

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE –**first named claimant**

UD384/2009

MN399/2009

WT172/2009

EMPLOYEE –**second named claimant**

UD385/2009

MN400/2009

WT173/2009

Against

EMPLOYER –**respondent**

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. K.T. O'Mahony B.L.

Members: Mr. M. Forde
Mr. K. O'Connor

heard these claims at Killarney on 11 November 2009
and 19 January 2010

Representation:

Claimants: Mr. Con Casey, SIPTU, Connolly Hall
Upper Rock Street, Tralee, Co. Kerry

Respondent:
Mr. John O'Dwyer, O'Donoghue O'Dwyer Solicitors,
on the first day and Ms. Clodagh Brick B.L. instructed by
Mr O'Dwyer on the second day

The determination of the Tribunal was as follows:

A preliminary issue arose in both claims herein.

It was contended on behalf of the respondent that, because the claimants had not been employed by

the respondent until around 9 November 2008, neither of them had the requisite twelve months continuous service to maintain a claim under the Unfair Dismissals Acts. The respondent operates a fast food restaurant, which opened under its name, on or about 9 November 2008. Prior to this there had been a fast food restaurant operating from the same premises, albeit under a different name, which employed both claimants as well as all the other employees of the respondent, and which closed for business on or about 2 November 2008. The previous lessee surrendered the lease to the lessor and the respondent commenced business under a new lease. Having considered the evidence of the respondent's managing director the Tribunal was satisfied that the European Communities (Protection of Employees' Rights on Transfer of Undertakings) Regulations, 2003 applied to the transfer. Accordingly, the service of both claimants with their previous employer was preserved. Thus, as the employees had more than one year's continuous service the Tribunal had jurisdiction to hear their claims under the Unfair Dismissals Acts.

The first named claimant was one of the longest serving employees with the previous employer. Prior to the transfer she had worked as a fully qualified full-time counter assistant in the restaurant from 5 November 2007. With the respondent's approval, she obtained a part-time job (10 to 15 hours per week), in a sandwich bar from 5 December 2008. This restricted the hours for which she was available to work for the respondent. Throughout January 2009, due to a downturn in trade at the restaurant, the first named claimant's hours were reduced and on 28 January 2008 the manager of the restaurant told her that there were no hours available for her to work the following week. This was despite the fact that other counter assistants who had less service than she had were getting more hours than she was. When she asked the manager if she was dismissed she told her that there was no work for her and gave no reason for this. Her last day of work for the respondent was Sunday 1 February 2009.

The previous employer employed the second named claimant as a grill person from 20 April 2007. He was paid an hourly rate and was one of three grill persons. He was the grill person with the longest service. Duty Managers may also operate as grill persons. At the time of the transfer at least one of the duty managers was paid on a per shift basis; this was a flat rate regardless of whether his rostered shifts were extended or contracted. After the transfer the duty manager, who was on the per shift rate, approached the second named claimant about changing to a per shift rate of pay and guaranteed him five shifts per week and told him that the alternative would be to have his hours reduced or have no hours at all. While it is not clear if this approach was at the behest of management it is common case that on 30 November 2008 the second named claimant agreed with the managing director (MD) to change to the per shift rate of pay.

During January 2009 the second named claimant became unhappy when he was reduced from five to four shifts per week. It is his position that he approached MD with a view to reverting to an hourly rate and was told that if he reverted there would not be enough hours available for him. According to the second named claimant MD was surprised when he told him that he had been guaranteed five shifts per week and told him no such guarantee could be given to anyone. The second named claimant then asked for a document for Social Welfare so that he could work three days per week and receive payment from Social Welfare in respect of the days not worked. It was his evidence that on finishing his shift on 24 January 2009 the manager spoke to him privately and told him that she had no hours for him. When he asked if he was being dismissed she replied that he was because she had no hours for him.

The manager denied telling the second named claimant, on 24 January 2009, that he was dismissed. It was her evidence that she told him that there were no hours for him the following week. She had no specific reason for choosing not to give the second named claimant some hours that week. She

had been instructed to reduce overheads and cut costs. On the following Monday the second named claimant, accompanied by his wife, came to the premises to ask for his P45 and stated that he was no longer working for the respondent.

Determination

The Tribunal accepts that the respondent suffered a downturn in business in January 2009. The Tribunal further accepts that both claimants were dismissed and that the dismissals were by reason of redundancy.

The first named claimant was among the most senior of the counter assistants and the Tribunal heard no evidence of any objective criteria being used in the selection of the first named claimant as a candidate for redundancy. Whilst her other work impinged somewhat on her availability for work for the respondent she was not at any time informed that this could affect her continuing employment with the respondent. Accordingly the selection was unfair. The Tribunal awards her €1,050-00 under the Unfair Dismissals Acts, 1977 to 2007. As the first named claimant received no notice of her dismissal the Tribunal awards her €130-00, being one week's pay, under the Minimum Notice and Terms of Employment Acts, 1973 to 2005. As no evidence was heard in regard to the claim under the Organisation of Working Time Act, 1997 that claim fails.

The second named claimant was the most senior of the grill persons at the relevant time. There was no evidence of any objective criteria being used in his selection for redundancy. Accordingly the selection was unfair and the claim for unfair dismissal succeeds. The Tribunal awards him €4,000-00 under the Unfair Dismissals Acts, 1977 to 2007. As he did not receive any prior notice of his dismissal the Tribunal awards him €350-00, being one week's pay, under the Minimum Notice and Terms of Employment Acts, 1973 to 2005. As no evidence was heard in regard to the claim under the Organisation of Working Time Act, 1997 that claim fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)