

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE – *claimant*

CASE NO.
UD87/2009

against

EMPLOYEE – *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

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

Members: Mr. J. Hennessy
Ms. E. Brezina

heard this claim at Kilkenny on 10th July 2009

Representation:

Claimant(s): Ms. Siobhan Phelan B.L. instructed by Ms. Sarah Brophy, James Harte & Son, Solicitors, 39 Parliament Street, Kilkenny

Respondent(s): Mr. Michael Murray B.L. instructed by Mr. Nicholas Russell, O'Shea Russell, Solicitors, Main Street, Graignamanagh, Co. Kilkenny

The determination of the Tribunal was as follows:-

Summary of the Evidence

The respondent owns and runs a newsagents and convenience store which has a deli section. The business has been in the family since the 1930s. DP and his wife DC are the current directors of the respondent, and proprietors of the business for over eighteen years. The store opens from 8.00am to 9.00pm, seven days a week. The respondent endeavours to employ an age-balanced staff as a person must be eighteen years of age or over to sell cigarettes, wine and rent DVDs to customers. The claimant commenced employment with the respondent in September 2006. She presented herself as being experienced and having previously worked in a number of stores including large ones such as Dunnes Stores and Superquinn.

It was the claimant's evidence that she did not receive a contract of employment or a disciplinary procedure, nor did she receive payslips on a regular basis. DP explained that due to it having been a difficult time in their personal lives because of his wife's illness, the finer points of paperwork in relation to contracts of employment and payslips had been overlooked. The respondent had worked on the basis of a person's suitability for the job and they were flexible with employees in that they

allowed the swapping of shifts. Other issues in relation to the operation of the shop had been given priority and it had been explained to staff, including the claimant, that flexibility was required. The claimant had no difficulty with this. The respondent wanted to run a small, compact team and tried to facilitate staff. Discipline was by way of a word in someone's ear. Staff were paid above the rates in the Joint Labour Committee Grocery Employment Regulation Order in order to achieve their flexibility.

DP was surprised when he found that the claimant was not familiar with the operation of the tills or "chip and pin" which at that time was replacing the swipe cards. The respondent provided whatever training was required and everyone was given training. It was the respondent's evidence that the claimant began her employment on a two-month probationary period where she worked alongside an experienced person. At the time, there had been a staff of ten employed in the shop and this had been how training was done. If the claimant encountered any difficulties, she was to let the respondent know. The claimant denied that there had been a probation period.

In August/September 2007 the claimant and her co-worker made a strong case to change from working weekends and although DP and DC found it difficult, they acceded to the request. Thereafter DP and his wife worked the 8.00am to 3.00pm shift, the claimant and her co-worker worked the 3.00pm to 9.00pm shift and another woman was employed to do weekends.

The HASSAP system was in place in the deli. A daily checklist had to be completed to ensure all tasks had been done. However, the respondent found that although the checklist was completed by the claimant, her work was not up to standard. Whenever DP spoke to the claimant about some thing that had not been done or needed attention, she would blank him for two or three weeks. DP gives the staff a "pep talks" when some general point had to be made but when it was an individual matter, he would take an employee aside to speak to them.

It was the claimant's evidence that she had previously worked in a deli in a well-known golf club. Based on this experience, she had cleaned the respondent's deli in places that had never been cleaned before. She did not recall receiving any pep talks from the respondent in relation to this duty and no specific issues had been raised with her.

Smoking in front of the shop did not give a good impression to the public and staff were admonished for doing so. The yard behind the shop was the designated smoking area. This was made clear to all the staff and applied to each one of them including the respondent's own daughter. DP denied picking on the claimant about smoking.

It was the claimant's evidence that, as she never received a break, she would go out front to have a cigarette but she would only have taken a few puffs when DC would come out and tell her that there were customers in the shop. DC also told her not to use her telephone in the shop while ignoring other employees who used it. The claimant denied having been informed about the respondent's smoking policy. Her position was that all staff smoked at the front and back of the shop. She felt that the respondent wanted her to leave.

The respondent sells seven different titles/newspapers and unsold copies can be returned. The mastheads of the unsold newspapers were cut off and the number of these was recorded in a book each day. At the end of a week, the numbers in the book were totalled and should correspond to the number of mastheads. Failure to make a return results in a financial loss to the respondent. The return procedure was changed in that as regards some newspapers, it was the bar codes that were to be cut out off the unsold newspapers and put on file and the number of same recorded in the book.

The new procedure had been going on for six months and was simple and the claimant had to be aware of it. DP was amazed to see the claimant's co-worker in the store one evening during her holidays doing the newspapers returns. When DP asked the claimant if there was a problem, she had replied that there was not. The following week, when the claimant was on holidays, the respondent realised that there was a problem as regards the returns. There was also a problem with the out-of-date magazines. The monthly magazines had not been touched and the account for the newspaper returns was incorrect. The respondent had to sort out the problem. The claimant should have told him that she was unsure about doing the job and he could have then dealt with the matter. However, when she was asked, the claimant had said she did not have a problem. Not admitting this was the last straw for the respondent.

It was the claimant's evidence that she and her co-worker had taken turns doing the newspaper and magazine returns. However, the system for doing the returns changed some months prior to her dismissal. While DP trained her co-worker, he did not train her in the new system and she watched her co-worker to learn how to do them. One night, while her co-worker was off on holidays, she had a problem doing the returns and when she telephoned her co-worker for advice, her co-worker told her that she was coming in and would do the returns for her. She did not contact DP about it because he would probably have given out to her. When DC questioned her the following Monday about it, the claimant explained that she had not asked her co-worker to come in and that she had indicated to her on the telephone that she was, in any case, coming in to the shop that evening. The respondent's daughter dealt with the magazines, which involved taking the first page off but if it was not busy in the shop, the claimant and her co-worker would do the magazines.

The claimant denied blanking DP. It was her evidence that it he who was "cold". She agreed that she would get upset if her work was criticised. It was further her evidence that she had never received a warning, either verbal or written from the respondent that her work was sub-standard, or in relation to her management of the tills or that her job was at risk because of her performance. She denied DP's assertion that she did not get on well with the other staff

It was the respondent's evidence that the claimant had commenced employment enthusiastically but this had not continued. The situation was going downhill and the issue of the newspaper returns was the last straw for them. On at least six to eight occasions over the course of her employment, DP had spoken to the claimant discreetly about keeping her work standards up; this occurred more towards the end of her employment. However, he had not kept any records of these. Things were not right. The claimant had been distant and cold with DC and the other members of staff. The directors and their daughter discussed the issue and came to the conclusion that it could not continue. On Thursday 26 June 2008, DC telephoned the claimant and told her it was not working out, that neither she (the claimant) nor the directors were happy at work and that she would send her on her wages and P45. The claimant had replied "o.k." The respondent believed that the parties had reached a mutual agreement to end the claimant's employment. During the telephone conversation, the respondent did not tell the claimant the reason why she was ending the employment relationship. €600.00 had been paid to the claimant as part of the agreement and when they heard nothing further, they had assumed that the agreement was accepted.

It was the claimant's evidence that over a few months before her holidays, the respondent had been picking on her and she had felt like walking out. When she was going on holidays, no one had said anything to her or had wished her well. While driving home from Dublin on Friday 27 June 2008, the last day of her holidays, she received a telephone call from DC telling her that she did not need

her to come back to work, that she was clearly not happy in her job, that things were not working out and that she (DC) would forward her wages to her. The claimant was so shocked at this that she just said, "o.k." and cut off her mobile. She had not left her employment on an agreed basis. She did not call to the respondent to get an explanation as to why her employment had been terminated because she had been too shocked and hurt. In any event, the claimant felt that DC could have telephoned her with an explanation. DC had no reason to dismiss her. She received a letter enclosing her P45 and a cheque for €600.00 in lieu of notice by post the following Monday.

Determination:

Whilst there is a dispute between the parties as to whether DC made the telephone call to the claimant on 26 June or 27 June 2008, it is common case that the employment relationship was terminated during that telephone conversation. The Tribunal rejects the respondent's contention that the employment was terminated by way of mutual agreement and finds that DC dismissed the claimant during that conversation.

The respondent did not establish if the claimant was in a position to deal with such a telephone call at the time. The dismissal was summary and devoid of any procedures. No reason or explanation was given to the claimant for her dismissal. While DP spoke to the claimant about her performance on several occasions, the Tribunal is satisfied that the claimant never received a warning to the effect that her job was under threat. Accordingly, the Tribunal finds that the dismissal was unfair and the claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds.

The Tribunal accepts that the claimant's work performance somewhat deteriorated over time and that as well as the general pep talk given to all employees, DC had to speak to the claimant on a number of occasions about her falling standards. Furthermore, the task of making newspaper and magazine returns is not a complicated one. While there was a conflict of evidence as to who was meting out the cold and silent treatment to whom in the workplace, the Tribunal accepts on the balance of probability that the claimant did not take well to correction. For these reasons, the Tribunal finds that the claimant contributed to her own dismissal. Having taken the claimant's contribution to her dismissal and her duty to mitigate her losses into account, the Tribunal awards the claimant compensation in the sum of €7,250.00 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

