

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:
Employee

CASE NO.UD506/2007
RP218/2007
MN360/2007

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001 REDUNDANCY PAYMENTS ACTS, 1967 TO 2003 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P Quinn

Members: Mr J Redmond
Ms H Henry

heard this claim at Galway on 9th June 2008

Representation:

Appellant: Mr. David Higgins,
Solicitor,
Henry Comerford & Co.,
3 Montpelier Terrace, Sea Road, Galway

Respondent: In person

The determination of the Tribunal was as follows:

The fact of dismissal was in dispute in this case.

The Claimant commenced employment with the Respondent on the 10th April 2000.

It appears that her initial role in the enterprise was as a receptionist and whilst she had a qualification in photography at the time, she had no practical experience. Over the subsequent period, she was trained by the Respondent as a studio and wedding photographer, such that by the time of the events, the subject matter of the proceedings, she was employed by the Respondent as a studio and wedding photographer.

It also appears that during the currency of her employment, her request for what was essentially 6 months unpaid leave of absence was acceded to by the Respondent and that on her return from abroad, she resumed her duties in the business.

There was evidence adduced by and on behalf of the Claimant that sometime after her return to work and from in or about the late Spring/ early Summer of 2006 onwards, the atmosphere in her workplace was quite unbearable, her workload was oppressive and that a considerable amount of tension and lack of communication was pervasive there, culminating, it was alleged, in the Summer of 2006, with the Claimant affording notice to the Respondent of her intention to leave her employment. Subsequently, there was a meeting between the Claimant and the Respondent resulting in an agreement between the parties, with the Respondent affording the Plaintiff improved terms and conditions of employment, particularly with regard to remuneration.

The Respondent's version of events was that the Claimant had approached him looking for an improvement in her financial position, or else that she would leave her employment, that she had sought to have her salary trebled, with half yearly incremental increases thereafter, as well as pension contributions by the Respondent. The Respondent alleged that he agreed to increase the Claimant's gross weekly salary from €375 to €500 and that the Claimant was happy to accept this.

Whilst it was acknowledged by the Claimant that thereafter there was an improvement in her financial circumstances, it was alleged by the Claimant, that the atmosphere, tension and lack of communication in the workplace as complained of, persisted.

The Respondent for his part strongly disputed that the situation in the workplace was as presented by the Claimant.

By March 2007, the Claimant was employed five days a week with the Respondent and her gross weekly wage was €604.31. As far as the Claimant was concerned, the final straw for her, was her receipt on the 20th March 2007, of a letter from the Respondent, advising her that she would henceforth be required to work only three days a week with the Respondent, commencing immediately.

The Claimant alleged that this was a unilateral change in her employment situation and circumstances, in that she had not previously been consulted about it by the Respondent prior to its introduction.

Once the Claimant had learned of the situation she alleged that she sought to establish with the Respondent the duration for which the three day working week was to last. The Respondent was unable to advise the Claimant in that regard. In addition, the Claimant sought to have the Respondent identify for her, the three days of the week, on which the Claimant would have to work. Again the Respondent was unable to assist the Claimant in that regard, as the roster for each week was only prepared the previous weekend and the Claimant had to learn what days she would be working each week, on a weekly basis. Notwithstanding her dissatisfaction with the foregoing, the Claimant alleged that she persisted with the altered state of affairs until the 17th April 2007, when she could no longer endure the situation and ceased her employment with the Respondent.

The Respondent for his part alleged that from in or about the beginning of the year 2007 he experienced a sharp downturn in the affairs of his business, with no appointments in the diary for days on end and that on numerous occasions in the course of that year, he had conversed with the Claimant as regards the downturn in business activity, a fact which he alleged she had acknowledged. The Claimant in her evidence to the Tribunal accepted this.

The Respondent alleged that it was in such circumstances that he was compelled to reorganise the affairs of the business and place the Claimant on a three-day week. Whilst the Respondent

acknowledged that he did not expect this change to be easy for the Claimant, he insisted that he did not expect there to be any issue surrounding same, as the Claimant could see for herself how the business had diminished and that at all times they had a cordial relationship. The Respondent contended that having worked under the new regime for a number of weeks, the Claimant on the 17th April 2007, suddenly left her employment with him, without any consultation, telling the Respondent that she “*couldn’t do this anymore*”.

The Respondent gave evidence that “*I didn’t know what she couldn’t do*” until he received a letter from her Solicitor, dated the 20th April 2007, to which the Respondent responded by enclosing a gratuity payment of €1,000 and requesting a meeting with the Claimant to arrange a reference for her and to discuss potential future working assignments.

As this was a claim for constructive dismissal, the onus of proof rested upon the Claimant to satisfy the Tribunal, on the balance of probabilities that her resignation was not voluntary and that she terminated her contract of employment in circumstances in which, because of the conduct of the Respondent she was entitled, or that it was reasonable for her to do so.

Having regard to the evidence of the parties and witnesses and having had the opportunity of observing their character, demeanour and disposition in the giving of their testimony, the Tribunal is not disposed to believe that the situation pertaining in the Respondent’s workplace was as harrowing as presented by the Claimant and her witnesses.

However, the Tribunal unanimously determines that, the Claimant was entitled to terminate her contract of employment in circumstances where her employer unilaterally imposed such a material change in her employment situation and further, that it was reasonable for the Claimant to terminate her employment in such circumstances.

The Unfair Dismissals legislation imposes a general presumption that dismissals are unfair. That being so, it then falls to the Tribunal to determine whether, on the balance of probabilities, the Respondent had established substantial grounds justifying the dismissal of the Claimant.

Without prejudice to the generality of the foregoing, Section 6(4)(c) of the Unfair Dismissals Act 1977 provides that “*the dismissal of an employee shall be deemed, for the purposes of this Act, not to be an unfair dismissal, if it results wholly or mainly from the redundancy of the employee.*”

No documentary evidence whatsoever, either in the nature of diaries, appointment books, or books of account, was introduced into evidence by the Respondent, at the hearing before the Tribunal, to corroborate his sworn testimony, as to a significant downturn in the affairs of his business from the beginning of the year 2007 onwards. In addition, the sworn testimony of the Respondent, in relation to the procedure deployed by him, for the selection of the Claimant for reduced working hours, as opposed to an alternative employee, merited some degree of suspicion on the part of the Tribunal as to the fairness of same.

Of course, it is also appropriate to acknowledge, that the Respondent, albeit undoubtedly of his own volition, appeared in person before the Tribunal and without the benefit of legal representation and also that the Claimant had by her evidence, substantially corroborated the lack of business activity in the months preceding the introduction of her reduced working hours.

In the light of the foregoing and notwithstanding that, as a result of same, it has some reasonable doubt on the issue, the Tribunal nonetheless believes and unanimously determines, that it is more

likely than not, that the dismissal of the Claimant resulted mainly, from the fact that the requirements of the Respondent's business, for employees such as the Claimant, to carry out work of a particular kind, on five days a week, in the place where she was so employed, had diminished.

Therefore, the Tribunal unanimously determines that the Claimant shall be deemed to have been dismissed by reason of redundancy and the Claimant's claim for Unfair Dismissal fails.

Furthermore, as this was a claim by the Claimant for constructive dismissal, her claim under the Minimum Notice and Terms of Employment Acts 1973 to 2001 fails.

In the light of the determination above, whilst it is not necessary for the Tribunal to consider what would have been the appropriate form of redress for the Claimant, had the Tribunal determined that her dismissal was unfair, in so far as the issue of compensation would have fallen to be considered, the Tribunal observes that it would have had considerable reservations, concerning the credibility of the evidence adduced by the Claimant, as regards her alleged financial loss and as regards her efforts to mitigate her alleged financial loss, in consequence of her dismissal and the reasons adduced by her for same.

However and in accordance with the provisions of section (9)(1)(c) of the Redundancy Payments Act 1967 and for the purposes of Part II thereof, the Tribunal unanimously determines that the Claimant is to be taken to have been dismissed by the Respondent, in circumstances where the Claimant terminated her contract of employment, under which she was employed by the Respondent, in circumstances that she was entitled to terminate it, by reason of the Respondent's conduct.

Accordingly, the claim under the Redundancy Payments Acts, 1967 to 2003 succeeds and the Tribunal awards the Claimant her statutory entitlement to redundancy there under, based on the following criteria:

Date of Commencement Of Employment:	10 th April 2000
Date of Termination Of Employment:	17 th April 2007
Gross Weekly Pay:	€604.31

In this regard, it should be noted by the Respondent, that a statutory weekly ceiling of €600.00 applies to payments from the Social Insurance Fund.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)