

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

EMPLOYEE (Claimant)

CASE NO.

UD320/2009

MN321/2009

WT135/2009

against

EMPLOYER (Respondent A)

EMPLOYER (Respondent B)

EMPLOYER (Respondent C)

EMPLOYER (Respondent D)

EMPLOYER (Respondent E)

Under

**UNFAIR DISMISSALS ACTS, 1977 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: Ms. P. Clancy

Members: Mr. G. Phelan
Dr. A. Clune

heard this claim at Ennis on 3rd July 2009 and 20th October 2009

Representation:

Claimant: Mr. Gearóid Howard, Crimmins Howard, Solicitors, Dolmen House,
Shannon, Co. Clare

Respondents: Respondent D was represented by Mr. Alastair Purdy, Purdy Fitzgerald, Solicitors,
Kiltartan House, Forster Street, Galway on the first day of hearing

No appearance or representation by the respondents on the second day of hearing.

The determination of the Tribunal was as follows:

The claimant's employment at a greeting-card shop commenced on 29 August 2007. Her gross weekly pay was €400.00.

Submissions on first hearing day:

The claimant's representative stated to the Tribunal that the claimant had received no terms and conditions of employment. He added that the claimant had thought that she had been working for the man (Respondent B) who had interviewed her. On 7th November 2008 she was summarily dismissed without any procedures or justification. She received a dismissal letter in the post.

The opposing representative stated that the correct respondent was Respondent D, which was in liquidation.

The claimant's representative contended that there was still staff working in the shop, which was still trading, and that there had been a transfer of undertaking. He stated that two witnesses brought to the hearing had worked with the claimant while the claimant was there and that there was an obligation on the employer to identify who or what was running the shop. It was submitted that there was a desire to avail of "a three-card trick" with regard to the claim and that there was an obligation to inform (and consult with) employees in good time when a transfer of undertaking occurred.

The opposing representative said that one company had been named at the top of every payslip and that no claim could be taken against other employers. He wanted the government's insolvency fund to be applicable in respect of the employing company and all other claims struck out. He submitted that there was no claim under transfer of undertaking regulations.

The claimant's representative countered that the claimant should be entitled to protection from transfer of undertaking regulations without complaining under such regulations.

The opposing representative replied that the claimant had not been an employee at the time of transfer and that any transferring rights should only transfer at that time. It was not even acknowledged that there had been a contract of employment at the time.

The claimant's representative, submitting that the opposing representative was trying to frustrate the case, asked that the names of individuals not be removed from the list of respondents before the Tribunal heard evidence.

The opposing representative replied: "There's no employer. It's in liquidation."

The claimant's representative told the Tribunal that he had two witness subpoenas and wanted to call one who was soon due to leave Ireland because she could give important evidence to address certain matters.

The opposing representative asked the Tribunal to deal with preliminary matters first before going into evidence. The Tribunal took a recess to consider this request.

After the said recess the Tribunal gave a ruling that it would allow the witness to be called. However, the Tribunal was then told that the said witness had left to attend a wedding. The opposing representative said that his information was that this witness would be coming back to Ireland. He denied that he was “playing ducks and drakes” but said that he had no address for the witness though she had worked in the shop.

The Tribunal adjourned the case to hear evidence on a future occasion. The opposing representative said: “I’ll probably be there on my own.” When it was put to him that it could be difficult to contest the case if evidence from the claimant were not countered by opposing evidence he replied that the matter would fall to the government’s insolvency fund. The claimant’s representative stated that he would call for any determination to be made against all respondents on the claim form. The opposing representative countered that he could not be liable for a liquidated company and that there should be no other respondent. Asked if a liquidator had been appointed, he replied that there was a voluntary winding-up and that an accountant was dealing with it.

The claimant and her representative were present on the second day of hearing. Neither the respondents nor a representative on their behalf were present at the hearing.

At the outset of the second day of hearing the claimant’s representative outlined to the Tribunal the difficulty in establishing the identity of the employer. The representative applied to the Tribunal to have five respondents named on the written determination.

Claimant’s Case:

The claimant gave evidence with the assistance of a Tribunal appointed translator.

Giving evidence the claimant stated that Respondent B (a director of respondents C, D and E) interviewed her for the position in the shop. The claimant was successful at interview and they agreed a rate of pay of €10.00 per hour with the claimant working forty hours per week. The claimant commenced her employment in August 2007.

During her employment the claimant did not receive a contract of employment or payslips. The claimant believed that Respondent B was her employer but she later discovered when she commenced her employment that she would also report to Respondent A (a director of respondent D) who was involved in the business.

The claimant outlined a number of instances to the Tribunal involving another employee who was promoted to manager. After this employee became manager she treated the claimant differently from other employees. One day the claimant and the manager disagreed about the claimant working on the till. The manager told the claimant she was fired but Respondent B reassured the claimant she was not. The manager was transferred to another shop.

On the 3rd November 2008 a new manager was appointed to the shop. On the same day Respondent A attended at the shop where the claimant worked and asked her to sign a document of rules and regulations. The claimant was asked to date the document August 2007. The rules and regulations also included rules concerning the uniform. The claimant had previously been told that she was required to wear only one part of the uniform with the logo. She mentioned this to Respondent A at the time of signing the document and he reassured her about it.

On the 7th November 2008 the claimant was wearing part of the uniform, as were other employees. The new manager requested that the claimant wear another part of the uniform. The claimant went to the store but the shirts that were there did not fit. The new manager contacted Respondent B by telephone and he informed the claimant she should go home if she was not wearing the uniform. The claimant queried with him if other staff members should also leave if they were not wearing the full uniform. Respondent B told her the other staff were required in the shop as a delivery of stock was due in.

After this conversation the claimant telephoned Respondent A to clarify if she had lost her job. He reassured the claimant after he had spoken with Respondent B that the claimant would remain in her employment. The claimant informed Respondent A that she was attending the doctor that day as she was feeling unwell but she hoped to be in attendance at work the following day. Later that day a test confirmed that the claimant was pregnant. When she attended at the doctor's he informed her she was suffering from an infection and wrote a medical certificate stating that she was unfit to work for two days.

When the claimant discovered she was pregnant on the 7th November 2008, she informed both Respondent A and Respondent B by text message that day. The claimant realised she was dismissed when she received a letter of termination which was posted on the 10th November 2008. The claimant subsequently received her P45.

The claimant sought other work but without success.

Determination:

It was noted by the Tribunal that the claimant's representative made numerous requests for information to clarify the identity of the claimant's employer but no clarification was forthcoming.

The Tribunal is satisfied that the respondents were duly notified of the dates of hearing. Neither the respondents nor a representative on their behalf attended the second day of hearing.

Based on the claimant's uncontested evidence the Tribunal finds in favour of the claimant and awards her the sum of €19,600.00 under the Unfair Dismissals Acts, 1977 to 2007.

The Tribunal also finds that the claimant is entitled to €400.00 in lieu of wages under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

The Tribunal dismisses the claim under the Organisation of Working Time Act, 1997, as no evidenced was adduced by the claimant in relation to this claim.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)