

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

EMPLOYEE

- appellant

CASE NO.

RP270/2010

Against

EMPLOYER

- respondent

under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey B.L.

Members: Mr D. Peakin
Mr M. O'Reilly

heard this appeal at Dublin on 6th October 2010.

Representation:

Appellant: Ms Mary Fay BL, instructed by Ms Teresa Le Gear-Keane, Keane Boland, Solicitors, 183 Upper Rathmines Road, Dublin 6

Respondent: Mr. Brian Conroy BL instructed by Maurice E Veale & Co, Solicitors, 6 Lower Baggot Street, Dublin 2

The decision of the Tribunal was as follows:-

Appellant's Case:

The appellant commenced employment on 29th January 2003 and was employed as a shop assistant in a fishmongers in Baggot Street. She worked Tuesday to Saturday each week. She had a twenty-minute walk to work each day. She was not furnished with a contract of work in writing from the respondent.

In January 2009 she became aware that a new shop was being built in Howth. On 11th April 2009 she attended a meeting with her boss TM and HM. There was no mention of an ex gratia payment of €500.00 at that meeting. At that time some staff had moved to Howth where the respondent had another premises. Her eventual transferring to the premises in Howth was mentioned to her but there was nothing in writing. She said she would think about moving to the new premises.

The appellant did not recall receiving certain correspondence from the respondent. Her only recollection was of receiving a letter dated 10th March 2009, headed "second written warning" from the respondent. The letter referred to her absences on certain dates in March 2009. Enclosed with

this letter was a page from her terms and conditions in the company. The extract covered uniform, probation, attendance, sickness, notice, holidays and confidentiality. She had never seen this document or signed such terms. On Thursday night, 21st May 2009 TM informed her that the shop would be closed the following Monday. The appellant was asked to go and work in the new premises in Howth, which would be managed by his daughter HM. She was to commence work on Tuesday, 26th May 2009 in Howth. The appellant had her holidays booked for that time and was asked to cancel them as she was required to attend training on new till procedures during that week.

It took the appellant approximately one and half-hours to travel to the new premises in Howth on 26th May 2009. She was asked to do some computer work. She stayed there for three days. She tried to talk to HM and go over her new contract. HM said she was too busy. On Thursday night 28th May 2009 she felt stressed. She also felt unwelcome in the new premises and was not being treated very well having worked nearly seven years for the respondent. She sent a text to RM, saying she could no longer work for HM and that she was leaving. RM texted her back and asked her to think about it and that he was aware that the travelling to the new job was far away for her. On that same day a new person was employed. On 11th November 2009 she requested her redundancy payment from the respondent using RP77 form. She waited six months approximately for her P45.

Respondent's Case:

The respondent is a fishmongers and was established in 1938. It is a family run business. It had a retail and processing facility in Baggot Street and from 2003 had a smoking facility on the Quays in Dublin. They employed two drivers, three filleters and two staff worked in the shop. The respondent owned a factory in Howth since 1981.

In June 2005 all staff were made aware that they would be moving to Howth. In 2006 HM spoke to the appellant concerning her moving to Howth. The downturn in the company slowed things down and it was January 2009 before work commenced on the shop in Howth. The builder promised the respondent that the shop would be ready in early May 2009.

HM met the claimant on 11th April 2009. She had a good relationship with the appellant. The appellant had let the respondent down on several occasions whereby she was absent without permission. On these days she texted the respondent to say she would not be at work. The respondent wrote to the appellant on different dates reminding her that she must give prior notification of days she wished to take off from work.

HM told the appellant that they were hoping to open the new shop on 11th May 2009. The appellant said she would be happy to move to Howth and accepted the offer of the move. The offer was not put in writing, as HM had no time to do so. HM assured her that her new job would be exactly the same. HM told her to think it over. The appellant mentioned that she was returning to her home abroad in June 2009. HM asked that she defer it until July 2009 and that she could then take unpaid leave at that time.

Training on new tills and scales which were computerised was scheduled from 25th to 29th May 2009 in the new premises. The trainers did not arrive until 12 noon on Friday, 29th May 2009. During that week HM asked the appellant to assist by typing up some recipes. The appellant was given a lift home each evening after work. She told the appellant she would be working in the shop and she did not expect the appellant to do office work. The appellant did not raise any issues and

showed no signs of unhappiness.

On 29th May 2009 RM and TM informed her that the appellant had resigned by text message. HM waited four weeks to see if the appellant would withdraw her resignation. As the appellant had sent text messages to the company before saying she was not coming to work the next day she left it open to the appellant to contact her. She posted the appellant's P45 to her on 26th June 2009, on 28th August 2009, 11th November 2009 and again on 1st February 2010.

HM contended that if the appellant wanted her job back she would re-employ the appellant. She told the Tribunal that the appellant was the face of the company. If the appellant had come to her and explained that she found travelling to Howth to be too far HM would have given her a lift to work each day.

Determination:

Having considered the evidence adduced at the hearing the Tribunal is of the view on balance that the appellant's move to Howth did not represent a reasonable alternative to the employment the appellant had in Baggot Street. The appellant had a twenty-minute walk to her employment in Baggot Street and her travel to Howth was a one and half hour journey. After a number of days working in Howth the appellant texted the respondent saying she was not happy with the alternative work.

Definition (a) in Section 7(2) of the Redundancy Payments Acts, 1967 to 2007 reads:

“For the purposes of subsection (1), an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to –

- (a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased or intends to cease, to carry on that business in the place where the employee was so employed”.

Quite clearly the respondent ceased to carry on the business in Baggot Street. This would raise a prima facie redundancy case, unless the appellant was disentitled by Section 15, which deals with unreasonable refusal of alternative employment.

In the circumstances, the appellant's refusal to work in Howth would not be deemed to be unreasonable and given the amount of travel involved in comparison to her twenty minutes walk to Baggot Street finds that the appellant is entitled to a redundancy payment based on the following criteria:

Date of Birth:	19 th March 1961
Date of Commencement:	30 th January 2003
Date of Termination:	29 th May 2009
Gross Weekly Wage:	€455.13

This award is made subject to the appellant fulfilling current social welfare requirements in relation to PRSI contributions.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____
(Sgd.) _____
(CHAIRMAN)