

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

Employee

UD1200/2006

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. McGrath

Members: Mr F. Moloney
Ms M. Maher

heard this claim at Dublin on 30th April 2007

Representation:

Claimant :

Ms Sheila L'Estrange, Citizens Information, 85/86 Patricks Street,
Dun Laoghaire, Co. Dublin

Respondent :

Mr. Ian Toomey, Shankill Business Centre, Shankill, Co.
Dublin

The determination of the Tribunal was as follows:

Respondent's case:

In his evidence the director told Tribunal that the claimant commenced her employment in October 2000 with the respondent through the assistant manager KT. They had both worked together prior to joining the respondent. Saturday is one of the busiest days in the retail gift business and they are also open on Sunday in one of their other shops. In October 2005 the claimant was rostered to work the Christmas weekend. She asked the assistant manager for the weekend off and she was told that this was not possible as it was the busiest weekend of the year. The claimant had worked some Saturdays for the previous couple of years. It's a small family run business and a sister of the witness covered that Christmas weekend so that the claimant could be off. There was also another Saturday when the claimant did not turn up for work. KT went through verbal warnings with

he claimant. There was bad feeling amongst the other staff and a human resources specialist advised against making one rule for the claimant and another for the remaining staff. It would only be necessary to work one Saturday in every four to six weeks and if any staff member needed a Saturday off that could be arranged. The claimant was asked if they could come to some arrangement and her response was that she was told she would never have to work Saturdays. Witness said this was not the case. A list was given to the Tribunal of the various Saturdays in question which showed a mix of Saturdays worked by the claimant and those not worked. The claimant was also rostered on 1st July 2006 and did not turn up for work. Ms KT the assistant manager who had dealt directly with the claimant has since left the company and was not present at the hearing.

In cross-examination witness said that the claimant had family commitments in the UK and the respondent had facilitated her at short notice with regard to taking Saturdays off but she was never told that she could have every Saturday off. Over the last three years of the claimant's employment she worked Saturdays and the respondent tried to divide out the Saturday work as evenly as possible amongst the staff. The normal rate of pay applies to Saturdays. The claimant was a key member of staff.

In answer to questions from Tribunal members witness said that their staff numbers were small and would have more on duty on a Saturday. Some casual staff work on Saturdays only. The claimant was permanent part-time and worked two and a half days per week including Saturday.

The Tribunal also heard evidence from the human resources specialist who advised the respondent on human resource matters up to 2003. He was contacted by the respondent in 2006 and following a discussion with the previous witness as to the stalemate reached with the claimant regarding her working on Saturdays they decided to set up a meeting with her. This meeting with the claimant took place on 16th June 2006 with the intention of working out a resolution. While the claimant was not asked to bring a witness she knew what the meeting was about. This was the first time for witness to meet the claimant formally however she would have seen him coming in and out of the company. The claimant said she could not give any guarantees and she could not say that she would at any stage be in a position to work Saturdays. The consequences were outlined to the claimant if a resolution could not be found. It was explained to her that if she failed to turn up for work on the next rostered Saturday and a medical certificate was not provided that she would be dismissed. The claimant's employment was terminated on 1st July 2006 when she did not turn up to work a rostered Saturday. The respondent was anxious to keep her on but felt it was left with no option in the circumstances. If the situation changed with regard to Saturdays they would be willing to take her back. The respondent had facilitated the claimant on numerous occasions previously when she needed to go to the UK and if this was the case on 1st July 2006 they would have endeavoured to find a colleague to fill in on the day but she did not make that request.

In answer to questions from Tribunal members witness said that the claimant worked Saturdays during the first two to three years of her employment. His reason for attending the meeting on 16th June 2006 was to diffuse the situation.

Claimant's case:

The claimant in her evidence told the Tribunal that she had previously worked with KT the assistant manager in another company. They had kept in contact and the claimant had moved to another job when KT offered her a position with the respondent. The claimant commenced her employment with the respondent in October 2000. KT told her that she would never have to work on a

Saturday. The days she was scheduled to work were Monday, Thursday and Friday. She was later told that the director did not want her working on Monday and well into her first year of employment she was asked to work Saturday and was told that it was not open for discussion. The claimant said she would work Saturdays if they were stuck. When asked she worked the occasional Saturday. She worked Monday, Friday and Saturday to fill for the person who wanted a day off. She worked Saturday four or five times per year and there were years when she did not work any Saturdays. Working on Saturday only became an issue after 2005.

The claimant worked the occasional Saturday as a favour for her colleagues. Some of her colleagues would comment as to why the claimant did not work on Saturday and there were some of those who did not want to work Fridays. The claimant was not aware that some of her colleagues had an issue with the fact that she did not work on Saturday. In October 2005 the claimant asked KT if she could have two days off a Friday and Saturday of Christmas week. She received a response by letter dated 21st October stating that action would be taken if she took the days off. The claimant told her that she would work all week to have the two days off however she was informed that the director wanted everybody in the shop for Christmas Eve. The claimant explained the importance for her to have the days off as she wanted to visit her daughter in London. Christmas day was on a Sunday and she offered to work Friday 23rd December. She worked the Tuesday of Christmas week and went to the UK on the Saturday returning on Wednesday 28th December. She was not working the next weekend and was off the Wednesday and Thursday when she got a call to come in as someone was sick and she obliged.

The roster was then made out for the following three months and the claimant was rostered to work one in four Saturdays. KT told the claimant that if she wanted a Saturday off to work it out with the others. In March 2006 when the claimant went into work on the Monday after her working on the Saturday KT called her in for a chat. The claimant told her that she had not agreed to work on Saturdays. On the second time KT called her in for a chat KT asked C from the office to be present also however the claimant was not asked if she wished to have a representative present. The Saturday working was again discussed. The claimant had received two verbal warnings. Others had agreed to work on Saturdays but the claimant had worked Saturdays as a favour for her colleagues but she did not want to get into a situation of having to swap every time she wanted a Saturday off. In another job she worked Friday and Saturday but she did not sign up to do Saturdays with the respondent.

In cross-examination the claimant said she would not change her mind regarding the Saturday working. She accepted the job with the respondent as she did not have to work on Saturdays. Other members of staff worked Saturdays when rostered while the claimant and two others did not work Saturdays.

In answer to questions from Tribunal members the claimant said she was appointed by the manageress who interviewed her informally and gave her the days she was to work. The person she replaced did not work Saturdays. While her contract states forty hours and Monday to Saturday she felt it did not apply to her as she had made the arrangement with the manageress. When she did work on Saturdays it was to fill in for other people when asked to do so. She left another job so that she would not have to work on Saturdays. By letter dated 16th June 2006 she received a written warning stating that her non-attendance on any future rostered Saturday would lead to her immediate dismissal. She was dismissed on 1st July 2006

Determination:

The Tribunal has carefully considered the evidence it heard in the course of this case. The Tribunal was impressed with the evidence adduced by both sides. The Tribunal accepts that an employer cannot be expected to give preferential treatment to one employee over the balance of employees. However, the Tribunal also accepts that in this instance the employee was given a positive assurance when she took this job that she would not be expected to work on Saturdays. The difficulty is that the assurance was given by somebody who did not have the authority to give it. With the passage of time the practice arose whereby the employee did work on Saturdays from time to time. It is accepted that this was done to facilitate other employees who might be on holidays or otherwise unavailable. The employee was not “rostered” to do Saturdays in the traditional sense but was obliging her co-workers.

Matters came to a head when the managing director realised that the employee was claiming privileges (i.e. an entitlement not to work Saturdays) which other employees did not have. As far as he was concerned this was unacceptable.

The Tribunal does accept that the employer did try and assure the employee that the company’s policy was to expect availability on Saturday’s but to facilitate family and other commitments as they arose. The employee was adamant that there should be no such expectation.

In the end the company did initiate some form of procedure whereby the employee was effectively told that she was to tow the company line or be let go. The employee refused and was consequently let go.

The procedures implemented by the company weren’t satisfactory insofar as the employee was given no offer to representation. However, the Tribunal feels the outcome would have been the same either way.

For failure to implement proper procedures the Tribunal awards the employee €2,000.00 under the Unfair Dismissals Acts 1977 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

