

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

EMPLOYEE

UD1093/2009

claimant

MN1107/2009

Against

EMPLOYER

respondent

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005 UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr D. Herlihy

Members: Mr. W. O'Carroll
Mr T. Kelly

heard this claim at Limerick on 22nd July 2010
and 15th September 2010
and 16th September 2010

Representation:

Claimant(s): Mr. Daniel J O'Gorman, O'Gorman, Solicitors, Munster House,
75a O'Connell Street, Limerick

Respondent(s): Mr. Declan Wade BL instructed by Mr. Niall Maguire,
Maguire McErlean, Solicitors, 78-80 Upper Drumcondra Road,
Dublin 9

The determination of the Tribunal was as follows:-

Claimant's Case

The claimant outlined in detail to the Tribunal the details of her extensive experience in retail prior to taking up the position with the respondent. She travelled on a regular basis as part of her job. She applied for a position in the respondent as she wanted to work and be based in Limerick. She would be willing to travel for store openings and for new set ups. The key factor in her leaving her job was to reside in Limerick. She received a letter of appointment from the respondent dated 8 August 2006 offering her a position of Assistant Manager and her first placement would be in Limerick but she would have to be flexible for transfer to any of the respondent stores in the Limerick Cork and Kerry region. She had an issue with this and she contacted JOC the regional manager at the time as she had accepted the job based on the original decision that she would be based in Limerick. JOC told her that he would sort it out with the HR department and send the

relevant letter to her. In accepting the position she would have to take a decrease in salary of €3,000 and she would not have the use of a company car. She wanted to get back to Limerick and she accepted the job. After the 28 August 2006 she received a contract of employment. She telephoned JOC as Limerick Cork and Kerry were stated on the contract. JOC assured her he would get on to HR and get the matter resolved, as he was aware of the original deal.

She got on well at her job and she learnt a lot from JOC. Two stores opened in 2008 and she was delighted to have the opportunity to train for the store openings. She met JOC on a regular basis and he left the respondent in May/June 2008. LB replaced JOC and she possibly met LB once a week or maybe two days a week. She had no problem with LB until 1 December 2008 when a member of staff summoned her to a meeting with LB. LB told her that she was being transferred to Midleton and should report for duty there on 5 January 2009. She explained to LB that Midleton was not part of her contract and that she would not be going to Midleton. She asked LB to listen to what she had to say and she had not signed a contract of employment. The meeting took fifteen to twenty minutes and she left the room and felt awful. In a letter dated 18 December 2008 to LB she indicated that she was very happy with her job in Limerick and was only too pleased to work on a very temporary basis outside of Limerick for the respondent when required. She stated she was not prepared to relocate to Midleton on 5 January 2009, as it was not part of the agreement that she had with the respondent.

On 24 December 2008 a staff member summoned her to the office. LB was in the office and he made no reference to her letter of 18 December 2008. She was still expected to report for work in Midleton on 5 January 2009. She left the meeting, upset and confused and felt all her rights were taken from her. She then reported for work on 27 December 2008 for a sales set up. She felt terrible and felt physically sick and had constant headaches. She was not part of a union. She left work on 27 December 2008 and went to the doctor. She furnished a medical certificate a few days later. She received a letter from LB dated 11 January 2009 in which he outlined that she was in breach of the company's absence and notification procedure as her absenteeism was currently uncertified. After receiving this letter she sent her medical certificates to the respondent by registered post. Between 27 December 2008 and 11 January 2009 matters escalated, she was prescribed medication and felt she was going to lose everything.

The respondent employed floor managers, assistant managers, managers and area managers. She trained in an assistant manager and she assumed that she and the assistant manager were going to work side by side. Her solicitor sent a letter to the respondent on 12 January 2009 but no response was received. She received a letter from LG dated 18 February 2009 requesting her to attend a meeting on 6 March 2009. Present at the meeting were the claimant and LB. She asked LB questions but she did not receive answers. She received a letter from the respondent on 19 March 2009 at 8.15a.m. by registered post requesting her to attend the company doctor at 3.30p.m. on that day. She contacted LB and let him know how she felt. She was distraught at the carry on. LB was not fazed by this and told her that the letter must have arrived late in the post because of St. Patrick's day. She was off salary on 23 March 2009 for a month and a half. She was in receipt of social welfare of €196.00 and she had to take out a personal loan. By letter dated 3 April 2009 the claimant submitted her resignation and she had no option but to resign her employment with the respondent. There was no acknowledgement of her situation and she was forced into resigning. Her position has been replaced. She realised the implications of submitting her resignation but her health was quite bad. She was not eating or sleeping and she had lost a considerable amount of weight. She received an acknowledgement of her letter of resignation on 9 April 2009 from LB and she was asked to return her keys and swipe card to the Store Manager. She wanted her job and life back.

On the **second** day of the hearing the claimant was cross-examined. She accepted she had signed the offer of acceptance stating her regions would be Limerick, Cork and Kerry, she said she was told to sign it. When asked if LB had agreed to check out the agreement she had had with JOC, she replied that LB had never said he would check it out. She refuted JOC had told her at the December meeting that he did not have the authority to agree to her working in the Limerick region only. She stated that the only reason she had left her previous job on a higher salary was because she wanted to return to live in Limerick. She also stated that she had agreed to work outside the Limerick area for new store openings and had on 3 or 4 occasions.

She told the Tribunal that she knew (and named TMA) a member of staff that had a 1-region contract but she had not seen the contract. LB had spoken to her on December 24th telling her she was moving to Midleton, she felt he did not want to listen to what she had to say and had made up his mind she was moving to Midleton. She felt her rights had been taken away and was very dissatisfied with how she was treated. She had no personal problems with LB, just the contract and the way she was treated. On numerous occasions she told the Tribunal that she had not signed her contract of employment.

When asked why she had not aired her grievance under the grievance procedure she replied she was been ignored for months and then bullied to attend a doctor in Dublin. She had rang LB that morning and told him it was a “dirty carry on”. She stated that she had not decided to use the bullying and harassment procedure but decided to go the legal route.

Respondent’s Case:

The HR manager gave evidence. The respondent company had 57 retail stores. All management must be flexible within their region in order to bring their expertise to other or new stores. The witness stated that it was a standard clause in management contracts that stated:

“ The employee must be flexible as the business activity may require the employee to transfer to any of our retail outlets within Limerick, Cork and Kerry region.”

She explained that, at the time, the regional manager held the interview, they went to the HR department with the details of the interview and the HR department then compiled the offer of acceptance. In this case the claimant signed it. Within 8 weeks 2 copies of the contract of employment would be sent to the intended employee, 1 for them and 1 for the HR department. In this case they did not receive a signed copy from the claimant.

The witness explained that the company handbook had been distributed to all management teams in 2007 and told to distribute them to their staff with a page to sign and return it to the HR department. The respondent company did not issue 1-region exclusive contracts; it was always for 3 regions.

She explained that there had been problems with the store in Midleton as the manager there was new. The respondent wanted the claimant to go to Midleton because of her expertise and for the “good of the company”.

On cross-examination he explained that he had been employed in the HR department in Dublin. He knew JOC for 3 years. He stated that JOC had ran the interview with the claimant on behalf of the respondent but did not have the authority to agree to a 1-region exclusive region. Emails were opened to the Tribunal between the recruitment agency, (the claimant was hired from), JOC and another member of management (PL).

She had attended the meeting between the claimant and LB on December 1st 2008. When asked she stated that she had been on maternity leave from December 3rd 2008 until June 2009. She explained that there was no witness present at the hearing to give evidence of what had occurred in the HR department while she was on maternity leave. She stated that it would have been preferred by the respondent to receive a signed contract and this had not happened since. When asked she stated as far as she was concerned as the claimant had signed the offer of the position she agreed to be flexible.

When put to the witness why 4 letters from the claimant's solicitor had not been replied to she replied that the respondent had a set procedure to deal with any disputes. The respondent company tried to deal with issues internally until those procedures are exhausted. When asked why the claimant had not been told to deal with the matter internally she replied that the claimant knew the procedure. She stated the HR department had advised LB to speak to the claimant.

When put to her she said that the claimant had not followed the grievance procedure. When asked why the claimant had not been informed to follow through the procedure she replied that the claimant had gone externally.

When asked by the Tribunal that the following procedures were critical to the respondent and the claimant had no contract she replied that she had not been aware until the meeting of December 1st. She again stated it was unprecedented to a 1-region clause in a management contract.

A member of management gave evidence (TMA). She had worked with the claimant in the Childers Road premises for 1 month. When presented with her contract at the hearing she stated that it was her contract that she had signed it and returned it to the HR department. She explained that when she signed the contract there had been no stores open in Clare and Galway but was told at her interview that if a store opened she would have to move. She was aware of the grievance procedure.

On cross-examination she stated she had not been aware of the claimant's complaint but could recall the issue arising of the claimant moving. She stated that she had learnt a lot from the claimant. She told the Tribunal that she was happy to work in Limerick and would have moved if stores had opened in Clare or Galway. She said it would not have affected her as long as she could drive home at night. When asked she said she had not seen the claimant's contract. When put to her did she not think that the claimant would have expected a response to her detailed letter to the respondent she replied if it had been her, she would have asked for a meeting.

When asked by the Tribunal she stated that after 1 year in the Childers Road store she had been moved to the store in the Crescent shopping centre. She told the Tribunal that she had spent 2 days in Ballincollig during the opening of a new store.

The regional manager (LB) gave evidence. In the period of 3 years he had taken part in the opening 25 new stores. The respondent company liked to have a mix of new and experienced staff in the new stores and would move experienced staff accordingly. He stated the claimant had been a very experienced manager. He made the decision to move the claimant. All management had flexibility and could be moved within their 3 regions. He had never seen an exclusive 1-region contract.

On December 1st he met with the claimant. He explained to her that there were several moves to take place in the region. He also told her it was in the best interest of the respondent company and

her development within the company to move to Midleton. The claimant told him she had a verbal agreement with JOC not to move out of Limerick. She did not want to know the reasons for the move. He later went to the HR department and informed them what the claimant had said about her agreement with JOC and asked to check her contract.

On December 18th the claimant wrote to the witness. He remembered receiving the letter and felt it was quite legal. He contacted the HR department that he had received the letter. A week later he was due in the Childers Road store and arranged to meet the claimant to discuss her letter.

On December 24th he met the claimant with another staff member present. He told her they needed her expertise in the Midleton store, as there was a new manager there. The claimant was not pleased and spoke of her agreement with JOC. They spoke of rent and travel allowances, that her salary would be unchanged and her position would be the same. The claimant was upset and annoyed but the meeting was not heated. He stated that he had seen the bullying and harassment policy and had not bullied and harassed the claimant at the meeting. He had explained why she was being moved. He wrote an explanation to the claimant to update her of the situation.

He explained that the management team in the Childers Road store had not been gelling; the manager formed him he was going to leave soon. When asked he replied that this was not the reason why the claimant was to be moved. The claimant made it clear that she did not want to move to Midleton and felt he was being unreasonable.

On January 11th 2009 he wrote to the claimant stating she was in breach of the company's absence and notification procedure due to her current absenteeism since December 27th 2008 and no medical certificates had been received. A meeting was arranged for February 17th in the Midleton store. The claimant's solicitor replied on January 12th 2009. When asked he stated that he had checked what the claimant had agreed with JOC concerning a 1-region area and that there was nothing on file of it. When put to him he refuted he had refused to engage with the claimant. He felt the claimant had not been receptive in what he had to say at the meeting. When asked he said that he was not aware of any complaint against him by the claimant. The meeting for February 17th 2009 was rescheduled for March 6th 2009. At the meeting the claimant stated, when asked, that she was feeling terrible and was not moving to Midleton. He arranged for her to see a company doctor.

A letter was sent to her within 5-7 working days to attend a doctor on March 19th 2009. She rang him, very upset, to tell him that she had not received it till that morning. He said he would rearrange it but the claimant did not attend. When put to him he said that he did not feel that his behaviour was doing his best to the claimant into a psychiatry hospital. When asked he said that he did not understand the claimant was using the grievance procedure. When asked he stated that he had treated the claimant fairly and with respect.

On cross-examination he stated that he was no longer the regional manager but still worked for the respondent company. When asked he could not recall why he had no minutes of the December 24th meeting with the claimant. He stated that the meeting of March 6th was to see how the claimant was and whether she could return to work. When put to him if he could have expected a response to letters he had sent to the respondent company, he replied that he would have. When asked he said he did not know if anyone had contacted JOC concerning the matter.

When asked by the Tribunal when he had heard of the agreement between the claimant and JOC concerning regions, he replied that the first time was December 1st.

Determination:

The Tribunal have carefully considered the sworn evidence and submissions submitted by both parties over the 3-day hearing. The Tribunal feel the claimant had not been treated well by the respondent during the process of dealing with the claimant's proposed move to Midleton. However, in cases of constructive dismissal the bar is very high in order to prove the case. The Tribunal feel in this case the claimant has been unable to prove it. Accordingly the claim under the Unfair Dismissals Acts, 1977 to 2007 fails. The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)