

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE - claimant

CASE NO.
UD1050/2010
RP1452/2010
MN1020/2010
WT432/2010

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. K.T. O'Mahony BL

Members: Mr. D. Hegarty
Mr. D. McEvoy

heard these claims in Cork on 12 July 2011

Representation:

Claimant(s):
No legal or trade union representation

Respondent(s):
Mr. Joseph Cuthbert, Martin Sheehan & Co., Solicitors,
16 South Mall, Cork

The determination of the Tribunal was as follows:-

Summary of the Evidence

The respondent traded as a bistro (hereafter referred to as HB) from 2002 to 29 November 2009. The claimant commenced employment as a commis chef with the respondent on 30 October 2006 and was subsequently promoted to the position of head chef. A good relationship existed between the parties and the respondent's evidence was that she confided in the claimant and that he had been a good worker and support to her.

The respondent's position was that the business deteriorated rapidly in the latter half of 2009 and was losing money daily. She had lost her wine licence in September 2009. She ceased trading on 29 November 2009 and all members of staff were made redundant and those who were eligible were given a redundancy payment. The claimant received a redundancy lump-sum payment of €4,200.30. The respondent's partner, with whom she had gone through a foreign marriage several years earlier, had set up a limited company and that company started to trade as a restaurant from the same premises from 1 December 2009. The respondent was neither a shareholder nor a director of the limited company but she was employed by it as head chef, earning €426.00 net per week. The limited company also took back the manager and the two commis chefs who had worked for the respondent. The claimant maintained that he had trained one of the commis chefs and that the rule 'last in first out' should have applied entitling him to be continued in the employment by the limited company and that accordingly he had been unfairly dismissed. He received his redundancy payment from the Social Insurance fund. The claimant found other employment three weeks after his dismissal.

There was a dispute between the parties as to whether the claimant had been given prior notification of the termination of his employment by reason of redundancy. The respondent's position was that she told the claimant at the start of November 2009 that all her employees would be made redundant by the end of the month. The claimant's position was that towards the end of November 2009 the respondent told him that the restaurant was being handed over to new management, that he would be a member of that new management and that a new agreement to this effect would be drawn up and signed. He submitted a letter dated 27 November 2009 to the Tribunal which he had received from the respondent which stated that his employment was to be terminated with effect from 29 November 2009 by reason of redundancy. On 29 November 2009 the claimant was called back early from his break and told that his services were no longer required due to unavoidable circumstances. The claimant maintained that the business had not diminished.

Determination:

The Tribunal finds that there was a transfer of an undertaking from the respondent to the limited company. The claimant's position of head chef was filled by the respondent herein who is the wife/partner of the owner of the limited company. Furthermore, the selection of the claimant for redundancy, being neither for any of the grounds specified in subsection (2) of section 6 of the Acts nor in breach of an agreed procedure or established custom or practice in the employment was not in breach of section 6 (3) of the Unfair Dismissals Acts 1977 to 2007. Accordingly, the dismissal is not unfair and the claim under the Unfair Dismissals Acts 197 to 2007 fails.

As the claimant has received his full entitlement under the Redundancy Payments Acts 1967 to 2007 the claim under those Acts is dismissed.

The claimant's uncontested evidence was that he had not taken annual leave because he had wanted to keep his holidays to go to Pakistan for his sister's wedding. Having taken the requirement to institute a holiday claim within six months of the dismissal the Tribunal determines that

the claimant is due twenty-one days' holidays (which includes one bank holiday) at the time of the termination of his employment. Accordingly, the Tribunal awards the claimant the sum of €2,457.00 (this amount being equivalent to 4.2 weeks' gross pay at €585.00 per week) under the Organisation of Working Time Act, 1997.

The Tribunal finds on the balance of probability that the claimant received notice on 27 November 2009 that his employment was being terminated on 29 November 2009. Accordingly, based on his service with the respondent he remains entitled to 1.6 weeks' gross pay at €585.00 per week, which amounts to €936, as payment in lieu of notice under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)