

## EMPLOYMENT APPEALS TRIBUNAL

Claims of:  
Employee

Case No.  
UD1083/2006

against

2 Employers

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal  
(Division of Tribunal)  
Chairman: Ms. M. Petty  
Members: Mr. T. Gill  
Dr. A. Clune

heard this claim at Limerick on 31st January 2008 and 25th April 2008

#### **Representation:**

Claimant: Ms. Vivian O'Shea, Lees, Solicitors, 45 Church Street, Listowel, Co. Kerry

Respondent: Mr. Mark Murphy, Mark Murphy & Company, Solicitors, 99 O'Connell Street,  
Limerick

#### **The decision of the Tribunal was as follows:**

##### Respondent's Case:

The Tribunal heard evidence from the owner of the respondent (Mr. M). He told the Tribunal that the respondent is a retail outlet discount store selling hardware and household items. There is another store that is connected to the respondent store, where the claimant worked. The claimant commenced working with the respondent in March 2006, her main job was checkout operator and she also priced stock. When the claimant started work there CW was also working there but he later moved to the Mr. M's other shop.

The shop opened 9:00 a.m. to 6:00 p.m. Saturday and Sunday. The claimant worked from 12.00 p.m. to 6:00 p.m. Saturday and Sunday (before time of dismissal). The witness told the Tribunal that the claimant never worked any other days. She was paid €10.00 per hour and this amounted to €120.00. She was paid on Fridays for work done the previous weekend. The staff were allowed a half-hour for lunch and they left the shop for their lunch. There were very few quiet times in the shop. There was no reading material in the shop, as it would send the wrong message to customers (Should the staff read in shop).

He reprimanded the claimant on a number of occasions. She was late several times and on one occasion he had to call to her house.

The witness told the Tribunal that there was no (personal) relationship between himself and the claimant. On one occasion he had sexual relations with the claimant, and this happened once in the

shop at summertime.

On or about the 2<sup>nd</sup>/3<sup>rd</sup> September 2006 the witness was in England and he got a phone call from his business advisor (Mr. N). Mr. C was working in the shop that day. Mr. N told the witness that the shop was busy and the claimant had not arrived for work, this was at 12:45 p.m. Later that day the claimant arrived to work at 1:10 p.m. She left the shop at 2:00 p.m. and returned at 4:00 p.m. Then Mr. C left the shop. At 5:45 p.m. on Saturday or Sunday 2<sup>nd</sup>/3<sup>rd</sup> September the claimant was counting the money on the shop counter and she left the money on the counter and went out for a cigarette. Normally they lock the door and pull the screen and then count the money.

The witness also saw on the CCTV footage that Mr. C and the claimant were asleep at one time. On Sunday the claimant had fallen asleep at the counter. He showed this footage to the claimant. The customers left the goods that they had wished to purchase and just left the shop. Normally he would have takings of €4,000.00 for Saturday and Sunday but that weekend he only had takings of €1,700.00. (Accounts sheets were opened to the Tribunal).

When he arrived back in Ireland he was at the airport and he phoned Mr. C and told him that he was suspended. The claimant would not answer his phone calls.

He reviewed the CCTV footage and it was as described. He contacted the claimant and Mr. C and invited them to separate meetings. He showed the claimant the CCTV and she offered no defence. He told the claimant he had no option but to let her go. She told him that if he did not give her, her job back she would tell his partner that he had sex with her.

He next called Mr. C and showed him the CCTV. He told Mr. C that he had no option but to let him go. Mr. C accepted this and Mr. M gave him his holiday pay and a reference.

During cross-examination the witness denied that the claimant stayed in his house or that he had bought her a mobile phone. He denied that the claimant worked during the week: "She worked Saturday and Sunday for €10.00 per hour. He told the Tribunal that they never had a relationship and she never told him that she was pregnant.

Mr. M was recalled on the second day of hearing with a logbook in which he had recorded staff absences. He gave evidence that the only employee not working on the 2 September 2006 was CW. Mr. M sells stock between his two businesses. Mr. M gave evidence that there was no stock movement on the 2 September 2006. However, stock had been moved between the two shops on the 1 September 2006 and the 9 September 2006. Documents showing stock movement were opened to the Tribunal. A telephone bill for the other shop was also opened to the Tribunal, which showed there was no telephone call from this shop on the 2<sup>nd</sup> September 2006 to where the claimant was working.

During cross-examination Mr. M stated he completed the log of staff absences on a weekly basis. He also confirmed that the stock movement documents had all been prepared on separate occasions when stock movement occurred.

The Tribunal heard evidence from CW. He was working there for three to four years. If a truck arrived he would unload the stock pallet/s and store spare stock upstairs. He also checked the invoice for the stock. The witness explained that the claimant did not unload the trucks or the pallets, as they were his job. The claimant did the pricing of the goods. He called to the respondent

shop about twice every second week.

It was put to the witness that on Saturday afternoon, the claimant was absent for two hours, and that the claimant contended that she was acting on a phone call from him to bring stock to another shop.

The witness denied this because if he needed stock he would get the stock himself. He and Mr. M viewed the CCTV footage of the weekend in question. He saw the money on the counter and customers in the shop and the claimant was not to be seen. He agreed with the evidence of Mr. M regarding the CCTV footage.

During cross-examination it was put to the witness that the claimant would say she unloaded from pallets and he disagreed, as it was his job. It was put to the witness that he asked the claimant if it was true that she was pregnant and he denied this. He also denied telephoning the claimant to ask her to bring stock to another store.

In answer to questions from the Tribunal the witness explained that he worked two days per week on average and “on and off” for the last three or four years. He was paid on Friday and in cash.

CW was also recalled on the second day of hearing. He confirmed he was not working on Saturday 2 September 2006.

During cross-examination it was put to CW that he failed to mention on the first day of hearing that he was not working on the 2 September 2006. CW replied that he had not been asked the question directly.

Answering questions from the Tribunal, CW said it was usually Mr. M who moved the stock between the shops.

Mr. J gave evidence to the Tribunal that he is a general operative in the respondent’s other shop. He gave evidence that on the 2 September 2006 he was working with Ms. D. Mr. J confirmed that CW was not working with them on this date. Mr. J did not receive a delivery of stock from the respondent’s other shop on this date. The shop was fully stocked as Mr. M was going to be in England. Mr. J remembered this particular weekend, as it was very busy.

Answering questions from the Tribunal Mr. J stated that he had previously worked for the respondent in the same shop as the claimant; therefore he was aware of what the claimant looked like. When he moved to the other shop Mr. M handled the movement of stock between the two shops. Mr. J did not receive a delivery of stock from the claimant on the 2 September 2006.

Giving evidence Ms. D told the Tribunal that she worked with Mr. J on the 2 September 2006. CW was not working on this date. Ms. D did not make a request for stock from the other shop on the 2 September 2006. Ms. D confirmed that the shop was fully stocked that weekend as the Mr. M was in England for the weekend. Ms. D remembered this particular weekend, as it was very busy.

Answering questions from the Tribunal, Ms. D said if the shop were ever short of stock, such as small items, they would have either got them from a shop nearby or got them from the shop where the claimant worked. Mr. M moved the stock between the two shops. Ms. D confirmed that on the 2 September 2006 she did not see the claimant bring stock to the shop.

Giving evidence Mr. N told the Tribunal that he is the Mr. M's financial and business advisor and a qualified accountant. Mr. N was aware that Mr. M was in England the weekend of the 2<sup>nd</sup>/3<sup>rd</sup> September 2006. Between 12.30pm – 1.00pm he visited where the claimant worked, to check on the shop. He observed only one employee present and when he enquired about this he was told that the claimant was on the roster to work that day but she was not in work yet. Mr. N contacted Mr. M by telephone to make him aware of this.

Mr. N also gave evidence that he holds various documents for Mr. M relating to his businesses. He did not have any knowledge of the claimant being paid by cash.

During cross-examination it was put to Mr. N that the claimant was on the roster to begin work at 12pm on the 2 September 2006. Mr. N replied that he had visited the shop at approximately 1pm.

### Claimant's Case:

Giving evidence the claimant told the Tribunal that she commenced employment with Mr. M in February 2006. Initially the claimant worked two days per week but this later increased to four days per week to include. The claimant stated that she was paid €240.00 for working four days per week. The claimant stated that this payment consisted of a cheque for €120.00 and a cash payment of €120.00. The claimant did not receive payslips.

The claimant worked as a checkout operator for the respondent and her duties also involved keeping the shop clean. Initially the claimant and Mr. M had a good working relationship. Sometimes the claimant read a newspaper or magazine at the till area when she her duties were completed and the shop was quiet. Mr. M did not have a problem with this. Mr. M often came into the shop to have conversations with the claimant. There was contact between them outside of working hours and Mr. M showed an interest in the claimant. The claimant responded and they started a sexual relationship, which lasted approximately six weeks.

The claimant ended the relationship in mid May 2006 and was reconciled with her husband in June 2006. Initially Mr. M was fine about her ending the relationship but as time passed he had a complete change of attitude. He started to change what days the claimant worked and other days he told her she was not needed at work.

After the claimant was reconciled with her husband she became pregnant. A doctor's letter was opened to the Tribunal, which confirmed that the claimant had her pregnancy confirmed on the 1 August 2006. The claimant told Mr. M she was pregnant during the first four weeks of her pregnancy. The claimant told Mr. M early in her pregnancy as the shop had received a delivery and she as anxious about lifting objects as she had problems in with previous pregnancies. The claimant felt awkward as she was not helping to unload the delivery from the truck and Mr. M was "in a mood." When she told Mr. M that she was pregnant he asked the claimant what did it have to do with him and walked away from her. The claimant had never been reprimanded prior to this.

The claimant was due to start work at 12pm on the 2 September 2006. However, the claimant did not attend work until 12.50pm, as she was unwell. She had telephoned her colleague prior to let him know this.

When the claimant was in work she received a telephone call from CW at approximately 3.00pm

-3.30pm. CW asked the claimant to bring a number of small items including plastic bags to the other shop. The claimant travelled by car to the other shop with the items. The journey lasted approximately fifteen minutes. When the claimant arrived she handed the items to CW. The claimant returned to the other shop straight away. Later that day the claimant contacted Mr. M and told him that she had been late to work that day.

On the following Thursday the 7 September 2006, Mr. M told the claimant that he wanted to speak to her. He showed CCTV footage to the claimant. The claimant did not see from the CCTV where she had left cash on the counter as he had said. The claimant told the Tribunal that she had never fallen asleep in the shop. Mr. M also raised with the claimant that she had read a magazine and drank coffee at the shop counter. Mr. M asked the claimant to take two weeks holidays and the claimant agreed to this, as she wanted to keep her job. Mr. M said she would not be paid for the two weeks. Mr. M said he was going to appoint a supervisor who would decide whether or not the claimant could keep her job. The claimant thought these matters were an excuse and that Mr. M wanted to get rid of her, as she was unwilling to lift things anymore.

The claimant sought advice and based on this she decided not to take two weeks' off work. She told Mr. M this by telephone and he said he wanted to meet her the following day. When they met he dismissed her and told her that she had only been a temporary employee. This was the first time the claimant had been told this. Mr. M paid the claimant holiday pay owing.

The claimant was aware that there were CCTV cameras in the shop and she was aware of where they were positioned. She did not understand why Mr. M had a problem with her reading in the shop on this particular weekend.

During cross-examination it was put to the claimant that she had not worked four days a week for Mr. M. The claimant replied that she had worked four days for the respondent but that Mr. M had told her she was "on the books" for €120.00. Also, Mr. M had shown her the CCTV footage on a Thursday, when she attended for work. At this meeting Mr. M only told the claimant that he had issues with her reading in the shop he did not tell her at this meeting that he had a problem with her being absent from the shop.

It was put to the claimant that she had continued to work for the respondent in a tense situation during the summer of 2006. The claimant agreed but stated that Mr. M was not always present when she was working. When she ended the relationship between them, Mr. M came into the shop but ignored the claimant. It was put to the respondent that Mr. M was unaware that she was pregnant. The claimant replied that Mr. M was aware she was pregnant, as she had told him. CW was also aware that the claimant was pregnant.

The claimant gave evidence relating to loss and her unavailability to seek new employment.

### **Determination:**

The Tribunal considered all of the evidence adduced at the hearings. There was a conflict of evidence in this case. Although the claimant did not have the requisite one-year service as set out

under the Act, the Tribunal unanimously determines that the claimant was unfairly dismissed for reasons connected with her pregnancy as set out under Section 6(2) of the Unfair Dismissal Act, 1977 rather than because the claimant was absent from the shop. The Tribunal finds that the claimant was unfairly dismissed within the meaning of the Unfair Dismissals Acts, 1977 to 2001 and finds the appropriate level of compensation to be €2,880.00.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)