

EMPLOYMENT APPEALS TRIBUNAL

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

CASE NO.

UD1322/2011

against the recommendation of the Rights Commissioner in the case of:

EMPLOYER– *respondent*

EMPLOYER- *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Dr. A. Courell B.L.

Members: Mr T. Gill
Ms H. Henry

heard this appeal at Galway on 28th February 2013

Representation:

Appellant(s) : In Person

Respondent(s) :

This case came before the Tribunal by way of an appeal by the employee (appellant) against the recommendation of the Rights Commissioner (r-100801-ud-10/GC) under the Unfair Dismissals Acts 1997 to 2007.

Appellant's Case

The appellant gave evidence that she was employed as a care giver by the respondent. She commenced her employment in July 2007 and generally worked up to 12 hours per week. She understood that her work was part-time and because of the nature of the respondent's business her hours and location of work could not be guaranteed. She was absent from work on sickleave from April 2010 and was due to return in early June 2010. She contacted her employer informing them that she was fit to return to work and was initially offered one weeks' work but this offer did not subsequently materialize. She was then offered one weeks' work for one hour per day at a location 40 miles from her home. She believed this to be an unreasonable offer of work and declined the offer.

In February 2011 she was offered a further weeks' work near her home. She declined this offer of work because by this stage she had initiated proceedings with the Rights Commissioner Service under the Unfair Dismissals Acts. She told the Tribunal that for 1.5 years prior to the termination of her employment she had been employed as a care giver for client (C). She had worked 12 hours per week for this client and would have been happy to be re-assigned to that client following her return to work from her medical absence. She was told by her employer that this was not possible as it would break the continuity of service that her replacement had established with client (C). She believed that her employer terminated her employment and she sought her P45 in September 2010. She has never received her P45. She confirmed to the Tribunal that she has not sought alternative work since the termination of her employment with the respondent.

Respondent's Case

A business support consultant gave evidence for the respondent that the nature of work for its care giver employees is of a casual nature. There is no exclusivity on employees to work for the respondent and because of the nature of the respondent's business no amount of work can be guaranteed. Employees are employed on a part-time basis and are free to work elsewhere while working for the respondent.

The recruitment and retention co-ordinator for the respondent gave evidence that she was the appellant's appropriate line manager to whom grievances should be raised. She told the Tribunal that the appellant never raised any grievance issues. She gave evidence that the appellant told her that she found her work as a care giver for client (C) as hard going and she would prefer alternative work. The appellant was subsequently offered alternative work on going work in her locality on 21 February 2011 but declined this offer of work. She has not been dismissed from her employment and still remains on the respondent's books.

The Managing Director of the respondent company gave evidence that the company provides non-medical home care. The appellant had a good employment record but had made it known that she found her work with client (C) challenging and asked to be placed with clients other than client (C). He told the Tribunal that client (C)'s needs and continuity of care were best met by the care giver who had replaced the appellant while the appellant was absent on sick leave. He gave further evidence that client (C) had also requested that the care giver who had replaced the appellant continue to provide care for them. He did not recollect if client (C) had ever made a complaint about the appellant and he accepted that there was no difficulty or compatibility with the appellant's skill-set in respect of caring for client (C). The appellant was offered alternative work with other clients but declined those offers of work.

Determination

The Tribunal considered the evidence adduced by both parties. There was a clear conflict of evidence between the parties. In relation to the salient aspects of the case the Tribunal prefers the evidence of the appellant and finds on the balance of probabilities that she was constructively dismissed from her employment. The Tribunal determines that the appropriate remedy in this case is one of compensation and in that regard the Tribunal notes that the appellant did not make sufficient effort to mitigate her loss in terms of seeking alternative employment since the termination of her employment with the respondent.

The Tribunal finds that the appellant was unfairly dismissed from her employment and upsets the recommendation of the Rights Commissioner. The Tribunal awards the appellant the sum of €3,300 under the Unfair Dismissals Acts 1977 to 2007.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

