EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE -*Claimant*

CASE NO.
UD1322/2009
RP1493/2009
MN1296/2009
WT583/2009

against

EMPLOYER -*Respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 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 N. Russell

Members: Mr R. Murphy
Mr F. Dorgan

heard this claim at Wexford on 10th March and 9th June 2010

Representation:

Claimant : Mr Thomas Lillis B L instructed by
D M O'Sullivan & Co, Solicitors, 4 St Mary's Road, Arklow, Co Wicklow

Respondent : Finbarr O'Gorman, Solicitors, Mayfield, Hollyfort Rd, Gorey, Co. Wexford

The determination of the Tribunal was as follows:

Preliminary Issues:

The respondent stated that the claimant commenced employment with him in March 2008. This was a "fresh start" by her and that no transfer of undertaking took place from her previous employer. Therefore her accrued rights as an employee with a previous entity did not apply. The claimant's case was that since she was undertaking the same job and role on the same premises prior to the change of ownership she was entitled to come under the protection of the relevant legalisation concerning transfer of undertakings. There was no documentation to show otherwise and the respondent issued no new contract of employment nor terms and conditions of employment to her.

The Tribunal found in this case that a transfer of undertaking had occurred and determined that the date of commencement of employment with the respondent as 01 March 2007.

On 10 June 2009 the secretariat of the Tribunal received two T1-A forms from the claimant showing two separate dates of commencement and termination of employment with the same respondent. The first date of termination was 10 June 2008 and the second one was 20 April 2009. The respondent's T2 form and a letter from its owner indicated that the claimant was actually dismissed on both occasions from her employment.

In the course of subsequent evidence and submissions both the claimant and the respondent changed their stances on this issue. The respondent maintained that the claimant had abandoned her employment in June 2008 and it assumed she had resigned. The claimant argued that neither an abandonment nor dismissal ever took place at that time and that the break in service was due to other factors.

Having considered the conflicting evidence and submissions the Tribunal found that on the balance of probability there was no break in the claimant's service. It follows that the Tribunal accepts jurisdiction to hear the substantive issues in this case.

Substantive Issue:

Respondent's Case:

The respondent gave evidence that he is the proprietor and co-manager of the business. The business commenced trading in March 2008 and currently employs fifteen members of staff.

In or around June 2008, the respondent met with staff regarding the issue of time off for examinations. He requested that the staff inform him of the hours they were available and unavailable to work. Despite this meeting the claimant failed to turn up for work and the respondent subsequently dismissed the claimant. However, he agreed to re-engage the claimant subject to certain conditions.

The claimant was given ample warnings prior to being dismissed in April 2009. He himself had provided the claimant with two warnings and his co-manager had also given warnings to the claimant.

The respondent dismissed the claimant in April 2009 due to her failure to attend for work. She had previously failed to attend on a number of occasions. The claimant would not inform management directly of her absence but she would make contact with a junior colleague.

The clamant was working on Thursday, 9th April 2009 when she told the respondent that she could not continue to work due to issues relating to a personal relationship. The premises was very busy and the respondent suggested that they continue the conversation the following day. The claimant worked the remainder of her shift.

They met on Friday, 10th April 2009. The respondent had not been involved in the claimant's personal issues up to this point but when he met the claimant the following day she was very upset and submitted her notice. The respondent would not accept the claimant's notice but suggested that she avail of one week's leave to take time to consider matters. He told the claimant that he would

mark her off the roster for week commencing 20th April 2009.

The claimant was working on Friday, 17th April 2009. The respondent told her that she could leave early if business was quiet but that she must contact him prior to leaving the premises. Another employee subsequently informed the respondent that the claimant had left the premises early. The claimant was due to attend for work on Saturday, 18th April 2009 but she sent a text message to the respondent stating that she would not be attending for work, as she "was not up to it."

The following week the claimant was on annual leave. During that week the respondent attempted to contact the claimant a number of times to find out if she was to be rostered for the following week. He left a message requesting the claimant to contact him and he later text the claimant stating that if he did not hear from her he would take it that she had left her employment. The claimant replied by text stating, "do what you like, I'm on holidays."

Given the claimant's previous history in June 2008 and the conditions of re-engagement at that time, the respondent reached the decision to dismiss the claimant. He wrote an undated letter to theclaimant which stated that she was dismissed from her employment with immediate effect as her failure to ask permission to leave early on Friday, 17th April 2009, showed a lack of regard for boththe respondent and the position she held.

The claimant received holiday pay owed to her.

During cross-examination the claimant's contract (March 2008) was opened to the Tribunal, which contained a notation from the time of events in June 2008. It was put to the respondent that there was a ten-month gap between the note regarding a final warning and the dismissal of the claimant. The respondent stated that while the claimant's performance had improved after June 2008, her personal issues began to affect her work in 2009.

The respondent confirmed that at the time of the claimant's employment the business did not have a grievance and disciplinary procedure, however this has since been rectified.

Ms. M gave evidence that she is currently employed by the respondent. She confirmed that staff meetings were held in June 2008 to discuss the availability and unavailability of staff members during examinations. If an employee had an issue they could raise it with either of the managers.

A former employee gave evidence that he was employed by the respondent until August 2009 and that during his employment he was in a personal relationship with the claimant.

The respondent's co-manager gave evidence that during 2008 he had cause to speak to the claimant on approximately ten occasions regarding her time keeping and he gave her a number of verbal warnings. The claimant would usually text a junior colleague rather than a member of management if she was going to be absent and only on certain occasions did she contact the co-manager directly.

During cross-examination the co-manager confirmed that between June 2008 and April 2009 there were a number of time-keeping issues, in relation to the claimant, that he did not inform the respondent of. The co-manager stated that he had made allowances for the claimant due to her

personal issues and for this reason he had not informed the respondent about the issues with the claimant's time-keeping during 2008.

It was put to the co-manager that in February 2009 the claimant was offered a job with a guarantee of 40 hours per week but that he had pleaded with her to remain in her position with the respondent. The co-manager recalled the claimant informing him of her offer of alternative work. He did ask the claimant to remain in her position, as she was familiar with the business and the duties involved with her role. He gave her extra hours and she remained in her employment with the respondent.

In reply to questions from the Tribunal, the co-manager stated that he understood that from June 2008 it was a condition of the claimant's final warning and her re-engagement that she would not be late or absent from work again but he did not remind her of these conditions when she arrived upset and late for work.

Claimant's Case:

The claimant accepted that she was warned in June 2008 that her position was in jeopardy if she continued to be a poor timekeeper but she denied signing her acceptance of a final warning in June 2008.

It was the co-manager who dealt with the claimant when she arrived late to work late. The claimant did recall just one occasion where she text a junior colleague to inform the co-manager that she would be late. The claimant thought that she might have been late to work once a month. Despite this, the co-manager pleaded with her to remain in her position when she secured other work in early 2009.

The claimant stated that by April 2009, the respondent was aware of her personal relationship with a colleague and it was the respondent who enquired about her well being on Thursday, 9th April 2009. The claimant continued to carry out her duties and worked until the end of her shift.

The following day she was informed by the respondent that he wanted her to take a week's annual leave but the claimant did not think that she had any personal problems to resolve. After having this discussion the claimant thought that, "the writing was on the wall."

The claimant stated that she left early on Friday, 17th April 2009 with the permission of the respondent. The claimant confirmed that she had missed work on Saturday, 18th April 2009, due to illness. The claimant confirmed she received the letter of dismissal while she was still on annual leave.

The claimant gave evidence pertaining to loss. It was the claimant's case that she had an outstanding annual leave entitlement.

Determination:

The Tribunal was faced with conflicting evidence on a number of key issues in relation to both procedural and factual matters. Having considered all of the evidence and documentation produced to the Tribunal and on hearing the submissions made on behalf of both parties, the Tribunal determines that:-

- The Respondent did not have a proper Disciplinary Procedure in place.

- At no point throughout the discussions between the parties and what appeared to be a disciplinary meeting was the Claimant advised of her entitlement to representation nor had she the benefit of representation. It was also noted that the Claimant only turned 18 years old in September 2008 and that her age was a factor that might have been given more consideration by the Respondent.

- There was no evidence of the Respondent having a progressive disciplinary procedure on the issue of absenteeism in particular.

- The nature and manner of communication between the parties could have been far better and the potential for misconception and conflict was ever present.

The Respondent was clear in his evidence that the sole reason for dismissal was the Claimant's poor time-keeping. While some details of a personal relationship between the Claimant and a colleague were opened to the Tribunal, the Respondent was adamant that this relationship did not prompt his decision to dismiss.

The principal matters that the Respondent relied upon to dismiss were the failure of the Claimant to turn up for work on the Saturday before her week's leave when she claimed to be ill; communication of a message through a junior staff member that she would not be at work, the leaving of work one hour early at the end of an evening shift in the week prior to her dismissal andthe suggestion that she was not engaging on the issue of roster preparation for the week followingher week's leave.

It appeared to the Tribunal that, while the Respondent was not happy that the Claimant's inability to attend on the Saturday was advised through a junior colleague, he appeared to waive any issue he had with this in a text message to the Claimant. There was a direct conflict of evidence in relation to the Claimant leaving work one hour early on a week evening prior to her dismissal. It was common case that she and the Respondent had spoken and that he agreed that she could go at 10pm if things were quiet. The only issue between the parties was, essentially, whether she was required to ring the Respondent before she actually left the premises.

On the issue of rostering for the week following her weeks leave, while the manner of communication between the Claimant and Respondent left much to be desired, there appeared to be no persuasive evidence before the Tribunal that the Claimant was not happy to be rostered for that week.

The Respondent's letter of dismissal addressed to the Claimant during a period when she was on a week's leave, which the Respondent insisted she take to get her personal life in order, refers to the Claimant's personal issues and not just to issues of time keeping. It is clear from the letter that the Respondent considered the personal issues to be a matter of concern.

Further, the Respondent could not offer any acceptable explanation to the Tribunal as to why he terminated the Claimant's employment while she was still on a week's leave, which he had insistedshe take.

The Tribunal noted the evidence of the Respondent, supported by the co-manager, that the notation on the Claimant's contract (March 2008), which reads, "*told 1 chance no more"* was the final warning relied upon in dismissing the Claimant. It was specifically confirmed to the Tribunal by the co-manager that an undated letter, which apparently pre-dated a meeting in June 2008 between the Respondent and the Claimant, was not being relied upon. The Tribunal considered whether a final warning was given in June 2008, whether, if so, it was merited, whether the Claimant understood she was on a final warning and whether the actions of the Respondent were consistent with the Claimant being on such a warning.

The Claimant accepted that she was warned in June 2008 and that her position was in jeopardy if she continued to be a poor timekeeper but she denied signing her acceptance of the wording "*told 1 last chance no more".* The Tribunal could not be satisfied as to when what appeared to be the Claimant's signature (though it was denied by her) was affixed to the bottom of the Contract document dated March 2008 and specifically, whether, if signed by the Claimant, it was signed in March 2008 when the terms issued or following the insertion of the handwritten wording at the bottom.

The Tribunal felt that the Claimant did not understand that she was on a final warning. Further, no evidence of any initial written warnings was given to the Tribunal.

The Respondent gave evidence that from June 2008 to April 2009 there were no issues of time keeping or other disciplinary issues until February 2009. However, the co-manager indicated that there were up to 10 occasions of lateness / absenteeism but he did not act on same nor notify the Respondent, his business partner about these. He advised that the Respondent only learnt in February 2009 of these issues. The Tribunal did not find the actions of the co-manager to be consistent with the existence of a final written warning against the Claimant.

In all of the circumstances, the Tribunal felt that the Claimant could not have understood that she truly faced dismissal in light of the apparent toleration of further incidences of lateness by the co-manager and, further, given that the Claimant was actually offered extra hours in the restaurant kitchen in February 2009 when she had the opportunity for a better paid position elsewhere.

The Claimant informed the Tribunal, and it was accepted by the Respondent, that during her week off she received a letter of dismissal. Her evidence to the Tribunal was that she received this letter before she had a chance to call into her workplace to check the rostering arrangement for the following week. It was also clear that the decision to terminate the Claimant followed shortly after text communication from her employer on the rostering issue and while the Claimant was still on leave that she had taken on the insistence of the Respondent.

The decision of the Tribunal is that the Claimant was unfairly dismissed and the Tribunal awards the claimant the sum of €3,000.00 in compensation under the Unfair Dismissals Acts, 1977 2007.

The claim under the Redundancy Payments Acts, 1967 to 2007, is dismissed.

The Tribunal finds that the claimant is entitled to the sum of €608.00 (being the equivalent of two weeks gross pay) under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

The Tribunal finds that the claimant is entitled to the sum of €201.87 (being the equivalent of 3.01 days gross pay) under the Organisation of Working Time Act, 1997.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)