

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIMS OF:

CASE NO.

Employee **-claimant**

UD452/2008

MN410/2008

WT191/2008

against

Employer **–respondent**

Under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007  
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005  
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. K.T. O'Mahony B.L.

Members: Mr. P. Casey  
Mr K. O'Connor

heard these claims at Cork on 20 November 2008  
and 11 & 12 February 2009

**Representation:**

Claimant: Mr. Tom Power B.L., instructed by  
Mr Albert Wolfe, Albert Wolfe & Co, Solicitors,  
Main Street, Innishannon, Co. Cork

Respondent: Mr. Eoin Clifford B.L., instructed by at separate times by  
Ms Gillian Keating & Mr. Pat Bradley, J.W. O'Donovan,  
Solicitors, 53 South Mall, Cork

The determination of the Tribunal was as follows:

Dismissal being in dispute between the parties it fell to the claimant to prove the fact of dismissal.

The claimant, who was an apprentice hairdresser, commenced employment with the respondent on 4 September 2006. The claimant's position was that she had finished her third-year apprenticeship with her former employer, had joined the respondent as a fourth-year apprentice and would not have accepted a third-year apprenticeship. The respondent's position was that the claimant joined her as a third-year apprentice and that she would not have taken on a fourth-year apprentice. Both parties adopted their positions on the basis of what had allegedly been said at the interview. Furthermore, the respondent decided on the basis of the claimant's performance

during her trial day that her skill level fell short of the standard of someone who had completed the third year of an apprenticeship. Immediately prior to her employment with the respondent the claimant had worked for another hairdresser for around two years and at the end of that period that employer regarded her as being close to having finished the third year of her apprenticeship. However, he was not happy for her to go into her fourth year apprenticeship and felt this was as much his fault as the claimant's. They both felt that the claimant should work in a busier salon; he felt that she needed to work with more juniors who would push one another.

The claimant's position was that in November 2006 she asked if she was being paid the correct rate and the respondent told her that they all received the same wage once they were over eighteen years of age. On information obtained from the Citizen's Information Centre in May/June 2007 the claimant discovered that she was not receiving the fourth year rate of pay but did not raise this matter with the respondent until August or September 2007. The respondent promised to check it out. While it was the respondent's evidence that she paid the claimant the fourth year rate from September (when the claimant had been one year in the employment) it was the claimant's evidence that she received the increased rate of pay in November 2007. The claimant's case was that on at least three subsequent occasions she then sought back pay at the fourth-year rate of pay but that the respondent informed her that she was not entitled to it.

The claimant was out sick at various times during the employment. The respondent's position was that this was mainly due to back trouble. The claimant's position was that from as early as May/June 2007 she was suffering from a stress-related illness caused by the conditions under which she worked. Among these were being asked to sweep and mop the floor, being told in public on querying her wages not to do this again and comments (positive and negative) on her attire. The claimant suffered from numerous symptoms. Her doctor, unable to attribute these to a physical cause, was of the opinion that these were anxiety and stress related. Because these symptoms developed while in the employment and improved on leaving the employment his opinion was that the most likely explanation was that they were work related. He could not recall whether he had considered any cause outside the employment.

On 5 December 2007 the claimant's sister (CS) telephoned the respondent to raise the matter of back-pay but the respondent would not discuss the matter with CS as she was not her employee. There is a dispute between the parties as to whether or not CS was aggressive towards the respondent during that call. Some time later on 5 December 2007 the respondent telephoned the claimant to discuss the matter with her. The claimant told the respondent that she was in traffic and hung up on the respondent. The respondent then sent a text message to the claimant saying: *"I rang u to talk to you about your sister's abuse phone call that I received this morning. You didn't have to hang up on me. So I feel it might be best if u don't come back to work. It would only cause tension in the salon. Very sorry for the inconvenience but u leave me no choice I don't deserve to be treated like that. I would have loved to have spoke to u about it over da phone and not this way."* The respondent's position was that she had sent the text in anger and had meant that the claimant should not return to work until they had discussed the matter further.

The claimant and her mother (CM) then consulted a solicitor and as a result called to see the respondent on 6 December 2007 to ask if the claimant had been dismissed. A meeting took place attended by the claimant, CM, the respondent and her sister (RS). Each side maintains that the other was aggressive during the course of this meeting. The claimant's position was that she asked a number of times whether or not she had been dismissed and the respondent did not reply but eventually RS replied that she had not been dismissed. The claimant's attitude was that RS was not her employer and after some comment about how the issue between them had started

the claimant decided that she had enough and left. The respondent's evidence was that she told the claimant three or four times that she had not been dismissed but that she wanted to discuss the events of the previous day. RS told the claimant that she had not been dismissed and asked, "Why should she be?" The claimant became very angry and stormed out of the room. Later that day the respondent wrote to the claimant setting out the history relating to her level of pay. In the final paragraph she stated, *"I would appreciate if you would let me know your intentions vis a vis work as I have a bus salon to run and will expect an apology for the abusive phone call."* The claimant did not return to work but her solicitor wrote to the respondent on 10 December 2007, submitting a medical certificate for the claimant covering the period 5 December to 17 December and saying that he would be in contact once the claimant was in a position to instruct him. On 18 December the claimant's solicitor again wrote a three-page letter, setting out the history of the case and seeking compensation within ten days for the claimant's dismissal. On 20 December 2007 the respondent's solicitor wrote to the claimant's solicitor stating that the claimant had not been dismissed and that her job remained open to her.

### **Determination**

The Tribunal is aware that communications between the parties on both 5 & 6 December were, to say the least, somewhat fraught. The respondent acknowledges that in her text message sent on 5 December 2007 she should have chosen her words more carefully. On the following day the claimant, having sought legal advice, called to the workplace seeking clarification on her position from the respondent. The claimant's insistence that she was dismissed by the text message is inconsistent with this action. The Tribunal is satisfied that, at that meeting, the respondent made it clear that the claimant was not dismissed. Following an exchange of correspondence this position was confirmed in the letter from the respondent's solicitor on 20 December 2007, which also made clear that the claimant's position was still open to her. In those circumstances the Tribunal finds that there was no dismissal. In such circumstances claims under both the Unfair Dismissals Acts, 1977 to 2007 and the Minimum Notice and Terms of Employment Acts, 1973 to 2005 do not arise.

The claim under the Organisation of Working Time Act, 1997 was withdrawn during the course of the hearing.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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