

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

Employee

MN157/2008
UD160/2008
WT80/2008
RP 392/2008

Against

Employer

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. McGrath BL

Members: Mr M. Noone
Mr. P. Woods

heard this claim at Dublin on 12th May 2008

Representation:

Claimant(s): Mr. Aaron Shearer BL instructed by Doyle Associates, Solicitors, Orchard House, Main Street, Rathfarnham, Dublin 14

Respondent(s): Company Representative

The determination of the Tribunal was as follows:-

The employer consented to a claim under the Redundancy Acts, being included during the hearing.

Respondent's Case

BM for the respondent told the Tribunal that he was director of operations for the respondent. It had a catering licence up to 3 November 2007. GS took over the respondent on 24 November 2007 on a transfer of undertaking and he took over everything except food. A licensee MF trading as Manna Foods provided food in the respondent and he paid the respondent a percentage of the food sold. In November 2007 the respondent took back the food and all employees were transferred

over under a transfer of undertaking with the exception of the claimant. The head chef, chef porter and kitchen assistants and serving staff transferred. The claimant did not want to transfer, as he had to undergo surgery and would be absent for over nine weeks. The claimant did indicate that he would be interested in coming back at a future date. On the date of transfer 3rd November 2007 he was not taken on as an employee. The respondent did not think that the claimant would return for at least two months if at all. The claimant returned to work on 1st December and he had contacted the head chef to say he would return. The claimant stated that he could not do any lifting. The respondent was changing the menu and having the second chef was beneficial. It was clear by mid December that Christmas was not going to be particularly busy. The respondent knew it could manage with just the one chef. On 3rd January the claimant was let go. He was paid one week in lieu of notice. The claimant was not given a contract of employment. The restructuring in the workplace was never explained to the claimant. The claimant worked forty hours per week and he took breaks from work.

The claimant was not his employee at that time and he did not give him advice. He was not certain that the claimant was going to return to work.

Claimant's Case

The claimant told the Tribunal that he commenced employment with Manna foods in March 2007. He was employed as a senior chef and two senior chefs were employed at this time. The senior chef GC left in 2006 and was replaced by D. Both the claimant and the senior chef were on the same rate of pay. The claimant was notified in September 2007 that he had to undergo a hernia operation on 9th October 2007. He had the surgery on 11 October 2007. He told his employer that he was going to be absent for ten weeks and pay was not discussed. He was given a guarantee that his job would be there for him. A transfer of undertaking occurred in November 2007. Some weeks after the operation he received a telephone call from the respondent that D the other chef had hurt his back and the claimant returned to work. He informed the respondent that he could not lift anything. The respondent was busy. He worked every weekend and got weekdays off. He worked Saturday from 7.30a.m. until 5p.m. He worked every Sunday from 8a.m. until 6p.m. and he did not get time and a half for this. The claimant never received sick pay. D returned three weeks later and the claimant was asked if he had a problem with this. On 3rd January 2008 D approached him and they went for a cigarette. D told the claimant that he had bad news for him and that due to cut backs that he had to leave today. The claimant decided to go and see the director of operations but he had left the premises. He never received a telephone call from the director of operations. Since his employment ended he has not worked and he is due to take up alternative employment the week commencing 20 May at the rate of €15 per hour.

Determination

The Tribunal has carefully considered the evidence adduced. A Transfer of Undertaking situation existed and the Tribunal accepts that the claimant was not excluded from forming part of this transfer. The implications of being excluded from a Transfer of Undertaking situation would have to be fully explained to an employee before he could be said to have rejected it. There is no advantage to be gained by the claimant in refusing to be included. He was going out on sick leave and had indicated his intention to return when his health allowed. The employer accepted these facts.

On his return to the workplace in early December 2007 the Tribunal finds a continuity of his service is preserved and the claimant is an employee of the respondent.

The question then becomes one of whether the claimant was made redundant by reason of a downturn in the profits in the respondent company or whether the claimant was unfairly dismissed by reason of having been unfairly selected for redundancy.

It should be noted that the employer consented to a claim under the Redundancy Acts, being included.

The Tribunal accepts that there has been a downturn in the restaurant and bar sector. However there has to be an obligation on an employer to demonstrate why a person is being singled out for dismissal by reason of his job being made redundant.

The manner of the claimant's dismissal was unfair. No explanation was given. No opportunity to work reduced hours was suggested. Crucially no member of management took the time to explain the reasons for selection. This was grossly unfair in circumstances where the claimant had cut short his sick leave to return to work at the request of the employer.

The claimant therefore succeeds in his claim under the Unfair Dismissals Acts, 1977 to 2001 and the Tribunal awards €10,000 in compensation.

The claimant received one week's notice and is therefore not entitled to compensation under the Minimum Notice and Terms of Employment Acts, 1973 to 2001. No award is being made under the Organisation of Working Time Act, 1997. The claimant is not entitled to an award under the Redundancy Payments Acts, 1967 to 2003.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

