

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIM(S) OF:  
EMPLOYEE - claimant

CASE NO.  
UD2148/2009  
RP2411/2009  
MN1989/2009

against

EMPLOYER

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 BL

Members: Mr. J. Browne  
Mr. F. Dorgan

heard these claims in Cork on 23 September 2010

Representation:  
\_\_\_\_\_

Claimant(s):  
In person

Respondent(s):  
Ms. Caroline Barry, Duggan & Barry, Solicitors,  
44 Castlegrove East, Castlebar, Co. Mayo

The determination of the Tribunal was as follows:-

Dismissal was in dispute in this case.

PS is the proprietor of two Montessori schools and a crèche owned and run by the respondent. The claimant commenced employment as a classroom assistant with the respondent in November 2001. That employment ended in 2004. There was a dispute between the parties as to whether it ended by way of dismissal. PS acceded to the claimant's request to have her job back and she recommenced

employment with the respondent in September 2005, working three hours per day, four days per week during the thirty-eight weeks of the school year.

It was the claimant's evidence that on 11 September 2009 at the end of her first week's work after the summer holidays, PS told her that the number of children attending the school had dropped and that she had to let her go. She had loved the job and would have gladly accepted three days work per week, had it been offered to her. The claimant subsequently phoned PS on 14 September 2009 and told PS that she could not take her job from her. PS was quite nasty to her. Two days later the claimant phoned PS again but PS told her that she was on a call and would phone her back but she never did. The claimant's phone records confirmed that these calls respectively lasted one minute and forty-four seconds and nine seconds.

It was the respondent's evidence that when the school year began in September 2009 a large number of the children did not return. On Mondays and Fridays only two or three children attended the school. It was not financially viable to operate two classrooms. On 11 September 2009, she spoke to the claimant and to another employee (OE). She explained that there would be only three days' work available until pupil numbers increased. OE continued to work with the respondent working three days per week. The claimant who had Mondays off, at her own request, found it unacceptable to have her working week reduced from four to three days per week, she stormed out of the premises and did not return to work. When she was leaving, the claimant announced to another employee that she had been fired. PS told the same employee that the claimant had not been fired. The claimant did not return to work the next day or anytime thereafter. PS was adamant that she neither dismissed the claimant nor treated her badly. There had been no issues with the claimant's work in September 2009 and she had no reason to dismiss her. According to PS the claimant is hot-headed.

PS's evidence was that the claimant had phoned her in her own home at 8.00pm one evening and that she had not been able to speak to her at the time. It was the only call she received from the claimant. She felt it more appropriate to write to the claimant. In her letter dated 24 September 2009 to the claimant (a copy of which was produced to the Tribunal) PS reiterated to the claimant that she had been asked to work three days per week instead of four due to the large reduction in attendance, denied that the claimant had been let go and indicated that if she did want to leave she could work out a week's notice and be paid for it. PS reiterated that three days per week was available to her at that time and that hopefully this would increase in January. In this letter PS invited the claimant into discuss arrangements. The claimant did not reply.

In a further letter dated 13 October 2009 to the claimant PS stated:

"I am writing to you again, as I have not heard from you since my last letter dated 24 September 2009. I have asked you to please come back to work. You still have a job here, these are very troubled times and you should not give up a job, when you have one. I am extremely hopeful that we will have our classroom running 5 mornings in the future.

If you do not wish to come back to work could you please let me know in writing. And I will issue you P45 and a weeks pay."

The claimant did not reply to this letter either and never indicated, in any way, that she wished to return to work. The claimant did not believe that the letters constituted a genuine attempt to get her back to work; she felt PS was only sending letters to cover herself.

The claimant's P45 was issued to her and she was paid €120.00 as a week's notice. The claimant did not cash the cheque. In January 2010, attendance improved and the hours could have been restored to the claimant.

**Determination:**

The fact of dismissal was in issue in this case. The onus of proving that there was a dismissal rests on the claimant. The Tribunal considered the different versions of the conversation and events that took place between the parties on 11 September 2009 as well as the subsequent communications between them. PS's version of that conversation was that she explained to the claimant that there would be only three days' work available until pupil numbers increased and that the claimant stormed out. The claimant's version was that PS had told her on 11 September 2009 that she had to let her go. It was further the claimant's evidence that she loved her job and would have gladly accepted three days work per week, had it been offered to her. The Tribunal notes that notwithstanding this evidence the claimant ignored two such offers made to her by PS in letters of 24 September 2009 and 12 October 2009. The Tribunal on the balance of probability does not accept the claimant's evidence that PS dismissed her on 11 September 2009. Accordingly, as there was no dismissal the Tribunal has no jurisdiction to hear a claim under the Unfair Dismissals Acts, 1977 to 2007.

From the claimant's own evidence it is clear that she regarded three days' work as reasonable. Under section 15 of the Redundancy Payments Acts 1967 to 2007 the offer of reasonable alternative employment disentitles the claimant to a redundancy payment under the Acts.

As there was no dismissal there is no entitlement to notice or payment in lieu of notice under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)