

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
EMPLOYEE

-claimant

CASE NO.
UD2247/2009
MN2086/2009
WT947/2009

Against

EMPLOYER

-respondent

Under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr D. Hegarty
Ms H. Kelleher

heard this claim at Cork on 7th October 2010
and 3rd December 2010

Representation:

Claimant: Mr. John Boylan, McNulty Boylan & Partners, Solicitors,
26/28 South Terrace, Cork

Respondent: Mr. David Gaffney, Coakley Moloney, Solicitors,
49 South Mall, Cork

The determination of the Tribunal was as follows:-

The respondent consented to the claimant's application to amend the title of the respondent to that as set out above.

Dismissal was in dispute in this case.

Claimant's Case

The claimant was employed as a manager in the respondent's restaurant from 9th January 2007. She had previously worked in the restaurant from August 1996 until 2005. There were no disciplinary issues relating to the claimant.

The claimant received a phone call on Tuesday, 26th May 2009 from the owner of the restaurant (RO) indicating that they needed to talk. When the claimant met with RO in the office he informed her that “it was not working out” and that he was letting her go. When the claimant asked whether she was being fired RO informed her that she was not being fired but that she was being let go and told her to take as much notice, as she wanted. The claimant later informed RO that she would be leaving the following Saturday. On Friday morning 29th May RO phoned the claimant to inquire, before he got her P45, whether she would take a pay cut but the claimant was unwilling to do so.

When the claimant arrived for work as normal on Saturday evening she discovered that two members of staff, one of whom was a new member of staff, were rostered for the shift that she had normally worked on her own. The claimant was concerned and went to the Employment Resource Centre ((hereafter the Centre). A representative from the Centre (CR) telephoned RO and inquired whether the claimant had been dismissed or made redundant. The claimant overheard their telephone conversation. RO told the representative that he had not made the claimant redundant. When the representative asked whether the claimant had been dismissed or let go, RO replied, ‘It was a bit of both.’ On being further questioned RO said that the claimant had been dismissed because of her work.

CR confirmed to the Tribunal that RO had told her that he had dismissed the claimant for a number of reasons including the fact that he was unhappy with her work. She asked him to send a letter of dismissal stating his reasons for the dismissal. RO’s letter to CR stated:

“Due to the current economic climate that the whole world is experiencing my business has been significantly reduced and the post of manageress became un-feasible and impractical for the company. I explained this to the then manageress. [The claimant] was offered a job as a waitress, working on a reduced pay of ten euro per hour but [the claimant] refused the offer.”

The claimant disputed that such an offer had been made to her. She agreed that she was asked to work at a reduced rate of pay but this was put to her on Friday 29th May, three days subsequent to her dismissal. The offer of alternative work as a waitress was not made to her. The claimant was unaware that RO had planned on taking on the role of manager himself and presumed the pay cut to €10.00 was for her role as manageress. The claimant accepted that she had been made redundant until RO informed CR that she had been ‘fired’. The claimant believed that she was dismissed because shortly prior to this she had missed a flight back to Ireland, resulting in her having to get cover for work, and because she had asked for time off on Saturday 23rd May for her niece’s Holy Communion. The claimant sought employment immediately after her dismissal and attended a number of interviews.

Respondent’s Case

RO’s position was that at the meeting with the claimant on 26th May he explained about the downturn in the business and that cut backs would have to be made. He informed the claimant that as she was the highest paid she would be the first to go. It was at this meeting on the Tuesday that he suggested that she take a pay cut and told her that he would not expect her to continue in the role of manager. RO himself took over as manager. RO rang the claimant on Saturday when he was doing the rosters to ascertain her decision regarding her future employment. The claimant informed him that she would not be working for him anymore, that she would be better off on the dole and that she would be doing her last shift that night. During that conversation the claimant requested her P45.

RO disputes CR’s evidence that he told her that he had dismissed the claimant. RO would have

saved €50.00 per week if the claimant had accepted the pay cut; the other members of staff did not earn enough to take a pay cut. The claimant was not replaced; new staff were hired to replace others who had left. RO's son confirmed that he was rostered to cover the claimant's shifts.

During the course of a conversation at a social event on or around 6 June 2009, the claimant raised the issue of her dismissal with the manager of a nearby business establishment, who invited her to send in her CV but the claimant never sent her CV. A former employee and friend of RO's, told the Tribunal that he was present when the claimant's daughter told OB that her mother (the claimant) was not taking up a job because she wanted to be free for the summer. The conversation took place in RO's restaurant when the claimant's daughter was having a meal there with a friend.

Determination

Dismissal was in dispute. There was a conflict of evidence as to central facts in the case. The Tribunal, relying on the evidence of the independent witness from the employment centre, accepts the claimant's version of the conversation that occurred between her and her employer (RO) on 26th May 2009 and finds that there was a dismissal.

The words used by RO, to inform the claimant of the reason for her dismissal, lacked clarity. In early July RO told the same independent witness that he dismissed the claimant for a number of reasons including the fact that he was not happy with her work. There was no evidence before the Tribunal that RO had ever warned the claimant about her work or that she was in any way made aware of his alleged dissatisfaction regarding her work. Accordingly, the dismissal is unfair and the claim under the Unfair Dismissals Acts 1977 to 2007 succeeds

Accepting the evidence of the independent witnesses on behalf of the respondent the Tribunal is satisfied that the claimant was not interested in working over the summer period and that accordingly she failed to mitigate her loss. In the claimant's evidence she made the point that when she was asked on Friday 29th May to accept a reduction in pay that she did not know that it was for the alternative position of waitress. However, sometime in early July she did become aware of this. The Tribunal finds that in not pursuing this or seeking to enter negotiations with RO about it, in particular in recessionary times and at least while seeking other employment was further evidence of the claimant's failure to mitigate her loss. Taking these failures into account the Tribunal awards the claimant the sum of €3,000.00 under the Unfair Dismissals Acts, 1977 to 2007.

The claimant was given an opportunity to work out her notice but chose not to do so. Therefore, the claim under the Minimum Notice and Terms Of Employment Acts, 1973 to 2005 fails.

As no evidence was adduced in respect of the claim under the Organisation Of Working Time Act, 1997 this claim is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

