

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
Employee

CASE NO.
UD866/2008
RP738/2008
MN797/2008
WT357/2008

against

2 Employers

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 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: Mrs. M. Quinlan

Members: Mr. M. Flood
Mr. A. Butler

heard these claims in Wicklow on 22 December 2008
and in Dublin on 13 March 2009 and 27 July 2009

Representation:

Claimant(s):
Mr. J. Kennedy BL instructed by
Doran W O'Toole & Company, Solicitors,
Unit 3b, Woodland Office Park, Southern Cross,
Bray, Co. Wicklow

Respondent(s):

Mr. D. Hipwell, Patrick O'Toole, Solicitors,
5 Church Street, Wicklow Town,
Co Wicklow

The determination of the Tribunal was as follows:-

The claimant's representative stated that this case had been taken against a company (BB) which was the licenceholder for the premises at which the claimant had worked but that the claimant had never had a contract and that all her dealings had been with an individual (MB) whom the claimant's representative wished to have added as a respondent.

BB's representative replied that BB was "a small family firm" and a company of which MB was a director and "a hands-on manager". Asked if MB was the licensee, the representative said that, the directors being husband and wife, MB's wife was "the nominee".

The claimant's representative, asked if BB was on the payslips, did not contest this but reiterated that there had never been any formal contract. He stated that MB had been the claimant's boss, that BB "was there as well" and submitted that the case should be against MB and BB.

Giving sworn testimony, the claimant said that her employment had begun at the end of November 2005. She started as a waitress but was taught to do tills and a year later was starting to do tills at the end of a day.

Asked about April 2008, the claimant said that she had been doing tills and making change orders for how much change was needed to manage the float. She was working a full week of forty to fifty hours for which she got about €430.00. Tips could bring this towards €500.00. She got more tips at weekends. She agreed when it was suggested that her weekly tips averaged out at €93.00 per week.

The claimant told the Tribunal that she had never got a contract, that "it was oral" and that she had always dealt with MB who had been her boss. She had no dealings with BB (the abovementioned company) but answered to MB. She acknowledged that she had been paid for two weeks' holidays and had got double pay for bank holiday Mondays but said that she had not got extra pay for Saturdays, Sundays or for weeks in which she had worked more than forty hours.

On 17 April 2008 the claimant went in at 4.30 p.m. to start a shift from 5.00 p.m. to closing. MB said that he wanted to talk to her and that he did not want her to do tills any more. When she asked why he said that he did not want her working free. (The claimant explained to the Tribunal that tills were done each morning when the money was counted from the previous night but that one did not get paid for that. One would go in, do the till and go home to come back subsequently to do a shift.) The claimant had no problem with this. MB was happy with her work.

The pub had farmers coming in as the farmers were "striking" in Dublin. Arriving just before 6.00 p.m. they came for a meal and MB asked the claimant to stay on covering the till. There were over a hundred farmers. It was so busy that the pub ran out of cutlery and delph. When the farmers had left the claimant got a half-hour break at about 8.00 p.m.. A waitress (L) left at 8.30 p.m. to 8.45 p.m.. The claimant was left with another waitress (S). At 9.00 p.m. they closed the lounge and left the bar open. S took tills, went to the office and put money in the safe.

The claimant was left alone in the bar. Closing-time was 12.30 p.m.. She took the till and put it on

the top shelf of the safe which was in the hallway. She did not count the money. She went to lock doors and gates. She saw two empty tills. Money had been taken out. There was a till-note from S to another person (K) for the morning. The note wished its recipient good luck with counting tills. Having seen the note, the claimant locked up and set the alarm.

18 April 2008 was the claimant's day off. At 11.03 a.m. the claimant got a missed call from MB who rang again at 11.31 a.m. to say that there was three hundred euro missing and that the claimant had been the last one with the takings. MB was screaming at her about the missing money. After the claimant said that she had not touched it MB replied with an obscenity and hung up on her.

The claimant told the Tribunal that MB was known for his temper and that she "and a lot of the girls" were "scared of him". Wanting this issue "sorted", she phoned to talk to him and was told that he would be there later. Going there, she called to talk to him. He said that he would see her when he came back.

The claimant waited for one-and-a-half hours. She saw MB come in after the lodgment. He saw her. She went to the lounge to talk to him. He said he was busy and had customers. He was very rude. She came back about an hour later. They went to the office. She asked what this was about and how he could tell her that three hundred euro was gone. He said that she had cashed the cheque of another employee and that she had been the last one at the tills. She said that she had not touched the money.

MB would not let the claimant explain. She was scared. She took out her key and clock-in card. She said she would not work until this was "sorted". She got a taxi home. That was it. She never got a call.

The claimant told the Tribunal that she had known how angry MB could get, that she had been scared and that she took out her key and clock-in card because she thought that she had been dismissed when MB had used bad language to her.

Asked if the pub had had any human resource procedures, the claimant merely replied that there was always three hundred euro missing after big parties and that it was always easy to blame someone especially if that person was new or was "gone already".

After 18 April the claimant was at home. MB had not let her defend herself. Her boyfriend's boss provided the number of a solicitor and she got legal advice. She got her P45 through her solicitor.

Regarding the financial loss she had incurred since the termination of her employment in the pub, the claimant gave details of having got some part-time work (for €10.00 per hour in a golf club and with a chef). She had also tried to upskill by doing a F.A.S. course after which she had done onemonth's work experience. She had applied to some employers but was concerned that it might be alleged to a prospective employer that she had been accused of stealing from the pub. She was due to start a course to become a legal secretary.

In cross-examination, the claimant was asked about her putting her key and clock-in card on the table when she was with MB. She replied that she had been upset because she could not get her point across and that she had said that she would not be back until this was "sorted".

Asked by the Tribunal if she had thought of phoning MB after her employment had ended, the claimant replied:

“No. There was a manager but MB was my direct boss.”

Asked if she had thought to ring the manager, the claimant replied that she had phoned him and told him what had happened but that, within a week, the manager was gone.

Regarding the cashing of a cheque for the manager, the claimant said that on 17 April he was going on holiday and that, having been paid by cheque, he had wanted to cash it and this had been done by K (a waitress).

At this point in the Tribunal hearing the claimant’s representative said that he had wanted the manager to attend the hearing but that the manager had said that he could not attend.

Giving sworn testimony, the claimant’s boyfriend corroborated the claimant’s evidence that she had got some part-time work at a golf club by saying that he had given her a lift there three times.

When the hearing resumed after lunch on 27 July the Tribunal was told that MB would not be giving evidence.

The claimant’s representative then sought costs for expenses incurred by the claimant due to the fact that two previous hearings had been scheduled for this case and reiterated his application that MB be added as a respondent stating: that MB had dealt with the claimant; that joint and several liability could apply; and that he wanted an award made against MB personally.

The other side’s representative submitted that BB was the respondent and that MB was a director of the company but that the licence and lease were held in the name of the company. The Tribunal was referred to a copy of a letter dated 15 May 2008 (from MB on behalf of BB) which was not addressed but which appeared to have been drafted for sending to the claimant’s solicitor. At this point in the Tribunal hearing the claimant’s solicitor stated that he had never seen this letter before.

Determination:

Having heard the evidence of the claimant and the opposing representative’s statement that no evidence was being offered against that of the claimant, the Tribunal unanimously finds that the claimant was unfairly dismissed. In the circumstances of this case the Tribunal is of the view that compensation is the most suitable form of redress. Having considered the claimant’s financial loss and her efforts to mitigate that loss, the Tribunal awards her the sum of €42,080.00 (forty-two thousand and eighty euro) under the Unfair Dismissals Acts, 1977 to 2007, based on a gross weekly pay of €430.00. For the purposes of calculation, the Tribunal does not grant the application that €93.00 be added to the claimant’s weekly pay as representing the claimant’s average amount of tips per week.

On the application of counsel for the claimant to amend the names of the responding parties, the Tribunal has altered the original application to jointly and severally cover the limited company (referred to above as BB) and the boss (referred to above as MB) for whom the claimant had worked.

In addition, the Tribunal awards the claimant the sum of €860.00 (this amount being equivalent to two weeks' gross pay at €430.00 per week) under the Minimum Notice and Terms of Employment Act, 1973 to 2005.

Also based on a gross weekly pay of €430.00, the Tribunal awards the claimant the sum of €500.00 under the Organisation of Working Time Act, 1997, in respect of leave outstanding to her at the termination of her employment.

The appeal lodged under the Redundancy Payments Acts, 1967 to 2007, is dismissed for want of prosecution.

A submission was made on behalf of the claimant applying for costs incurred in dealing with the matter. It is the unanimous view of the members of the Tribunal that it would be inappropriate to grant such an application.

A submission was made on behalf of the claimant applying for compensation for the fact that the claimant had not been furnished with a written contract. The Tribunal does not grant this application. Such an application can only be heard by the Tribunal on appeal after the issue of a Rights Commissioner Recommendation under the Terms of Employment (Information) Acts, 1994 to 2001, and no such appeal was before the Tribunal.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

