

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

Employee

- appellant

CASE NO.

UD1520/08

against the recommendation of the Rights Commissioner in the case of:

Employer

- respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms O. Brennan B.L.

Members: Mr. A. O'Mara
Mr G. Lamon

heard this appeal at Naas on 8th June 2009.

Representation:

Appellant: Ms Sandra Frayne BL, instructed by C Grogan & Company, Solicitors, 65 Main Street, Leixlip, Co Kildare

Respondent: Ms. Kealin Ireland, Ireland Human Resources, Annaghamaddoo, Kilnagross, Co. Leitrim

The determination of the Tribunal was as follows:-

This case came before the Tribunal by way of the appellant (employee) appealing against the recommendation of the Rights Commissioner ref. r-062237-ud-08/JT.

Respondent's Case:

Joint owner J gave evidence. The company employed two full time staff. The appellant's colleague AM commenced employment in September 2006 as a gym instructor and the appellant commenced work on the following month, initially in a part-time capacity and then was offered full time work. As the appellant had managerial experience she was offered the position of Gym Manager. Her duties also included instructing members. Working relationships were excellent.

In July 2007 the appellant informed J and B (second joint owner) that she was experiencing back pain, which was as a result of an injury sustained in her previous job. She could not perform her

instructor's duties. She was only able to demonstrate the exercises and instruct members verbally. However, they were happy to retain her in employment.

Sometime prior to this the respondent's Accountant advised that they needed to reduce expenditure in the gym and they decided to re-organise and restructure. Adjustments had to be made in the staffing structure. However, they did not want to make either of the staff redundant. There was a need to increase membership. In the third week in September 2007 they realised that there was a significant number of cancellations of direct debits and membership had plummeted. J informed the appellant that his wife would be taking over the appellant's managerial position and offered the appellant part-time hours. The appellant was not interested. They did not want the appellant to leave.

In October 2007 a competition was run offering free use of their investment apartment in Spain. The appellant asked for, and was given permission to use the apartment and went to Spain some time after. While the appellant was on holidays another instructor came from a gym which had ceased operating to instruct staff in new techniques.

As the appellant sustained an injury in Spain and was unable to carry out her duties in the gym on her return home, B suggested that she go home and rest. B called to the appellant's house and offered her part-time work in the gym and part-time work selling property abroad. The appellant was not interested in this arrangement and the joint owners were left with no alternative but to let her go. It was a difficult decision to make but as AM had more qualifications than the appellant it was decided to keep AM in employment. J was unaware that the appellant had any qualifications in gym instructing.

B has now taken over the appellant's managerial role, AM is working part-time together with another part-time instructor, who replaced the appellant.

Appellant's Case:

The appellant gave evidence. She was a member of the gym owned by the respondent company and subsequently was offered part-time employment by the joint owner B. She was employed as a Gym Manager. She had qualifications in aerobic training and other sports. In October 2006 she was offered full time work. Her duties included generating business for the gym and working as a fitness instructor. Membership fluctuated. She enjoyed her work and was popular with the members. No complaints had ever been raised about her work.

The appellant had never received any commission, which B had promised her upon her commencement in the company. She had not been asked to work part-time in September 2007.

The appellant availed of the use of the joint owners' apartment in Spain for a holiday. Upon her arrival in Spain on 11th October 2007 she slipped on a wet floor and had to visit the hospital. When she returned home on 16th October 2007 she attended Naas Hospital and was certified unfit for work until 2 November 2007. However, she returned to work the following Monday and worked 9 to 9. On Tuesday she worked the late shift. As she was feeling unwell on the Wednesday she informed B that she needed to visit her doctor. B said she had no difficulty with this.

On 23 October 2007, B telephoned her and asked if she could call to the appellant's house. B told her that they could not afford to pay two people for the one job and that they were letting her go.

However, B offered her part-time work selling property abroad on a commission basis. The appellant contended that she had no experience of selling foreign property. She said as soon as she felt better she wanted to return to work. She felt let down, hurt and surprised.

Determination:

The Tribunal carefully considered the evidence adduced at the hearing. Prior to 23rd October 2007 working part-time had not been discussed with the appellant. Instead on that day a decision was taken by the respondent to dismiss the appellant because she refused to accept the offer of part-time work selling property abroad. The Tribunal notes with concern that no proper procedure was used to effect the dismissal and the appellant was given no opportunity to appeal the decision to dismiss her.

The Tribunal finds that the dismissal of the appellant was unfair. Accordingly, the Tribunal upsets the recommendation of the Rights Commissioner and awards the appellant €2,000.00 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)