

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S):
EMPLOYEE - appellant

CASE NO.
UD1228/2008

against the recommendation of the Rights Commissioner in the case of:

EMPLOYER -respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. K. Buckley

Members: Mr. M. Forde
Mr. J. McDonnell

heard this appeal in Cork on 9 September 2009 and 25 January 2010

Representation:

Appellant(s):
Mr. David Waters, Sullivan Waters & Co, Solicitors,
West End, Mallow, Co. Cork

Respondent(s):
Ms. Maeve Cahill, IBEC,
Knockrea House, Douglas Road, Cork

The determination of the Tribunal was as follows:-

This appeal arose as a result of an employee (the appellant) appealing against a recommendation of a Rights Commissioner R-063715-UD-08/JT in the case of an employer (the respondent)

Preliminary Issue

The employee resigned from her position with the employer with effect from 12 October 2007. On 7 April 2007 the employee's then solicitor posted a notice of claim for constructive unfair dismissal to the Rights Commissioner service. When the matter came before the Rights Commissioner it emerged that the notice of claim of unfair dismissal was date-stamped as having been received by

the Rights Commissioner service on 14 April 2007. On that basis the Rights Commissioner found that there were no exceptional circumstances which had prevented the notice of claim being lodged within the period of six months beginning on the date of dismissal.

It was submitted by the employee's representative that, as section 8 (2)(a) of the Unfair Dismissals Acts, 1977 to 2007 provides that

a claim for redress under this Act shall be initiated by giving a notice in writing (containing such particulars (if any) as may be specified in regulations under section 17 of this Act made for the purposes of subsection (8) of this section) to a rights commissioner or the Tribunal as the case may be-

Then the Tribunal should consider section 25 of the Interpretation Act, 2005 which provides

Where an enactment authorises or requires a document to be served by post, by using the word "serve", "give", "deliver", "send" or any other word or expression, the service of the document may be effected by properly addressing, prepaying (where required) and posting a letter containing the document, and in that case the service of the document is deemed, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Then it was open to the Tribunal to find that, as the notice was posted on 7 April 2007, then in the ordinary course of post the notice of claim should be deemed to have been given within the period of six months beginning on the date of dismissal. In the alternative it was submitted that the events surrounding the giving of the notice of claim amounted to exceptional circumstances.

The employer's representative submitted that there was ample case law before the tribunal to show that the circumstances outlined by the employee did not amount to exceptional circumstance.

Preliminary Determination:

Based on the sworn evidence of the employee's former solicitor and her secretary the Tribunal is satisfied that the notice of claim was posted on 7 April 2007. Nevertheless the Tribunal is also satisfied that the date stamp of 14 April 2007 on the notice of claim sent to the Rights Commissioner service proves the contrary and on that basis the Tribunal finds against the appellant on this point. However the Tribunal is satisfied that the particular circumstances of this case represent exceptional circumstances preventing the notice of claim being lodged within the six-month period. On that basis there is jurisdiction to hear the employee's claim of constructive dismissal under the Unfair Dismissals Acts, 1977 to 2007.

Substantive Case

In an opening statement on the substantive unfair dismissal claim, the appellant's representative said that this was an unusual case in that the appellant, who had been employed by the respondent for about four-and-a-half years, had approached the respondent around September 2007 regarding dissatisfaction with her job. She was offered an alternative post which was, in effect, a promotion.

This was verbal. She was told that she would have to resign from her own job so that it could be advertised. Subsequently, the respondent denied having made the offer of a new job but said that the old job was gone. The respondent offered her a relief job but could not guarantee her shifts.

In response, the respondent's representative stated that it was in dispute that there had been any dismissal of the appellant who had been a house manager for the respondent which provided residential childcare for children who were at risk.

After the Tribunal heard sworn testimony from the appellant and from witnesses for the respondent, the appellant's representative submitted that it was open to the Tribunal to find that the appellant had indeed been offered the post of training officer with the respondent and had thereby been led to give a written resignation from her house manager post only to subsequently find that the offer of the training officer post was revoked. He submitted that it had been clear from at least one respondent witness that the appellant had believed that she had been offered another job. She was sent for a course by the respondent which was now alleging that this had been just an altruistic gesture to someone who was leaving and might not ever return to working for the respondent in any capacity. It was submitted that the respondent's procedures had been inappropriate and that the fact that a meeting was held on 26 September 2007 reflected the fact that the appellant believed that she had been offered the training officer post. It was submitted that, even taking the respondent's case at its best, there had been a misunderstanding which should not have been allowed to occur. The appellant's case was that she had been offered a job but that the offer had been revoked and that her claim under unfair dismissals legislation should succeed.

The respondent's representative submitted that the appellant had not discharged the onus of proof that was on her to show that her claim under unfair dismissals legislation should succeed. It was contended that the appellant had never raised any grievance with the respondent and had not stated in detail why she had resigned. It was argued that the appellant had resigned before there had been any mention of the training officer post. The appellant had signed a supervisor's form giving the reason for her resignation as having been the fact that she had done residential work for too long and making no mention of the training officer post. The Tribunal was reminded that a respondent witness had testified that the appellant had told her that she (the appellant) had been offered a post in the public sector. Finally, it was submitted that the appellant had rejected the role offered to her by the respondent on 26 September 2007 and that she had failed to show that she had attempted to mitigate in any meaningful way the financial loss she had incurred after her employment with the respondent.

Determination:

After hearing conflicting oral testimony as to what had been said between the appellant and the respondent's owner, the Tribunal has had particular regard, in arriving at its determination, to the appellant's 12 September 2007 written resignation and to a supervision form dated 13 September 2007 both of which were signed by the appellant.

On the supervision form, rather than the appellant remaining silent as to why she was leaving, the appellant signed off on a statement by the supervisor that the appellant's resignation was "as a result of being in residential so long", that the appellant "has come to the stage where she needs to move on" and that there was an "exit interview scheduled also".

Also, the resignation letter itself concludes as follows:

"I wish to take this opportunity to thank you for the time that I was given in (the respondent) and I wish you every success for the future."

The above two documents which the appellant signed appear more indicative of someone who had made up her mind to leave (even if she subsequently changed her mind) than of someone who was merely going to take up another position with the same employer. In all the circumstances of this case, the Tribunal is unanimous in finding that the appellant has not discharged the onus that was on her to satisfy the Tribunal that the termination of her employment was brought about by anything other than her own voluntary resignation whether subsequently regretted or not. The appeal against Rights Commissioner Recommendation R-063715-UD-08/JT under the Unfair Dismissals Acts, 1977 to 2007, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)