

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

EMPLOYEE - *claimant*

UD23/2009

WT13/2009

against

EMPLOYER - *respondent*

under

ORGANISATION OF WORKING TIME ACT, 1997 UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

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

Members: Mr G. Phelan
Dr. A. Clune

heard this claim at Ennis on 22nd May 2009

Representation:

Claimant(s) : Mr John Rynne, Rynne Hanrahan & Associates, Solicitors, 61
O'Connell Street, Ennis, Co. Clare

Respondent(s) : Mr. Alban Carney B.L instructed by Mr. Donal Gavin, W.B. Gavin & Co,
Solicitors, 4 Devon Place, The Crescent, Galway.

The determination of the Tribunal was as follows:-

Preliminary Issue

The respondent contended that the claimant did not have one-year's continuous service as required under Section 2 (1)(a) of the Unfair Dismissals Act 1977 and that accordingly the Tribunal did not have jurisdiction to hear the claim.

The Tribunal decided to hear all the evidence in this case before making a determination on the preliminary issue.

Summary of the Evidence

FO and his son (SO) were the two directors of the respondent company, which owned a supermarket in Munster. SO and the deli manager ran the supermarket. The respondent also owned another shop elsewhere and the General Manager (GM) worked there and he visited the supermarket around twice a week.

The manager of the deli section of the supermarket had been a previous owner of the supermarket and had sold it to the respondent in June 2006. During her time as owner she had employed the claimant for around six months and had found her to be a great worker. However, she had been unreliable in that she had not reported for work on many occasions and she ultimately had to let her go. It was the claimant's evidence that she had left her former employer of her own accord.

Around mid 2007 the claimant replied to the respondent's advertisement for staff and was hired by the deli manager who was under strict instructions to let her go if she let her down. It was the claimant's evidence that she had commenced employment with the respondent on either the second or third week of May 2007. The claimant's husband's evidence was that the claimant commenced the employment before their son got his school holidays (end June). As far as the deli manager could recall she hired the claimant in September 2007. She had hired students to cover the summer period.

The claimant's hours of work varied from between 20 to 43 hours per week. The claimant worked weekdays and often did weekend shifts. The claimant's daughter also worked with the respondent and the deli manager had agreed that if the claimant could not come to work her daughter could cover for her. It was the claimant's evidence that they got on very well and she would do whatever hours the deli manager asked her to do. She had been there only a few months when she was given a bonus.

On 13 June 2008 the claimant sought extra time off as she had to take her husband to work and she also wanted to spend more time with her family. On Saturday 14 June 2008 the deli manager put up the new roster for the following week and then left to visit some friends. While with her friends she received a telephone call from the claimant at 3.15 pm complaining that her hours of work had been reduced. The deli manager told her that she would be in the next day and would talk to her then.

On Sunday the 15 June 2008 the deli manager started work early and noticed that some Saturday tasks had been left undone. The claimant was due to report for work at 2.00 pm but neither she nor her daughter showed for the shift. The deli manager's position was that she had tried to contact the claimant and her daughter a number of times by phone and by text and ultimately she left a message on the claimant's voice mail stating that if she did not hear from her within one hour she would take it that she was no longer interested in her job. The deli manager arranged for another girl to cover the Monday shift. The claimant's position was that she had not received any calls or texts to her mobile from the deli manager on Sunday, 15 June 2008. There was a dispute between the parties as to whether the claimant had been rostered to work on the Sunday. It was the deli manager's evidence that she had rostered the claimant for the Sunday shift because a student had not been available. It was the claimant's evidence that she was not rostered to work on Sunday 15 June 2008. About two weeks earlier she had arranged with the deli manager to have that day off because it was father's day and she wanted to visit her father's grave.

On Monday morning 16 June 2008 when the claimant reported for work she got herself a cup of coffee and the deli manager asked her to step outside. According to the deli manager she asked the

claimant if she thought she could turn up for work having let her down and having failed to answer her phone calls. She told the claimant that she could not run the shop not knowing where her staff were. When the claimant asked her if she was dismissing her she replied, "That is your choice". The claimant then emptied the cup of its contents, threw the cup at her feet and left the premises. According to the claimant the deli manager asked her if she honestly thought she had a job there after her daughter's failure to show for work the previous day. The claimant's evidence was that while she did throw the cup she did not throw it at the deli manager's feet. The claimant felt that the interchange between them had been planned and watched by another employee on the CCTV camera. The claimant left the premises and went home. Shortly afterwards the claimant telephoned the deli manager and told her she was making a very big mistake and asked her if she had ever heard of unfair dismissal.

The claimant informed GM about her dismissal over the telephone. He discussed the matter with the deli manager and she would have no problem apologising to the claimant or with her returning to work but the claimant would "have to toe the line". GM reverted to the claimant and left a voice message on her mobile saying that the deli manager had made a hasty decision and was willing to apologise. He offered the claimant her job back subject to the aforesaid condition and stated that if he did not hear from her immediately he would assume that she was leaving her employment. The claimant declined to return to work. The claimant declined GM's invitation to meet on 17 June. She felt he did not accept her version of events and she would feel very uncomfortable in the work situation. The claimant went to a solicitor. In his letter of reply dated 24 June to the claimant's solicitor GM again relayed that the deli manager would provide a written apology to the claimant and assured her that all reference to the dismissal would be removed and that there would be no animosity shown towards her by any member of management.

The claimant's evidence was that for around the first three months of her employment she was paid in cash, either by the deli manager or SO. About two months into her employment SO told her that her wages would be paid into her bank account as soon as the computer system was in operation and she had given her bank account details to SO a number of times because he mislaid them. The respondent's evidence was that the claimant was paid by cheque until the payroll was computerised after the revamp of the premises which ended in May 2007. The respondent denied that it had at any time paid the claimant in cash. Her weekly hours of work varied and the deli manager forwarded her hours to the accountant in Galway and her wages were paid directly into her bank account. FO had nothing to do with wages and did not know if at the beginning there was an element of cash payment made to the claimant.

The claimant was never given her terms and conditions of employment and was not provided with a grievance procedure. She never received a warning. During her time working for the respondent she had only been late for work on one or two occasions. She has requested a P45 from the respondent but has not been provided with one. She felt humiliated and disgusted with her ordeal.

Determination:

The Tribunal accepts the claimant's evidence that she commenced employment in the latter part of May 2007. The claimant's employment having terminated on 16 June 2008, she has one year's continuous service as required by section 2 (1)(a) of the Unfair Dismissals Act 1977 as amended. Accordingly, the Tribunal has jurisdiction to hear the claim.

It is not in dispute that the deli manager was annoyed when she met the claimant on 16 June

because neither she nor her daughter had covered the Sunday afternoon shift. Whilst there was a dispute as to the words uttered by the deli manager during her interchange with the claimant neither version admits of clear words of dismissal having been uttered by her. However, the deli manager did not argue that that she had not dismissed the claimant. Following the interchange on 16 June a number of attempts were made by the respondent's general Manager (GM) to retrieve the situation. These efforts were made immediately following the dismissal, the next day and a week later. The words of dismissal having been uttered in the heat of the moment, the Tribunal is satisfied that, the respondent had taken adequate and reasonable steps to withdraw the dismissal. Accordingly, the dismissal having been withdrawn, the claim under the Unfair Dismissals Acts 1977 to 2007 is dismissed.

As no evidence was adduced as regards the claim under the Organisation of Working Time Act that claim is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

