

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
Employee

CASE NO.
UD688/2008, RP587/2008
MN629/2008, WT283/2008

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
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P. O' Leary B L

Members: Mr D. Moore
Mr N. Broughall

heard this claim at Dublin on 21st October 2008

Representation:

Claimant : Mr Stephen Boggs B L instructed by
Nora Gallagher & Co, Solicitors, No. 5, Ranelagh, Dublin 6

Respondent : No representation listed

The determination of the Tribunal was as follows:

Respondent's Case

A director of this health and wellness business said she dealt with most human resource issues within the respondent. She hired the claimant in September 2005 primarily as a massage therapist and reserved the right to expand her duties to other relevant work as circumstances changed. A statement of the claimant's terms and conditions of employment issued the following month and among its contents was the claimant's basic remuneration of fifteen euro per hour. In July 2007 another director wrote to the claimant and informed her that her hourly rate had increased by two euro to seventeen euro. The letter writer also thanked her for her hard work and added that the claimant was doing a great job. The witness commented that this increase was done to keep the claimant "on board".

By early 2008 the respondent was encountering financial difficulties. In order to address that

situation the witness asked several members of staff including the claimant to consider taking a reduction in their hourly rate. In March 2008 the witness met the claimant twice and proposed a reduction of around a third of her basic rate. While she accepted that it was not the claimant's problem she was better paid than other staff at their Terenure branch the witness denied she told her she could get others to do her job for less. At that time there were between nine and twelve staff in that branch some of whom had more skills and qualifications than the claimant but received less remuneration. The claimant however was there longer than many of her colleagues.

Prior to the end of March 2008 the claimant having considered the proposal informed the witness that she was not willing to take a cut in her basic pay. The witness arranged a meeting with the claimant for 28 March and also contacted the redundancy section of the Department of Enterprise, Trade, and Employment and "acted on their advice". When the two ladies met the witness told the claimant she was being made redundant. In repose the claimant in exiting the meeting said she was not accepting that situation, left the room and stated she would not be returning to work. The witness did not get the opportunity to furnish the claimant with a redundancy form and payment.

The respondent who operated in four locations at the time did not offer alternative employment to the claimant. The witness outlined the criterion for this redundancy to the Tribunal on the grounds that the respondent no longer had a need for a masseuse. She disagreed that the claimant's redundancy's was due to her refusal to accept a pay cut.

Claimant's Case

Prior to her commencement of employment with the respondent the witness had acquired many years experience as a massage therapist. She was the only such therapist employed at the Terenure branch and her colleagues did not give the same type of massage. Up to March 2008 the claimant had no disciplinary issues and was happy to be working there. She did not notice any downturn in the business and was unaware the respondent was facing trading and commercial problems.

In rejecting the respondent's proposal to cut her hourly pay by six euro the claimant was told that she was facing a redundancy situation. That situation materialised on 28 March and the claimant did not accept the respondent's contention that she be let go. She felt she was being dismissed due to her refusal to accede to the respondent's request to take that proposed pay cut.

Determination

Having considered the evidence the Tribunal unanimously finds that the dismissal of the claimant was unfair. The respondent's purported reason for her redundancy was based on her comparative skills and qualifications and their contemporary financial situation. No supporting evidence was produced to support that assertion. The respondent's selection procedure for redundancy was not demonstrated in this case. The claimant was within her rights to refuse their unilateral proposal to decrease her hourly rate. The Tribunal finds it hard to accept that this refusal had no bearing on the respondent's decision to terminate the claimant's employment. This dismissal was not due wholly or mainly for redundancy reasons.

Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2001 is allowed and the claimant is awarded €3000.00 as compensation under the above Acts.

Based on her service the claimant was due two weeks notice of the termination of her employment. Neither this notice nor payment in lieu of such notice was given and, as a consequence her appeal

under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 succeeds, and the claimant is awarded €1010.00 under those Acts as compensation for that outstanding notice.

The appeal under the Organisation of Working Time Act, 1997 was withdrawn during the course of this case.

Since unfair dismissal and redundancy are mutually exclusive it follows that the appeal under the Redundancy Payments Acts, 1967 to 2003 must fall.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

