EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.

EMPLOYEE UD362/2010

against
EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K.T. O'Mahony B.L.
Members: Ms. M. Sweeney
Mr. J. Flavin

heard this claim at Cork on 7th March 2011, 17th May 2011, 6th October 2011, and 7th October 2011.

Representation:

Claimant:
Mr. Pat Guilfoyle, Regional Secretary, T.E.E.U.,
Old Fire House, 23 Sullivans Quay, Cork

Respondent:
Lillian O Sullivan & Co, Solicitors, 48 Maylor Street, Cork

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Summary of Evidence

The claimant, who worked for the respondent from 3rd March 2008 until around 1st August 2009, claimed that she had been constructive dismissed.

The respondent set up a health and beauty business in 2003. As the recession began to hit she looked for new ways to develop the business and in consultation with the manager she decided to introduce a sports injuries therapy service into the business. She placed an advertisement in a local newspaper seeking an experienced sports injuries therapist. Of the 8 interviewees, the claimant who had experience working with local sports clubs was the successful candidate for the job. The claimant was given the option of working as an independent contractor but opted to become an employee. The claimant was not provided with a written contract of employment.

The claimant's position was that the respondent had guaranteed her 20 hour's work per week.

at €18.00 per hour. She set out the 20 hours she would be available for, two to three weeks in advance, in a diary kept at the reception desk. Appointments were made within that time-frame. It was her position that she was in attendance in the clinic for those 20 hours eachweek except on 3 occasions when she had been on authorised leave. The claimant maintainedthat she would not have left a well-paid job to come to one where she would not have 20hours' work. In cross-examination the claimant accepted that her assertion that the positionhad been advertised for 20 hours per week was incorrect. A copy of the advertisement wasproduced in evidence. The evidence of two receptionists was that the claimant did not cometo the workplace when she did not have appointments.

The respondent, a sole trader, denied having given the claimant any such guarantee. Her position was that at the interview the claimant requested 20 hours' work per week but it was made clear to her that the respondent could not guarantee her anything, that sports injury therapy was a new venture for the respondent and that the claimant would have a role in its development. Whilst the claimant initially denied this, she accepted in cross-examination that as part of the interview process candidates had to outline in writing how they would develop and market the business. If work became available the respondent would be happy to give the claimant 20 hours' work. The practice was that the therapists, including the claimant, would log in the diary the hours they were available for work, appointments were entered and the receptionist would phone the therapists the day before to confirm the appointments or inform them of any appointments that had been made after the therapist had gone home.

In the first months of her employment the claimant had little therapy work but she was actively involved in canvassing for clients, assisted in the creation of a brochure and the preparation of other documentation for her service and did leaflet drops. During this time she was in general paid for 20 hours each week.

Around three months into the employment, when the initial marketing of the business hadbeen completed, the respondent paid the claimant for the hours she had worked. It was theclaimant's position that she approached the respondent about the reduction in her wages onfive separate occasions between June 2008 and May 2009, to no avail. Initially therespondent indicated that she would sort it out and get back to her but she never did. Duringthat period she also sought payslips, a contract of employment and a grievance procedure inwriting. During the period two pay cheques bounced and it took two weeks to resolve thematter. In or around December 2008 and again in May 2009 she asked to be let go so shecould look for other employment or seek job seekers allowance but the respondent told herthat she was the only one qualified to provide sport injuries therapy and she would not beletting her go. She had also received an untaxed payment from the respondent.

The respondent's evidence was that the claimant had never complained or raised a grievance in connection with her reduced hours or pay in the period June 2008 to May 2009. This was corroborated by the manager, whose practice is to sit in on any meetings where employees raise issues. Nor had the accountant received any complaint from the claimant in respect of any shortfall in her wages. The evidence of other employees, who had formerly worked with the claimant, was that she had been happy in the employment and had never complained about her work or pay. In early 2009 the respondent had introduced a pay-cut but excluded the claimant from this as the hours for sport injuries therapy were relatively low. As regards the issue of untaxed pay raised by the claimant, the accountant's evidence was that this involved payment for 45 minutes which the Thesaurus software package suggested

could betransferred to the next week in order to avoid a tax liability. It was not a covert deduction;Thesaurus software Payslips package is widely used and is recognised by the Revenue Commissioners. were left at reception for collection by employees. This was corroborated byother witnesses. The claimant's payslips were produced in evidence.

Later in the period the respondent allocated general massage work to the claimant but continued to pay her the higher rate of €18.00 per hour rather than €11.00 per hour, whichwas the applicable rate for general massage. The respondent found this was unsustainable andon 27th May 2009 she informed the claimant that she could only pay her €11.00 per hour forgeneral massage work but would continue to pay her the higher rate for sport injuries therapy.The claimant rejected this proposal. Her position was that she had been employed as a sportinjuries therapist. The respondent told her to go home and think about it. The claimant wasalso told that she was not needed at work the next day. When a receptionist phoned her to sayshe was required for an hour, the claimant indicated that she would only go in if paid the€18.00 rate. The receptionist was to enquire about this and confirm the situation to the claimant but failed to so do.

On 6 June the claimant asked the respondent to complete a form for Social Welfare. In the appropriate section the respondent indicated that the claimant had refused an offer of work at €11.00 per hour. The respondent felt that this was the catalyst in the breakdown of the employment relationship.

The claimant's position was that she continued to attend for work on the days and times asindicated by her in the diary. However, despite that, from 27th May to 28th July 2009 shereceived phone calls at home in the evenings and nights from the receptionists and from aclient enquiring about her availability. The claimant felt intimidated and harassed by thesecalls. During the last few weeks of her employment she was being sent home as there was nowork for her. The respondent's position was that during that time it became increasingly difficult to contact the claimant; several attempts were made to contact her but she did notanswer her phone or respond to messages left for her.

There was a dispute between the parties as to whether the claimant had been given a company handbook or was aware that a copy was available at reception.

In late July 2009 the claimant came to the conclusion that her employment with the respondent was no longer tenable and that her issues could not be resolved internally. The situation was beginning to affect her health and wellbeing and by letter dated 29th July 2009 she resigned from the employment.

Determination

There was a conflict of evidence between the parties on several issues. A core issue in the case is whether the claimant had been guaranteed 20 hours' work per week. Having considered the evidence of both parties, on the contents of the advertisement placed in the local newspaper, whether it had been raised at the interview that the position was to include a role in the development and marketing of the business, the fact that sports injuries therapy was a new venture in the respondent's business, the respondent's explanation as to why the claimant paid for 20 hours' work in the early weeks of her employment and despite the claimant's assertion that she would not have left a well-paid job to come to one where she would not have 20 hours' work, the Tribunal unanimously accepts the respondent's evidence

that no such guarantee had been given to the claimant.

Having made the finding on the above issue the Tribunal further accepts the respondent's evidence that the claimant had not raised a grievance prior to June 2009. However, from the evidence adduced on that issue the Tribunal believes that the claimant was aware of the respondent's open door policy.

Phone calls were made to the claimant to confirm appointments. Some repeated calls were made to the claimant when she failed to reply to phone calls and messages left for her. The allegation of harassment and bullying were not proved.

Due to the lack of work in sport injuries therapy the Tribunal finds that the respondent's offer of alternative work to the claimant, albeit at a lower rate of pay, was reasonable.

The Tribunal unanimously finds that the claimant failed to discharge the burden of showing that it was reasonable for her to terminate her employment with the respondent. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)