

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

Employee

CASE NO.

UD490/2007

against

Employer

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. E. Kearney BL

Members: Mr. B. O'Carroll
Ms H. Henry

heard this claim at Nenagh on 22nd September 2008

Representation:

Claimant(s) : Mark Murphy & Company, Solicitors, 99 O'Connell Street, Limerick

Respondent(s) : Mr. Dermot Cahill BL instructed by:
James O'Brien & Co., Solicitors, 30 Castle Street, Nenagh, Co. Tipperary

The determination of the Tribunal was as follows:-

Claimant's Case:

The claimant gave evidence. She explained that the respondent had employed her for over four years caring for the elderly. She worked six hours a day in seven days over fourteen. She loved her job had never had any problems with the respondent and always obliged if needed to come to work on her day off.

When she applied for the position she had explained to the Director of Nursing and joint proprietor of the respondent of her history caring for her mother for eighteen years, that she had family in England who visited every Christmas for a family gathering and therefore did not work on Christmas Day. She was available to work St. Stephens Day or New Years Day. She did not work on Christmas Day between 2002 to 2005.

On December 7th 2006 at 11.30 am she met the Director of Nursing in the corridor and explained to her that she had relatives visiting for Christmas and would not be able to work on Christmas Day. The Director of Nursing told her she had looked at the roster and thought her name was on it. An

hour later herself and a colleague were looking at the roster, both names were on it for Christmas Day. After lunch she and her colleague were talking in the staff room discussing the roster and whom they could swap with. The Director of Nursing was in her office and came into the staffroom and told them “not to panic”, they would sort it out and get someone.

On December 21st 2006 she worked her shift of 8 am to 2 pm. At 2 pm the Director of Nursing called her into her office asking her “what’s this that you are not working on Christmas Day”. She replied that she and her colleague had informed her two weeks previous that they could not work that day but she said that she could not recall it. The Director of Nursing said that she was letting her friends down. The claimant explained that her colleagues had no problem with her not working Christmas Day as it was less busy and they could cope because a lot of residents went home that day. The Director of Nursing told her that her colleagues had told her that it was not fair. The claimant left.

She refuted that she had told the Director of Nursing if she did not work Christmas Day the Director of Nursing could fire her. The Director of Nursing told her that if she would not work that day she would have to sack her. The claimant told her she could not sack her 3 days before Christmas. The Director of Nursing told her that she did not want to be “bad mouthed” but the claimant informed her that she would tell the residents why she had been let go.

The rosters were submitted into evidence. Three other people did not want to work on the day in question and they were substituted. On December 22nd 2006 she arrived to work. The Director of Nursing informed her that if she could not work on the day in question she was sacked from now. She was so shocked she told the Director of Nursing that she had to go home. She told her colleague she had been sacked.

The claimant gave evidence of loss and explained that her dismissal had affected her health.

On cross-examination she reiterated that she had not refused to work the day in question, she just couldn’t and had told the Director of Nursing on two occasions in December 2006. When asked about prior Christmas Days she said that she had not been rostered or got cover. Plenty of other staff wanted to work Christmas Day. She always worked New Years Day. Letters were shown to the claimant of other staff applying in writing for time off at Christmas. She explained that notice for time off had to be either verbal or written to the Director of Nursing.

She explained that the roster had not been up when she had informed the Director of Nursing that she could work Christmas Day. Rosters were sometimes listed one or two days before the rostered week, sometimes a week before. She was not aware the roster was to be listed on December 7th 2006. When asked, she said that once the roster was listed either you worked the day you were rostered or you got cover. The Director of Nursing knew less staff had worked the day in question in the past and managed. She explained that she had asked everyone available to swap the day with her. She would have told the Director of Nursing that she could not get a swap.

When put to her if she knew she would be dismissed if she did not turn up for work, she replied that other staff that had not turned up for work had not been dismissed. When shown a copy of a contract of employment she said that she had not received it but had received an addendum.

Questions were put to the claimant by the Tribunal concerning the staff named on the roster to work on the day in question. She again stated she had never worked Christmas Day in the past and that there had not been a problem.

A colleague of the claimant gave evidence on behalf of the claimant. She was currently employed by the respondent as a Care Assistant.

On December 7th 2006, or early in the month, she was in the canteen with the claimant when they discovered the rosters had been posted and both of them had been rostered for Christmas Day. The Director of Nursing came in and told them they had two weeks to sort it out. The witness obtained a swap.

On cross-examination she stated that she could not really recall the exact words spoken that day but said that they had been told not to worry or fuss they had two weeks to get organised. She explained that if you were rostered and could not work it was up to you to try to get a swap and then inform the Director of Nursing. If you could not get a replacement you informed the office. She never thought anyone would be fired over the matter.

Respondent's Case:

The Director of Nursing and joint proprietor of the respondent gave evidence. She explained that the business had opened in 1999. At the time of the claimant's employment there were fifty staff employed.

She had interviewed the claimant but could not remember when she had given her a contract of employment. She did not recall the claimant telling her that she did not work on Christmas Day and would not have employed someone who could not work certain days. She explained that if staff required leave they had to apply in writing. Everyone knew the procedures.

The Christmas roster was posted in the canteen two weeks beforehand. She explained that before it was compiled, staff would be asked their preferences. Once the roster was posted it was up to the staff themselves to secure a swap and would come to her if they had a problem. She explained that Christmas Day was a very busy day from. Fifty percent of residents went to their relatives that day and they had to be ready to leave from early morning to be collected. Lunchtime was quiet and staff rostered till 2 pm would be allowed to leave at 1.30 pm.

On December 7th 2006 the roster was posted up. The claimant and her colleague were in the canteen. She told them the roster was posted up. She told them they had two weeks to work on it, it was up to them to organise a swap and to come to her if they could not sort it. The only reason given by the claimant was that she could not work Christmas Day.

On December 21st 2006 she spoke to the claimant telling her that the staff had told her that the claimant was not working on the day in question. She asked her was she to work that day and was told she was not. She told the claimant that once the roster was posted it was up to them to get a swap or work the shift. She also told her that she must work or "not stay with us". She advised the claimant to think about it overnight and come back and talk to her again.

The following day she met with the claimant and asked her had she made her decision to either work or go. She told her she was letting her colleagues and the residents down and told her that it was not appropriate to return after Christmas. The claimant came into the premises the following day and informed the residents what had occurred.

When shown the roster for the Christmas period of time she said that the staff had organised their own cover. She explained that she covered the claimant's shift on the day in question as a last

resort.

On cross-examination she stated that she was the boss, there was no Human Resource or Personnel Manager. When asked, she said that she had known on December 7th that the claimant wanted Christmas Day off. She stated that the claimant must have been lucky or given her a note in the past regarding Christmas Day and this was why she had not been rostered. She did not have a copy of the claimant's signed contract of employment. The claimant had not received any verbal or written warnings in the past. She had been a good employee and had no other problems with her attendance.

The witness stated that she had been perfectly justified to dismiss the claimant; she had given the claimant the option and told her to think about it. The claimant had been facilitated in the past with leave to visit her ill sister. The witness said it was a "two way street".

On re-examination she again stated that the claimant had given her no option but to dismiss her.

An employee of the respondent gave evidence. She was employed as a Care Assistant from November 1998. She stated that if you refused to work your rostered shift you were dismissed.

When asked, she stated that she did not know if this had happened to any other employee.

Determination:

The Tribunal are satisfied that staff cover ultimately rests; irrespective of inter staff temporary arrangements, with the management of the respondent business and not with the employees. On the evidence adduced the Tribunal finds that the sanction taken was disproportionate in the circumstances.

In the circumstances the Tribunal finds that the claimant was unfairly dismissed and awards her the sum of € 15,000 under the Unfair Dismissals Acts, 1977 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)