

## EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE - **Claimant**

UD2428/2010

RP3263/2010

MN2365/2010

WT1065/2010

against

EMPLOYER - **Respondent**

under

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

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr J. Smith

Members: Mr D. Morrison  
Ms R. Kerrigan

heard these claims at Donegal on 3 May 2012  
and 7 February 2013

### **Representation:**

Claimant:

Respondent:

The determination of the Tribunal was as follows:

This being a claim of constructive dismissal it fell to the claimant to make her case

At the outset the claims under the Redundancy Payments Acts, 1967 to 2007, the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and the Organisation of Working Time Act, 1997 were withdrawn.

The claimant was employed as a sales assistant in the respondent's retail store (the store) from January 2007. Her position was that she had experienced bullying at the hands of a fellow sales assistant (SA) fairly soon after the start of her employment. She had complained verbally to the then store manager (SM1) at the time but no action had been taken.

The employment was uneventful until June 2009 when the store changed the identity of its franchise and grew in size from around 20 to 30 plus employees and from three to six check-out tills after an expansion programme. At this time the store manager (SM2) was in the process of handing control of the store over to SM3, the son in law of the managing director (MD) of the respondent. The respondent had become aware of a process, described as sweet hearting, whereby certain members of staff were obtaining unapproved discount on goods with the collusion of some check-out operators.

As a result of an investigation conducted by SM2 and MD two staff members were dismissed and three others received less severe disciplinary sanction in November 2009. The claimant, who was regarded as being on the periphery of the sweet hearting, received no disciplinary sanction. The respondent's position was that they ruled a line, moved on and retained trust in the claimant after she admitted and apologised for her involvement.

The claimant's position was that MD spoke to her in an intimidatory manner during the investigation. Soon after the disciplinary action her keys for the shop were taken from her and she regarded this as a form of demotion. In January 2010 after a box of cheese was found to be out of date the claimant felt that SM3 held her responsible, as a result of which he took her off the ordering of dairy product and, following her return from holidays, put her to work on the tills three or four days a week. The claimant felt that SM3 gave her a hard time over fuel pump drive-offs, over a €50 discrepancy, in March 2010, on money handed up from a till pick-up and also over a refund she gave to a customer for a pack of chicken nuggets. She considered that these matters amounted to SM3 trying to get rid of her and alleged that on 17 May 2010 SM3 scribbled in his notebook "Debbie resigns" and later scrubbed it out.

On 24 May 2010 the respondent received a complaint from a customer to the effect that the claimant had caused a child to leave from the store in tears. SM3 called the claimant to his office in order to get her side of the story. It was the respondent's position that the assistant manager (AM) was present throughout this meeting whereas the claimant's position was that AM came in part way through the meeting. Her position was further that during the meeting SM3 told her that she could forget about the supervisory position she had applied for. When the complaint about her causing the child to cry was put to her the claimant told SM3 that she had had enough and was resigning. The claimant left the meeting and left the store. Within a few days the respondent received a medical certificate from the claimant citing stress and her partner returned the claimant's uniform.

### **Determination:**

The claimant contended that she was unable to utilise the respondent's grievance procedure in pursuit of her complaints against SM3 because the procedure called for her to complain to her manager, the same person and because MD is the father in law of SM3. On 25 March 2010 the claimant signed an up to date job description presented to her by the respondent's human resource manager (HR). The Tribunal is not aware of any reason why the claimant could not have lodged a grievance with HR and for this reason cannot accept the claimant's contention in this regard.

In order to succeed in a claim of constructive dismissal a claimant must show that, either their contractual terms were altered in such a way, going to the root of the contract, as to justify their claim or the conduct of the employer was so unreasonable as to justify the claim of constructive dismissal. The Tribunal is not satisfied that the claimant has met either leg of this test. The Tribunal accepts that, in taking the shop keys from her, the respondent was merely implementing a policy

whereby only those in managerial or supervisory positions were to hold keys. Additionally the Tribunal is satisfied that, in placing the claimant to work on the tills, the respondent was demonstrating that it reposed trust in her.

It was further contended on behalf of the claimant that her resignation on 24 May 2010 was a heat of the moment termination of the contract of employment and that the respondent should have contacted the claimant and given her the opportunity to recant on her resignation. MD was aware that the claimant was under stress in regard to her personal circumstances and it would have represented better practice had the respondent written to the claimant subsequent to her resignation to set out their position. If the claimant had been dismissed in the heat of the moment then certainly it would have been open to the respondent to recant and give the claimant the opportunity to return. In this case it was the claimant who effected the termination of the contract of employment. Accordingly, it was for the claimant to seek to recant on her resignation. She chose not to do this; rather her partner returned her uniform and in doing so confirmed her resignation. For all these reasons the Tribunal is satisfied that the claim under the Unfair Dismissals Acts, 1977 to 2007 must fail.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

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