

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

Employee

CASE NO's.

UD1163/2007,MN900/2007

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J. O'Connor
Members: Ms M. Sweeney
Mr K. O'Connor

heard this claim at Killarney and Tralee on 9th October 2008 and 30th June 2009

Representation:

Claimant: Mr. Joe Revington SC instructed by Nuala G. Liston Solicitor
Liston & Co., Solicitors, 8 Day Place, Tralee, Co. Kerry

Respondent: Ms Laura Lynch BL instructed by Ms Joanne Duignan Solicitor,
BCM Hanby Wallace, Solicitors, 88 Harcourt Street, Dublin 2

Background:

The case before the Tribunal is one of constructive dismissal. The claimant initially worked in the canteen of a large retail outlet

Claimant's case:

In common with most other employees the claimant commenced employment as a sales assistant, albeit on a temporary contract. Her commencement date was in December 2001. That contract stated among other things that she was employed on a flexible hours basis. The claimant also acknowledged receiving a staff handbook, which contained details of a complaints procedure. Her employment status was changed to a standard contract the following month as she was placed on a permanent footing subject to a successful completion of a six-month probationary period. The claimant's place of work was the staff canteen. From early 2002 to April 2007 the claimant described herself as being very happy there and thoroughly enjoyed working at that place. However, certain events that month changed this situation.

The cessation of a colleague's employment and a reduction in services offered by that canteen contributed to the claimant's concern at her own position and conditions of work. Till registers had been changed in late 2006 and the claimant had some difficulties with properly operating the new

machines. The departed colleague had given her some informal training on how to operate those machines. Despite that the claimant struggled with those registers and never felt comfortable using them. While the claimant did not officially know of the respondent's proposed downgrading of services in the canteen she was aware that those services were being reduced.

By mid April 2007 it had come to the respondent's attention through their security officer that discrepancies had emerged between what the till registered as a payment and the actual value of purchases. Those discrepancies always favoured the purchaser of the products. The claimant was identified as the only person operating the till at the relevant times. On 19 April she attended a meeting with a joint store manager in the presence of the personnel manager and a representative of the claimant. The main topic of discussion was the reported irregularities. The claimant apologised for those errors saying they were genuine mistakes. She added that no pressure was being exerted on her to operate the tills in that way.

The claimant expressed frustration and annoyance at the Tribunal hearing that she was the only person at the canteen multitasking. She acknowledged the assistance of others there at the time but commented they were only part-time and besides they had limited capabilities. The claimant, who felt that the respondent was targeting her, labelled this emerging process as a witchhunt. At that time the claimant agreed that the description of that meeting, as presented to her the next day, was correct. However, she told the Tribunal that she now disagreed with that description. On 20 April the same group met on the same topic. The claimant declined an offer to view video recording of these reported discrepancies. She also formed the impression that this matter was being referred to the respondent's office in Dublin and that she was facing possible dismissal. The meeting concluded with the claimant being placed on suspension for two days.

Following that meeting the claimant attended at her doctor's practice where she was declared as being unable to work from 24 April for seven days due to work related stress. Upon her return the claimant together with her trade union representative met the respondent's personnel manager and the drapery manager on 8 May. At that meeting the claimant was given notice that she would receive a written warning about her conduct connected with those discrepancies. In addition she was told she was being transferred to the cuisine de France department and would come under the supervision of the grocery manager. While the claimant did not think that the respondent treated her fairly in this situation she accepted "her punishment". The claimant maintained that she never subsequently received that written warning.

The claimant told the Tribunal she had a certain concerns about working at her new location. These included the feeling that she was being excessively watched and intimidated by another employee there, and that she was being rostered to work unsuitable hours; she had worked the same set of hours for six years. By that time the claimant's domestic situation was evolving due to changing circumstances and she wanted to avoid working on Saturdays. The claimant felt she got an unsympathetic hearing from the grocery manager on the rostering issue. She described that manager's attitude to her as horrid and viewed that manager's undated statement about their verbal encounter as "all lies".

That discussion took place on 6 June and some three hours later that same morning the claimant left her place of employment. Following that incident she again visited her doctor and secured further medical certificates proclaiming she was unfit for work until the end of that month. She also submitted a short letter giving the respondent one week's notice of her resignation from 2 July 2008. The claimant told the Tribunal that she could not return to work due to strain caused by the way the respondent treated her. Besides, it was her opinion at the time that the respondent wanted

to get rid of her. On 24 July the claimant met the personnel manager and discussed her resignation. She regarded that meeting as a talk between friends as she was not told it was an official meeting.

Respondent's case:

The personnel manager confirmed she met the claimant on 24 July 2008 regarding her situation. However it was incorrect to state that the claimant did not know of the agenda of that meeting as the witness had written to her earlier to outline its purpose. It was the intention of the personnel manager to try to convince the claimant to rescind her registration, but she soon came to the understanding from the claimant that matters unrelated to her situation at the respondent's, prevented her from returning to her former employer. During that conversation the claimant clearly indicated that she would not return to the respondent employment under any circumstances. The witness first learned of the claimant's complaints and bullying allegations at that meeting. However, since the claimant was no longer an employee the witness felt no need to carry out a detailed investigation into those grievances.

This witness who had a good relationship with claimant also attended the earlier meetings with the claimant on 19 and 20 April. Nobody told the claimant her case was going to Dublin. However, it emerged that the human resource department in Dublin was contacted on this ongoing issue. That was done on an advisory and procedural grounds. The witness had no recall of handing a written warning letter to the claimant. She also stated that at no time during her employment had the claimant brought to her attention any complaints or grievances. This witness added the claimant appeared to be adjusting well to her new position in the cuisine de France section.

The grocery manager described the conversation she had with the claimant on 6 June 2008 as civil. During the course of that exchange the claimant introduced her domestic situation to that manager. That topic was set in the context of rostering as the claimant sought to retain her 08.30 to 14.00 hours shift. While the witness could not give her a definite answer about rostering hours, she told the claimant she would revert to her later about this. By midday she heard that the claimant had left the store and had not reappeared.

A joint manager who was also a former drapery manager took notes and generally conducted meetings with the claimant on 19, 20 April, and 8 May 2008. Considering the circumstances of this case he felt that a written warning to the claimant was appropriate to this situation. This witness said that he never bullied the claimant. Another joint manager also stated that the claimant never complained to him about her treatment at work. This manager did not reply to a trade union letter seeking a meeting with him concerning the claimant's situation. He justified that his non-response was based on his preference to deal directly with the claimant. An assistant manager had no recall of watching the claimant as alleged by her. She never complained to him about working at the respondent.

Determination:

There is little doubt that the claimant was a good, loyal and dedicated employee of the respondent. At times she contributed her own personal resources in the pursuit of quality service to her customers. The claimant accepted there were discrepancies at her work place in which she had an input. Those discrepancies were most likely the consequence of genuine mistakes made by the claimant in operating a till register. Those discrepancies together with a downturn in staff canteen business resulted in a change of work location for the claimant. That change combined with domestic and disciplinary action seemed to have persuaded the claimant that she was being badly

treated by the respondent. She finally felt that she had no option but to resign her employment there.

The Tribunal notes that there was no evidence by the claimant that she formally utilised the respondent's complaints procedure. While a failure to use a grievance procedure is not necessarily fatal in a constructive dismissal case the omission by the claimant to do this has greatly damaged her case. Added to that flaw was the absence of medical evidence to support her contention that she suffered from work related stress.

Considering all the circumstances the Tribunal finds that the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

The appeal under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 is also dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

