EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.
Employee UD1051/2007

against
Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr S Ó Riordain

Members: Mr J Browne
Mr S O'Donnell

heard this claim at Wexford on 10th July 2008 and 10th October 2008

Representation:

Claimant: Mr. Paudge Reck
Sunrise, Mulgannon, Wexford

Respondent: Mr Eddie Farrelly BL, instructed by:
Ms. Denise Fanning, Solicitor
Assistant Manager Of Legal Services,
Das Group, 12 Duke Lane, Dublin 2

The determination of the Tribunal was as follows:

Claimant's Case:

The claimant commenced employment in June 1995. The claimant was approached by the respondent on the 20th July 2007 and asked if she would be interested in receiving redundancy. The respondent told her that she would receive a lump sum but she could continue to work part-time for him. The respondent had calculated the redundancy. The respondent had what he and the claimant would receive from the lump sum. The respondent's written calculations were opened to the Tribunal and showed a proposed figure of 60% of the lump sum for the claimant with the respondent retaining 40%. The claimant enquired from her employer how she would be able to work on a part-time basis when she was made redundant. The respondent told her that because itwas a three-part business consisting of a shop, bed and breakfast and restaurant, it was possible forher to continue in a part-time role. The claimant told the respondent that she would think about it.

On the 23rd July 2008 the claimant informed the respondent that she would accept the redundancy. The claimant told the respondent that she had been to the Citizens' Information Centre that she was informed that she was entitled to six weeks minimum notice and holiday pay. He went to his calendar and said she was entitled to eight weeks notice. From this time the claimant believed thatshe was working her notice. The claimant did ask the respondent not to guarantee her any dayspart-time, as she thought that she might find some new work.

At the beginning of August 2007 things changed. The claimant was unwell and attended her doctor who provided her with a medical certificate. When she submitted the certificate to the respondent he asked her if it was a legitimate certificate. The claimant told him that she had never submitted an illegitimate certificate. The respondent walked away from her.

The claimant examined the staff roster although her hours were always the same from week-to-week. However, the claimant saw that her hours were reduced to a three-day week. When she queried this with the respondent he told her that he forgotten to tell her. The claimant's hours were reduced without consultation but she did not pursue this matter further as she was due to finish the end of August with her redundancy.

A new employee commenced work with the respondent on the 27th August 2007 in place of the claimant. The claimant finished work with the respondent on the 1st September 2007 and received her last week's wages and holiday pay in two separate cheques. The claimant attended at the Social Welfare office and was told that without a redundancy certificate and P45 her claim could not beprocessed. When she spoke to the respondent about this he assured her that she would have it thefollowing week. The claimant also queried with the respondent that she thought she was entitled toa full redundancy payment. The respondent asked the claimant, "what redundancy?" The claimantwas devastated. The claimant became ill as a result of this situation and attended her doctor. Theclaimant also needed the respondent to confirm that she was being made redundant in the context ofher credit union loan, but he did not do this when she produced the credit union book.

The claimant also received a letter from the respondent dated the 5th September 2007 in which he stated that they had discussed the possibility of redundancy. The claimant stated that redundancy was not only discussed but organised. In this letter the respondent offered the claimant her 35hours back.

The claimant wrote a letter to the respondent stating that she would accept her 35hours again commencing on the 8th September 2007. Subsequently, the claimant attended her doctor and her friend submitted a medical certificate to the respondent on the claimant's behalf. The claimant decided that she could not return to work with the respondent and that she was forced from her employment. The claimant asked the respondent for her P45 and he agreed to provide it to her when he received a letter of resignation. The claimant subsequently submitted this letter.

The claimant stated that through a series of correspondence the situation had changed from one where she was actually getting a redundancy payment to one where the respondent offered only a possibility of redundancy.

The claimant worked 35 hours per week for the respondent until the 31st August 2007. The claimant looked at the roster in August for September and saw that she was down for three days. When she looked at a later stage it was only one day and a new name was added where her name had been. She understood that it meant her redundancy would begin on 1st September. She went to

the respondent and he told her that he had forgotten to tell her.

During cross-examination it was put to the claimant that she had approached the respondent about redundancy. The claimant refuted this.

It was put to the claimant that she agreed to work full-time for the summer of 2007 but that she sought reduced hours in September 2007, as she was looking into the possibility of other work. The claimant denied this.

Respondent's Case:

The respondent gave evidence that he took over the business in 2005 through a transfer of undertakings and continued to employ the staff in the business, which comprised of a grocery shop/B&B/Video rental. The respondent had a good relationship with the claimant who was the longest serving member of staff, and she continued to work 35 hours per week. He issued written contracts of employment to each employee.

The claimant had frequently mentioned in an offhand way that she would like to receive a redundancy payment. On Friday 20th July 2007 he suggested, as a favour, to the claimant that they discuss the possibility of giving her a redundancy payment. On either the Friday or the following Monday, when he also met the claimant, the respondent checked the redundancy calculator on line to assess what amount the claimant might receive. When he saw the figure he told the claimant that he couldn't afford the whole amount and he discussed a reduced package with her, which she agreed. The claimant wished to work part-time in the shop, claim social welfare and do a cleaningjob for cash, which he agreed. He suggested that they resume the discussion until after the summerwhen things would be quieter, the idea being that the redundancy would happen in October, afterthe claimant came back from holidays. The claimant expressed her interest regarding the proposalat this time. He also suggested that they keep the conversation between themselves, but was approached by another staff member after the meeting who commented on it.

The respondent denied that he had offered a redundancy payment, he believed that the idea would be revisited after the summer. He didn't realise that he could not give a redundancy payment and continue to employ the person. He denied suggesting to the claimant that she should repay him part of the payment.

The respondent had no further discussions with the claimant about the proposal and on 20th August he put up the roster for September with the claimant allocated one day a week. The claimant came to him on Monday 3rd September as she was told by social welfare that she couldn't claim without a P45, but he explained that he couldn't issue one as she was still employed. He did not recall any incident involving the claimant's credit union book. The respondent had employed a new member of staff at the end of August to take up the hours of the claimant.

The following day the respondent sought advice regarding the redundancy situation and discovered that he could not make her redundant as her position was not redundant and she would have to be replaced. The respondent wrote to the claimant on 5th September to explain the situation to her and to offer her a resumption of her 35 hours a week effective immediately. The claimant responded in a letter dated 7th September that she would resume her hours beginning the following Saturday.

Within hours of receiving the claimant's letter a friend of the claimant's came to the shop and gave

him a sick cert for one week on behalf of the claimant, and so the respondent did not reply to the letter. The respondent then received another letter from the claimant dated 10th September requesting her P45 and informing him that she would be bringing a case of constructive dismissal against him. The respondent requested a formal letter of resignation which he received dated 17th September.

Determination:

This is a case of alleged constructive dismissal and the respective position of the parties is set out in the evidence. At the root of the matter are meetings between the parties in July 2007 at which the redundancy of the claimant was discussed. Evidence on oath was given by the claimant and respondent and there were no other witnesses.

The essence of the claimant's case is set out in her letter of 10th September 2007 in which in particular she alleges that the respondent withdrew an offer of redundancy and reduced her working hours from 35 hours to 21 hours per week and then to 7 hours per week thereby leading to her decision to leave the employment and claim constructive dismissal. It was clear from her evidence that the claimant believed that the respondent agreed in July 2007 to give her a redundancy package of €5,609, i.e. 60% of her estimated legal entitlement, and that she would end her employment on 14th September, 2007 when she would commence her holidays. Some part time work post redundancy was also agreed. Her believe that redundancy had been agreed was supported in her view by the engagement of her replacement against a background in which a previous employee had been made redundant and replaced by a sister of the respondent. The claimant told a number of people at work and her family and friends that she was being made redundant.

The respondent's main evidence was to the effect that he did discuss the possibility of a redundancy package in the amount mentioned with the claimant on a confidential basis in July 2007 but he was adamant that it was not finalised or agreed and the matter was to be resolved after the return of the claimant from holidays in October. He had no expertise in redundancy matters and it was subject to his getting advise as on a previous occasion when he consulted RGDATA who advised that he could lawfully make an employee redundant in circumstances where he was employing a family member in replacement. He was favourably disposed to give the reduced redundancy package butwhen he took advice from RGDATA on 4th September, 2007 he found that what he proposed wasunlawful and he could not proceed with it. He had reduced the claimant's hours to 7 hours perweek with effect from Monday 3 September on a basis which he understood from their July discussions was acceptable to the claimant but he had, in his letter of 5 September, offered to immediately return the claimant to her 35 hour week or less if she wished and he had also explainedto her in that letter that he could not legally make her redundant. The claimant on 7th Septemberhad written agreeing to return to her original position of 35 hours per week but subsequently wroteon 10th September notifying him that she would be taking a constructive dismissal case. He believed he had acted reasonably and that there was no justification for the claimant's case.

There was a conflict of evidence as to whether the reduction in working hours in the roster for the week beginning 3 September was initially to 21 and subsequently to 7 hours per week or whether the reduction was only to 7 hours per week. This conflict, in the Tribunal's view, is not material as the matter was resolved immediately the claimant objected and her access to a 35 hour week wasrestored on 5th September. This element on its' own clearly does not constitute a basis for constructive dismissal.

The position on the substantive issue of redundancy is more complicated. Clearly the claimant believed that a redundancy package was agreed and that her last day of service was to be 14th September 2007 whereas the respondent in his evidence disputes both the element of agreement and the prospective timing of any possible redundancy. Subsequent events tend in the Tribunal's view to support the position of the respondent that there was an element of conditionality about the redundancy in that no confirmation in writing was given to the claimant after the July meeting andnone of the necessary legal formalities associated with a redundancy by 14th September were put inplace. The respondent's evidence, which was not disputed, was that he only discovered on 4th September from RGDATA that what he was proposing was unlawful and he conveyed that to theclaimant on 5th September. While there is a conflict of evidence in relation to credit union notification of redundancy it does not support the proposition that a redundancy package was agreed. Equally, the reference in the claimant's letter of 10th September to the respondent of anoffer of redundancy made on 20th July and withdrawn on 3 September does not support theproposition of a completed agreement between the parties.

The position in which the claimant found herself at the beginning of September was undoubtedly most unfortunate and distressing for the claimant and could have been avoided if the respondent as employer had exercised a greater level of care towards her in fully checking out the legal position when they discussed redundancy in July and formally notifying her in this regard. There is, however, no evidence to in any way to suggest that the respondent had any interest in or intention of either deliberately misleading the claimant or forcing an excellent employee into redundancy.

The reality in this case is that, even if there had been an agreement between the parties on either a full or reduced redundancy package, it would have been unlawful to proceed with it where the respondent was being replaced and a situation of redundancy did not legally exist. Equally, it would, of course, be fraudulent for any employer to make the normal claim for a 60% rebate from the Social Insurance Fund in a situation where the redundancy lump sum actually paid was at the 60% rate.

The Tribunal, in the circumstances, does not see what reasonable course the respondent could have followed other than to notify the claimant of the position and restore her, if she wished, to her full 35 hours per week. It may well be, perhaps with the benefit of hindsight, that a more caring employer would have met the employee and handled the matter more sensitively, perhaps offering some compensation for the distress caused, but the basic facts would not have altered. The decision by the claimant to take a case for constructive dismissal rather than to first seek to explore some favourable resolution with the respondent was an option that, in the Tribunal's view might have been followed, even if, legally, it could not lead to redundancy.

The Tribunal fully recognises the upset and distress caused to the claimant in these most unfortunate of circumstances but the Tribunal does not consider that the conduct of the respondent was such as would have entitled or would have made it reasonable for the claimant to terminate her contract of employment. The claim of unfair dismissal under the Unfair Dismissals Act, 1977 to 2001, therefore, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This ______________________________

(Sgd.) ______________________________
(CHAIRMAN)