

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
Employee

CASE NO.
UD846/2006, RP431/2006
MN561/2006,
WT273/2006

against

3 Employers

under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2003
UNFAIR DISMISSALS ACTS, 1977 TO 2001
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J Flanagan BL

Members: Mr J Walsh
Mr A Butler

heard this claim at Dublin on 28th February 2007

Representation:

Claimant: In person

Respondent: Ms Mona O'Leary, O'Leary Maher, Solicitors, 191 Howth Road, Killester, Dublin 3

The determination of the Tribunal was as follows:

Claimant's Case

The claimant had commenced employment with the respondents in early 2000. The respondents are partners involved in the sale of books. The claimant became manager of the respondents' bookshop in Donaghmede in and around 2003. The claimant was absent from work for a period of two-weeks due to a family bereavement. When the claimant returned to her duties in October 2005 following this absence she felt that she was no longer wanted at work. Certain changes had taken place within the structure and organisation of the workplace and the claimant gave evidence that she was told she would have to put up with those changes. The claimant was also told it was up to her whether she wanted to stay with the respondents. The branch had sustained financial losses the previous month. By the end of the year another manager and general operatives from another branch were on the premises telling her what to do. During her weekly meetings with the owners the witness raised her difficulties at least once concerning orders and other matters.

The claimant was absent from work from January 2006 on medical grounds. Prior to returning to duties she met one of the owners in April 2006 who informed her that the position of manager was no longer available in the Donaghmede branch. The claimant felt undermined at this development and felt it was an unfair situation as others were doing her job. The claimant was due to recommence work in May but was unable to do so due to ill health. When she reported again for work on 26th June 2006 the claimant was allocated to the respondents' warehouse. She asked the respondents for a letter stating that her old job no longer existed.

The claimant again felt badly treated and ignored in the warehouse. In addition she believed her status had dropped due to that change. The claimant could not understand why she was put out of her position as manager while younger and even part-time staff did her job. The claimant agreed that one of the owners was astonished when she announced her resignation on 13th July 2006. The claimant was offered her position back in Donaghmede but refused that invitation. The claimant acknowledged that the respondents had paid her during her absences from work. The claimant said that it did not make sense that this happened while at the same time they wanted to get rid of her. It was the claimant's impression that the respondents thought that she would not return to work following her earlier absences.

Respondents' Case

The respondents did not adduce any evidence. Submissions were furnished on their behalf.

Determination

In constructive dismissal cases the burden of proof lies with the claimant to prove the fact of dismissal. Having carefully considered the evidence of the claimant given in chief and her acceptance of certain matters put to her in cross-examination and her answers to enquiries by the Tribunal itself, the Tribunal is satisfied that the burden of proof has not been discharged by the claimant.

The claimant asserted her belief that it was the wish of the respondents that the claimant no longer continue in her employment. This subjective view of the respondents' intentions was wholly unsupported by any kind of objective evidence that would justify that conclusion. The claimant accepted that the respondents had paid sick leave to the claimant for a period of almost six months, and that the respondents had no obligation to do so. The more reasonable conclusion to draw from the making of such payments is that the respondents wished the claimant to return to her employment. Despite being invited to do so, the claimant could offer no explanation as to why the respondents would make such a payment if the respondents wished to be rid of her.

The claimant accepted that there had been a downturn in the business of the respondents at the branch of which she had been manager. The claimant admitted that she had been told that as a result of this reduction in profitability the branch could no longer justify the employment of a manager and that she had been offered alternative work which she had accepted. The claimant admitted that she was not in a position to show that the commercial realities were other than had been outlined to her by the respondent. The alternative work involved going out to visit schools, where the claimant would promote the sale of schoolbooks. It was made clear to the Tribunal that the claimant was quite happy to take on this new role. The claimant further admitted that she did not return to work on the date intended, but at a later date. It was put to the claimant and accepted by her that the supply of schoolbooks was a seasonal business and that she returned at that stage in

the season when the schools were closed and the business was involved in what was described as the schoolbook supply period. During this period the claimant was expected to work in the warehouse on a temporary basis. It was the claimant's case that her status was being undermined by the requirement that she work in the distribution centre, carrying out tasks which were also being done by employees who she clearly considered to be her juniors. However, the claimant admitted that it was the busiest part of the business year and that even the respondents themselves worked at that time of year in the warehouse, packing boxes personally and so on. Ultimately, the claimant tendered her resignation. In response to the receipt of her resignation, the claimant accepted that the respondents had offered the claimant her original job back as manager in Donaghmede, turnover in that branch having improved in the meantime.

The Tribunal finds that due to a downturn in the business of the respondents a redundancy type situation arose in relation to the claimant's position while the claimant was absent on sick leave. However the claimant was left on paid sick leave and was not made redundant nor sought to be made redundant and the employment of the claimant continued to subsist throughout the sick leave period. Towards the end of the sick leave period the redundancy situation in relation to the claimant's position persisted. As the claimant had been offered alternative work by her employer and as the claimant accepted that alternative work no redundancy occurred. The claimant did not return to work on the intended date and when she did return the alternative work was temporarily unavailable. The temporary unavailability of the alternative work was of so brief a duration as not to satisfy the requirements for an application for redundancy and the claimant did not apply by way of serving notice in the usual manner in relation to redundancy, and was not made redundant. The Tribunal finds that the nature of the work temporarily engaged in by the claimant was of a seasonal nature where a number of workers of various grades were expected to help out, including the proprietors of the firm, such that the claimant was not undermined in her status in the firm in a manner justifying a claim of constructive dismissal. By the time the claimant communicated her unwillingness to continue working for the respondents the financial circumstances of the respondents had improved to such an extent that they could, and did, offer her original position back to her and therefore there was doubly no redundancy type situation as her original position was available to the claimant and the alternative work which she had accepted was imminently available to her. The Tribunal finds that the respondents' treatment of the claimant was fair (and even generous in respect of sick leave) such the conduct of the respondents did not constitute an unfair dismissal. The respondents operated the workplace in an informal manner and, notwithstanding the absence of a grievance procedure, addressed the concerns of the claimant in such a manner as soon as those concerns were made known to them that a constructive dismissal claim is not justified either on the basis of the contract test or the reasonableness test.

Having carefully considered the evidence and submissions before it the Tribunal finds that the claimant has failed to show that she was dismissed, constructively or otherwise. An employer defending a claim of unfair dismissal is under no obligation to admit the fact of dismissal. Where the employer denies the fact of dismissal the employee is placed on proof of the fact of dismissal. The fact of dismissal must be proven on the balance of probabilities. Where the employee fails to adduce sufficient evidence at the close of the employee's case to show that the employee was dismissed the employer may seek a direction from the Tribunal that the employer has no case to answer. Where the Tribunal is satisfied to grant such a direction the matter may then be concluded without the necessity of hearing evidence from the employer. The Tribunal finds at the conclusion of the claimant's case for dismissal that the claimant was not dismissed. Where there is no dismissal, there can be no unfair dismissal. Accordingly the Tribunal dismisses the claim under the Unfair Dismissals Acts, 1977 to 2001. Furthermore, as the claimant was not dismissed by the respondent, the respondents was not obliged to give notice of dismissal and therefore the Tribunal

dismisses the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001.

The Tribunal finds that there was not a redundancy situation present in respect of the claimant's position at the date of termination of employment and further finds that the employment of the claimant was terminated otherwise than by redundancy. The Tribunal therefore dismisses the claim under the Redundancy Payments Acts, 1967 to 2003.

The appeal under the Organisation of Working time Act, 1997 fails due to lack of prosecution and is dismissed by the Tribunal.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)