

CORRECTING ORDER

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE – **Claimant**

UD1194/2009

against

WT532/2009

EMPLOYER – **Respondent**

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. B. Glynn
Members: Mr. B. O'Carroll
Ms. H. Murphy

heard these claims at Athlone on 6 May 2010

Representation:

Claimant: Ms. Colette Egan B.L. instructed by Mr. Frank Sugrue,
Byrne Carolan, Cunningham Solicitors,
39/41 Mardyke Street, Athlone, Co. Westmeath

Respondent: Ms. Clare Hannon, Fintan O'Reilly & Co. Solicitors, Suite 5, Gateway Centre,
Monksland, Athlone, Co. Roscommon

The determination of the Tribunal was as follows:

This order corrects the original order dated 7 May 2010 and should be read in conjunction with that order.

Due to an error the names of the representatives were attributed to the incorrect parties, this order will correct that error and the representatives are as shown in this correcting order.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

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39/41 Mardyke Street, Athlone, Co. Westmeath

The determination of the Tribunal was as follows:

The respondent is a company with a franchise, since 1998, to sell shoes of a particular brand, which it does at two outlets, in Athlone and Letterkenny. It also retains a lease on a shop it used to operate in Athlone prior to the opening of the current Athlone shop in November 2007. There are two directors of the respondent PD and MD. PD, the managing partner, who is an accountant, carried out the bookkeeping role for the respondent prior to the opening of the new shop in November 2007. MD is the manager of the Athlone shop.

The claimant was employed from 26 February 2008 as a bookkeeper on a part-time three day a week basis working fifteen hours a week Tuesday to Thursday. The employment was uneventful until February 2009 other than to say that the claimant received a significant pay rise some six months into the employment. By February 2009 the effects of the economic downturn had begun to

affect the respondent to the extent that an assistant manager who left had not been replaced and a stock person had been let go. It also became necessary to seek to impose cuts in working hours on all other members of staff in the order of 20%. MD came to the conclusion that the claimant's position ought to be made redundant and that the two directors could absorb the bookkeeping duties. It is the respondent's position that PD felt sympathy for the claimant, whom he knew to be in financial difficulty following an earlier business she had been involved in, and sought to offer the claimant an alternative to redundancy in the form of a cut in her rate of pay to the minimum wage. The total number of staff in the Athlone shop has reduced from eighteen to twelve.

PD discussed this proposal, that the claimant consider a pay cut as an alternative to her redundancy, with the claimant on 18 February 2009. It was agreed that the claimant would go home and discuss the proposal with her family. In the event the claimant became unwell and submitted medical certificates such that she did not return to work until Tuesday 3 March 2009 by which time she had decided that she was not prepared to work for the minimum wage as she considered that to be demeaning. PD was out of the jurisdiction when the claimant returned to work but on 4 March 2009 she received a proposed revised contract from the respondent, which reflected the proposal that PD had put to her on 18 February 2009. She spoke to PD on the telephone that day and arranged to meet him the following day.

Following PD's return he met the claimant on the afternoon of 5 March 2009 in private in the kitchen of the Athlone shop. There is a dispute between the parties about the conduct of this meeting, each accusing the other of causing the atmosphere of the meeting to be tension laden or worse. At this meeting PD was now proposing ten hours a week for the claimant on the reduced rate of pay. The claimant was not prepared to accept this and told PD as much. PD left the meeting as he felt the claimant was out of control and when he returned after some ten minutes the claimant had left the shop saying in a raised voice "You haven't heard the last of this."

On 9 March the directors wrote to the claimant notifying her of the termination of her employment on the grounds of her position having become redundant. Included with this letter was a cheque for the monies thought to be owing to the claimant in respect of notice pay and outstanding annual leave. Following further correspondence the claimant received further payment in respect of unpaid entitlements for public holidays. There was a further dispute in the amount of some €93-00 relating to public holiday pay. When a cheque for this amount was furnished the claimant rejected it on the basis of the tone of the accompanying letter. The directors, in particular PD, have taken on the work, which was formerly carried out by the claimant. No replacement staff have been hired since the termination of the claimant's employment.

Determination:

In light of the prevailing circumstances in the respondent at the time of these events the Tribunal cannot accept the claimant's assertion that she did not see this problem for her employment arising. It was unfortunate that the claimant took ill after the meeting on 18 February 2009, as it appears that she refused to engage with the situation, which was developing in regard to her position. Whilst the meeting of 5 March 2009 was obviously an unpleasant experience for both parties which reflects no credit on either of them it is clear that the claimant made known that she was not accepting the proposal.

The Tribunal is satisfied that a genuine redundancy situation existed in the respondent at the time the claimant was declared redundant. Clearly the respondent was entitled to rely on Section 7(2)(b)

of the Redundancy Payments Acts, 1967 to 2007 which provides as a definition of redundancy

“the fact that his employer has decided to carry on the business with fewer or no employees, whether by requiring the work for which the employee had been employed (or had been doing before his dismissal) to be done by other employees or otherwise, or”

The claimant was the only member of staff involved in bookkeeping and, as such, was the only candidate for redundancy in this area where PD was ideally qualified to carry out this role; indeed he had carried out the role prior to the claimant being employed.

The claimant was dismissed by reason of redundancy and her selection, as the candidate for redundancy, was not unfair. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

The evidence having shown that the entire amount claimed under the Organisation of Working Time Act, 1997 has been furnished by the respondent, notwithstanding its rejection by the claimant, the claim under this Act also fails.

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This _____

(Sgd.) _____
(CHAIRMAN)