

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

EMPLOYEE - *claimant*

CASE NO.

MN552/2010

UD610/2010

WT251/2010

against

EMPLOYER - *respondent*

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997
UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms E. Kearney BL

Members: Mr T. Gill
Mr T. Brady

heard this claim at Tullamore on 17th February
and 2nd May 2012

Representation:

Claimant:

Mr Richard Stapleton, Smyth Stapleton & Co, Solicitors,
O'Moore Street, Tullamore, Co Offaly

Respondent:

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

The claims under the Minimum Notice and Terms of Employment Acts 1973 to 2005 and the Organisation of Working Time Act 1997 were withdrawn at the commencement of the hearing.

Claimant's Case

The claimant was employed from 29 December as a retail assistant in the respondent's Tullamore café. It is the claimant's position that she was not interviewed for the position but was hired after collecting a friend of the café manager (CM) from the airport. The claimant

initially worked at washing dishes and after a few weeks began to work on the till. Her position is that she then declined to collect another friend of CM from the airport as she was too tired, whereupon CM hung up on her and after that would not talk to the claimant and that from then on the claimant was required to clean toilets and windows.

The claimant began to take orders and in December 2008 she spent time working in the respondent's Athlone café. On or around 19 February 2009 the claimant was taken to task by CM in the presence of the retail manager. This was on account of her lack of command of English. After this meeting her hours were cut and she was no longer allowed to take orders. She complained that during the February meeting CM said to her in Russian "Who would tell in your face that you are stupid".

From June 2009 the claimant started another part-time, 16 hour per week, job because of the lack of hours with the respondent.

(LD) assistant supervisor gave evidence that the restaurant was very busy and the respondent needed more staff. She knew that the claimant was available for work and put arrangements in place for the respondent to contact the claimant. She gave evidence that the claimant commenced work without an interview taking place. The claimant worked in the wash up area and also prepared food. The witness outlined to the Tribunal instances when the claimant received harsh treatment in the workplace, in particular when she (the claimant) was asked to gather tables from outside when it was raining. The claimant was asked to carry out this task at 5.55pm and her finishing time was 6pm. The witness did not report the instances to the owner, (BS) as she was fearful that she may be treated in the same manner herself if she did so, and was also fearful that her hours may be reduced. Eventually, two weeks before she left her employment she reported the matter to (BS) but (BS) did not do anything about it. She left the employment of her own accord because her hours were reduced. She confirmed that she was aware of the respondent's grievance procedures and accepted that she did not use the grievance procedures. She was also provided with a company handbook. She did not advise the claimant to use the grievance procedures either.

Respondent's Case

(BS) gave evidence that she is the retail manager for the respondent company. She is responsible for the general running of the shops and hires all employees. She does not delegate this duty to other employees. She gave evidence that she interviewed the claimant on 28 December 2007 and the claimant's level of English was very poor. She offered her work in the wash-up area and cleaning tables and the claimant accepted the offer. She commenced employment on 29 December 2007 as a retail assistant and was provided with a contract of employment. Over a period of time the respondent attempted to expand her role but the claimant was unable to multi-task. The witness told the Tribunal that the claimant was unable to perform her duties in the floor area of the restaurant due to her poor level of English. She also

witness received a number of complaints from customers concerning incorrect orders served to them by the claimant.

In February 2009 the witness, along with a supervisor known as (RB) met with the claimant and informed her that they were dissatisfied with her trial period working in the floor area of the restaurant. This was as a result of her poor level of English. The witness explained that the only area that they could continue to offer her work was in the wash-up area. It was also explained that due to the economic downturn that hours of all employees were going to be reduced. The claimant subsequently made a complaint about the work performances of other employees. This complaint was investigated by the witness but no substance was found to the complaint. The claimant did not make any complaint of bullying or harassment and never mentioned that she felt under pressure in the workplace. The respondent then received a letter from the claimant's solicitor in March 2009. This letter was opened to the Tribunal and the respondent replied to this letter by way of a letter of 1 April 2009 which was also opened to the Tribunal. The respondent did not receive any further communication from the claimant's solicitor and the claimant continued working for the respondent until the termination of her employment in December 2009.

The witness accepted that the claimant was able to perform simple duties other than her wash-up duties such as tea or coffee making and she could also assist other employees. However 85% to 90% of her duties were in the wash-up area. She confirmed that the reduction in the claimant's hours was due to her being unable to perform duties other than the wash-up area and the general downturn in business. The number of employees working in the floor area of the restaurant has decreased from 5 in 2008 to 3 in 2009. The claimant's hours were reduced to Saturday work only in the wash-up area. During the remainder of the week the claimant's duties in the wash-up area were subsumed by employees from the floor area. It was not possible for these employees to carry out the wash-up duties on Saturdays as this was the busiest day of the week.

The next witness (RB) gave evidence that she is employed as a supervisor by the respondent. She told the Tribunal that she attended the interview process when the claimant was hired. She gave evidence that the claimant worked in the wash-up area and assisted other employees in making tea and coffee and preparing orders. As a supervisor she was very happy with the claimant's work in the wash-up area but was not happy with her work on the floor area as wrong orders were given by her to customers. She gave evidence that the claimant was not fast enough in performing her duties in the floor area and she (the witness) reported this to (BS). She confirmed that her own hours of work were also reduced due to the downturn in business. She denied that the claimant ever made her aware that she felt bullied or harassed. She denied that she called the claimant a fool at the meeting in February 2009. She denied that she ever bullied the claimant or reduced her hours as she did not have the authority to reduce any employee's hours.

She gave further evidence that the claimant gave her lifts to the airport on a number of occasions outside of working hours. She paid the claimant €80 on two occasions for those lifts

and sought a lift on a third occasion. On this occasion she agreed an amount of €50 for the lift but told the Tribunal that this lift did not materialize as the claimant's boyfriend became angry at the reduced amount of €50. She gave further evidence that the claimant gave her driving lessons on a number of occasions and of her offering to pay the claimant for the lessons.

Determination

The claimant makes a claim for constructive dismissal on grounds of bullying, harassment and victimisation which led to a direct decrease in her hours, leaving her with no option but to resign. In considering the evidence the Tribunal finds as a matter of fact that there was no complaint of bullying and harassment made in February 2009 by the claimant. The Tribunal accepts the solicitor's letter sent on 27 March 2009, which in general terms alleged bullying, harassment and victimisation but no specifics were alleged. The Tribunal accepts the company replied to this letter on 1 April 2009 and there the matter rested. The claimant then did not engage with the company any further either personally or through her solicitor's. She continued to work without further complaint until December 2009.

During this period there was no communication from the claimant regarding bullying and harassment, although the claimant did in July 2009 make a complaint regarding the standard of work of other staff members which was investigated. She resigned from work on 9 December 2009. She made a complaint to the Rights Commissioner Service under various pieces of legislation thereafter.

On listening to the oral evidence and reading the documents produced the Tribunal is unanimously satisfied that the claimant has not discharged the burden of proof necessary and did not satisfy the Tribunal that she was left with no option but to resign her position. Accordingly, the claim under the Unfair Dismissals Acts 1977 to 2007 fails and is hereby dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)