

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:  
EMPLOYEE (*appellant*)

CASE NO.  
UD1120/2010

PW153/2010

against the recommendation of the Rights Commissioner in the case of:  
EMPLOYER (*respondent*)

under

**PAYMENT OF WAGES ACT, 1991**  
**UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr N. Russell

Members: Mr J. Browne  
Ms S. Kelly

heard this appeal at Wexford on 17th November 2011

Representation:

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Appellant(s) :

Mr. Blazej Nowak, Polish Consultancy Enterprise, 107 Amiens  
Street, Dublin 1

Respondent(s) :

In Person

The determination of the Tribunal was as follows:

The Parties came before the Tribunal on an employee appeal from a decision of the Rights Commissioners dated the 16<sup>th</sup> April 2010 (r-083875-ud-09/TB and r-083872-pw-09/TB).

### **Respondent's Case**

Giving evidence, VP stated that the café business was unsustainable and as a result he had to let one waiter position go. Another employee, who had been taken on as a waitress after the claimant had been promoted to Assistant Manageress (AM) and was in a role of responsibility and therefore had been retained over the claimant. The claimant never completed rosters with the AM and did not do the bank run. VP stated that the claimant was chosen on a number of grounds. The claimant had been spoken to informally as he refused to go on breaks.

VP had been told that the claimant had also been rude to a customer. In reply to the Tribunal, VM stated that he did not take this matter up with claimant. There was never any disciplinary action taken against any member of staff. A letter of notice was issued to the claimant on 19<sup>th</sup> June 2009 while he was on sick leave.

### **Claimant's case**

The claimant stated that he started with the respondent on 5<sup>th</sup> November 2007. His role involved waitering, taking orders, working the till, helping in the kitchen and cleaning. He also made lodgements in the bank. The claimant trained the employee who had progressed to Assistant Manager, their duties were the same. This other employee was a waitress and helped in the kitchen. The claimant stated that he always asked for his breaks.

The claimant went on sick leave in 2009 when he broke his hand and there was no issue with his employer about the absence. When he rang about returning from sick leave he was told there was no hours. He had been working 40 hours per week and this had gone down to between 32-36 hours. He did not receive a letter in relation to his notice as it went to his old address. His correct address was on the sick cert sent to his employer and he had told the Manager he had moved house.. He did not receive his notice pay.

### **Determination**

On the evidence of the Respondent, the Tribunal was satisfied that there was a need for a staff reduction in July 2009 when the Claimant's employment was terminated.

The issue for the Tribunal then was whether the Claimant had been fairly selected for dismissal.

The business had been operating since August 2007 only and this was the first occasion when a staff reduction was necessary. The Respondent explained his criteria for selecting the Claimant to the Tribunal, however, the Tribunal feels that the Respondent was influenced by factors which should not have formed part of the decision process.

Specifically, the Respondent clearly gave considerable weight to a complaint of rudeness against the Claimant which had neither been put to him nor investigated and in respect of which there had been a significant element of pre-judgement by the Respondent. Neither was the Tribunal satisfied that the Respondent had made any meaningful distinction between the role of the Claimant and that of a fellow employee within the business who started in employment after the Claimant. The Claimant had submitted that, in the absence of other objective criteria, the application of the 'last in first out' test should have seen the Claimant retain his position within the business.

There was neither discussion nor consultation with the Claimant in advance of his dismissal which the Respondent sought to communicate to him by letter dated 19<sup>th</sup> June 2009, albeit that same was not received by the Claimant.

Considering the totality of the evidence presented, it is the decision of the Tribunal that the Claimant was Unfairly Dismissed. The Tribunal awards the sum of €4,000 to the Claimant together with €360 by way of notice pay.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)