

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

EMPLOYEE - *claimant*

UD534/2010

WT227/2010

against

EMPLOYER - *respondent*

under

ORGANISATION OF WORKING TIME ACT, 1997 UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P. Hurley

Members: Mr. W. O'Carroll
Ms H. Henry

heard this claim at Galway on 6th October 2011

Representation:

Claimant(s) : Ms Gemma Forde, Charles Foley, Solicitors, Market Square,
Gort, Co Galway

Respondent(s) : Ms. Muireann McEnery, Peninsula Business Services (Ireland) Limited, Unit 3,
Ground Floor, Block S, East Point Business Park, Dublin 3.

Claimant's Case

The claimant gave direct evidence that he commenced working for the respondent in August 2006. He was initially employed as a car wash attendant. He was promoted to manager in September 2009 and assumed extra responsibilities. He was not provided with any written documentation confirming this promotion. He worked five days per week and was paid an hourly rate of pay. This position changed in December 2009 when he was told by (LC) that he would be paid a weekly wage of €400 over a seven day week. A bonus structure was also introduced and he was told he would be paid a bonus of 20% on all takings over €3850. The takings were recorded in a cashbook/note book. He was not happy with these new procedures and expressed his unhappiness to (LC). He was told by (LC) that it was a temporary change and he would be reverting to a five day week earning €400 in January 2010.

On 4 January 2010 he brought the takings to (LC) and he was informed that he would be working six days per week earning €400 in the future. He was not given any reason for this change. He did not accept this position and sought an explanation from (LC). He was not provided with any explanation and (LC) then told him that he was fired. (LC) also asked him for the cash book/notebook and he told him he would provide it to him the next day. (LC) was very angry. On 6 January 2010 he gave (LC) the cash book/notebook and (LC) gave him a cheque for €351.00 in respect of his wages. He did not receive any notice of his dismissal and he was provided with his P45 by post approximately nine days later. He gave further evidence that he did not receive his entitlements in respect of bank holidays worked in October 2009, December 2009 and January 2010. He was never told by (LC) that the business was experiencing difficulties. He was not given the opportunity to appeal his dismissal. Following his dismissal he was in receipt of job seekers benefit until May 2010. He secured alternative employment as a car attendant in May 2010. He earned €350 - €400 per week in that employment and remained in that position until January 2011 when he returned to Poland. He is currently seeking work in Poland.

Under cross examination he accepted that there was potential for him to earn more money per week as a result of the proposed introduction of the new working arrangement and his take home pay was not going to be reduced. He confirmed that (LC) had requested the cash book/notebook on a number of occasions prior to it being given to him on 6 January 2010 but did not accept that he withheld the cashbook/notebook from (LC). He denied that he told (LC) that he would give the cashbook/notebook to his (LC's) competitors if he was not allowed revert to the working arrangements of pre December 2009. On 5 January 2009 he asked (LC) if he was fired and (LC) replied "yes". He confirmed that he never queried his payslips with the respondent. He denied that Gardai were called by (LC) on 6 January 2010 concerning the cashbook/notebook.

Respondent's Case

(LC) for the respondent gave evidence that the business experienced a significant decrease in turnover from 2008 to 2009. As a result, the company introduced a new rota structure in December 2009 and employees were to be paid a weekly flat rate of pay rather than an hourly rate of pay. It was also proposed to introduce a commission bonus but the percentage bonus had not been fully decided upon until January 2010. It was necessary to wait until then when the business had received accurate financial information from their accountants. This commission figure was going to be nowhere near 20% as the business could not sustain such a figure. A cashbook/notebook was also introduced at that time where work undertaken was recorded. All employees including the claimant accepted the proposed new system. The claimant was not going to suffer a pay cut as a result of the changes and (LC) explained to him that he would be better off financially as a result of the new structure. He would have earned an increase of €796 per annum under the new structure.

(LC) gave further evidence that, on 2 January 2010 the claimant said he was unhappy with the new structure. He said he wanted to revert to the old structure and said to (LC) that if he was not allowed revert to the old structure "why don't you fire me. (LC) then asked him for the cashbook/notebook and the claimant informed him that he was going to sell the book to the respondent's competitors if he was not allowed revert to the old structure. He told (LC) that he had the cashbook/notebook at home and would bring it to work on 5 January 2010. He did not do so and (LC) again requested the book. On 6 January 2010 (LC) tried to explain the new system again to the claimant and informed him that it was not possible to revert to the old structure. He again requested the cashbook/notebook and the claimant refused to give it to him. At that

point he informed the claimant that he was going to telephone the Gardai as he was refusing to give him the book. The claimant replied to go ahead and ring the Gardai. (LC) proceeded to telephone the Gardai in the presence of the claimant and at that point the claimant produced the cashbook/notebook and left the workplace. CCTV evidence was shown to the Tribunal of a Garda arriving at the respondent's premises and engaging with (LC).

(LC) gave further evidence that bank holiday entitlements are paid to all employees and documentary evidence in this regard was provided to the Tribunal in respect of the claimant. He told the Tribunal that the claimant had never raised any issues concerning his bank holiday entitlements during his employment with the respondent.

Under cross examination he confirmed that he was requested by the Gardai to retain footage of the CCTV evidence. He also confirmed that all employees are aware that the workplace is monitored by CCTV. He confirmed that the bonus structure was introduced to incentivise employees. This bonus was not due to be launched until January 2010 when the business had received definitive financial figures from their accountants. He confirmed that the claimant was given a different role in September 2009 but denied that this was a promotion.

Determination

The Tribunal finds that the claimant has failed to prove that he was dismissed and determines that the claim under the Unfair Dismissals Acts fails. The Tribunal is influenced by the strong conflict of evidence between the claimant and (BM) for the respondent in relation to the circumstances surrounding the claimant's cessation of employment. In all the circumstances the claimant's claim that he was dismissed by (BM) is not credible and therefore the claim under the Unfair Dismissals Acts fails.

The Tribunal is also satisfied that the claimant received his public holiday entitlements and the claim under the Organisation of Working Time Act also fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

