

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

EMPLOYEE- (*claimant*)

CASE NO.

RP446/2010

UD224/2010

MN213/2010

WT108/2010

Against

EMPLOYER - (*respondent*)

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

ORGANISATION OF WORKING TIME ACT, 1997

REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. Mcgrath

Members: Mr R. Murphy
Ms M. Finnerty

heard this claim at Dublin on 10th June 2011

Representation:

Claimant(s) :

Proinsais O'Maolchalain B.L instructed by Cafferky, Solicitors, 17 Talbot Street, Dublin 1

Respondent(s) :

Martin A. Kennedy & Co., Solicitors, The Diamond, Malahide,
Co Dublin

The determination of the Tribunal was as follows:

Claimant's Case

Giving evidence, the claimant stated that he was a barman in the pub in question since 2007 and worked 20hrs per week approx. He was informed in June 2009 that the business was being taken over and that his job was safe. Under the new ownership, his rate of pay was reduced from €12.61 per hour to €10 per hour. Other employees confirmed to the claimant that they did not receive a

reduction in pay. The claimant brought this to the attention of the respondent, who said it would be sorted. After a three-week period, the matter had not been sorted and the claimant mentioned it again to the respondent. The respondent said he would try to sort it but the matter was not sorted. The respondent told the claimant that the previous records showed the claimant's pay as €10. The respondent then checked with the previous owners who confirmed that the claimant had been paid €12.61. The respondent said there would be no chance of back pay in relation to monies owed.

The claimant stated that at times he would have to work 10-hour shifts with no breaks. Other employees received their breaks. The claimant's hours were reduced to eight hours one week and then he was not given any hours. The respondent told him that there were no shifts going. The claimant said he was available for work.

Under cross-examination, the claimant stated that the respondent agreed he was on the wrong rate of pay and subsequently his hours were reduced. The reason for the reduction in the rate of pay was changed three or four times. He was flexible in his availability for work and had informed the respondent if he did not get hours of work, he would have to leave. The claimant did not receive any hours of work during a three-week period. He did not give a resignation letter and was unemployed for 11 months after finishing his employment with the respondent. He tried to obtain employment during that period.

In reply to the tribunal, the claimant stated he received €118 per week social welfare plus rent allowance. After three weeks of no shifts, the claimant felt he was at the end of his employment. He did not receive his minimum notice due or holiday pay.

Respondent's case

The Director of the respondent company stated that he obtained the leasehold interest in the pub in the Summer of 2009. There was three full time staff and the other employees were part-time. He took over the pub on 24th July and a meeting was held with staff on 24th June 2009 in relation to the takeover. The claimant was not present at this meeting. The respondent met the claimant about three to four weeks after the takeover, when he rang looking for shifts. He started one week later and was told he would be on €10 per hour and the claimant was fine with that. The Director said when he became aware that the claimant had previously been paid €12.61, he agreed to pay the higher amount but not the back money. By October the rate had still not been increased. The respondent said he had told his Accountant to increase the claimant's rate. The claimant then said he was resigning and asked the respondent for a letter for social welfare.

Under cross-examination, the Director said he started the claimant at €10 per hour as that was the going rate at the time. He accepted the claimant had been paid €12.61 with the previous employer. He was not aware that the same terms and conditions should have been transferred to the claimant, as this was his first venture. The Director did not know that he had to give a contract to the claimant. He did not dispute holiday pay due to the claimant. The Director did not accept that the claimant did not receive breaks but had no record of breaks taken. The Rights Commissioner award of €1,700 is still outstanding as the Director thought that it was connected to the Tribunal hearing today. The claimant had been told his rate would be increased.

Determination

The Tribunal accepts that there was no real effort made by the respondent to implement a smooth take-over situation, certainly in so far as the claimant's treatment was concerned. There was a failure to ensure that the claimant was being paid at a correct rate of pay as per previous employment contract arrangements. In addition, the respondent appears to have been at best ambivalent with regard to the claimant's break entitlements.

The Tribunal does however recognise that the claimant only worked for a nine-week period past the takeover by the respondent company and that his decision to resign was premature in all the circumstances.

The claimant was constructively dismissed and is awarded €2,500. Accordingly, the claim under the Redundancy Payments Acts, 1967 to 2007 fails as these are mutually exclusive.

In addition, an order is made under the Organisation of Working Time Act, 1997 for holiday pay in the amount of €305.

The claim under the Minimum Notice and Terms of Employment Acts 1973 to 2005 is hereby dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)