

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.
UD367/2009

EMPLOYEE

RP371/2009
MN371/2009
WT162/2009

against
EMPLOYER

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: Mr. J. Sheedy

Members: Mr. J. Hennessy
Mr. T. Kennelly

heard this claim at Thurles on 23rd September 2009

Representation:

Claimant: Mr Neil Butler, Neil J. Butler & Co, Solicitors, Friar Street, Thurles, Co. Tipperary

Respondent: Mr Kevin O'Reilly, John P. Carrigan & Co, Solicitors,
Slievenamon Road, Thurles, Co. Tipperary

The determination of the Tribunal was as follows:

The Tribunal heard that dismissal as a fact was in dispute.

At the outset of the hearing the claimant's representative confirmed to the Tribunal that the claimant was pursuing the claim under the Unfair Dismissals Acts, 1977 to 2007. The claim under the Redundancy Payments Acts, 1967 to 2007, was therefore withdrawn.

Claimant's Case:

The claimant is a fully qualified beautician. She commenced employment with the respondent in June 2005. She initially worked five days per week and one late evening. After the claimant returned to work following the birth of her first child, her hours reduced to a four-day week. In January 2008 the respondent placed the claimant on a two-day week. At this time the claimant was pregnant with her second child. Before the claimant commenced her maternity leave her hours were increased and she worked three days per week. The claimant was due to commence her maternity leave on the 14th May 2008 but due to illness she was on sick leave for the two weeks prior to this date. The last day the claimant worked before her maternity leave commenced was the 26th April 2008. The claimant was aware that the respondent employed another person when she was on maternity leave.

The claimant was due to return from maternity leave in or around the 11th/13th November 2008. Approximately two weeks before her return to work date the claimant spoke to the respondent at the salon and reminded the respondent that her return to work was approaching. The respondent told the claimant that as business was quiet she would have to let her go from her employment.

On the 9th December 2008 the claimant again approached the respondent at the salon. The claimant provided the respondent with an RP77 form. The respondent telephoned the claimant some days later and said that no one was made redundant and told the claimant that a five-day week was available starting in January 2009. The claimant was happy about this and asked the respondent to give her some notice of the start date so that she could arrange childminding. The claimant also raised the issue of outstanding holiday entitlements with the respondent during this conversation and the respondent agreed to check with her accountant if the claimant was owed any holidays.

The claimant heard nothing further from the respondent and at the end of January 2009 she received a cheque for two days' holiday pay and a P45 without a cover letter. The claimant's issue of outstanding holiday monies was unresolved, as the claimant had accrued more than two days holidays since January 2008. A calculation of outstanding holiday monies was submitted to the Tribunal.

In letter dated the 26th February 2009 the respondent's solicitor wrote that a four-day week was available to the claimant at the salon. The claimant did not think that this was a genuine offer of work. The claimant has sought work since but without success.

In cross-examination it was put to the claimant that the respondent wrote the letter of the 6th November 2008 to the social welfare under duress and the claimant had told the respondent she was willing to do some work for cash payment. The claimant stated that the respondent was not put under any pressure to write the letter.

It was put to the claimant that on the 9th December 2008 she had agreed with the respondent that she would return to work on the 2nd January 2009. The claimant stated that a specific date was not agreed but she was told that the respondent would contact her about returning to work sometime in January 2009. It was put to the claimant that when she did not arrive to work on the 2nd January 2009 the respondent wrote to social welfare to clear up matters and that her solicitor subsequently wrote on the respondent's behalf on the 26th February 2009 informing the claimant that her job was still available. The claimant responded that by the time she received this letter the trust with her employer had completely broken down, she had received her P45 and felt she could not return to

her employment.

Respondent's Case:

Giving evidence the respondent confirmed the claimant was due to return from maternity leave on the 14th November 2008. Prior to this date the claimant attended at the salon and asked the respondent if she was in difficulty in taking her back to work at the moment. The claimant asked the respondent if she would do her a favour and write a letter for social welfare purposes. The claimant worded the letter and the respondent wrote the letter while the claimant was present in the salon. Although the respondent hesitated she wrote the letter for the claimant. The letter was dated the 6th November 2008 and stated that the respondent did not have work for the claimant at this time. The claimant said she was available to work for cash payments but the respondent does not operate on that basis. The following week the respondent contacted her accountant, as she believed she had been foolish providing the claimant with the letter for social welfare.

Some weeks later the claimant again attended at the salon seeking a redundancy payment. The respondent knew she had jumped in too quickly when the claimant asked her for the letter for social welfare and she asked the claimant for some time to consider matters. The respondent telephoned her accountant and later telephoned the claimant and informed her she was not entitled to a redundancy payment, as work was available for her. The respondent and the claimant discussed the claimant's return to work date of the 2nd January 2009. The respondent told the claimant this would provide her with the time to give notice to the temporary employee who was covering the claimant's maternity leave.

The claimant did not return to work on the 2nd January 2009. The respondent subsequently telephoned the social welfare and explained that although she wrote the letter of the 6th November 2008, work was available for the claimant. The respondent confirmed this in a letter to social welfare, which was submitted to the Tribunal. The respondent's solicitor wrote on her behalf to the claimant on the 26th February 2009 confirming that the claimant's job was available to her.

Witness H for the respondent was the temporary member of staff covering the claimant's maternity leave. She commenced employment with the respondent on the 17th August 2008. The respondent informed Witness H at the commencement of her employment that she was employed on a temporary basis to cover the claimant's maternity leave.

Witness A gave evidence that she was present in the salon when the claimant spoke to the respondent. Witness H observed the claimant and the respondent talking and heard the claimant asking the respondent if she was in "a bit of bother" taking her back after her maternity leave. The respondent replied that while things were a bit quiet the claimant's job was there for her. The claimant said she would have difficulty getting a childminder for four days a week and asked the respondent for a letter for social welfare purposes.

Witness B for the respondent commenced employment with the respondent in August 2006. On the 9th December 2008 she overheard the respondent on the telephone. She knew the respondent was telephoning the claimant and heard the respondent say that there were two days holiday pay due to the claimant and asked the claimant to return to work on the 2nd January 2009 as the respondent wanted to give Witness A notice of the end of her employment.

The respondent's accountant gave evidence that the claimant was paid her holiday entitlements of two days by cheque. She examined the payroll records and was satisfied the claimant was paid her entitlements. A calculation of the claimant's holidays for 2008 was submitted.

In cross-examination the accountant stated that she did not have proof the claimant was paid all of her holidays. She did not think holiday pay showed on the claimant's payslips. It was her understanding that holiday pay was not calculated for the time the claimant was on maternity leave.

Determination:

The Tribunal carefully considered the evidence adduced. Witness A continued to be employed by the respondent, which indicates that the claimant's position was available for her at the end of her maternity leave. In considering this, the Tribunal prefers the evidence of the respondent and finds that a dismissal did not occur in this case. In support of this the Tribunal also noted that the respondent had contacted social welfare regarding the falsified letter of the 6th November 2008 and informed social welfare that work was available to the claimant. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2007, is dismissed. The claim under the Redundancy Payments Acts, 1967 to 2007, was withdrawn at the outset of the hearing, the two being mutually exclusive.

The Tribunal having determined that a dismissal did not occur dismisses the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

The Tribunal is not satisfied that outstanding holiday pay was discharged to the claimant and there was a lack of documentary evidence in this regard. In addition, the claimant was entitled to be paid for holidays accrued during her maternity leave. Therefore, the Tribunal awards the claimant €1,024.00 (being the equivalent of 10.4 days) under the Organisation of Working Time Act, 1997.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)