

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

CASE NO.
UD960/2010

MN906/2010
WT393/2010
RP1301/2010

Against

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr M. Gilvarry

Members: Mr. D. Morrison
Ms. R. Kerrigan

heard this claim at Sligo on 15th November 2011 and 22nd February 2012

Representation:

Claimant: McGovern Walsh & Co, Solicitors, Pearse Plaza, Pearse Road,
Sligo

Respondent: O'Boyle, Solicitors, Courtyard, The Mall, Sligo

The determination of the Tribunal was as follows:-

Respondent's case:

Mr C in his sworn evidence stated that he operated a supermarket that employed 43 people, made up of full time, part time and managerial staff. The claimant began as a cashier and was promoted to trainee manager in June 2008. Following a decline in business and a discussion with the company accountants it became necessary to reduce overheads. Everything was on the table, staff were aware of the situation and were asked for their ideas on cost saving measures. Sunday rates of pay and bank holiday remuneration were looked at. Contracts were in place, setting out duties and

included a grievance procedure. Meetings were held with employees, everybody was aware of the downturn.

Not paying public holiday pay was considered, but head office told Mr C that legally he was not entitled to do so. It was only a proposal and was never implemented.

A cost analysis was done of every shift and a four day week was agreed with full time employees. Part time staff worked week-ends or on demand. Looking at the management team the manager was with the employer for seven years, the assistant manager four years and the claimant was a trainee manager for a lesser period. She had responsibility for check outs and various other duties. Both managers could handle the extra duties so a decision was taken to make a post redundant.

The claimant was asked to attend a meeting on 12th January. She was advised that her post was being made redundant. She was also advised if there was any recovery in the business she would be reemployed. A position did become available but the claimant did not answer her phone when he tried to contact her. Mr C had a work colleague CD call to the claimant's house and offer her the position but she did not return to work.

Under cross examination Mr C said he did not take the decision lightly, and refuted that there was no discussion at all regarding redundancies. It was discussed at management meetings and the claimant was present. Asked if all employees were asked to sign amended contracts on 17th December outlining the non-payment of bank holidays Mr C said "no" absolutely not. The claimant was upset on the day she was told of her redundancy, the union got involved but were not recognised by the business. Asked if it was because she refused to sign the amended contract that her hours were reduced and then she was made redundant Mr C disagreed. No one else was made redundant at the store. The new offer of work was not put to the claimant in writing.

CD said that there were discussions in December regarding the downturn in business. Proposals were made and options looked at. It was better to look at any option rather than let people go. A draft document was done and was put on the notice board. CD did not remember ever getting a copy of it. Mr C told staff that it was not being implemented, hours would be reduced instead. From CD's perspective she felt the claimant had handed in her notice. A position became available and she said she would go and talk to the claimant. She explained that a position had become available. The claimant said she would think about it and speak to her husband.

Under cross examination it was put to CD that the claimant wanted to talk to SIPTU not her husband. She said that was untrue. Asked how she knew the document produced was only a draft she said it wasn't signed by Mr C or the manager and documents were always signed. She bumped into the claimant at a later stage and casually said "you never did come back". The claimant stated that she felt she didn't want anything more to do with the situation.

Claimants Case:

AC SIPTU representative stated that the claimant came into his offices after visiting the Citizens Information Centre and was disturbed that her employer was insisting on employees giving up their public holiday entitlement. Her employer had advised her that anybody refusing to sign an amended contract would have to give up hours.

The claimant was refusing to sign the new agreement but was being put under pressure to do so. She was doing 50/60 hours per week and her contract did not reflect her post of responsibility.

Holding a post of responsibility her pay would be well below the JLC rates.

AC telephoned Mr C and advised him that he could not stop paying public holiday entitlements as it was a statutory obligation. Mr C said he would look into it. The claimant came in to the office a few days later, said she was being put under pressure, her hours were cut and she was threatened with redundancy. AC wrote to Mr C on 11th January and again on 20th January. He wrote on behalf of two members of staff. He got no written response. There were two telephone conversations in which Mr C made it clear he would not deal with the union.

Under cross examination AC said that a second member of staff had initially made contact. He did not follow up on the issue and was probably afraid to do so. AC conceded that the second member of staff still worked for the store.

The claimant in her evidence stated that she worked as a trainee manager, she mainly did evening shifts, would open and close the store and worked most weekends and bank holidays. It suited her to work bank holidays as she got time off in lieu.

On 17th December she popped into the store on her way to the crèche, CD told her that Mr C and the manager were bringing people into the office and getting them to sign amended contracts withdrawing payment for bank holidays. The claimant was passing the Citizens Information Centre later and went in to ask about her entitlements. They told her that what was happening was illegal, not to sign anything and advised her to ring SIPTU.

She went into work at 1.30pm and the store manager told her that all the new contracts were on the desk in the office, all staff had to sign them by that evening. She told him she wanted to talk to him but he said there was nothing to talk about. He told her she was being selfish and she had nothing to lose. She said she would be losing her days off. Mr C called her into the office and made it clear to her that everyone had to sign the new contracts, he said he would drive it through whether it was legal or illegal. He telephoned her the next day because three other people had refused to sign them, he accused her of being the “leader of the pack”. He told her she had until 2pm to get them to sign the contracts “in her own interest”.

She worked her shift that day and Mr C came in at 10pm, he called her to the office and told her that her hours would be cut by one day per week. He also said he could and would make her redundant. The next day the rota appeared and she was down for four days. From then on she was excluded from management meetings and undermined in her position in front of staff. Following the claimants contact with SIPTU she was asked to come to a meeting on 12th January. It was her day off but she agreed to come in at 5pm. She was told she could bring someone to the meeting and Mr C made a speech about hard times and cuts, he then told her he had no choice but to make her redundant.

At a later stage DC called to her house and told her she had good news for her, she said Mr C wanted her back and it would be better for everyone with no need to take things any further.

The claimant said that she wanted to talk to her union representative.

Under cross examination the claimant said that she had witnessed people signing the amended contracts. She had seen a folder with the signed contracts on the desk. Asked why she did not invoke the grievance procedure she said “who could she go to”, Mr C was the owner so she went to the union. Asked about not accepting the redundancy she said she couldn’t, the RP 50 sited cutbacks and that wasn’t true.

Determination:

The Tribunal carefully considered all the evidence adduced and the submissions made. The Tribunal discounted entirely all matters not put to the respondent in the course of the hearing. The Tribunal accepts the evidence of the claimant as to the circumstances of her dismissal, and noted with disquiet the proposal by the employer to remove holiday rights from employees. The Tribunal finds that the dismissal was not by reason of redundancy. The respondent submitted that an offer of re-employment had been made by the respondent, but the Tribunal does not consider that any credible attempt was made to offer the claimant alternative employment. The Tribunal preferred the evidence of the claimant, and determines that the claimant was dismissed and that her dismissal was unfair. The Tribunal considered that compensation was the appropriate remedy in all the circumstances. Pursuant to her claim under the Unfair Dismissals Acts, 1977 to 2007, and taking into account the evidence of loss and mitigation of loss given, the Tribunal awards compensation in the amount of €17,000 as being just and equitable in the circumstances.

The Tribunal also awards the claimant €820 under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

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

The Tribunal finds that there is no case for redundancy and dismisses the claim under the Redundancy Payments Acts, 1967 to 2007

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)