

## EMPLOYMENT APPEALS TRIBUNAL

Claim Of:  
Employee

Case NO.  
UD727/2008

against  
Employer

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. D. Cagney B.L.

Members: Mr. J. Goulding  
Mr. J. Maher

heard this claim at Dublin on 4th November 2008

#### **Representation:**

Claimant: In Person

Respondent: In Person

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

The fact of dismissal was in dispute between the parties.

#### Claimant's Case:

The claimant's employer is a small business. The claimant commenced employment with the respondent on the 9<sup>th</sup> October 2006. On the 27<sup>th</sup> February 2008 the claimant attended for work and carried out her normal duties. The shop was being renovated at that time.

When the claimant was on her break at 10am, the director of the respondent spoke to her and told her that there was an issue about her treatment of the shop's customers.

Some days prior to the 26<sup>th</sup> February 2008 the claimant told her manager that she was seeking leave in May 2008. The claimant's manager told the claimant that she did not think that would be a problem. The claimant told her manager that if there was any problem it was possible for her to alter her flight dates.

On the 26<sup>th</sup> February 2008 the director told the claimant that he could not grant her leave in May 2008. The claimant enquired about overtime that was due to her. The director told her to leave the shop. As a result the claimant could not continue in her employment. The claimant returned to the

shop two days later seeking her P45, her last payment and payment for overtime. On this occasion the director pushed her out the door of the shop. The claimant had no further contact with her employer. The claimant accepted that she has received all monies owing to her for overtime.

The claimant stated that a number of times during her employment she was going to tender her resignation as her workspace was unsafe. The claimant provided examples to the Tribunal of issues she had regarding health and safety. However, each time the claimant was going to tender her resignation she was persuaded not to.

The claimant gave evidence of her loss.

During cross-examination it was put to the claimant that throughout 2007 the director provided her with approximately 33 days unpaid leave in addition to her 21-day entitlement. The claimant accepted that the director facilitated her with this additional leave, as he was aware of her family circumstances abroad.

It was put to the claimant that employees must complete a request form for holidays. The claimant stated that she was not provided with this form. The claimant stated that the procedure for leave was to ask approximately one month prior to when the leave would commence.

The claimant confirmed that she received and signed a contract of employment on the 15 February 2008, which stated that leave must be approved in advance. However, the claimant had already booked her flights for May 2008 before she received this contract.

It was put to the claimant that she was provided with verbal warnings on many occasions and that she had walked away from her job on the 26<sup>th</sup> February 2008. The claimant did not accept these statements but accepted that she had received one warning at a meeting on the 4<sup>th</sup> January 2008. The claimant accepted that on a number of previous occasions she had walked away from her job but that these incidences occurred because of health and safety issues within her workspace.

It was put to the claimant that at the formal meeting of the 4<sup>th</sup> January 2008 two members of management raised serious performance issues with the claimant and that the claimant was warned, if there was no improvement, she could be dismissed. The claimant accepted that such a meeting had occurred and that it related to performance issues. The claimant confirmed that a copy of the warning was provided to her.

It was put to the claimant that a manager and the director held numerous counselling sessions with the claimant regarding her abruptness with customers but that the claimant's behaviour failed to improve. The claimant denied this.

In reply to questions from the Tribunal, the claimant stated that she had, in previous years, been granted leave without completing a request form.

In September 2007 when the claimant's manager commenced work with the respondent the claimant was told that she was to deal with this manager regarding all matters.

The claimant stated that she did not receive any additional documents such as terms and conditions as detailed within her contract of employment.

The claimant confirmed that on the 26<sup>th</sup> February 2008 she did not tell the director that it was

possible for her to alter her flights for May 2008.

### Respondent's Case:

The first witness for the respondent gave evidence that he worked with the respondent until July 2007. During his employment he managed the claimant. He issued several verbal warnings to the claimant due to her attitude with customers. The claimant also had a problem accepting authority and she had a lack of respect for management in front of customers.

The first witness confirmed that he was present with the director of the respondent for meetings with the claimant, which the witness considered to be verbal counselling sessions of a disciplinary nature. They went forward from these sessions on the basis that the claimant's behaviour would improve. The first witness confirmed that there was a holiday request form but the director dealt with all matters relating to leave.

The first witness confirmed that there were a number of occasions throughout the claimant's employment that she had threatened to walk out of her employment and on other occasions she had actually walked out of her employment. The witness recalled a specific incident on his first day of work when the claimant directly refused an instruction from him.

During cross-examination the first witness stated that in his opinion the shop met reasonable health and safety standards.

In reply to questions from the Tribunal, the first witness stated that there were no records of the counselling sessions with the claimant as they were casual counselling sessions. The first witness stated that there were issues throughout the claimant's employment including the probation period and these were addressed by verbal counselling.

The second witness for the respondent commenced work in a managerial role with the respondent in September 2007. The claimant's manager commenced work at the same time and they shared responsibility. Neither of them had a discretion in relation to approving holidays. Staffing was part of the second witness's role and as he progressed in his employment it came to light that there were continuous issues with the claimant. A number of complaints were received from customers concerning how the claimant treated them. The claimant's manager and the second witness had discussions with the claimant regarding breaches of HACCP procedures.

A meeting was held with the claimant on the 4<sup>th</sup> January 2008. The claimant was informed that her behaviour had to change or she would be dismissed. The claimant said that she would endeavour to improve her performance.

On the 26<sup>th</sup> February 2008 the witness started work at 1pm. At 2pm he was approached by the claimant who shouted at him about her holidays being refused. The witness told her that it was unnecessary to shout and that she should speak to the director, as he did not have the authority to approve holidays.

A number of days later the claimant returned to the shop and was irate with the director. The director asked the claimant to leave the premises. The director did not push the claimant from the shop as the claimant had stated in her evidence.

In reply to questions from the Tribunal, the witness stated that there was a list of issues to be discussed at the meeting of the 4<sup>th</sup> January 2008. This list was not given to the claimant in advance of the meeting.

The witness outlined that the procedure for applying for leave was that an employee approached a manager for the holiday leave application form and when the employee completed the form it was submitted to the director for authorisation.

The director of the respondent gave evidence to the Tribunal. When the claimant commenced employment she was hard working, polite and courteous. However, after the initial three months of her employment there was a change.

The director was aware of the claimant's family circumstances in Poland and when she commenced employment he told her that he would accommodate her holidays as much as possible. The claimant's leave was often granted at short notice. The director confirmed he is the only person who has the authority to approve holidays. During 2007 the claimant was granted a period of unpaid leave in addition to her paid entitlement. The claimant did not follow the holiday application procedure on three previous applications but she was asked by the director to complete it the next time she applied for holidays.

The shop was undergoing a refurbishment and during this time a Health Officer assessed it. The director assumed that if there were any health and safety issues then the Health Officer would have closed the shop and/or the deli. This did not occur.

The claimant's attitude became a problem and she was blatantly rude. The director had a number of conversations with the managers of the shop concerning the claimant. The director had to correct the claimant twice and sometimes three times a week regarding a number of issues. The claimant was very aware on the 4<sup>th</sup> January 2008 of the director's issues with her regarding her attitude, lack of respect and lack of manners. The claimant was afforded the opportunity to bring a member of staff to this meeting. The claimant was informed that if her behaviour did not improve she could be dismissed at the director's discretion.

In or around the 26<sup>th</sup> February 2008 the claimant's supervisor told the director that the claimant was seeking leave in May 2008. The director could not grant this leave to the claimant as it was a very busy time for the shop and the new deli was due to open. On the 26<sup>th</sup> February 2008 the director told the claimant that he was unable to grant her leave. The claimant became angry and walked out. When the claimant returned to the shop a few days later she was abusive and aggressive and the director asked her to leave the shop.

During cross-examination the director stated that he had not pushed the claimant out of the shop.

In reply to questions from the Tribunal, the director stated that on the 26<sup>th</sup> February 2007 he did not tell the claimant to leave the shop.

The claimant was provided with an induction manual. She returned the induction manual when she signed her contract.

**Determination:**

The Tribunal carefully considered the evidence adduced at the hearing. The claimant accepted in her evidence that she could easily have changed the dates of her annual leave in May 2008. The claimant had offered this to her manager some days prior to the 26<sup>th</sup> February 2008. However, the claimant did not facilitate the director in this regard although she could have done so without inconvenience to herself as she had outlined to her manager.

On the balance of probabilities the Tribunal determines that the claimant was not dismissed but resigned of her own volition. The claimant did not discharge the onus of proof of a constructive dismissal and therefore, the claim under the Unfair Dismissals Acts, 1977 to 2001, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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