

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
EMPLOYEE – *claimant*

CASE NO.
UD1561/2009
RP1760/2009
MN1539/2009
WT661/2009

against

EMPLOYER – *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 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 M McAveety

Members: Mr A O'Mara
Mr J Moore

heard this claim at Monaghan on 29th October 2010 and 10th March 2011

Representation:

Claimant: Mr Aaron Shearer BL, instructed by:
Ms Elaine Connolly
McDonough & Breen, Solicitors
Distillery House, Distillery Lane, Dundalk, Co Louth

Respondents: Mr Enda O'Carroll
Wells & O'Carroll, Solicitors
Carrickmacross, Co Monaghan

Respondent's Case

The respondent consists of a retail shop, deli and petrol station in which the claimant was employed as a shop assistant. The respondent MD gave evidence that the customer base consisted of local and passing trade as well as corporate accounts for outside catering. Initially the business did very well but as the construction industry collapsed the demand on the deli decreased dramatically. It was important to retain the existing corporate accounts and provide the level of customer service that would retain them. The orders were mainly placed by phone.

The claimant was employed on the basis that she was taking a professional English course to

improve her language skills, as communication by phone was an essential part of her job. When the respondent was busy her lack of English was not a problem but as work decreased in every area it was difficult to find a role for her that did not require interaction with customers. The respondent asked her how her English classes were going to which she replied that she could not afford them. The claimant asked for a 50cent raise per hour but the respondent gave her a €1.50 raise on the condition she take some English lessons. The claimant attended some lessons and on one occasion the respondent requested to meet with the instructor only to discover she had limited English and was in fact an Italian teacher. It transpired in March 2009 that the claimant did not apply to the Dundalk Institute of Technology for English lessons as she had told the respondent she did. As the respondent was paying for these lessons he was annoyed at the lack of progress and that the claimant was lying to him. In April 2009 the respondent informed her that he was disappointed and that she was on 'her last legs.'

The claimant's hours had to be decreased as her lack of language skills meant she could not be left alone on the till, she could not answer the phone, she could not help with the post office and could not assist customers. The claimant's main duties were helping in the deli and packing the milk fridges. The claimant attended the HSAP training and it was part of her job to ensure that all the sell by dates on the fridge products were in order – she consistently did not do this part of her job.

By February 2009 the claimant's enthusiasm for the job was gone and in March 2009 she asked about being made redundant, as her hours had been reduced from 33 to 20 per week equating to €200.00 per week. The respondent informed her that it was her lack of English that was the problem, as she could not undertake the duties required and that the position was not redundant. The respondent's attitude did not change after the claimant got married in June 2008; he in fact paid for her hen night.

An incident occurred in late 2008 where the respondent had to follow a truck down the road to get the €300.00 for diesel from the driver that he had failed to pay for. The claimant had activated the pump but had not noticed that he failed to pay.

A second incident occurred in May 2009 where the claimant failed to take €20.00 for petrol when the woman tried to pay for it; the respondent informed her that this was her last warning.

After the above incidents the respondent again found out of date products in the fridge and as a result informed the claimant that she was detrimental to his business and he would have to let her go in a week. The respondent advised the claimant to seek advice from the Citizens Advice Centre and that they could represent her at an appeal.

The respondent did not document any of the warnings issued to the claimant, did not issue a letter of dismissal, did not document any of the meetings with the claimant or have any records relating to the disciplinary procedure.

On the second day of hearing the MD gave evidence that rosters referred to on the first day of the hearing, which he said he would supply, were unavailable. They had been on his computer, but it got a virus and he had it cleaned by a computer company. The rosters were no longer on his hard drive. In relation to payslips, he contended that he could not recreate the payslips issued as he used the *Quickpay* system, but that if a payslip had issued it would be listed on the computer printout list he submitted. He acknowledged that there was no report for a number of weeks in 2008. He changed the status of the business from sole trader to limited company at the end of February 2008. That may have explained the absence of recorded payments to the claimant.

During cross-examination he agreed that from his records he could not see evidence of a pay rise of €1.50 per hour in 2006. It appeared that the claimant's pay was doubled. There may have been more hours available due to another staff member going on maternity leave.

An employee of the respondent company gave evidence that she worked from 9am to 2pm Monday to Friday and that the claimant began her shifts at 11am. She did not know when the claimant's shift finished. She received payslips, but did not have copies with her to show the Tribunal.

Claimant's Case

The claimant commenced her employment with the respondent in September 2005. At the time her level of English was poor so in the beginning she stacked shelves and cleaned. She worked from 10am to 6pm at the beginning. She was never paid as little as €144 per week, she was paid over €300 per week. She was given her wages in an envelope, but she never received a payslip.

She worked on improving her English and after a time began operating the till. She was often left to work on her own in the afternoons. It was never a condition of her employment that she improve her English. She did not receive a €1.50 per hour pay increase in 2006. She worked longer hours. At one point she worked 57 hours a week when two employees were on maternity leave. Prior to her marriage in June 2008 she had a good relationship with her employer, but after she returned from honeymoon the relationship deteriorated and he often used offensive language towards her. In 2007 she represented the company in a beauty contest and the company received publicity in the newspaper.

She did not recall any incident in February 2008 in regard to a DCI truck. She did recall an incident when she was busy serving customers in the shop and the MD was outside with the diesel customers. He said that it was her fault that a customer had not paid, but he had been outside with them. She disputed that she had ever been issued with any written or verbal warnings about her work. There were no disciplinary meetings.

Two or three days before her dismissal he asked her to help at the deli. She said she was checking the dates on products in the fridge, but he told her not to worry about it. The next day he showed her products from the fridge and asked her if she was stupid. She went to the Citizens' Information Service and a representative said she would phone him. On June 2nd or 3rd 2009 he gave her a P45. She thought it was documents she had requested in order to secure a mortgage in Poland. He said it was her P45 and that he didn't need her anymore.

The claimant gave evidence of her loss.

During cross-examination the claimant insisted that the MD had used bad language towards her. Everything was her fault after she returned from her honeymoon. The MD had travelled to Poland for her wedding. She felt obliged to invite him as he had earlier said to her that he wanted to attend if she was getting married. She disputed the contention that she had asked to be made redundant in February 2009. Her attitude did not deteriorate. Her job was very important to her. She did not recall failing to charge a customer for fuel in May 2009.

She was paid €10 per hour at the end of her employment. Her hours were reduced from 47 to 40 in February 2009. She disputed that she was paid €332 per week as per the records submitted by the respondent.

Determination:

Having heard all the evidence the Tribunal finds that the respondent failed to follow procedures and accordingly finds that the claimant was unfairly dismissed. The Tribunal awards the claimant €15,000 (fifteen thousand euro) under the Unfair Dismissals Acts, 1977 to 2007.

As awards under the Unfair Dismissals Acts and the Redundancy Payments Acts are mutually exclusive the Tribunal dismisses the appeal under the Redundancy Payments Acts, 1967 to 2007.

The Tribunal awards the claimant €664.00 (six hundred and sixty-four euro) in respect of two weeks' pay under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

The Tribunal dismisses the claim under the Organisation of Working Time Act, 1997, as no evidence was heard in relation to that Act.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)