

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

CASE NO.
UD794/2009

claimant WT348/2009
MN818/2009

Against

EMPLOYER

respondent

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997
UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Mac Carthy S C

Members: Mr. B. Kealy
Ms. N. Greene

heard this claim at Dublin on 24th February 2010
and 28th April 2010
and 18th October 2010

Representation:

Claimant: Mr Nicholas J Waters, Waters & Associates, Solicitors, Unit 1a, Hyde Court, Shaw Street, Dublin 2

Respondent: In Person

The determination of the Tribunal was as follows:-

Respondent's Case

The Tribunal heard evidence from PR, director of the respondent company, who told the Tribunal that the company was in decline since 2007. During the course of 2007 and 2008 PR looked at various ways of reducing costs and increasing sales. The results from 2007 showed the company had made a loss for the first time in three years.

In 2008 there were 5 members of staff, including PR and one other director who was part time. PR worked closely with the claimant looking at every aspect of the business to try and increase sales,

but the decline continued. As a result of this another member of staff was let go in October 2008 and PR decided to cease operating from the enterprise centre. PR decided at the end of September that he would work from his home and the claimant could work from her home. He put the option to the claimant in October to see if it was suitable to her.

PR felt that that claimant had no intention to ever work from her home. The claimant's plan was to continue to get paid through her pregnancy and never return to work. PR became suspicious of the claimant's motives in November 2008 because she would request something and then want it in writing. At this stage PR asked the claimant if she was preparing some kind of file against him.

The respondent moved out of the enterprise centre on 20th November. PR worked from the basement of his property in Leeson Street but this was not a safe place for the claimant to work. The claimant's house required electrical work to be carried out for an office set up. PR arranged for an electrician to go to the claimant's house to carry out the work. For some reason the electrician said he was not going to carry out the required work. PR met with the claimant on 3rd December in the Burlington Hotel. PR attended the meeting to try and figure out what was going on.

At this meeting on 3rd December 2008, it became obvious to PR that it was not a workable option for the claimant to work from home. PR told the claimant that if she could not work from home then he would have to make her redundant. The claimant inquired about holidays and commission. The meeting lasted 1-2 hours. PR returned to his house and contacted the Department of Enterprise, Trade and Employment about redundancies. PR was directed to a website which provided a calculator for redundancy. The claimant waited in the area while PR carried out the calculations. On his return, PR went through documents with the claimant but they could not arrive at a settlement because the claimant said she was owed holidays and commission from the previous month.

PR told the claimant that she had two options. He would pay her what she was owed for the month of December or she could keep the company car. PR told the Tribunal that in 2006 the car had been purchased for €11,500 but he paid €9,000 because €2,500 was the claimant's trade off. PR wrote off money, amounting to approximately €11,100, that the claimant owed to the company. This figure was not mentioned to the claimant at the meeting. PR felt that he could not make the claimant redundant and then say "you owe me money". For this reason he wrote off the amount that he felt was owed. These figures were not discussed at the meeting because they could not get past the issue of holidays owed.

PR and the claimant had another meeting on 8th December because the claimant could not agree to anything at the initial meeting. The meeting of the 8th December was brief because a few days beforehand PR received a telephone call from the claimant and she informed him "that he had won and she would accept the settlement". PR understood that to mean the car, the redundancy cheque and the monies owed. The car was in the claimant's name.

On 8th December the meeting between the parties was very brief, the RP50 and a cheque were exchanged. PR told the claimant that there was a specific amount for statutory redundancy and commissions and approximately €7,000 for the car. The claimant signed the RP50 and a receipt and PR gave her the cheque. There was no paperwork for the car.

On 9th January 2009 PR received a letter from the claimant's solicitor. PR told the Tribunal that the suggestion that he would take advantage of a person's pregnancy and dismiss a person because of

same is absolutely disgusting and he did not wish to comment further. In relation to the letter dated 9th January, PR told the Tribunal that he did not agree with any of its contents other than the date of commencement and the date on which the claimant's maternity leave was due to start.

PR told the Tribunal that the claimant had deceived him and by taking this case is trying to deceive the Tribunal. The Tribunal gave PR the opportunity to confirm that he intended to use the word "deception". PR said that the word is being aptly used in this instance. In order to substantiate his use of the word deception PR referred to documents of communication between the claimant and her colleague. The claimant's representative objected to the submission of same because the documents had not been disclosed prior to this second day of hearing as directed by the Tribunal on the first day of hearing. The Tribunal allowed the documents to be submitted but directed that they be exchanged between the parties before being given to the Tribunal.

At the resumed hearing on 18 October 2010 PR told the Tribunal that he was not informed of the claimant's pregnancy on 13 August 2008. The working relationship between him and the claimant did not deteriorate rapidly. He had no issues with the claimant's start time as long as she met her targets. The job was performance based. He had no record of the claimant remaining in work until after 6.30p.m. A review of the claimant's performance took place in September 2008. It was clear at the meeting in December 2008 that there was no possibility of them working together. The claimant had sought legal advice prior to December 2008. The claimant had an old car, which she traded in and this was offset against the new car. The respondent paid €9,000 for this car. He did not concede shared ownership regarding the car. He issued a contract to the employee but she did not sign it.

In cross-examination he stated that as of 26 September 2008 he was aware of the claimant's pregnancy. The claimant was given a contract of employment, which he left on a server. He gave her a car in lieu of notice and holiday pay. He had an issue with the claimant not meeting her targets. He did not agree to a start time with the claimant. His intention was that the claimant would work from her home. After a poor review in September 2008 the claimant asked him for payslips. He met the claimant a couple of days later at a hotel, as he could not get to a point where the claimant would work at home. He thought that he could sort out the problems at the meeting in the Burlington. When put to him if he said to the claimant that if she could not work from home he had no option but to make her redundant he replied she could not work from her home and the intent of the claimant was not there.

Claimant's Case

The claimant told the Tribunal that she accepted her redundancy as she was under severe pressure. The respondent owed her money and he told her if she did not sign for it she would not receive it. She knew that he was not going to pay her what he owed her. She was told she was not getting a cent unless she signed for it.

She told the respondent of her pregnancy in mid August 2008 but she could not recall the exact date. Matters deteriorated between her and the respondent after she told him and he made life very difficult for her. He told her that she would have to make hospital appointments in her own time. She felt that the respondent wanted to get rid of her when she announced that she was pregnant. She informed the respondent on 29 September 2008 of her intention to commence maternity leave on 7 January 2009. In November 2008 the claimant was informed that the respondent's business would be relocated and she was told she could either leave or work from home. The claimant agreed to work from home and it was agreed that an electrician who the respondent knew would call to her

house in December 2008 to install sockets for her PC. The electrician could not set this up on a temporary basis. The respondent then contacted the claimant and requested her to attend a meeting; she was requested to bring the office equipment with her. She met the respondent and he told her that he was letting her go. He asked her to sign an RP50 form and she telephoned her solicitor. There was no discussion about the car at this time. He returned to the hotel and told her if she did not sign it she would not get anything. She again met him on 8 December 2008 in the hotel and he gave her two cheques one for redundancy and one for commission.

Determination

In assessing the evidence the Tribunal gives weight to a fundamental change in the claimant's case that she told PR on the 13 August 2008 that she was pregnant. On the third day of the hearing the claimant accepted that she did not tell him this until late September.

The Tribunal heard extensive evidence in relation to the dismissal of the claimant. There is no doubt that the relationship between the parties had broken down but the parties had widely diverging views as to why and how it happened.

The first question the Tribunal must decide on is whether she was dismissed by reason of redundancy. She was given a redundancy payment and she accepted it. While she said she accepted this payment because of pressure, she had the RP50 form for some days before she signed it, and she had the benefit of legal advice.

In any event it is clear that a redundancy situation applied. The respondent ceased to carry on the business in the place where she was employed under definition 7(1)(a) of the Act of 1967. Discussions regarding new working premises did not produce a result. The Tribunal's view is that the dismissal is due to redundancy and the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

The remaining questions arise under the Minimum Notice and Terms of Employment acts, 1973 to 2005 and the Organisation of Working Time Act, 1997. The respondent disputed these as he had provided a car to the claimant to cover her holiday and minimum notice pay. This is not the correct way to discharge the duties laid down by the statutes. The Tribunal awards the claimant one weeks holiday pay in the amount of €595.75. The claimant is also entitled to two weeks gross pay in lieu of notice in the amount of €1,191.50 under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)