

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE

- *claimant*

CASE NO.
UD2223/2009

against

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J. Sheedy

Members: Mr. P. Casey
Ms. P. Doyle

heard this claim at Cork on 7th October 2010
and 22nd March 2011

Representation:

Claimant: Mr Brian Leahy BL instructed by Ms. Karen Kearney, M.J. O'Callaghan & O'Keeffe, Solicitors, New Market Square, Mitchelstown, Co Cork

Respondent: Mr Frank Drumm BL instructed by Vincent & Beatty, Solicitors, 67/68 Fitzwilliam Square, Dublin 2

The determination of the Tribunal was as follows:

The claim

The claimant, a supermarket-multiple shop assistant, brought the following claim under unfair dismissals legislation based on an employment from 24 September 2007 to 30 April 2009. On Thursday 23 April 2009 the claimant was working the shift from 1.00 p.m. to close of business. The shop would close at 9.00 p.m. but work would go on until 10.00 p.m. to clean up.

23 April 2009 was very busy. There was only one cashier (the claimant) and one deputy manager (hereafter referred to as M) on duty at closing. TB (the manager) had been in the store but had left at about 5.30 p.m. that evening. Just as they were about to close the shop M approached the claimant and told her that she (the claimant) would have to stay late as management from the multiple would come the next morning. The claimant explained to M that she (the claimant) would have to leave at 10.00 p.m. that evening as she had her babysitter booked and she had to get home. M started shouting at her in front of customers.

The claimant felt constantly undermined and embarrassed by M and she had had to bring this to the attention of different managers in the past. Unfortunately, the fact that she reported her problems to

management had repercussions for her. On one occasion M stopped talking to her for eight weeks and made work in the shop extremely difficult for her.

On the evening of 23 April 2009 the claimant had had enough. She was being shouted at and told that she had to stay but she was unable to stay in the shop due to her commitment at home to her child. In addition, her shift did finish at 10.00 p.m. that night. She also felt that, given that Thursdays were always busy, there should have been more staff on duty that Thursday.

The claimant felt that she had no option but to hand in her notice to M. M told her that she would phone TB, the manager, and tell him that the claimant had refused to work which the claimant had not. As far as the claimant was concerned her shift was due to finish at 10.00 p.m. that night. M came back from the office, told the claimant to leave and said that R (the other deputy manager) was coming to help her. M told the claimant that TB would speak to the claimant the next morning.

As far as the claimant was concerned she had handed in her notice on 23 April 2009 because she felt that she had been constructively dismissed. She returned to work the following morning to work out the period of one week's notice. TB (the manager) did come into work the next day and, after speaking to M, told the claimant that he wanted to speak with her. When the claimant spoke with TB in his office she confirmed to him that the problems with M were as she had previously mentioned to him and that nothing had changed. He told her to go out, cash up her till, bring it in and go. She left extremely upset with tears flowing down her face. That was the morning of Friday 24 April 2009. That weekend, TB rang the claimant's phone and asked if she would come back to talk to him and wanted to know what the claimant was going to tell F (the area manager). The next Monday, F contacted the claimant and later that week he asked to meet up with both the claimant and TB at a hotel. That meeting took place on 6 May 2009.

At the 6 May 2009 meeting both F and TB told the claimant that she could come back to her job but on the condition that she start from scratch with the company. In other words, the claimant would lose all her entitlements accrued in her employment with the respondent for the previous two years. The company's attitude was that the claimant had thrown a fit. TB also made the comment that the claimant was too exact for the job. The claimant had no option but to reject the offer. The claimant also wanted it noted that she had had to be hospitalised for stress as a result of what had occurred.

The defence

The respondent's defence was that the claimant had not been unfairly dismissed from her position as a store assistant but that she had voluntarily resigned from her position in or around 24 April 2009. It was also contended that, after the claimant had resigned from her position, the respondent made a number of efforts to contact her and requested that she reconsider her resignation. In particular, on 24 April 2009 and on 7 May 2009 the respondent met with the claimant and, on both occasions, requested that she re-consider her position and return to work. The respondent denied that the claimant was requested to return to work on the basis that she would lose any entitlements hitherto gained in her employment

The hearing

After lengthy talks had not resulted in a settlement the claimant's termination date was agreed. The claimant's representative stated that the claimant had subsequently obtained nine months' employment at €164.00 per week. (On the T1A claim form the claimant's gross and net pay with

the respondent were both stated to have been €284.45 per week.)

Claimant's testimony

Giving sworn testimony, the claimant said that she had initially been based in Clonmel where she had been trained and had got on well in her short time there. However, the respondent opened a store in Mitchelstown and the claimant began to work there. She liked her job. She worked a 19.5 hour-week. She had a daughter.

On 23 April 2009 M approached the claimant about staying late. Normally, they stayed an hour after 9.00 p.m. but M wanted the claimant to stay later than 10.00 p.m.. The claimant said that she had to get her daughter from a babysitter. M said that the claimant always made excuses. M would often ring the claimant in the morning if someone was sick.

M rang TB and told the claimant that TB had said that the claimant was to work that night of 23 April 2009. The claimant left at 9.50 p.m. when she had all her work done. The next day TB was not in great form. TB was "always normally lovely" in the opinion of the claimant. TB went into the office and called M. M then told the claimant to go in. TB told the claimant to get her till and cash it up.

Asked at the hearing if she had had problems with M, the claimant replied that there had been an incident that F (operations director previously described as area manager) knew about and that M had blanked her for eight weeks. The claimant had spoken to MG (another manager there) who had spoken to M but MG later left. The claimant described M to the Tribunal as a deputy who was as good as a manager. The claimant stated that she had not wanted disciplining for answering back. She approached the management team about M but the claimant thought that this made it worse. M would shout at her in front of customers.

On the night of 23 April 2009 M shouted at the claimant saying that the claimant always used her child as an excuse to go early. TB phoned the claimant subsequently. She told him that she was too upset to speak. Asked at the Tribunal hearing if there had been more contact from the respondent, she replied that there had been a meeting with management in a hotel. It was alleged that she had thrown a fit and it was said that she would have to start from scratch with the respondent. TB said that she was too exact in her job. To the Tribunal the claimant did not deny that she had been very exact but said that she could not lose the service she had. The claimant told the Tribunal that the offer was to come back as a new employee but that there was no contact from TB after that.

Describing her job, the claimant said that she had been a cashier but that she had unloaded pallets and stocked shelves. She had also mopped floors, brushed and swept.

Asked if there was constant testing of employees, the claimant replied that testing occurred after three months with the respondent. Asked if there had been complaints against her, she replied that it had been said that she was the nicest staff member in Mitchelstown and that her only problem had been with M. She had made two previous complaints about M.

Telling the Tribunal about M ringing her and asking her in if someone was sick, the claimant said that she had gone in on a hundred per cent of the times she was asked in. She had obliged before and had been asked to stay on an hour or two extra.

Reiterating that the store would close at 9.00 p.m. and that she had her daughter booked with a

babysitter until 10.00 p.m., the claimant stated that her daughter was of primary school age. M had said that she would talk to TB and the claimant told the Tribunal that TB had said that he would deal with the claimant the next morning.

Under cross-examination the claimant gave details of her workplace, its staff hierarchy and the shift times. She said that the people present at closing did the clean up and that it was not possible to do those final cleaning tasks before the shop closed. As much as an hour or as little as five minutes could be given to the final cleaning depending on who was in charge at closing. If little cleaning was done on a preceding evening the claimant, the next day, “would fly around with a brush when the till was quiet”. The claimant said that she worked less than twenty hours per week because she was a lone parent and that was all that the government would allow her to work without cutting her lone parent allowance. Neither did she want to work less than fifteen hours and lose her family income supplement.

On the second day of the hearing the respondent’s representative continued with the cross-examination of the claimant. The claimant was referred to the company’s grievance procedure and if she had used it. This procedure states that you must raise this matter with a senior manager or “if you wish to raise a formal grievance, you must set out your grievance and the basis for this in writing”. She had raised it with two of her managers (R and F) after an incident with itinerants in the store. She recalled this incident. She was on the checkout and there were itinerants in the store stealing, she rang the bell and M came up to her, M told her not to be ringing the bell as she was too busy and walked away. After this incident M did not talk to her for 8 weeks. She had also informed MG that she had problems with M. TB the manager also knew from time to time the problems she was having with M. However when she approached management about M it only made things worse.

M was horrible towards her; M would nearly attack her for ringing the bell, if customers were around she would give out to her. After she had mentioned to F and TB what was going on, M no longer chatted to her but just issued instructions to her. She felt if she went back to F again about M it would only make things worst so she decided to keep her head down, as she needed her job. She had told F on several occasions about M attitude towards her. She never submitted a formal complaint under the grievance procedure. At the meeting in the Hotel on the 6th May 2009 she had raised the issue of M’s attitude to her.

In reply to questions from the Tribunal, F had told her that she would have to start from scratch again. If you were on the evening shift you would stay until all tasks were completed. She was not aware of any bullying policy.

The respondent’s representative referred the Tribunal to the company’s “Equal Opportunities Policy” which sets out the informal and formal approach for an employee if they feel they are being harassed or discriminated against.

Respondents Case.

The Store Operations director (F) gave direct sworn evidence. He commenced with the company in September 2006 and was the area manager when the claimant was employed and has since been promoted to the store operations director. He explained that their stores through out the country are consistent with each other. The lay out of each is the same, and their efficiencies are as a result of established practise. Their staff are the best paid in their industry. Each of their stores would have an average of 11/12 employees. The management structure is the stores are, store assistants,

assistant store managers, store manager and an area manager.

In the store where the claimant was employed they have 9/10 staff. One store manager, one assistant manager, two shift supervisors and store assistants. He was area manager at the time and had responsibility for four stores. The claimant commenced in September 2007 as a store assistant and was trained in another store until the store she worked was opened.

The area managers hire the store assistants; there are three types of contracts available for store assistants. The claimant was on a 20-hour contract, this guaranteed her 20 hours work a week, and if more hours were available she could work more. The claimant was concerned about her Family income supplement allowance, so they accommodated her to ensure she kept this allowance.

His relationship with the claimant was minimal as his leadership responsibility was to the store managers. However the claimant positively contributed to the running of the store. His personnel responsibility extended to about 40-45 staff including the claimant. He knew all the staff including their personal circumstances, as they also knew him. He visited the stores under him about 2 to 3 times a week.

He had no recollection of the itinerant incident the claimant recalled. He received a telephone call from the store manager (TB) on the afternoon of Friday 24th April 2009 who informed him that the previous night there had been an issue between M and the claimant. The claimant had refused to stay on after the store closed to finish the tasks and they had to bring someone else in. TB further informed him that he had called the claimant in to the office that morning and she had refused to discuss the issue with him, this ultimately led to the claimant tendering her resignation. Then the claimant had telephoned TB seeking a letter stating that she was fired and also a reference letter. TB tried to make contact with the claimant on the Saturday but the claimant hung up.

On Sunday he tried to contact the claimant and the third time he telephoned her he left a voice mail asking her to contact him. The claimant replied by text stating she was too upset to talk, she wanted a letter stating she was fired and thanked him for how he had treated her during the course of her employment. The next day he arranged a letter to issue to the claimant by registered post stating that she had ceased employment with the company. On Tuesday the 5th May he received a telephone call from the assistant manager (TC) of the store informing him that the claimant had contacted him wondering why the letter did not say she was fired.

He telephoned the claimant the next day to discuss the letter and told her that he could only fire her and he had not done this. He was glad to be speaking to the claimant and informed her that he did not want her to resign and asked if they could meet up. He and the store manager TB met with the claimant the next day in a hotel. The claimant was polite and pleasant. He opened up the meeting and asked her what had happened to lead to this. The claimant replied that she had not resigned but was fired. He told her he couldn't understand as he only had the authority to fire her. The claimant explained that she did not want to talk to TB that Friday morning as some of the issues she had were with him. She further explained that since TB had been promoted to store manager he had rostered himself for easier shifts and when he was working he spent most of the time in the office. He explained to the claimant that the role of the store manager was more administratively based and the claimant accepted this point. Another issue the claimant raised was that she felt the burden of cleaning in the store mostly fell on her. He explained to her that the worst task in the store was the freezer stock room and he asked her how many times had she been assigned this task, her response was less than five. The claimant asked him if she returned to work would she face disciplinary action he replied in the negative. The claimant also asked

would she keep her years of service, he did not know and would look in to it. At this meeting the only reference to M was in respect of the incident that led to the claimant resigning. He and TB thought that the claimant would return to work after the meeting.

Later on that day he received a text message from the claimant stating that she was not happy and would be bringing the matter further. He confirmed that if the claimant returned to work she would have kept her years of service. After this meeting he had no further contact with the claimant.

Under cross examination he agreed that in the letter sent to the claimant regarding the cessation of her employment he did not outline that he could only fire her. However he had attempted to speak to her over a number of days and as soon as communications was opened he had ceased this opportunity. He had set up the meeting with the claimant to facilitate her return to work. The claimant did not raise any issues with M at this meeting. He did not recall the claimant sending him a text stating she would give a full statement of the events in writing and that he tested back "best of luck with that".

In reply to questions from the Tribunal, he explained that he had given the claimant the opportunity to lead the meeting and the claimant had not elaborated on her relationship with M other than the incident. He had not been aware of any interpersonal difficulty between the claimant and M.

The store manager (TB) gave evidence on behalf of the respondent. At 8.50pm on the 23rd April 2009 he received a telephone call from M the store deputy. M informed him that she had a bust up with the claimant because she had requested her to stay until 10.00pm but the claimant had refused. M asked him could he arrange cover to allow the claimant to go home.

The next day he commenced work at 11.00am and M told him her version of events. He then wanted to talk to the claimant to her side, but the claimant refused to speak with him about the incident. She refused about 2/3 times and said she wanted to return to her work. He informed her that she could not return to work until they had spoken about the previous night and sorted it out. She responded by saying she was leaving and continued on to give him a weeks notice. He asked her if she was serious and she confirmed she was. He informed her that she didn't have to go back on the check out and did not have to work her notice period. When she was leaving the store he asked her for her key. About an hour later the claimant telephoned him seeking a letter stating that she had been fired. He told the claimant that the whole situation was unnecessary and they had never any issues with her.

He decided to inform the Area Manager (F) of the events. He agreed that he would try and contact the claimant on Saturday, but he was unsuccessful. The area manager made contact with the claimant and set up the meeting with her in the hotel.

FB chaired this meeting and told the claimant now was the time to air all issues. The claimant raised a few issues she had with his performance and also that she was unhappy with her cleaning duties. Both these issues were addressed and the claimant seemed happier. FB explained to the claimant it all seemed to be "a storm in a teacup" and offered the claimant the chance to return to work.

He and the claimant had always got on well together, she was a likeable character and the respondent could do with more employees like her. He was not aware that the claimant had raised any grievance with the previous store manager. Neither his predecessor nor the area manager had mentioned this to him. A number of months before the claimant left, she and M had a falling out

and they did not speak for a number of months. He was under the impression that this falling out was something to do with an issue outside of the workplace. This issue evaporated a few weeks later and the claimant and M were back talking with each other. It would not be possible to work with two people who had ongoing issues with each other and not be aware of the situation. Today was the first time he had heard of the itinerant incident. Staff are normally rostered from their start time to “close” and get paid to the nearest 15 minutes.

Under cross-examination he denied that the claimant had been asked to work until 11.00pm on 23rd April 2009, he confirmed it was 10.00pm. He further explained that it would be highly unusual circumstances that employees would work until 11.00pm. He had spoken with M on the 24th April who informed that she had told the claimant that she would have to work on until 10.00pm, the claimant told her she had to go at 9.30pm. He could not recall at what time M told him that the claimant went home that night. The claimant has refused to talk to him about the night in question stated that she was leaving. The claimant could be hot headed at times. He did not contact Head Office in relation to the incident or to explain that the claimant was saying she was fired and in fact she had left. This was because they were trying to resolve the situation at the time. He reiterated that the claimant had not mentioned M at the meeting in the hotel on the 6th May 2009.

In reply to questions from the Tribunal, as far as he was aware there was nothing on record within the store in respect of issues between the claimant and M. The conversation between himself and the claimant on Friday 24th April 2009 had become heated and the claimant had refused to talk to him in respect of the incident. He had asked the claimant about 3 to 4 times if she was serious when she said she was leaving. He then requested her to bring in her till and key before she left the premises.

Determination

The Tribunal carefully considered the evidence adduced at the hearing. The Tribunal are of the view that there was an ongoing problems between the claimant and M and that the company did not deal with this adequately. This in turn led to the incident that occurred on the 23rd April 2009. On this basis and the balance of probability the Tribunal finds that the claimant was constructively dismissed.

However, the Tribunal finds that the claimant did not make sufficient efforts to justify her loss therefore we award the claimant €6,750.00 under the Unfair Dismissals Acts 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)