

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE – **First Named Claimant**

UD1517/2009
MN1511/2009
WT647/2009

EMPLOYEE
– **Second Named Claimant**

UD2327/2009
MN2163/2009
WT987/2009

EMPLOYEE
– **Third Named Claimant**

UD2328/2009
MN2164/2009
WT988/2009

EMPLOYEE
– **Fourth Named Claimant**

UD2462/2009
MN2302/2009
WT1055/2009

against

EMPLOYER
-**First Named Respondent**

EMPLOYER
-**Second Named 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. C. Corcoran B.L.

Members: Mr. M. Noone
Mr. N. Dowling

heard these claims at Dublin on 28 July 2010

Representation:

Claimants:

Mr. Barry Quirke B.L. instructed by Ms. Elizabeth Howard,
Howard Synnott Solicitors, Ballyowen Castle,
Lucan, Co. Dublin

Respondents:

Ms. Anne O'Connell, William Fry Solicitors,
Fitzwilton House, Wilton Place, Dublin 2,
for the first named respondent
Mr. Barry O'Donoghue, Ferrys Solicitors,
Inn Chambers, 15 Upper Ormond Quay, Dublin 7
for the second named respondent

The determination of the Tribunal was as follows:

Preliminary Issue

At the outset the claimants' representative stated that, following a Transfer of Undertakings which had been effected on or around 30 October 2008, the claimants were satisfied that it was only against the second named respondent that they needed to proceed and accordingly the claims against the first named respondent were withdrawn.

At this point the representative of the first named respondent sought costs on behalf of her client on the basis that the facts of the October 2008 Transfer had been brought to the attention of the claimants and accepted by the second named respondent well before this hearing. It was submitted on behalf of the first named respondent that the actions of the claimants in continuing to pursue the first named respondent, in circumstances where it had been shown that at all material times the second named respondent was the employer, amounted to frivolous or vexatious action on the part of the claimants and sought expenses in the amount of €2,500-00 on behalf of the first named respondent.

Preliminary Determination:

Having listened to the submissions of all the parties and having considered the extensive inter-parties correspondence opened to it the Tribunal is satisfied that the claimants were well aware of the identity of their employer at all material times well in advance of this hearing such that their actions in not releasing the first named respondent from the case until the day of the hearing were frivolous or vexatious. Accordingly, under Paragraph 19 (2) of Statutory Instrument 24 of 1968, the Redundancy (Redundancy Appeals Tribunal) Regulations, 1968 the Tribunal awards expenses to the first named respondent in the amount of €1,500-00 to be divided equally between the four claimants. This sum is to be paid within 21 days of this determination being communicated to the parties.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE –**Claimant**

UD1517/2009
MN1511/2009
WT647/2009

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**

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Lucan, Co. Dublin

Respondent:

Mr. Barry O'Donoghue, Ferrys Solicitors,
Inn Chambers, 15 Upper Ormond Quay, Dublin 7
for the second named respondent

The determination of the Tribunal was as follows:

The claimant was employed in the public house from 13 June 2008, at which time it was operated by a limited company (the company). On 30 October 2008 the respondent became the claimant's employer following a transfer of the undertaking. At this time there were some 33 employees in the public house. By the end of the claimant's employment there were around twenty employees remaining. Prior to and in the two months following the transfer the claimant was employed for in

excess of 30 hours per week as lounge/floor staff. Prior to the transfer she had also worked in the off licence attached to the public house.

In the two months following the transfer around five employees, one of whom was the respondent's daughter, who had worked for the respondent in his previous enterprise, came to work in the public house and replaced staff that had left the public house.

From January 2009 the claimant was again sent to work in the off licence but, as trade declined, her hours were somewhat reduced with some weeks down to fifteen hours. For one week in January 2009 the claimant was given no work and consequently was not paid for that week. In April 2009 the respondent took the decision to close down the off licence and the claimant resumed her duties in the public house.

It is the claimant's position that, at times, she worked on the sandwich bar following her return from the off licence. It is further the claimant's position that, from the time of her move to the off licence in January 2009, she regularly complained to the respondent's financial controller (FC) about the reduction in her hours of work. The respondent denies both of these contentions.

On 25 June 2009, a day when the claimant was not rostered to work, she was called to the public house by FC where she met FC and the respondent whereupon the respondent told the claimant that she was dismissed on account of there being insufficient work for her, as trade had continued to decline, and therefore her position could not be sustained. It is common case that this was a very brief meeting. The respondent's position is that on being told of her dismissal the claimant commented, "I was expecting it". The claimant denies this. The respondent told the Tribunal that he selected the claimant for redundancy because she was the person he needed the least. He accepted that if LIFO had been applied the claimant would have been kept on.

The claimant made allegations at the hearing, which had not previously been raised, of inappropriate conduct on the part of the respondent, such that her response to this conduct in which she had rebuffed the respondent had led to her selection for dismissal. The respondent vehemently denied the allegations of inappropriate conduct.

Determination:

The Tribunal accepts that the respondent's business was suffering a downturn in trade and accordingly is satisfied that there was a genuine redundancy situation on 25 June 2009. The respondent told the Tribunal the criteria for selecting the claimant for redundancy was insufficient hours; this goes to the fact of redundancy and not the selection of the claimant as the candidate for redundancy. The claimant was given no reason for dismissal beyond insufficient hours. The respondent stated that claimant was the person he needed the least yet was able to offer no objective criteria on which this assessment was based. It must follow that the selection of the claimant for redundancy was without any, or fair, procedure.

The claimant raised serious issues of inappropriate conduct on the part of the respondent during the course of her evidence without having flagged this at any time in the preceding twelve months from the lodgement of her claim. Without making any assessment of the veracity of these allegations the Tribunal is not satisfied that there exists any nexus between the allegations and the claimant's selection for redundancy.

For the reasons given above the Tribunal finds that the claimant was unfairly dismissed. The Tribunal awards €1,000-00 under the Unfair Dismissals Acts, 1977 to 2007. The Tribunal is satisfied that the claimant is not at an ongoing loss as, despite a lower hourly rate, the claimant's gross weekly wage in her new employment appears to be no lower than that she was receiving from the respondent.

It having been conceded that the claimant received no payment in respect of notice the Tribunal awards €332-00, being one week's pay, under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

The claimant stated that she had received no holiday pay whilst working at the public house. Section 25 of the Organisation of Working Time Act, 1997 places an onus on the respondent to keep records of compliance with the requirements of that Act. The respondent was unable to produce any records of holiday pay received by the claimant. In the absence of such records the Tribunal awards €1,328-00, being the equivalent of four weeks' pay, under that Act.

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(Sgd.) _____
(CHAIRMAN)