

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
EMPLOYEE
- claimant

CASE NO.

UD1117/2008
MN1026/2008

WT461/2008

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: Mr. K. Buckley

Members: Mr. D. Hegarty
Mr. D. McEvoy

heard these claims in Cork on 22 May 2009 and 29 September 2009

Representation:

Claimant:

Ms. Emer O'Callaghan, Barry M. O'Meara & Son, Solicitors,
18 South Mall, Cork

Respondent:

Mr. Dan Murphy, Carey Murphy & Partners, Solicitors,
23 Marlboro Street, Cork

The determination of the Tribunal was as follows:-

The fact of dismissal was in dispute in this case

Claimant's case:

The claimant commenced her employment with the respondent in October 2006 as a sales assistant. Her duties included working with fabrics, serving customers and stocktaking. She worked on a full time basis for the first year and then for child minding reasons she worked part-time. There were no complaints about her work and she did not have a contract of employment or grievance procedures.

On the week of her dismissal on 29th May 2008 she was asked to work two extra days Friday and Monday. Her normal days were Thursday and Saturday. Some weeks she was asked to work one or two extra days. She left a message to get the manager, BW to ring her on the Monday. The claimant said that the Monday was okay and she would work until lunchtime on the Friday. BW said she had bad news that lunchtime was cut to half hour from an hour. She told BW she was checking her entitlements under the Organisation of Working Time Act. When she spoke with M, shop assistant she was not aware of the proposed lunchtime cut.

On Thursday 29th May 2008 the claimant was working along with BW and M. At around 11am she said to BW that if it was okay she would work up to lunch time on the Friday. She then asked if the one hour lunch was okay that day and BW's response was if the claimant took a half hour lunchbreak she was welcome to come back and if not, don't come back. The claimant's responded that based on the Organisation of Working Time Act she would be taking the hour. BW rang VM, the proprietor and when he came in nothing was mentioned about the lunch break. He and BW took the rosters from the filing cabinet and sat in the car and when BW returned there was no mention of the lunch break. The claimant would have lunch at 1pm and at 1.10pm BW asked if she was taking any lunch to which the claimant replied that she would do so when finished with customers. BW then repeated what she had said earlier in relation to the length of lunch break and that she was only welcome to come back if she took the half hour. BW got the claimant's wages and it was for one days pay. The claimant did not understand why she was letting her go. The claimant called M and asked BW to repeat what she had said earlier and she did so. Since the claimant had set up a Christmas club the previous year she stated that she wanted to sort out other people's money before leaving. The claimant left work at 1.25pm and rang the Citizens Information Office who advised her to return to work in the afternoon. As far as the claimant was concerned she did not resign.

The claimant rang from home during lunch and asked to speak to BW. She mentioned what had happened to M and she felt that the claimant had been fired. The claimant told BW she could not understand why she had been fired and BW's response was that she had not fired her. The claimant mentioned the half hour/hour lunch break and she then came back to work. When she arrived back at work BW was serving a customer and the claimant waited until she was free to talk to her. The claimant stated that she was rostered to work from 2pm to 5.30pm and she also requested a letter to say she had not been dismissed. BW stated that she would have to get in touch with VM and she later told the claimant that the letter would be ready for her the next day. She left and went home and the claimant received a telephone call from BW later that evening in or around 5.30pm to say that the letter would be ready for collection the next day. When the claimant rang her Solicitor she was advised not to go back to the respondent. Correspondence was exchanged between the legal representatives for both parties and a meeting was arranged for the 18th June 2008. During this meeting CM, one of the respondent's principals, offered the claimant an apology and there was agreement that the one hour lunch break would apply. It was also agreed that once the

claimant made the decision to return to work the respondent would consider paying her for the time she was off and legal fees were also to be discussed.

Further correspondence was exchanged between the legal representatives and the claimant attended for work as agreed on 10th July 2008. When the claimant went in to work BW and M were there and the claimant mentioned to BW that she wanted to see what hours she was rostered and she also wanted to talk about holidays. BW suggested that they would not discuss holidays until the complete matter was resolved and that her roster had not been sorted. The claimant stated that she would telephone her solicitor. When the co-owner, V's brother, came in he stated that V was more familiar with the claimant's case and that he would arrange a meeting for Tuesday however the claimant reminded him that she did not work on a Tuesday. When she rang her solicitor and told of the proposed meeting she was told that the respondent wanted from the claimant written confirmation that she was not dismissed. Her solicitor suggested that the claimant would not return to work until the matter was fully resolved. At this point the claimant went home. As far as the claimant was concerned she was fired and was not going to sign such a letter. In further correspondence between the legal representatives it was agreed that the respondent would make a payment towards the claimant's legal fees as a goodwill gesture and her loss of wages and the hour lunch break was also discussed. As the claimant was not prepared to sign a letter stating she was not dismissed the parties failed to resolve matters. By letter dated 18th July 2008 the claimant's legal representative requested her P.45. The claimant then outlined to the Tribunal her efforts to obtain alternative employment

In cross-examination witness stated that when it was suggested that her lunch break be reduced to a half hour there was no discussion in relation to her being paid an extra half hour.

Respondent's case:

In sworn testimony, BW (a fabrics manager with the respondent) said that in late May 2008 she was told that lunch break would change from an hour to a half-hour and that she was to inform staff of this. She did so telling girls not in work at the time by telephone. The claimant was not happy about this change. BW did not see the claimant until a couple of days later (on 29 May 2008) when they spoke about the lunch break and BW said that they would lose a half-hour from the lunch break. The claimant said that she had found out that she was entitled to and would take an hour for her lunch break.

Close to lunchtime on 29 May BW said that the break would be a half-hour. The claimant repeated that she would take the hour. BW had spoken to VM (one of the respondent's principals) about this and had been told that the claimant was not to come back if she was not back in half an hour. BW told the claimant this just before the claimant went on lunch. The claimant asked BW to repeat this in front of a staff member. The claimant called over a staff member (MF) and repeated it. BW said: "As manager of the shop, I'm telling you your lunch is a half an hour and if you're not back in half an hour you're not to come back. When the claimant turned and walked away BW heard the claimant say that she guessed that she was being fired. BW told the claimant that she (BW) had not said "fired".

BW told the Tribunal that she did not say anything to the claimant about the Christmas club and that she could not recall anything about that.

The claimant went on her lunch break and did not come back within half an hour. The next girl went and BW was there on her own. Over an hour passed without the claimant coming back. The claimant subsequently, by phone, asked for a letter saying why she had been fired. BW replied that she had not been fired and that she (BW) would have to talk to VM. The claimant went away. BW spoke to VM and told him what had happened. VM rang back and asked that the claimant go in at 11.00 a.m. on Friday (30 May 2008). Reading from a note (that she had made on the following Monday) BW said that she had phoned the claimant to inform her of the time of the meeting with VM. BW thought that it would all be sorted out. She was not sure if the claimant asked what the meeting would be about.

Asked at the Tribunal hearing why she had made a note, BW said that she had been very upset about what had happened, that the claimant had kept saying "fired" and that BW had never said that. No-one had told her to do a note but she told the respondent about it when the case came up.

Speaking of text messages she had received after Thursday 29 May 2008, BW said that the first was from LI saying that she was not coming in until the situation with the claimant was sorted out. This confused BW. On the Saturday BW got a text message from LA saying that she could not, in all justice, go into work. BW could not recall the exact words. She never saw either girl again.

On 10 July the claimant returned to work, was welcomed back and worked for a while. Then CM (another of the respondent's principals) came in. The claimant had a phone with her and said she was expecting a call. Subsequently, the claimant took her bag and said there would be a letter for VM because she was going. CM was with people then. BW said that she would tell CM. BW told the Tribunal that she had given no reason for the claimant not to stay at work and that she did not believe that CM had given any reason.

Asked at the Tribunal hearing if VM had been asked why the lunch break had changed from an hour to a half-hour, BW replied that all other sections in the respondent had a half-hour lunch break but that her section had a whole hour. Six people were affected. They were told that it would change. An incident had occurred because a girl had not rung in. BW had expected to be paid for losing a half-hour of her lunch break. She had thought that this would be sorted out. Everybody had complained about the change. BW had told VM about this but VM had not met staff about the change. Asked at the Tribunal hearing if she had suggested a meeting, BW replied: "No, not on that day."

Asked how staff had reacted to the change, BW replied that everyone had just taken the half-hour. Even LI and LA had done so until the Thursday when BW had got the first text message. However, LI and LA had not come back. BW confirmed that the respondent had paid staff for the half-hour lost.

A respondent employee (MF) was asked at the Tribunal hearing if the claimant had asked that something said be repeated in front of MF. In sworn testimony MF said that BW had said to the claimant that the claimant was not to come back if she took an hour for lunch rather than a half-hour.

Asked if something had been said about the Christmas club, MF denied this saying that she had been a member of the said club but that, as far as she knew, that club had ceased to exist long

before that and that, if there had been a new club, she had not been in it.

It was put to MF that there had been a suggestion that the claimant had come back and had sat in a car with MF. MF replied that she had said nothing about the respondent losing a lot of staff. Asked if she had said anything to VM about a meeting, MF replied that VM had said that he would have an 11.00 a.m. meeting with the claimant. MF confirmed that she had been paid for losing a half-hour from her lunch break.

CM (abovementioned as being one of the respondent's principals) gave sworn testimony that he was a director of the respondent based at the respondent's premises. Asked about Thursday 10 July 2008 when the claimant returned, CM said that, although he did have other staff, he had gone to welcome the claimant back because she had been out. He was quite friendly and cordial with her. He had known that two other members of staff were out.

VM (abovementioned as being one of the respondent's principals) gave sworn testimony. He was asked why the respondent had changed the staff's hours. He replied that the respondent employed about thirty-two people of whom six worked in fabrics. He said that there had been many complaints from other staff about six people getting an hour for lunch and that he had wanted to put this right.

Speaking about breaks, VM said that all employees (including those in fabrics) would get a fifteen-minute morning break. There was a kettle under the counter and also a full canteen. Generally this break would be at about 11.00 a.m. but, if it was busy, it could be before or after that time.

However, VM told the Tribunal that he fully accepted that the respondent had not used the best way of approaching the breaks issue and that he could well understand that staff would be upset. He said that he had been "getting it in the neck" from other staff.

VM said that there was now a morning break and a half-hour lunch break. In addition, there could be a cup of tea in the afternoon. VM stated that employees were getting paid for the half-hour lunch break.

Regarding Thursday 29 May 2008, VM told the Tribunal that BW had rung him saying that the claimant was not happy and was going to take a full hour for lunch whereupon VM had told BW that, if the claimant did not come back in half an hour, then the claimant was not to come back. Subsequently, BW had rung to say that the claimant had not come back within half an hour and that the claimant had asked for a letter saying that she had been fired. BW told him that she had not fired the claimant.

VM did not tell BW that he would have a letter for the claimant but he set up a meeting for the next day. He brought someone to take notes and waited. He wanted to talk to the claimant about what had happened so that there could be an opportunity for explanation and so that the matter could be cleared up.

Asked why this had not been done on the evening of the day that the claimant had left, VM replied that the claimant was gone, that he had wanted BW to set up a meeting with the claimant and that he had thought this was "a definite appointment".

VM told the Tribunal that LI had texted on Thursday evening and LA on Friday evening and that, as “these three were rostered for Saturday”, he now had no staff for Saturday and he had asked two others to help him out.

VM made an attempt to contact the claimant. He contacted his solicitor and got a letter from the claimant’s solicitors. VM said in a letter that the claimant had not been dismissed. He had wanted to get talking and to go back to work. They met in a hotel. VM apologised to the claimant for saying that she had said that she would be at the Friday meeting. She had not done so.

VM told the Tribunal that he held his hands up and that he had been told that the claimant had been within her rights. The claimant still wanted to take the hour though the respondent was happy to pay her. VM admitted to the Tribunal that his preference was that the claimant would take the half-hour but that the claimant was reluctant. He was happy to have the claimant back as the only person on a one-hour lunch break. The respondent had had no contact from the claimant or from staff but subsequently paid for the lunch break reduction.

When it was put to VM that the claimant had thought that she might be victimised VM replied:

“We’d not stand for that.”

When it was put to VM that the claimant had had a concern about legal expenses, he replied:

“We considered it and made an offer.”

The respondent subsequently slightly increased its small offer with regard to the claimant’s legal costs. VM told the Tribunal: “We wanted an end to this matter.”

Regarding the claimant’s return to work in July 2008, VM said that he had been on holiday in Spain at the time and that he had been annoyed that the claimant had gone back and had left. BW had not expected the claimant back on that particular day (10 July 2008) but the respondent had been glad to have the claimant back. The claimant had not been dismissed. The respondent felt that it was nonsense that it had an obligation to make a gesture regarding costs.

Asked about the present position, VM replied that the respondent was now “fully up to speed” with contracts, payslips and grievance procedure. He accepted that the respondent had not been “up to speed” previously.

Determination:

Having considered the evidence adduced, the Tribunal finds that it was reasonable for the claimant to assume that she had been dismissed. The respondent made significant attempts to rectify the situation. There was then fault on the part of the claimant. Taking all matters into consideration, including a substantial contribution by the claimant, the Tribunal, in allowing the claim under the Unfair Dismissals Acts, 1977 to 2007, deems it just and equitable to award the claimant compensation under the said legislation in the amount of €3,500.00 (three thousand five hundred euro).

The claim lodged under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, is dismissed because the Tribunal does not find the respondent to have been in breach of the said legislation.

The claim lodged under the Organisation of Working Time Act, 1997, is dismissed because the Tribunal does not find the respondent to have been in breach of this Act.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)