

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
EMPLOYEE

-claimant

CASE NO.
UD1783/2010
MN1741/2010
WT794/2010

against
EMPLOYER
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 J. McGovern B.L.

Members: Mr. J. O'Neill
Mr J. Maher

heard this claim at Dublin on 19th January 2012

Representation:

Claimant: Ms Nichola Hogan BL instructed by Mr. Niall Bass
Solicitor, Keans, Solicitors, 2 Upper Pembroke Street, Dublin 2

Respondent: Mr. Stephen O'Sullivan BL instructed by Ms Susan Battye
Solicitor LK Shields, Solicitors, 39/40 Upper Mount Street, Dublin 2

Background:

The claim before the Tribunal is one of constructive dismissal. Accordingly the burden is on the claimant to prove the dismissal was unfair. The respondent operates a concession in Dublin Airport. The contended that he was an accounts payable assistant within the respondent company at the time he left his employment but was not given the same pay and conditions as other accounts payable assistants whereas the respondent disputed the claimant ever held this position.

Claimant's case:

The claimant told the Tribunal that he commenced employment with the respondent as a sales

assistant. He worked in the concessionary coffee shop serving customers coffee and confectionary and operating the till. He was required to obtain a security pass from Dublin Airport Police. While he was waiting for this pass he was sent to work in the stores area. He worked in the stores for a couple of weeks. He then transferred to the coffee shop.

After some time as he got to know the management he told them that he was studying accountancy. Someone from the office was being let-go and he was asked if he wished to take on that role. He was happy to take the offer. He told the management that he could do the work and he moved into that role.

His new role consisted of invoicing, stock control, goods distribution and weekly stock taking. He found that the position was as he was promised and as the respondent had agreed. Despite this the claimant had a number of complaints. Firstly, he felt that it was not appropriate that as office staff, he should wear a uniform that he maintains only stores personnel wore; He gave evidence that he was the only person in the office that had to wear a uniform. He “felt it was humiliating” and refused to wear it. He was told by his managers that their managers were complaining that he did not wear a uniform. At one time when he was eating the managers asked him why he was not wearing a uniform.

There was also an on-going dispute regarding his pay. The claimant felt that the respondent was attempting to have the administrative work that he was doing at a lower cost that it should be. He raised that issue with his manager (Mr.B). He then raised it with HR who in turn indicated that there was no issue with his pay and any pay talks should be initiated with Mr. B.

He was asked what he understood his wages were supposed to be. He maintained that he was doing administrative work but not getting paid admin wages. He gave examples of previous employees that supposedly were paid more for the same work.

At a point in time the structure of the stores system at Dublin Airport changed and a new employer was engaged to undertake the stores function. There was no official transfer of undertaking but it was agreed that the respondent would make its stores employees redundant and the new employer would re-employee those workers in the same jobs. An option was give to the claimant to ‘transfer’ under these conditions to the new employer or to stay with the respondent. The claimant chose to stay with the respondent.

Following this change the claimant gave evidence that a further issue for him was his place of work/office after the transfer took place. He said that he occasionally had to do his work in an area of the coffee shop. When he raised the issue with Mr.B he was shown a room where he could move to but he declined as the room was far too small. The claimants maintains that he would have been better off staying as a stores worker given he remained on that pay scale despite being administrative staff. Furthermore if he was on that pay scale as a stores operative he would have had chances to get paid more with overtime and Sunday premiums and/or be promoted.

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The claimant notified HR of his dissatisfaction in correspondence dated 25th February 2010. This correspondence was not acknowledged initially by HR and he had to send a reminder letter in March 2010. The claimant then involved his Union representative to negotiate on his behalf.

The claimant ultimately sent an email notifying HR of his resignation on the 3rd June 2010 and subsequently resigned on the 4th June 2010.

The claimant was asked what prompted him to send the resignation e-mail and he explained that he had asked for holiday time to do exams but was refused the time. Furthermore, his ongoing difficulties continued so he just decided to leave. The claimant's evidence was that he was never informed of grievance procedures.

Cross-examination:

The claimant agreed that when he commenced employment he agreed a pay rate of CS1. In or about March 2010 he was advanced to the CS2 rate which included a pay rise which said pay rise was backdated to September 2009. The claimant stated that this was simply what he was due rather than any negotiated pay rise.

When asked whether or not his employer ever actually agreed to increase his pay the claimant conceded that they never did. His position was that he expected a pay rise to accord with what he considered an administrative position rather than a stores operative pay rate, CS2.

The claimant disagreed that he left his employment because he wanted to take study leave; he maintained that he asked his manager, Mr. B, if he could have leave for exams and this was refused. When it was put to him that he left it too late to ask for leave that he had not filled in the leave application form the required two weeks in advance the claimant replied "I was refused".

It was put to him that he was to attend a meeting with the HR manageress and was late for the meeting and therefore it did not come to pass, he replied "I expected her to stay and wait for me at the meeting and there was no one there".

Respondent's case:

The Tribunal heard evidence from the supply chain manager, Mr. B. He explained that the claimant was employed initially as a customer service assistant in March 2009. In May 2009 the claimant was offered a position in stores and to also process data. They utilised the claimant's experience. The claimant was also asked to move and transfer stock in the stores area from time to time which would have required him to wear a uniform for health and safety reasons.

In 2010 the concessionary shops store room function was placed out to tender and taken over by a single entity. All of the employees in the respondent's stores were made redundant and re-employed by the new entity.

The claimant was given a choice as to what he wanted to do in these circumstances. He could transfer to the shop, leave and be re-employed by the new entity or to remain in his current role, The witness gave evidence that there were no new terms and conditions or pay increase offered to the claimant at this juncture. If he chose to stay he stayed on the same terms as he was initially employed save for the CSA2 pay rate which was previously agreed.

The witness would not agree that the claimant role was accounts payable role as this role never existed at the Dublin location. The work that the claimant carried out solely concerned stores.

Regarding the size of the office that the claimant was offered he himself told the claimant that he would use the office and the claimant could move to his desk where he shared a room with

others.

Regarding the annual leave the claimant did not apply for the leave in time and the respondent could not give him the leave.

Evidence was heard from a witness from the respondent who explained the administrative role wages were negotiated at the interview stage and was separate to the CSA grading system. There was no automatic entitlement to a pay rise and generally administrative staff were not on the CSA grading system She agreed in cross-examination that the claimant was on a different grading that the administrative staff.

Determination:

The case before the Tribunal is one of constructive dismissal. The onus is on the claimant to prove that the dismissal was unfair.

It seems to the Tribunal that the claimant's main issue was that of pay and grading. The claimant notified his employer in February 2010 that he considered himself to be an accounts payable assistant by letter dated 24th February 2010. In that letter he referred to the function previous employees in "accounts payable" and "administration" completed and that they were treated differently to him. He maintained that they were being paid more than him for the same work. The claimant gave evidence to this effect during the hearing, however at no stage were any details of the previous employee's job functions/responsibilities, pay or grading proffered by the claimant; no other comparator was presented to the Tribunal.

It was agreed that the job the claimant performed was graded appropriately at CSA1 and then subsequently increased to CSA 2 level. When he was re-located into the office he felt that he should not be graded on the CSA scale and should be remunerated according to the fact that he was now doing administrative work as opposed to stores work.

Evidence was given on behalf of the respondent that when the claimant re-located into the office he would remain at CSA 2 and his job and pay would remain the same.

The claimant noted his dissatisfaction to his employer as far back as February 2010. This dissatisfaction trundled on for some months without any real effort on the part of HR to resolve it.

Evidence was given on behalf of the employer, which was accepted by the claimant, that he was never actually promised a pay rise following his upgrade to CSA 2. In the circumstances it seems to the Tribunal that the claimant got what he was contractually entitled to. While he clearly feels that he was entitled to more, it was never actually agreed that he would have a pay increase.

The grievance procedure was not invoked by either party at any stage and no evidence or cross-examination by either party addressed this issue.

In all of the circumstances the claimant has not discharged the onus of proof that the dismissal was unfair. The claim under the Unfair Dismissals Acts, 1977 To 2007, fails.

The claim under the Minimum Notice And Terms Of Employment Acts, 1973 To 2005 fails.

No evidence was adduced under the Organisation Of Working Time Act, 1997.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

