the claimant said that she was seeking trade union advice. Therefore I feel that there was a case of unfair dismissal.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)