

## EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:  
Employee

CASE NO.  
UD1206/2005

MN908/2005  
WT412/2005

against

Employer

Under

### UNFAIR DISMISSALS ACTS, 1977 TO 2001 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001 ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. E. Kearney BL  
Members: Mr T. Gill  
Dr. A. Clune

heard this claim at Galway on 8th February 2007  
and 18th September 2007

#### Representation:

Claimant: Michael O'Connor BL instructed by Ms Lucy Tynan solicitor,  
Norton Solicitors, 21 Mary Street, Galway

Respondent: John F. Flannery & Associates, Solicitors, 4 Fr. Griffin  
Road, Galway

The determination of the Tribunal was as follows:

At the outset it was agreed that the date of commencement was April 21<sup>st</sup> 2003.

#### **Respondent's case:**

The Manageress of the restaurant gave evidence. The claimant was employed as Assistant Manageress. She stated that the respondent had employed her for twenty years. During the time in question: race week in Galway during July 2005, she was employed by the respondent at the racecourse and was not present in the restaurant.

When asked, she said that the contract submitted at the hearing in respect of the claimant was unsigned, as she had not received the signed contract from the claimant after she had asked her to look it over. She said that “as time goes on” she forgot to ask for the signed contract. She explained that the claimant had worked during race week in 2003 and 2004 and was aware how busy the restaurant was. The claimant was also aware how busy the restaurant was during this time. She explained that during race week last orders were 11 p.m.

The week before race week the witness met with the claimant to go through rosters and schedules. The claimant was quite clear about the opening times. The week after race week on August 2<sup>nd</sup> 2005 she arrived for work. She spoke to the claimant about the previous week, race week, in the afternoon. The claimant had no issues to discuss. The claimant was thanked for her work, including working her day off and received a payment for it. The claimant was to finish at 4 p.m., that day but said she would stay on to help. The witness received a call of complaint from a customer at around 5 p.m. The customer could not gain entry to the restaurant the previous Wednesday, Thursday or Friday night. The claimant left the premises but then returned. She questioned the claimant over the complaint and the Claimant told her that she had to close the premises for five minutes as there was a problem with a “drunk” and that the premises re-opened within ten minutes.

The claimant was on leave the following two days. During Tuesday evening the witness received four more calls of complaint. These people said they were refused enter after 10 p.m. The witness said that she then knew she had a problem. She contacted the other Supervisor (known as S) and the head chef (known as M). S told her that the restaurant had closed early. M concurred with what S had said. She also spoke to her boss. These calls all took place on Tuesday evening. She later asked M and S for a written statement each.

She rang the claimant the following day, Wednesday, and asked her to meet her on Friday at 3.00 p.m. to have a chat. The claimant was informed that she could have someone with her at the meeting and was also informed that another Assistant Manager would be present to take notes. She declined. When asked, the witness stated that she had not informed the claimant what the chat was about but the witness felt the claimant had no doubt what it was all about.

On Friday, August 5<sup>th</sup> 2005, the claimant arrived for the meeting. The claimant was asked what had happened during the previous week. The claimant admitted she had closed early on Wednesday at 10.20 p.m., on Thursday at 10.20 p.m. and Friday at 10.30 p.m. When asked, the witness said that she had no written statements from M and S at this meeting. The witness stated that she felt she had investigated the matter and had discussed the matter with her boss. The claimant was told she was suspended with pay pending further investigation. Due to the breakdown in trust she decided to dismiss the claimant the following day, Saturday August 6<sup>th</sup> 2005.

When asked, the witness said that she had dismissed two other staff while working for the respondent. When put to her, the witness said that the claimant’s version of events written in her T1A form were incorrect; she had not asked for a different representative at the meeting.

When put to her, the witness said that having calculated the claimant’s annual leave, after the dismissal, she was owed a further 7.2 days annual leave.

On cross-examination the witness said that, at the time, there had been inconsistencies in the records concerning her annual leave. She explained that the claimant worked a 39 hour week, was paid till 11.30 p.m. and any overtime worked was paid as time in lieu but that there was no record

of it. Waitressing staff were paid until they finished work. She said that the respondent was using the contract of employment submitted and the respondent had used it for over five years. She stated the clause concerning dismissal was always included. She said that she had not been aware that she had to inform the claimant that she had a right to appeal her decision. When put to her that she did not know why the reason of closing because of a “drunk” had not been discussed at the meetings or entered onto the T2 form to the Tribunal. She agreed that the claimant had not received any previous oral or written warnings but was aware that certain steps should be taken in the case of discipline. However, the claimant had breached trust.

She agreed that the claimant had not been given any prior notice of why she wanted to speak to her. The witness did state that the claimant apologised on three or four occasions for closing up early. She stated that at the meeting on Saturday August 6<sup>th</sup> 2005, only she and the claimant were present. She was not aware that the claimant should be paid minimum notice.

When put to her, the witness stated that she felt she had spoke to two employment agencies in confidence after the claimant’s dismissal. She submitted that she could have been in bad form but had answered the questions asked of her, albeit not in favour of the claimant. The witness stated that the respondent had lost a considerable sum of revenue because of the early closures, compared to the previous years figures.

The head chef (known as M) gave evidence. She explained that she had received a call from the Manageress about race week in the restaurant. She was asked to confirm that the restaurant had closed early on three days. She explained that she had received no dockets for food after 10.00 p.m., which was quite unusual. She had worked four previous race weeks and orders continued to be submitted until 10.45 p.m. She said that she had not observed the claimant at the door of the restaurant as she was working in the kitchen. She said it was normal for kitchen staff to finish up around 11.30 p.m. as the kitchen clean up began at 9.00 p.m.

When asked by the Tribunal she said that it had not been her place to question the claimant’s decision, although she did not agree with it, as the claimant was in charge.

Another employee gave evidence. She explained that she had been employed by the respondent since 1991 but now worked on a part-time basis as a Supervisor. On the Wednesday in question, July 27<sup>th</sup> 2005, she began her shift at 6.30 p.m. Her role was in charge of the reception area and front of house. The claimant was in charge of the kitchen. The claimant approached the witness said that she had an idea for finishing up early. The claimant said that she would not close the door but would refuse customers entry to the restaurant. The witness said that she told the claimant that it was a “mad idea” and that she could lose her job. She let the claimant leave early that evening. The following evening on Thursday July 28<sup>th</sup> 2005 the same occurred.

On cross-examination the witness stated that she was not present at any meetings with the claimant. She was asked by the Manager for a statement on August 2<sup>nd</sup> 2005 but did not type it up till August 12<sup>th</sup> 2005. When asked why no one reported the incidents to the Manageress, she said that no staff would have wanted to ask the claimant for the Manageress’ contact number or report the incidents concerning a Manager in charge. He said that it was very unusual for staff to be present after 12.30 a.m.

On re-examination the witness explained that when working on reception the role included taking customers to their tables and helping other staff and therefore no one would stand at reception all night.

**Claimant's case:**

The Tribunal heard evidence from a friend of the Claimant. She explained that the Claimant was "devastated" when she was dismissed. She was aware of the Claimant's efforts to secure new employment. She phoned the restaurant to seek a reference about the Claimant and was given an uncomplimentary account of the Claimant's work.

The Claimant gave evidence to the Tribunal. She told the Tribunal that the restaurant normally closed at 10.00pm except on Race week. She was paid up until 10.30pm. She explained that she did not stay open until 11.00pm on the Race week. She closed the restaurant at 10.15pm on Wednesday and 10.30pm on Thursday. She told the Tribunal that it was wrong of her to do this it was a "wrong call".

Although the restaurant policy had changed in recent times they would previously have been paid for up to a half hour after closing time. So, for example, if they closed at 11.00pm on Saturday they were paid until 11.30pm and frequently they would not finish until 12.00pm. She did not air this grievance with her employer because she was afraid to do so.

The Claimant was asked if the supervisor who was next in charge to her had said to her that she was "mad to do it", i.e. to close early. She explained that this was not said and indeed she had let the supervisor leave early on the Thursday night. She herself was locking up the restaurant at 11.15pm in any case. No one had protested to her to keep the restaurant open.

The Claimant was not due back to work until Tuesday of the following week, as the weekend was a bank holiday weekend. On Sunday a colleague phoned her to say that a customer phoned the restaurant to complain that he could not book a table for the previous Friday. The Claimant explained that they did not take bookings on race week.

She received a phone call from the manageress on Thursday 4<sup>th</sup> August to ask her to call to the restaurant to discuss some issues that arose about race week and that she could bring a member of staff with her if she wished to. The Claimant explained that she was not going to bring a member of staff as they were all under her supervision. The manageress told her "No" that it had to be a member of staff.

The Claimant arrived to the meeting at 3.00 p.m. the following day. The meeting lasted twenty minutes. She was told that she was being suspended with pay. The manageress told her that she would meet/ phone her the following day. The manageress phoned her the next day and asked to meet her in a local public house.

The Claimant told the Tribunal that it was embarrassing for her to have a disciplinary hearing in a public bar. The manageress handed her a letter that stated that she refused to take bookings.

The Claimant agreed when put to her that she was suspended on Friday 5<sup>th</sup> August and dismissed on Saturday August 6<sup>th</sup> 2005, therefore less than twenty four hours after being suspended she was dismissed.

The Claimant told the Tribunal that she never received a written contract of employment from the Respondent. She never saw grievance procedures in writing. The contract she was shown on the first day of hearing she had not seen. She did not sign a contract. Prior to her suspension on Friday 5<sup>th</sup> August she had never received any other warning. Regarding the decision to dismiss her she

was not told she could appeal the decision.

The Claimant gave evidence as to her loss and mitigation of loss.

In cross examination the representative for the Respondent explained that the company had “no problem” accepting that the Claimant was paid 7 days holidays and she was owed 7.1 days holiday pay. The Claimant accepted this.

The Claimant accepted that she did not comply with keeping the restaurant open (at the correct times) on race week. When a question was put to her, the Claimant explained that the supervisor was content to leave early. She did not decide until 10.30 p.m. or after to close early. She was sorry that she closed early but she did not want to still be in work until 12.30 a.m. or 1.00 a.m. and not get paid for the work. There was no plan to close early “I was exhausted at 10.30 p.m., I was wrong and I regretted it”. She did ask if she could bring an outside representative to the meeting for Friday 5<sup>th</sup>.

**Determination:**

The Respondent did not discharge the burden of proof that the conduct of the Claimant was of such a serious nature as to justify the dismissal. The claim under the Unfair Dismissals Acts, 1977 to 2001 succeeds. The Tribunal find that compensation is the most appropriate remedy in this case. Accordingly, the Tribunal awards the Claimant the sum of €5,000.00, as being just and equitable having regard to all the circumstances.

The claim under the Minimum Notice and Terms Of Employment Acts, 1973 to 2001, succeeds. The Tribunal awards the Claimant the sum of €1,133.24, this being two weeks gross pay as compensation in lieu of notice.

The claim under the Organisation Of Working Time Act, 1997, succeeds; the Tribunal awards the Claimant the sum of €804.600.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

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