

**EMPLOYMENT APPEALS TRIBUNAL**

**CLAIM(S) OF:**

Employee

– *claimant*

**CASE NO.**

UD48/2009

RP33/2009

MN51/2009

against

Employer

- *respondent*

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007  
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005  
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. M. Levey B.L.

Members: Mr. D. Winston  
Mr. N. Broughall

heard this claim at Dublin on 3rd June 2009

**Representation:**

Claimant(s): Mr. Fergus Whelan, ICTU, 32 Parnell Square, Dublin 1

Respondent(s): Ms. Geraldine Lockhart, Lockhart O'Leary Maher, Solicitors,  
191 Howth Road, Killester, Dublin 3

The determination of the Tribunal was as follows:-

*(Dismissal was in dispute therefore, as a case of constructive dismissal the claimant went into evidence first)*

**Claimant's case:**

In her sworn evidence, the claimant confirmed that she had worked for the respondent for fourteen years and had been relatively content there for the first five or six years. From then, things got progressively bad with shouting and screaming. Prior to the incident of 22 May 2008, the claimant stated that the respondent addressed her as "you". Up to that time, she had been addressed by her first name. She approached the owner (*hereinafter referred to as R*) about this but there was no change on his part. She had set him up in business and had never been out on sick leave.

The claimant recounted another incident, which had occurred prior to 22 May 2008. She had been dealing with customers around 10.20am when the owner told her to go on her break. He had come

in to the shop and shouted across at her that she was not on her break and she had replied that she would go once she had finished serving the customers. She had been “grouchily” told by him to go on her break.

On 22 May 2008, the claimant had gone in to work and got things ready for service. She also had to place orders for the shop by telephone and this had to be done by 12.00pm. She went to the office to make this telephone call. Everything was trayed-up and ready for service for the 12.30pm rush and the other girls at the deli counter knew what had to be done. When she returned from the office, R asked her why the food was not ready for service and she explained that the oven was going slowly because there was so much food to cook in it. She had reported this some nine weeks earlier to R’s brother (*hereinafter referred to as D*) and she had also written it down. R told the claimant to go and stand by the freezer. He also told her that where the door was if she wanted to go. The claimant had never been told to stand by the freezer before. She was left standing there for five minutes. She was then taken into the storeroom where no customers were present. J and D were also there. The claimant was not invited to bring anyone with her nor was she given a chair to sit down. Three times, the claimant tried to explain that the oven was going slowly. R never said anything except that it was his shop. He did not listen to her. His eyes were bulging so she knew when he was not listening. The claimant told R that she had given a written report on the oven to his brother nine weeks earlier. Despite reporting the incident, she had been made to feel that she was not doing her job. She also told R that she was going to report him to the Labour Court. She then went to the kitchen. She left the shop twenty minutes before her shift was due to end but did not tell anyone that she was leaving.

The next day, the claimant went in on time for her shift. Staff were already present. She went to the kitchen to put on her uniform but was told by the person who opens the shop – the claimant thought this person was the manager – that there was no job for her that day and she was not rostered to work. The claimant got upset in front of the staff and felt belittled for what R had done in replacing her with part-time staff. The claimant then left and went to her doctor, as she needed to talk to someone. She had enough of R’s aggression. Some days, he was unapproachable.

The claimant returned at 2.40pm that day for her wages. She went down the corridor and knocked on R’s office door. He answered and said that he was eating his lunch and that he would speak to her when he had finished. She waited for R for fifteen minutes. He told her that she had no authority to walk the corridor and he started on again about the Thursday incident so the claimant left. On the 27 May, the claimant telephoned R and he told her not to hurry back.

The claimant recounted another incident when a service person had been working behind the deli counter. She had also been there, serving customers. R had come over and asked if she had introduced herself to the service person and then had apologised to the service person for the lack of an introduction. The claimant had not said anything then because she had been busy.

The claimant thought that it had been on 27 August when she returned to the shop and was told by R that a job was still available for her on the tills if she wanted it. However, she had been the deli manager and so considered this to be a demotion. Also, R did not offer her hours or days of work. She could not return to that stress. She had kept her head down while working for the respondent. It was hard on a person to be watching a clock, waiting for a shift to end. The claimant had loved her job, the staff and customers but R’s bad form had worn her down. She thought that R had not wanted her in the shop because he had foreign staff working and there was nothing like them.

In cross-examination, the claimant confirmed that she had known R for twenty years and had also known his father. She had been the deli manager. D and A were also managers in the shop. R had

been her supervisor. However, if R was not present in the shop, she would report to D. When put to the claimant that D had no authority over her, she denied that this was the case.

The claimant could not recall the last regular meeting she had with R. She finished her shifts at 1.30pm. R had said that he did not have time to talk to her. The claimant was asked if she remembered an instruction from R to the effect that if anything was wrong, he was to be told or notified in writing. The claimant replied that R was the owner of the shop and D was the shop manager and if R was not present in the shop, she would report to D. She had reported a problem with a fridge to D. It was put to the claimant that she, as deli manager and D, as shop manager, were to liaise together but both were supposed to report to R. However, the claimant replied that she felt that if she reported an incident to D, she did not have to report it secondly to R.

Despite the oven failing over a period of nine weeks, it was not unusual that the problem was ongoing. Its service could occur at any time and the claimant might not be told that the service people had come to make the repairs.

In relation to the incident on the 22 May when R had come in to the deli and seen that the food was not cooked and ready for the lunchtime rush, the claimant stated that the burgers were being turned and she had told him that the oven was cooking slowly. He had told her to stand by the fridge and that he would speak to her when he was ready. The claimant had been left there for five minutes. She had no idea that he wanted to speak to her about the cooking. R had returned with his brother and taken the claimant into the storeroom. The door had been closed and no one else had been present. At the fridge, he had told her where the door was if she wanted to use it. She had assumed that D had told R about the problem with the oven. Three times, she tried to explain this to R but his eyes were bulging and he would not listen. She also told him that she was going to report him to the Labour Court and then she went to the kitchen. She confirmed that she was aware that the oven was not working properly and had given a written report on it to D.

It was put to the claimant that D was the shop manager only. She stated that she took instructions from both R and D and assumed that any instruction she gave to D would have been passed on to R.

R had shouted at her. He had told her to go ahead when she told him that she would report him to the Labour Court because of his behaviour. The claimant denied that R had asked her not to leave when she had been in the corridor.

The claimant agreed that there had been three subsequent meetings. The first had been on 10 June when the incident of 22 May was discussed. R had offered her a chair at the second meeting but not at the first one. The incident had also been discussed when the claimant called for her wages on 23 May. She had attended her doctor on that date due to her unwell state and he had told her that she needed time off from the aggression. She had not expected that her job would have been given to part-time staff. She was still on medical certificates and not fit to return to work on 10 June. She agreed that the certificate certified that she had a back problem. She had not wanted the real reason for her illness to appear on the medical certificates and same had not appeared until she had to go on medication.

The claimant stated that she had felt humiliated at finding that she had been removed from the Friday roster and R had not explained to her why she had been removed for it. It was put to the claimant that if R had not known that she was returning to work on the Friday morning, was it not reasonable that he would have replaced her on the roster. In reply, the claimant said that it was herself and another girl who were rostered to work in the deli and she had not told R that she would not be in for work on the Friday morning.

Referring to an incident which had happened in 2005, the claimant confirmed that when she left at that time, she had not told R that she would be returning. It was then put to the claimant that, on this occasion, it had not been unreasonable for R to assume that she would not be returning to work, thus his need to replace her. The claimant replied with the question as to why R had not telephoned her.

The claimant confirmed that R had explained the reason why she had been replaced that morning, at their meeting on 10 June. He had also given her a verbal warning and she had told him that she could not go back behind the counter because she was too upset.

At the next meeting on 19 August 2008, the claimant confirmed that she was still on medical certificates. She denied that R had asked her about her medical condition. The discussion she remembered was about the staff and how well the shop was doing. She agreed that R had offered her an alternative job on the tills but she did not see this as an option because it was a demotion. Two managers already worked on the tills. However, she was aware that her job was still available to her and there was this offer of an alternative job.

The claimant had written to R by letter dated 13 October 2008 and in same was stated in part “I believe that in fact I have been constructively dismissed by you. I am asking advice on this matter with a view to enforcing my rights. I would be grateful for an early response to this letter.” It was put to the claimant that a third meeting occurred on 16 October 2008, which R had arranged with her by telephone. In reply, the claimant stated that she could not really recall the October meeting and that the August meeting was the last one she remembered. She could recall her letter. It was put to the claimant that at the meeting in October, she and R had discussed the incident and it had been explained to her that there had been no option but to replace her on the roster. The claimant denied that this had been explained to her. R had put his hand out but she had said that she could not forgive him. He had attempted to apologise but this had been months later. She did not recall if R had enquired about her health. He did not enquire about her returning to work. He had never telephoned her though at the meeting, he said that he had meant to do so. She had telephoned him nine times.

The claimant agreed that the meeting in October 2008 was to arrange her return to work. However, she was not fit to return and her doctor would not allow it.

The next letter from the claimant to R was dated 31 October 2008. In same was stated “I have decided to go for unfair dismissal as I can see no future for me in the shop”. The claimant stated that she could see no future in her return to the shop though she confirmed that she was aware that the offer of her job was still available to her, as was the option of alternative work on the tills.

Replying to the Tribunal, the claimant stated that she never received the “chain of command” in writing from the respondent.

The claimant confirmed that the food would have been cooked by 12.30pm if she had been left behind the deli counter. She could not return there now as she had put up with things for too long.

The claimant had left the respondent’s employment for a week in 2005. R’s behaviour had been constant. Though she had not seen him behave badly towards other staff, he had taken one person to the storeroom and when she returned, she was upset. When asked if the problem had been a personality clash between herself and R, she replied that R had once said to her that they knew each other for too long.

The claimant maintained that there had been no need to change the roster of 23 May. The roster would have been prepared from the night before. It was necessary to have two people serve on the deli counter because it was very busy. The claimant never told R that she would not be in for work on the 23 May. Even if she had not come in to work on 23 May, a replacement could have been found for her from the shop floor, as the food was prepared from the night before.

R would talk to the foreign staff when the claimant was not around. He thought that there was nothing like them and that they could do no wrong.

In relation to loss, the claimant confirmed that she had been on disability benefit for sickness and anxiety since May 2008. She had gone to her doctor in May 2008 and due to her medical condition, he had not allowed her to return to work. She was currently seeking alternative employment, but had not been successful in securing same.

### **Respondent's case:**

In his sworn evidence, R confirmed that he commenced in the shop fifteen years ago. The claimant had worked there for fourteen years but he had known her previously. He found the claimant to be hard working and good with customers and he was satisfied with her. He had never contemplated dismissing her.

When put to R that the claimant had alleged that he had shouted, was aggressive and that his eyes had bulged, R stated that he would not agree with aggression but would agree that he would be upset if things were not put in place. He would not say that he had shouted or screamed at the claimant but admitted to having a high-pitched voice. He would not say that his behaviour was bad but he tried to get on with running the business. The claimant worked from 7.30am until 1.30pm and the business was opened from 7.30am until 10.00pm.

R remembered that on 22 May, he walked into the deli. Most of the kids had left at that stage but the burgers were still in the oven. When he asked why this was the case, he was told that the oven was cooking slowly and this had been told to D on numerous occasions in the previous weeks. R asked the claimant to come out from behind the counter, as he wanted to talk to both herself and D. He wanted to talk to D because of what the claimant had said. R had asked that important things were to be reported in writing to him.

D was not the claimant's manager. Both D and the claimant reported to R and both were on par with each other. R had always tried to hold regular meetings but this had not always been possible due to the business being so busy.

The reporting of issues in writing had been a tip that R had received in training. However, the claimant had never told him about the problem with the oven. The first he heard of the problem was on 22 May. The claimant had said that she had enough and had walked out of the meeting, though R had asked her not to leave as she had previously done. The meeting had not lasted more than ten minutes. The claimant had told R that she was going to get the Labour Court after him. That evening at 9.50pm, R had checked to see if any messages had been received from the staff. He had concerns that the claimant would not show up for work the next day, as had happened previously, so he contacted another staff member to replace her. R had not been present when the claimant arrived for work the next morning but met her when she returned that afternoon. She had only been left waiting for him for ten to fifteen minutes. He gave the claimant her wages and she gave him her medical certificate in relation to her back problem.

The first meeting with the claimant had been on 10 June. In relation to the claimant's allegation that she had been left standing at this meeting, R explained that his office was small with not much space and the meeting had been conducted there to ensure privacy. At the meeting, he had explained that he had to ensure that the shop had enough staff cover on that Friday. No other staff member had the claimant's experience. At the meeting, he had asked the claimant about her medical condition as he had a similar ailment. She was also made aware that her job was still available to her. He had given the claimant a verbal warning. He had gotten advice on this from Muxxx H.R.

The claimant was offered a chair at the meeting on 19 August. R could see that the claimant had felt that he had set out to embarrass her by the re-rostering of staff, but he maintained that this had not been his intention. The advice of Muxxx H.R. had been for R to telephone the claimant after he received her letter of 13 October. He had telephoned her and she had said that it was his fault. A meeting was arranged for 16 October and at same, the claimant spoke about her embarrassment, and R had apologised. He had asked her about her medical condition and offered her a job on the tills. The claimant was R's longest serving employee so there would have been no change in her pay or conditions of work.

R was surprised to hear, in the claimant's evidence that he had referred to her as "you" and found it hard to believe. He genuinely tried to be as courteous as possible to all his staff and to call people by their first name. When asked if shouting was the norm in the shop, R replied that there could be, from one end of the shop to the other. There was music in the shop, so it would be a case that there was shouting to someone rather than shouting at someone.

In cross-examination, R confirmed that he had a high-pitched voice and his "upset" could come across to people when things got tense, but he would not say that he shouted. He would have been upset on the 22 May because the burgers had not been cooked and the rush of customers had gone. The burgers should have been prepared by 12.30pm. As the rush of customers had gone, the meeting with the claimant and D was at about 12.40pm. The claimant had left the shop by 1.10pm after having been in the storeroom for a few minutes. When put to R if the rush was over by the time of the meeting, R replied that there was a constant rush of customers for about a half hour and the meeting was probably in the middle of the rush.

R did not recall telling the claimant to "stand there" by the fridge but he did not deny that he told her to stand by the freezer door. He did not constantly address the claimant as "you", though possibly, he did sometimes.

There were no chairs in the storeroom to offer the claimant a seat so all of them had stood. The meeting was conducted in the storeroom for the sake of privacy for the claimant and D. R was upset with both the claimant and D and, at their meeting he wanted to know what was going on. He would not say that he was upset with the claimant but he did the talking. He would not be surprised if someone got upset at being spoken to loudly. However, the claimant would not take responsibility for what had to be done.

R confirmed that the claimant had said that she reported the problem with the oven to D but she had not said that she did this in writing. R did not speak to D at the meeting about what the claimant had said to him, nor did he ask D if he had gotten a report from her.

It was R's view that he and the claimant should meet and talk first before she returned to her job, that she could not just walk off and then return and work as normal. He felt that she should have

telephoned to say that she would be back to work on the Friday. He had telephoned the shop on the Thursday night to see if the claimant had made contact to confirm that she was returning to work on the Friday. He agreed that he had decided that some process had to take place before she could return. He had not told this to the claimant when she was leaving on the Thursday. However, she would have had to make some contact.

R agreed that sometimes over the years, he had embarrassed the claimant in the way he had spoken to her. The claimant had initiated all of the telephone calls subsequent to the 22 May but, as far as R could recall, he returned those telephone calls. He was always available for the claimant to come and meet him.

R confirmed that his behaviour would have been highlighted over time. He was aware of the claimant's embarrassment over the incident on 22 May. When put to R that some of the claimant's embarrassment was down to him and he should have built bridges, he replied that the claimant had been invited to family events, though work was another thing. There was a personality clash between them and the claimant would not have been the easiest person to work with. R went to work in a professional manner. If the staff did not tell him of difficulties, then he could not know of same.

Replying to Tribunal questions, R explained that as he was coming in late to the shop, he wanted written reports. He acknowledged that the claimant had told D about the problem with the oven.

He gave the claimant the verbal warning at their first meeting in June and he reiterated to her that her job was still available to her at their meeting in October.

In his sworn evidence, D confirmed that he was the shop manager and reported to R. The claimant was a separate manager in the deli and also reported to R.

D recalled the incident of 22 May. He had been asked to go to the storeroom by R, where he learned the purpose of the meeting. R, the claimant and D had gone in to the storeroom together. R had wanted an explanation for the faulty oven and the claimant had explained that it was faulty hence the reason why the burgers were not ready. She had said that the oven had been running slow over a number of weeks and that she had reported the problem verbally to D but had not done so in writing.

The meeting had lasted six to seven minutes and R had not shouted or been aggressive at it. The claimant had then left to get her change of clothes. R told her not to leave as leaving would not achieve anything. The claimant had said that she would report R to the Labour Court.

D stated that the problem with the oven should have been reported to R. It had been in conversation that the claimant had told D about the problem with the oven and he did not take it that he had to report the problem to R. Any issues in the shop had to be reported in writing and it was D's habit to give written reports to R. Shop floor issues were his responsibility and issues in the deli would not have been on his list.

In cross-examination, D confirmed that he was absolutely certain that the claimant had not made a written report of the problem with the oven, despite her saying in her evidence that she did. He had not replied to the claimant when she had told him about the problem with the oven nor had he mentioned it at the meeting in the storeroom because the meeting did not progress that far. R had been speaking loudly at the meeting but he had not been shouting. They were all in close proximity to each other but R had not intimidated D. R was easy to get on with as an employer.

Replying to the Tribunal, D confirmed that there are no other family members employed in the shop and there were no difficulties between them as a family.

When asked why he had not done something when the claimant had told him about the problem with the oven, D admitted that, in hindsight, he should have taken it on board and done something. However, at the end of the day, it had been the claimant's responsibility.

The meeting on 22 May had been brief. The claimant had said that she had enough and had gone to the staffroom to change her clothes.

**Determination:**

Having carefully considered the evidence adduced, the Tribunal is of the view that the claimant contributed substantially to her own dismissal by walking out of her employment. If the Tribunal had been in a position to award a large compensation figure, same would have been substantially reduced due to this contribution. Furthermore, in her evidence, the claimant confirmed that she claimed disability benefit since the termination of her employment. Consequently, she was not available for work since that time and therefore suffered no financial loss. Section 7 1 (c) of the Unfair Dismissals Act, 1977 as amended by section 6 (ii) of the Unfair Dismissals (Amendment) Act, 1993 provides that *“if the employee incurred no such financial loss, payment to the employee by the employer of such compensation (if any, but not exceeding in amount 4 weeks remuneration in respect of the employment from which he was dismissed calculated as aforesaid) as is just and equitable having regard to all the circumstances...”*. The Tribunal finds that the claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds and the claimant is awarded compensation in the sum of €1,512.00, which the Tribunal considers just and equitable under the circumstances.

As claims under unfair dismissals legislation and redundancy payments legislation are mutually exclusive, the claim under the Redundancy Payments Acts, 1967 to 2007 automatically fails and is therefore dismissed.

A claim for minimum notice does not arise in a case of constructive dismissal, therefore the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2007 must fail and is also dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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