

## EMPLOYMENT APPEALS TRIBUNAL

**CLAIM OF:**  
EMPLOYEE - *appellant*

**CASE NO.**  
UD1525/2009

Against

EMPLOYER - *respondent*

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr J. Sheedy

Members: Mr D. Hegarty  
Ms. P. Doyle

heard this claim at Cork on 27th July 2010

#### Representation:

Claimant: Eoin Clifford BL instructed by Seamus Hickey, Hickey Fitzgerald, Solicitors,  
O'Brien Street, Mallow, Co. Cork

Respondent: Frank Nyhan & Associates, Solicitors, 11 Market Square, (Opposite Courthouse),  
Mallow, Co. Cork

The determination of the Tribunal was as follows:-

#### **Respondent's Case**

The managing director of the respondents gave direct sworn evidence. They operate two food outlets one in Mallow and the other in Blackrock. The premises in Mallow is operating over 20 years and their employee numbers vary over the year depending on the season. They have a number of roles within the business, shift managers, area managers, trainers and crew. The claimant was employed as a part-time shift manager so she was responsible for running the restaurant from 5.00 pm to close.

At the end of 2008 and the start of 2009 Mallow lost a few key employers, a lot of shop units in the town had also closed up, the sales of their restaurant were down on the previous years. Also at this time the local county council proposed to close the Main Street where they are situated to carry out works and also there were four new outlets planned which subsequently opened.

After November and December of 2008 all costs in respect of their business were looked at to achieve savings. They examined their trading hours, outside services and labour costs. Staff rosters were changed and hours reduced and they decided to reduce their managers by one to rationalise

the business. The restaurant operates seven days and seven nights so an employee being flexible is important. The claimant could only work evenings at the time and was the least suitable for the business so he made the claimant redundant in February 2009. Since then, he has not recruited a new shift manager to fill the claimant's role. Currently the restaurant employs 29/30 staff compared to 35 at the beginning of 2009.

Under cross-examination he confirmed that the claimant had commenced employment with the company in 2000 and was a good employee and that he had no issues with her. It was put to him that he had suspended the employee at some stage over the course of her employment. He denied this but recalled when the claimant could not attend a health and safety course due to family commitments and her certificate had lapsed so she was not in a position to do her job. He told the claimant that once she achieved this certificate he would reinstate her to her position. The claimant had not been in a position to do this course three times when he had arranged same. The course was held in Dublin and he pays the employees travel and subsistence when they attend. They were required by health and safety legislation to have a qualified first aider on the premises at all times and this was part of the claimant's role as shift manager. He denied he was cross with the claimant at this time and had no difficulty with her excuse as she had small children at the time. He could not have employed her at a lower position during this period, as it would have been unfair to cut other employees' hours because of the claimant's inability to attend a course. The claimant paid and did the course locally and returned to work.

There were five shift managers at the time of the claimant's redundancy, A who was there about 9 years, AM and L 20 years, and C about 11 years. All four of these shift managers were doing five shifts a week and fully flexible while the claimant could only work evenings. At the time of the claimant's redundancy AM was on maternity leave, the other three shift managers covered the 14 shifts per week between themselves. AM was also a part-time shift manager but she was flexible in the hours she worked. He had previously discussed with the claimant her availability but the claimant could only work evenings. He accepted that the claimant had told him that she would do the same job for less money, however the Joint Labour Committee for the catering trade governs his business so he could not employ her in her role at a lower rate. He denied that D had ever worked as a shift manager after the claimant had left, as D was not qualified. They have taken on crewmembers since the claimant left, as they would have a natural turnover of staff. He has not reduced any of his employees' wages. He had made the maintenance man also redundant. There were no other vacancies in their business at the time of the claimant's redundancy.

### **Claimant's Case**

The claimant gave direct sworn evidence. She commenced employment in 2000 and had moved up to shift manager after about two years. She went part-time about seven years ago and the respondent had no difficulty with this. There was never any discussion about her hours and she was never asked to do the day shift. At the time of her redundancy she would have been available for day work as her husband was at home. In respect of the health and safety course in September 2008 she was unable to attend as her son broke his arm, she could not recall if the respondent had arranged for her to go to the course twice before this. When she called to the office the PA had told her that she could not work in the restaurant as her certificate had lapsed. As a result of this she was out of work for September. She did the course locally and resumed work.

She maintained that she commenced employment 5 or 6 weeks before A, 4 to 5 years before C. She had no knowledge of the rationalisation plan and on Monday night when she was finishing her shift the MD and the PA approached her. The MD informed her that he was making her redundant,

he did not explain the drop in sales figures but told her it was happening all over the place. She was dazed and crying. Afterwards she rang the MD and told him she would do anything to get her job back and he informed her he could not give her the position back. He also told her that he had enough managers and could not pay her less in her role.

She had called to the restaurant a number of times since her redundancy and had not seen anyone she knew working there. She had seen D acting as shift manager a number of times. She gave evidence of loss.

Under cross-examination she confirmed that at the time of her redundancy she was working three evening shifts a week and she had not asked for additional hours. She had told the MD on the phone afterwards that she was available for fulltime work, however she did not want extra hours at the time. She could not recall the dates when she had called to the restaurant after her redundancy nor could she recall when she had seen D acting as shift manager. She agreed that while she was a shift manager she wore a shift manager's uniform and when she had seen D she was in a floor manager's uniform. She was never asked to do full time work. She had signed and accepted her cheque for redundancy.

### **Determination**

The Tribunal have carefully considered the evidence adduced. The employer failed to prove that he acted fair and reasonably in the process applied to the selection of the claimant for redundancy. Therefore, the Tribunal awards the claimant the amount of €10,600.00 under the Unfair Dismissals Acts, 1977 to 2007 less her statutory redundancy already received.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)