

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:  
EMPLOYEE *-claimant*  
MN797/2011

CASE NO.  
UD737/2011

against

EMPLOYER *-respondent*

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007**  
**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms D. Donovan B.L.

Members: Mr J. Browne  
Mr F. Dorgan

heard this claim at Waterford on 28th November 2012

### **Representation:**

Claimant:

Respondent: A director of the company

### Background:

The respondent company employs 43 people in 16 shops. The claimant was employed in one of the respondent's shops as a sales assistant from June 2009. It was the respondent's case that the claimant's employment was terminated due to performance issues. It was the claimant's case that her employment was terminated while she was on sick leave.

### Summary of evidence:

An independent interpreter was present to assist the Tribunal.

The director stated in evidence that there were a number of issues with the claimant's work performance and these were previously discussed with the claimant on a number of occasions. The director outlined a number of issues to the Tribunal. The claimant's partner attended at the shop premises most days for a number of hours and stood behind the counter. The claimant disputed this in evidence. The director also stated that he had received a number of complaints from customers that the claimant's partner was aggressive towards them. In addition customers complained that the claimant did not want to assist them with their purchases in the last 30

minutes before the shop closed and that she displayed a poor attitude towards them. The claimant disputed this in evidence stating that she stayed beyond closing time, if required.

Another issue outlined to the Tribunal related to errors made by the claimant in using a new debit terminal. The director stated that the claimant made mistakes despite the training provided. During cross-examination it was put to the director that the new machine was only installed on 29<sup>th</sup> January 2011 and the training was for less than five minutes. One of the errors made by the claimant was due to the fact that the terminal was not connected and she had not been trained how to check for this.

The director had hoped that the claimant would learn some English but this did not transpire. The director explained that when he opened the shops seven years ago 99% of the customers were Polish but now, however, 30% of customers are Irish. It was for this reason that he hoped the claimant would learn some English.

In mid January 2011 the director spoke to the claimant about the issues outlined. He provided the claimant with a letter of warning but the claimant refused to sign it. The claimant refuted in evidence that such a letter was provided to her. She also refuted that the director held a meeting with her about the issues raised. She stated that she had never refused to serve a customer prior to closing time.

An independent interpreter translated the letter for the Tribunal. The letter was dated 15<sup>th</sup> January 2011 and outlined that the claimant was provided with a warning in relation to not complying with verbal instructions and for the presence of her partner on the premises during working hours. The letter further stated that these situations were unacceptable as it was causing damage to the shop's reputation and leading to customer complaints about the claimant not wanting to serve customers in the 30 minutes prior to closure. The letter informed the claimant that should the issues continue the director would be forced to terminate her employment.

However, despite this warning matters did not improve and on 2<sup>nd</sup> February the director issued the claimant with verbal notice that her employment was to terminate on 16<sup>th</sup> February 2011. It was the claimant's evidence that the 2<sup>nd</sup> February 2011 was the first time that she became aware of any issues. The director stated that he attempted to present the claimant with a letter to this effect on 2<sup>nd</sup> and 7<sup>th</sup> February 2011 and that he subsequently sent it by registered post.

It was the claimant's case that she did receive a verbal warning on 2<sup>nd</sup> February 2011 about not assisting customers and she recalled being offered a letter on that date; however she did not sign it as she wanted to discuss the issues raised with the director. The claimant recalled the director's wife stating that her behaviour could not be tolerated. The claimant stated that she wanted to resolve the issues but was not given an opportunity to do so.

The claimant attended for work until 6<sup>th</sup> February 2011. On the morning of 7<sup>th</sup> February 2011 she attended at work but only to submit a medical certificate. She refuted that the director provided her with a letter on that date but she later received notification regarding a registered letter on 10<sup>th</sup> February 2011. This was the first time she received the letter of termination. The claimant initially stated in evidence that she had submitted a second medical certificate to the respondent. However, in reply to questions from the Tribunal concerning the whereabouts of the second medical certificate, the claimant later stated that the second certificate was not in fact submitted to the respondent due to the fact that she received the letter of termination in the

interim. In later evidence the claimant stated despite the fact that her employment had been terminated by this time that a second medical certificate was submitted on 14<sup>th</sup> February but by her partner. The director refuted in evidence that a second medical certificate was received from the claimant.

During cross-examination it was put to the claimant that an offer was put to her on 2<sup>nd</sup> February 2011 that she could continue to work for the respondent but in an alternative role that did not involve serving customers. The claimant replied that she had understood that the offer of alternative work was on the condition of her signing the letter on 2<sup>nd</sup> February 2011. As she did not sign it she could not accept this offer of alternative work. The claimant gave evidence pertaining to loss.

Another employee who worked with the claimant for one year gave evidence to the Tribunal that customers had complained to her about the claimant.

**Determination:**

Having considered the evidence adduced at the hearing the Tribunal notes the conflict in evidence between the claimant and the respondent and the conflict in the claimant's own evidence. The Tribunal prefers the evidence of the respondent and having considered the totality of the evidence the Tribunal finds that the claimant was dismissed from her role of salesassistant for the conduct alleged. The Tribunal finds that the respondent was fair in his dealings with the claimant in that he offered her an alternative position where the claimant's failings in work performance would matter less. Accordingly, the claim under the UnfairDismissals Acts 1977-2007 fails.

The claim under the Minimum Notice & Terms of Employment Acts 1973-2005 fails as the claimant was not available for work during the notice period.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_  
(Sgd.) \_\_\_\_\_  
(CHAIRMAN)