

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYER - appellant

CASE NO.
UD532/2008

against the recommendation of the Rights Commissioner in the case of:

EMPLOYEE - respondent
V
EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P Hurley

Members: Mr T Gill
Dr A. Clune

heard this appeal at Loughrea on 27th April 2009

Representation:

Appellant: Mr Andrew Turner
Hamilton Turner
Solicitors
66 Dame Street
Dublin 2

Respondent: Mr Cormac McCarthy
Solicitor
Davis Street
Athenry
Co. Galway

The determination of the Tribunal was as follows:

This case came before the Tribunal by way of an appeal by an employer appealing against the Recommendation of the Rights Commissioner ref: (r-056585-ud-07).

Appellant's Case:

The Managing Director (MD) of the appellant company, a supermarket in Galway, gave evidence that the respondent commenced her employment with the company in February 2005. She proved herself as the best employee in the company and was promoted to assistant manager and then later, in June 2006, to manager. At the end of August 2006 the respondent asked to step down from the role of manager, as she found it too stressful. MD agreed to this.

When the respondent stepped down her wages were reduced accordingly. The respondent met MD in October 2006 and agreed to put her wages back to the manager's rate. A new manager was recruited on 23 October 2006.

On 14th November 2006 MD was informed by the new manager that the respondent had walked out and didn't return that day. When MD met the respondent on 22nd November 2006 she told him she found it too difficult to remain working in the store as an assistant manager. MD was disappointed, but understood why the respondent wanted to leave. The respondent had a 'fractious' relationship with the wages clerk and there was a dispute about monies owed. MD agreed to the monies that the respondent was seeking. The respondent's P45 was issued on 27th November 2006.

In December 2006, MD contacted the respondent, as he required a manager for a different store he owned, under a different company, in Longford. He asked the claimant if she could give him a 'dig-out'. She agreed to a temporary arrangement but would not commit as the journey to Longford was quite far. There was no written contract issued to the respondent for this employment. MD asked the respondent over the following months if she would become manager of the Longford store, but she would not commit to it. She told him she was considering opening her own business or a merchandising operation.

The respondent went on sick leave on 28th May 2007 due to back problems and was certified fit for work on 16th August 2007. Around this time MD was unavailable due to family circumstances and agreed that he wasn't answering calls. He had asked his manager, in Galway, to deal with issues. In August, MD was told by the Galway manager that the respondent had come in seeking to return to her job in Galway. MD wasn't surprised that she had gone to the Galway office as that was where the office was, however her job was with the company in Longford and there was no position available in Galway. While the respondent had occasion to go to the Galway store for stock, she had never been re-engaged there. MD disputed that the respondent had returned to the Galway store on a permanent basis after a few weeks in Longford. The respondent did not return to her employment after her sick leave and later requested her P45, which was issued to her on 25th August 2007.

MD disputed that he had taken the respondent back on under a different company so that she wouldn't have to deal with the wages clerk. The wages clerk paid the wages for all three companies that he operated. MD also disputed that he had promised the claimant that her service would not be broken. MD disputed having ever dismissed the respondent.

An accountant for MD's companies gave evidence that it was normal for pay to revert to a previous level if an employee stepped down to a previous position. The respondent had last clocked in at the Galway store on 14th November 2006. The company operating in Galway issued a P45. The company operating in Longford then employed the claimant. The witness disputed that the

respondent would work for one company and be paid by another. The company operating in Longford issued the second P45 on 25th August 2007, at the respondent's request. He had thought the respondent would return. The witness stated that he had visited the Longford store on occasion and had seen the respondent working there. The respondent was last paid by the Longford company on 9th June 2007.

Respondent's Case:

The respondent gave evidence that she stepped down as store manager at the end of August 2006 due to difficulties with some staff members. Afterwards she had difficulties with the wages clerk due to a dispute over monies owed from her time as manager. The respondent sought a meeting in October with MD to resolve her problem. MD agreed to put her back on her manager's pay and this was effective from the end of October.

She had walked out of the job in November over the issues with her pay. When the respondent met MD in November he asked her to help out in his Longford, to which she agreed. He told her that her service would not be broken and that he would pay her from a different company so she wouldn't have to deal with the wages clerk again.

The respondent resumed her employment in December in Longford, at the same rate of pay. In February she was asked by MD to return to work in Galway. He told her he wanted her to cover his three stores, but she disputed that MD had asked her to become manager at the Longford store. The respondent only travelled to Longford occasionally to check products and stock. The respondent had agreed with MD that she didn't have to clock in. She furnished the wages clerk with start and finish times for travel to Longford.

The respondent remained in Galway until she went on sick leave in May due to a problem with her neck. MD had said to her prior to her sick leave that he would need her back in Longford, but that was the last conversation about the Longford shop prior to her sick leave. The respondent disputed that she had intended to setting up her own company. She agreed that she had sought a reference in March from MD for a job in Galway. The respondent sought the new job in Galway as it offered her an opportunity and not because, according to the appellant, she was working in Longford.

The respondent spoke to MD in June about returning on a three-day week, but he told her to wait until she was better. On 15th August 2007 the respondent went to the Galway manager to find out about returning to work. He was unable to contact MD. MD later contacted the respondent and, after talking to his Galway manager, told her that there was no work available for her. She asked if she was being made redundant but he didn't answer. The respondent contended that the manager's role in Longford was filled while she was on sick leave. The respondent sought her P45 for Social Welfare purposes.

Determination

The Tribunal, having carefully considered the evidence of both parties, is satisfied that the respondent has not established continuity of service with the appellant employer in both businesses such as would bring her claim within the ambit of the Unfair Dismissals Acts.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)