

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF
EMPLOYEE - claimant

CASE NO.
UD878/2009
MN908/2009
WT383/2009

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: Mr J Flanagan BL

Members: Mr A O'Mara
Mr J Moore

heard these claims in Navan on 7th April 2010

Representation:

Claimant(s):

Ms Eugenie Houston BL instructed by
Mr James Evans, James P Evans, Solicitors,
13c Main Street, Ongar Village, Dublin 15

Respondent(s):

Mr Brendan Steen, Steen O'Reilly, Solicitors,
31/34 Trimgate Street, Navan, Co. Meath

The determination of the Tribunal was as follows: -

It was the claimant's case that she had been unfairly dismissed by the respondent which had failed to follow fair procedures and had failed to afford her natural or constitutional justice. The claimant alleged that the respondent had not provided the claimant with sufficient statutory notice or payment in lieu of notice. A claim was also made under the Organisation of Working Time Act, 1997.

For the respondent it was contended that the claimant had not been dismissed but that she had in fact resigned. The claims under unfair dismissals, minimum notice and organisation of working time legislation were also disputed.

This case had been adjourned previously on the day of its first scheduled hearing date by the division then assigned to hear the case without evidence being heard and subsequently a new division of the Tribunal was assigned to the case. At the commencement of the hearing before the new division the respondent's representative applied for an adjournment. The respondent's representative stated that he had been in telephone contact with the principal of the respondent firm that very morning but that he was now appearing before the Tribunal without the principal or any other witness for the respondent being in attendance. The respondent's representative was not in a position to explain this absence of witnesses or to give the Tribunal any assurance that any witnesses for the respondent would appear even if the case were to be rescheduled by Tribunal. The claimant was present in person together with her barrister, solicitor and witnesses. The Tribunal refused the application for an adjournment because the failure of the witnesses to attend was without justification or excuse and because there was no assurance that this would not recur and in order to avoid further delay, inconvenience and expense to the claimant whose case would otherwise stand twice adjourned through no fault of her own.

The respondent's representative asked if the Tribunal would permit him to cross-examine the claimant's witnesses. The Tribunal held that the respondent's representative could make enquiries of the claimant's witnesses by way of non-leading questions but that he would not be permitted to pose questions as is usual in cross-examination that involved the putting of any alternative version of the facts to a witness for the claimant as the respondent did not have any witness of his own to give evidence to support the alternative version of the facts.

The claimant's representative furnished the Tribunal with a note estimating the financial losses incurred by the claimant subsequent to the termination of her employment. The respondent's representative queried the claimant's estimate and in particular raised a query about the claimant's hourly rate when employed by the respondent and which had formed a basis for this estimate. The respondent's representative then sought to furnish documentation of his own to the Tribunal. The claimant's representative strongly objected to the introduction of this evidence given that the claimant's solicitor had written to the respondent seeking to obtain this information but that it had not been provided. The claimant's representative submitted that it would be unjust if the respondent were to be allowed to introduce this evidence now. The claimant's representative invited the Tribunal to draw an inference from the fact that documentation was now "suddenly available". The Tribunal declined to draw any adverse inference from the failure of the respondent to furnish the documents requested by the claimant's representatives in advance of the hearing as there is no obligation upon a party to furnish documents in advance of a hearing and no procedure before the Tribunal akin to the procedures before the courts in respect of a notice for particulars. The Tribunal accepted into evidence these documents, which were copies of a contract of employment for the claimant, as the Tribunal held that the burden of proof lay with the claimant to prove the quantum of loss and because the claimant's representative stated that the claimant was saying that she must have signed the document.

The claimant's representative stated that the claimant had been paid €12.50 per hour (before commission) and not €12.00 or even €9.00 as had been suggested on behalf of the respondent. The respondent's representative queried the commission aspect of the claimant's estimate of the loss of earnings. The claimant's representative stated that the claimant had been employed to give out cards inviting members of the public to attend at the respondent's night club

at a concessionary rate and the claimant had been paid a commission calculated as a multiple of the number of cards presented at the club by customers. It was submitted that this commission had been paid in cash and that the claimant did not know whether or not all tax had been paid. It was submitted that €323.00 was the claimant's average weekly pay including commission although the documentation available permitted the Tribunal to infer a different figure.

It was submitted by the claimant's representative that the claimant had tried to mitigate her loss by endeavouring to find new employment but she had not yet been fully successful. It was acknowledged that the claimant had obtained some part-time work at a department store for a short period.

When the respondent's representative pointed out that it was his case that the claimant had resigned her position with the respondent the claimant's representative replied that this defence had not been raised until a couple of months before the hearing. Furthermore, in a notice for particulars the claimant had sought a reason for the dismissal and the respondent had given "unsatisfactory timekeeping" in reply.

The respondent's representative requested that the claimant be put on proof of dismissal even though the respondent had no witness present on its behalf. The Tribunal held that the employer was entitled through his representative to formally deny that the claimant had been dismissed, even where no witnesses were available to support this contention, and thereby the fact of dismissal was put in dispute by the respondent such that the burden of proof lay with the claimant to prove that fact.

The claimant's representative stated that the claimant would say that there had been no disciplinary hearing and that she had never been put on notice of any issues. About four weeks before the dismissal the claimant had been asked by her employer to try on an outfit which she might wear while promoting the business. The claimant tried it on in the ladies lavatory. The outfit was see-through and the claimant was unhappy to wear it. The respondent ultimately told the claimant that she did not fully represent the image of the respondent's venue.

The Tribunal was told that the nightclub was now closed for financial reasons. The respondent's representative was not sure when employees had been let go but said that trading had ceased before Christmas 2009. The claimant's representative said that this could have occurred in July 2009. The claimant herself said that the nightclub in question closed in July 2009, re-opened in November 2009 and closed again in December 2009.

The respondent's representative submitted that the claimant's employment had ended by mutual agreement after discussion of the claimant's timekeeping and that it was denied that the claimant had been dismissed. Although the nightclub was no longer operational the respondent company was still trading.

The claimant's representative explained that the claimant had been deployed to more than one nightspot where she promoted the venue in order to boost admissions and that she had also worked behind the bar.

Giving sworn testimony, the claimant said that her hourly rate from the respondent had previously been €10.00 per hour but that it had increased to €12.50 per hour. She also earned a commission of €1.00 on each concession card. Her average weekly pay was €323.00. When her employment was terminated the reason given for her dismissal was that her standards had dropped as a person

representing the respondent. She was let go that night and was not given any hearing. She was given no notice and took none of her annual leave entitlement.

The claimant believed that her dismissal had been completely unfair. Regarding timekeeping, she said that her parents had dropped her to work and that she was never late.

The claimant gave evidence supporting her claim that she had been entitled to four weeks of annual leave, which she had not received, and in support of her claim that she had not been given statutory notice of her dismissal or had not been paid in lieu thereof.

Under cross-examination, the claimant said that she had had no other job when she had worked for the respondent. She had been at secondary school when she had started the employment. She was a student on a college course from Monday to Thursday but worked full-time outside of college hours.

Determination:

The Tribunal allows the claim under the Organisation of Working Time Act, 1997, and awards to the claimant the sum of €1,292.00 (this amount being equivalent to four weeks' gross pay at €323.00 per week) in respect of annual leave outstanding to her at the time of termination of her employment under the said legislation.

The Tribunal allows the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, and awards the claimant the sum of €646.00 (this amount being equivalent to two weeks' gross pay at €323.00 per week) under the said legislation.

The Tribunal finds on the uncontroverted evidence of the claimant that the claimant was dismissed. The fact of dismissal thereby being established, it fell to the respondent to prove that the dismissal was not unfair. Evidence was not tendered by or on behalf of the respondent sufficient to discharge the burden of proof that the dismissal was not unfair and the Tribunal therefore finds the dismissal to have been unfair.

In calculating the award of compensation the Tribunal has had regard to the likely further duration of the claimant's employment with the respondent had she not been unfairly dismissed. The Tribunal has allowed for the periods of closure up to and including the ultimate date of closure of the nightclub. The quantum of loss has been calculated on the basis that the claimant would have been earning €323.00 per week. The Tribunal has also considered the claimant's potential entitlement to statutory redundancy had her employment ended when the nightclub in whose service she was employed finally closed in calculating her loss. The Tribunal makes no deduction for the short period during which the appellant obtained employment subsequent to her dismissal on the grounds that the particular employment was at times such that it could have been carried on by her while continuing in her original employment as an additional source of income. The Tribunal has also had regard to other less precisely calculated factors such as but not limited to the potential that the claimant might have been redeployed by the respondent to other work such as to bar work.

The Tribunal allows the claim under the Unfair Dismissals Acts, 1977 to 2007, and, in all the circumstances of the case, deems it just and equitable to award the claimant compensation in the amount of €20,000.00 under the said legislation.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)