

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

Employee –**Claimant**

UD896/2008
MN825/2008

against

Employer
- **Respondent**

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1967 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan

Members: Mr. B. O'Carroll
Mr. T. Kennelly

heard this appeal at Nenagh on 21 May 2009

Representation:

Claimant: Mr. Philip O'Meara, Nenagh Citizens Information Centre,
43 Pearse Street, Nenagh, Co. Tipperary

Respondent:
Mr. Donal G. Smyth, Patrick F. Treacy & Co. Solicitors,
29 Pearse Street, Nenagh, Co. Tipperary

The determination of the Tribunal was as follows:

As this was a case where dismissal, as a fact, was in dispute between the parties, it fell to the claimant to prove the fact of dismissal. The claimant who had less than twelve months continuous service at the time of the alleged dismissal was claiming that, as the dismissal was wholly or mainly due to her pregnancy, she did not have to fulfil the requirement for twelve months continuous service in order to bring a claim under the Unfair Dismissals Acts, 1977 to 2007.

The claimant was employed as an assistant in the respondent's family owned and operated take-away pizzeria from mid October 2007. There was no written contract of employment and there was no disciplinary or grievance procedure. During the initial phase of the employment the claimant worked the day shift. Once the respondent was satisfied with her level of competence the claimant began to work alternate day and evening shifts. Some time in the early part of 2008 the claimant became pregnant. It is her position that the respondent became aware of this on or around 5 April 2008. The respondent's position is that the claimant informed them of her pregnancy some time in March 2008.

The claimant's position, denied by the respondent, is that once her employer's daughters, (FD) and (SD), became aware of her pregnancy they treated her with resentment. FD and SD would not talk to her, only gave her evening shifts and insisted on her lifting heavy boxes by admonishing a colleague who was helping her in the lifting. Her position is further that she was unable to express her feelings to the respondent and his family as there was a language barrier between them. The respondent's position was that the claimant had sufficient command of English so as to be able to understand work rosters and to take orders from customers. On 28 April 2008 the claimant received a medical certificate stating that she was unfit for work for one week due to a pregnancy related illness. Following a request by telephone from FD the claimant worked the evening shift on 3 May 2008 and resumed work after the expiry of the medical certificate. The claimant, who continued to work up to and including 26 May 2008 on which day she worked the day shift, produced a letter from her GP dated 29 May 2008, which stated that the claimant was finding night-time work difficult during her pregnancy. Enclosed with this letter was a copy of guidelines regarding night work and pregnancy.

The claimant's position is that after giving GP's letter of 29 May 2008 to FD she received a telephone call from FD asking her to work the evening shift on 31 May 2008. When she declined and went to discuss this FD that there was no job for her except on nights and that there was no job for her on days. The respondent's position is that FD was unable to accommodate the claimant with exclusively day shifts as other staff members were not prepared to work only evening shifts and therefore FD offered the claimant the option to work alternate weeks and only day shifts but the claimant rejected this as it would dilute her wages too much. The respondent's position is that at this time the claimant then sought health and safety leave and the respondent was slow in responding to this request due to an ongoing tragedy which was rapidly unfolding in the respondent's family. A position working for the respondent was still available to the claimant on the day of this hearing as the respondent's position was that the claimant had commenced her maternity leave early when she went on health and safety leave. The claimant's position was that she had to give up her job because the employers' behaviour made her feel very bad and she felt that they wanted her to quit. The form P45 issued to the claimant in July 2008 was in response to a request from the Revenue Commissioners.

Determination:

Whilst there was a conflict of evidence between the parties over many aspects of this case the key events centre around the period from the issuing of GP's letter on 29 May 2008 and the discussion between the claimant and FD on 31 May 2008. It is common case that from the issuing of the 29 May 2008 letter the claimant was no longer going to be working evening shifts. The Tribunal is satisfied that FD did offer the claimant the opportunity to work day shifts on alternate weeks and this, allied to the claimant's inability to work evening shifts for health and safety reasons, in no way amounted to a dismissal. As the Tribunal has found that there was no dismissal a claim under the Unfair Dismissals Acts, 1977 to 2007 does not arise. In these circumstances the claim under the Minimum Notice and Terms of Employment Acts, 1967 to 2001 must fail

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)