

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

Employee

CASE NO.

UD89/2005, MN66/2005

against

Employer

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms E. Daly B.L.

Members: Mr F. Cunneen
Mr G. Hunter

heard this claim at Monaghan on 27th October 2005 and 8th November 2006

Representation:

Claimant : Mr Patrick J Macklin, Macklin & Company, Solicitor, 26, North Road,
Monaghan

Respondent : Terence V Grant & Co, Solicitors, 26 Fair Street, Drogheda, Co Louth

The determination of the Tribunal was as follows:

Claimant's Case

The claimant gave evidence. She explained that she had commenced employment as a counter assistant with the respondent in October 2000, although her P60 stated December 5th 2000. In 2002 she was asked by the owner of the business to become the manager of the premises. Her wages increased to €437 per week but she said that she had never received a payslip or P60's. Her duties as manager consisted of ordering stock, dealing with sales representatives, opening and closing the premises and supervising staff. She explained that the owner was not present on a daily basis.

In September 2004 the claimant became unwell at work. She was admitted to hospital that evening and remained for eleven days. She tried to return to work and went to the respondent's premises on September 28th 2004 with a note stating she could return to work. The owner would not accept this and told the claimant that she wanted a note from the claimant's cardiologist. She contacted her consultant but was informed that she could not get an appointment until November 11th 2004. On September 29th 2004 she told the owner that she could not get an appointment until November.

The owner asked for a “word” and they moved into the kitchen. She again told the owner she would have the letter required in November but she was told that the owner she had a problem, she had no money to pay her and she, the owner, would take over as manager. The claimant said that she got upset. The owner offered her three to four hours a week. The claimant told the Tribunal that she could not understand this as there were other staff working thirty hours a week. The owner told her that she had no job for her. The claimant told her to “suit herself” and left.

Four or five weeks later the claimant received a telephone call from the owner of the respondent business regarding a bill query. The claimant said that she was not told that her job was there for her. She no longer had any faith in the owner and would not have returned to work there.

Since leaving the respondent the claimant said that she contacted Revenue, as she wanted to return to college. She was informed that her employment record with the respondent was only for 2003. She and her solicitor wrote to the owner requesting her P45 but never received it. She tried to acquire employment but to no avail and she returned to higher education.

On cross-examination she explained that she was quite sure she commenced employment in October 2000 as it was just after her birthday. She explained that she had worked two nights in a fast food outlet during Christmas 2004. She also did some work for a taxi firm in return for lifts to Drogheda hospital in order for her son to attend his doctor. The claimant said that she was very depressed when she was out of work.

When asked by the Tribunal the claimant explained that she had paid the respondent’s staff out of the cash till as she would have been aware of the hours they worked. The amounts were logged in a small notebook and never used a payroll system. Receipts for purchases were also logged in another notebook. There were two books, one green and one red.

The claimant gave evidence. She stated that she commenced employment with the respondent business in October 2000 as a counter assistant and was offered the position as Manager in 2002. She received €437 in wages per week cash in hand

Respondent’s Case

The respondent’s accountant gave evidence. He said that he had no recollection of seeing the claimant’s entries into a notebook. He produced evidence of printouts of staff names and their gross pay. When asked about P60’s, he said that he completed the P35 form and sent it to the respondent for signature and P60’s to be distributed. He only retained a copy of the P35 form.

When asked, he explained that the printout produced concerning the claimant gave details of her annual gross pay from December 2000 to September 2004. This ranged from €1,212 to €7,957 per year respectively. He explained that it was up to the employer to sort out the tax. He explained that he had prepared the annual returns and accounts but had never seen the red or green notebooks and had no personal recollection of anyone requesting a P60.

On cross-examination he said the wages were based on the total figure on the P35 proforma. He explained that the first two years filing of the P35 to Revenue had been late.

The owner and manager of a fast food establishment in Monaghan had sole and exclusive rights over the recruitment of staff for that outlet. In November 2004 the claimant commenced full time employment at his restaurant. According to the witness the claimant’s position within his business

was as a general worker and not as a consultant. However she only remained as an employee for a week and a P45 was issued to her following her cessation of employment. The witness could not comment on the claimant's assertion that she only worked on his premises for four evenings.

The owner of the respondent who also described herself as the manager stated that the claimant commenced employment in her business in December 2001. Up to 28 October 2004 there were never any problems or disputes in the workplace between the claimant and the respondent. The witness visited the claimant in hospital during her recovery there following her collapse at work in September 2004. When the claimant returned to work on 28 October 2004 she submitted a doctor's certificate declaring her fit for employment. The witness was unwilling to accept that note and asked the claimant for a certificate from her cardiologist stating she was able to recommence employment. The witness justified that demand based on health and safety issues. Some of the restaurant's equipment and the nature of the work were possible threats to the claimant's well-being reasoned the witness. She explained that such a certificate was needed from the specialist, as it was the cardiologist who was treating the claimant and not her general practitioner. The claimant objected to such a demand saying it could take a few weeks to receive such a certificate.

In the course of a conversation about that issue the witness maintained that the claimant told her to "stuff your job" and left the premises. The owner felt then that the claimant was "on a short fuse" and would return.

In cross-examination the witness acknowledged that she did not know when the claimant commenced work with respondent but did not disagree with October 2000 as her commencement date. The owner also had no knowledge of the claimant's working hours per week but suggested they amounted to around thirty each week. Apart from basic calculations written on the outside of wage envelopes the claimant never received pay slips. In denying the claimant's stated weekly net wage the issue of calculating those wages was addressed. The witness admitted discarding the primary source of evidence of staff wages' including that of the claimant's. P60s never issued to the claimant nor was she furnished with a P45 when she left the respondent's employment. The witness commented that she was "just a worker and not an accountant". The claimant was not entitled to call herself a manager and when she was publicity labelled as one the witness did not sanction her, as it was "only a word".

The owner claimed never to have seen the claimant's application to the Tribunal but signed and authorised a formal reply to it. She described her discussions with the claimant regarding medical certificates as significant. Her aim of that interaction was "to get across" to the claimant her message that a certificate from the consultant was needed before she could return to work. Due to the claimant's reaction the owner did not have the opportunity to offer her alternative work as the claimant "turned on her heels and walked out"

The owner told the Tribunal that the claimant was a reliable and valued member of staff who was still welcome to resume work with the respondent. All members of staff received no more than the prevailing minimum wage so it was not possible for the claimant to earn in excess of that. Her only argument with the claimant concerned the source of the medical certificate as the owner judged the doctor's certificate not sufficient in this case. The witness did not get a response from the claimant when she phoned her shortly after her departure from the premises in late October 2004. The claimant's place and position was not replaced.

Two other witnesses gave brief evidence. The first witness who was currently employed with the respondent stated that she never received P60s from her employer nor had she ever received wage

slips. She described the owner of the respondent as the boss and added that the claimant was never the manager of the restaurant. This general worker was present in the kitchen on 29 October 2004 when she heard the conversation between the claimant and the owner. Health and safety matters were raised and a letter from a hospital was also mentioned. This witness met the claimant later that day and told her she was not returning to work. A second witness said it was correct to state that she would consider lying to the Tribunal.

Determination

There was a significant conflict of evidence in this case with inconsistent evidence on both sides. The claimant's assertion that she earned €437.00 net per week lacked supporting evidence and did not coincide with the stated hours of work at the minimum wage. Neither party supplied documented gross figures. The owner's reliance on health and safety issues in support of her demand for a cardiologist certificate is not reasonable. Employees are not required to produce such certificates to their employers' as medical certificates from doctors are sufficient. There was no need for a specialist certificate stating the claimant's fitness to return to work.

The owner's lack of knowledge over a safety statement undermined her stated concerns about health and safety. The respondent along with all other employers are obliged by statute to provide their staff with contracts of employment and wage slips. This clearly was not done in this case. Records of wages and hours worked were not forthcoming.

The claim under the Unfair Dismissals Acts, 1977 to 2001 succeeds and the Tribunal awards the claimant €2100.00 compensation under those Acts. That amount is based on the minimum wage current at the time where the claimant is deemed to have worked on average thirty hours per week and for a period of ten weeks.

Based on the evidence adduced the Tribunal finds that the claimant contributed to her dismissal. That contribution is reflected in the amount of compensation awarded.

The appeal under the Minimum Notice and Terms of Employment Acts, 1991 to 2001 is allowed and the appellant is awarded € 420.00 as compensation for two weeks notice' entitlement.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)