

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE - *claimant*
RP858/2009

CASE NO.
UD783/2009

MN806/2009

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K.T. O'Mahony B.L.

Members: Mr J. Killian
Mr J. Flavin

heard this claim at Tralee on 13th April 2010

Representation:

Claimant: Mr Patrick Enright, Solicitor, St Anthony's, Tralee Road, Castleisland, Co. Kerry

Respondent: In Person

The determination of the Tribunal was as follows: -

Dismissal was in dispute in this case

Claimant's Case

The respondent is one of a chain of supermarkets. The claimant commenced employment with the respondent as a shop assistant on 1st September 1997. He took up a full-time position in construction from 5th June 2007 to 18th December 2009 but continued to work with the respondent on a part-time basis. In his latter years with the respondent he also did some hours in one of the other supermarkets in the group. There had been no disciplinary issues in respect of his employment. The claimant was a valued member of staff.

The claimant had a day off on Friday 16th January 2009. While shopping in the store that day the shop manager (hereinafter referred to as manager) called him into the stairwell, an area restricted to

staff, where she told him that due to the downturn in the economy they had to cut staff hours and he was being laid off until things picked up. The claimant was so shocked he just went home. The claimant checked the employee handbook. It stated:

'We reserve the right to lay you off from work or reduce your working hours, if we are unable to maintain you in employment or maintain you in full-time employment. You will receive as much notice as is reasonably possible.'

On reading this and not having received any prior notice of lay-off the claimant believed that he had been dismissed. On the following Monday, 19th January, the claimant went to the store to clarify his position and met the shop manager. He asked her if she could guarantee him work in six months and she could not but told him that if he kept calling in something would surely turn up. The claimant understood that he had been dismissed.

The claimant was concerned about his ability to repay his credit union loan. His Payment Protection Insurance would meet the repayments if he was unemployed. At the claimant's request the respondent provided a letter dated 22nd January for the Credit Union stating:

'Due to the downturn in business we unfortunately no longer have work for (the claimant). His last day working with us was Saturday January 17th 2009.'

While the claimant accepted that the manager informed him that he would be given another letter for the credit union when he returned to work, the contents of the letter convinced him that he had been dismissed. The claimant collected his P60 and had one further meeting with the respondent. The claimant asked the respondent for his minimum notice entitlement but was informed that he was not entitled to notice because he was only on temporary lay-off. The claimant saw one of the other part-time employees doing working extra hours after he had been let go. Rosters were put up on Thursdays for the following week. The claimant had no hours some weeks but this only happened infrequently.

He did not get a P45 but the respondent told him one would be provided if he wished. The respondent did not tell Social Welfare that had been laid off. No one had contacted the claimant to inform him that he had been rostered for work on 18th & 19th March.

Respondent's Case

January and February are always quiet months in the shop. On Friday, 16th January 2009 the shop manager informed the claimant that due to the slowdown in the economy there would be no work for him on a short-term basis for a few months but that 'hopefully things would pick up'. The following Monday the claimant returned to the respondent and requested a letter for his credit union stating that he was now unemployed in order to avail of his payment protection insurance. As a gesture of goodwill the respondent provided such a letter for the claimant.

In early February 2009 the claimant visited the respondent and suggested that he was entitled to a redundancy payment and to collect his P60. The manager explained that he had not been "let go", that it was not a case of redundancy but that he had been laid off on a short-term basis. February 2009 the claimant came to the respondent's premises to request a reference. The manager accepted that at this time in February she did not inform him that there would be hours for him in March or discuss his future job prospects with the respondent.

The claimant was rostered to work on 18th & 19th of March. The respondent did not contact the

claimant to tell him that he had been rostered for work. The claimant should have come in every week to check if he was on the roster. The manager did not enquire into the claimant's failure to work his rostered hours on the 18th & 19th of March because the respondent had received a letter dated 2nd March 2009 from his solicitor.

When the claimant contacted the respondent for a reference she accepted that regarding his employment status with the respondent. The manager did not realise there was a problem with the claimant until she received a letter from his solicitor (early March). The claimant's hours had always been erratic and he never approached the respondent regarding hours after 16th January. The manager was satisfied that the claimant understood that he was on short term lay off. The member of staff, whom the claimant believes was covering his hours, was 'more than likely' covering some employee's sick leave.

The manager did not recall being asked by the claimant if she could guarantee him work in 6 months time. The manager did not give the claimant any prior notice of his lay-off. She did not think there was a need for a formal meeting to inform him that he was being put on lay-off. She did not invoke the lay-off procedure as the claimant's lay off was on a temporary basis.

An administrator with the respondent confirmed that she was present at the meetings where the manager informed him that he was on temporary lay-off and that there should be work for him in March. She did not recall the claimant asking the manager if she could guarantee him work in six months or a conversation about his P45. It is the respondent's practice to phone staff if they do not appear for work but the claimant was not contacted after he failed to appear for work because the company had his solicitor's letter. She informed the HR manager that the claimant did not appear for work on the 18th & 19th of March but could not recall her response.

Determination

The Tribunal is satisfied that the claimant did not clearly distinguish between the terms "dismissed" and "laid off".

Whatever the manager may have wished to communicate to the claimant at their meeting on 16th January 2009 the Tribunal is satisfied, having considered all the evidence before it, that the claimant genuinely and reasonably believed that his employment with the respondent had been terminated. The Tribunal bases its findings for the reasonableness of the claimant's belief on the contents of the abovementioned paragraph in the employee's handbook, the contents of the respondent's letter of 22nd January (notwithstanding the manager's comment that another letter would issue on his return to work) and the fact that in subsequent conversations with the claimant, in particular when the claimant had sought a reference for another employer, the matter of his future employment with the company had not been raised by the respondent. Furthermore, the Tribunal notes that the respondent had not followed its own procedures for laying-off an employee and there was no evidence before the Tribunal that there was any urgency obtaining which would call for dispensing with the requirement to give notice of a purported lay-off. In all the circumstances the Tribunal is satisfied that there was a dismissal and as there were no grounds justifying the dismissal it was unfair. Accordingly, the claim under the Unfair Dismissal Acts 1977 to 2007 succeeds. The Tribunal awards the claimant €8,699.60 compensation under these Acts.

The appeal under the Redundancy Payments Acts, 1967 to 2007 fails.
As the claimant was not given prior notice of his dismissal the Tribunal awards him

€1,003.80, being equivalent to six weeks' pay, under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Note: In a situation of purported lay-off it is not reasonable to expect an employee to check the roster on a weekly basis to ascertain whether he has been rostered for work.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)