

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIMS OF:

CASE NO.

Employee

WT331/2006  
UD1062/2006

against

Employer

under

**ORGANISATION OF WORKING TIME ACT, 1997  
UNFAIR DISMISSALS ACTS, 1977 TO 2001**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. P. O'Leary B L

Members: Mr. B. Kealy  
Ms M. Finnerty

heard this claim at Dublin on 17th May 2007  
and 20th September 2007  
and 21st September 2007

Representation:  
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Claimant :

Mr Conor Bowman, B.L., instructed by Fitzpatrick Gallagher McEvoy,  
Solicitors, Orby Chambers, 7 Coke Lane, Smithfield, Dublin 7

Respondent :

Mr Bernard Dunleavy, B.L, instructed by L K Shields, Solicitors,  
39/40 Upper Mount Street, Dublin 2

The determination of the Tribunal was as follows:-

The fact of dismissal was in dispute in this case

**Claimant's case:**

The claimant commenced her employment with the respondent August 1996. Initially she worked as a waitress on a part-time basis and then moved to management level. She was branch manager in Temple Bar and was in charge of the outlet with twenty staff. She reported to RB and when she returned from maternity leave in 2005 she reported to Mr M. line manager. Other managers also reported to Mr M. The claimant was responsible for hiring and firing staff. There were no

complaints about her work. After her maternity leave MG had taken over as senior operations manager. She found MG to be patronising. New standards were brought in after her maternity leave and there was more pressure on her to meet targets. There was also an increase in her workload where she had a period of seven weeks after March 2006 when she did not have an assistant manager. During this time she had to work double shifts in order to get her two days off and this was very important to have time with her young baby. While she was on Parental Leave her line manager rang her to state she was being moved to the Dawson Street branch where she would not have the same degree of responsibility. The claimant took this as a demotion and she had never indicated that she wanted to move.

On 31<sup>st</sup> May 2006 a couple called her to their table to say there was a hair in a pizza. The claimant took the bill and pizza and deducted the pizza from the bill. The standard procedure would be to deduct the cost of the pizza and give a complimentary pizza or sambuca. She showed the hair on pizza to Oscar the chef and the pizza was thrown out. She then went to the till and they also keep spiked bills. She scratched out the pizza and amended the bill to reflect that the pizza would not be paid for. When she went back to the customers the female was making pretend gestures that she was feeling sick. The claimant told them that if they were not satisfied to just pay for the drinks and they enquired about hairnet and glove policy in the restaurant. After they left there was €20 on the table, which meant they had just paid for the drinks. She scratched off the rest of the bill writing the total they had paid, "to pay €17.50", which was listed on the bill as the price of a bottle of wine. This would happen occasionally and she would make the call as manager.

The claimant was going on holidays three days later and the auditor was coming in the next couple of days. This was a financial audit by an outside company that were hired by the respondent and she and her colleagues were aware it was due. She was going on holidays to Majorca for two weeks. The assistant manager who was taking over from her in her absence telephoned her a couple of times during her holidays. On 13<sup>th</sup> June, one week into her holiday she received a telephone call from the senior operations manager asking if she could come in and meet him and having told him she was away on holiday he said no problem. A week later approx 20<sup>th</sup> June she spoke with OC who told her there was a problem with the audit in relation to the complimentary bill. He had been questioned by E line manager and the senior operations manager. There was a lot of suspicion about the complimentary bill and she was very upset. She rang the senior operations manager and told him she felt her integrity was being undermined. The senior operations manager had questioned other staff and inferred that she had stolen money. Nothing was said on the phone. She told the senior operations manager she was concerned and requested a meeting with him.

Her first official shift was the Wednesday 21<sup>st</sup> June 2006 and the meeting was arranged for that day at a sister restaurant nearby. The claimant could remember what happened and she asked other staff members K or O if there had been two bills for the same amount. Her only explanation was that she had written "complimentary" on the wrong bill. The electronic journal showed two bills rung in at the same time by the same waiter. A written copy and till copy is kept of each receipt. She scratched out the wrong item and the bill that she marked "complimentary" was paid for by visa. The auditor found the visa slip matching the bill that the claimant had marked "complimentary". The claimant had marked "complimentary" on a bill totalling €51.80 whereas the bill in question totalled €28.70. The meeting was in a small office with no windows and the senior operations manager locked the door behind her and interrogated the claimant regarding the bill. She told him her clients had been sitting at either table eleven, twelve or thirteen and the bill he showed the claimant was for table six. There was no one else in the room and he continued to interrogate her. She told him what happened and he said her explanation was plausible. The claimant was then told she was going to be suspended there and then pending

investigation. She was amazed having had a clean record for ten years. The senior operations manager was trying to catch her out and said he did not believe her and that he would have to find someone to corroborate with her explanation. He said he had questioned O and another staff member and they could not remember. Oscar was the chef on the night and he said he would speak to him. The claimant was amazed she was being suspended and pointed out that something similar had happened with another branch manager and no sanction was taken against her. She was not told if the suspension was with or without pay. She had left her handbag in her own branch and she was told by the senior operations manager that he would have to escort her to get it and this he did in front of her staff and customers. She did not think he was concerned about her security. The claimant felt like a school kid going to headmaster as she was escorted with customers looking on. She got upset in the office and told him she was not a thief and had not stolen anything. Because of the different bills the till was up by €20 and she originally thought it was down. They had a jar for shortages and would throw in 1 or 2 cent coins, which they used when needed.

Correspondence between the parties was opened to the Tribunal. The claimant wrote to the senior operations manager on 23<sup>rd</sup> June 2006 enquiring as to when she would be re-instated in her job and referred to a remark made by him if she was planning to have more children and how this would impact on her being branch manager. The response dated 25<sup>th</sup> June 2006 confirmed that the suspension was on full pay and stated that the discussion about parenthood was part of a general conversation. She then received confirmation of a disciplinary hearing on 7<sup>th</sup> July 2006. As the claimant was certified by her doctor as being unfit for work and likewise unfit to attend this meeting she requested by letter dated 5<sup>th</sup> July that it be adjourned. This letter also enclosed her medical certificate. The response from the senior operations manager dated 11<sup>th</sup> July stated that she would now receive sick pay rather than full pay. This was followed by letter dated 18<sup>th</sup> July from her solicitor wherein it was confirmed that the claimant was pregnant and suffering from stress due to the actions of the respondent. By letter dated 28<sup>th</sup> July 2006 from the operations manager she received confirmation of a disciplinary hearing on 10<sup>th</sup> August and that the allegations in question were regarded as gross misconduct. Further correspondence followed including confirmation of her continuing medical difficulties and her being unfit to attend the meeting as scheduled. A response from the employee relations manager dated 29<sup>th</sup> August stated that the claimant would only be paid her full pay up to 12<sup>th</sup> September and it was hoped she could attend the disciplinary hearing prior to that date. Correspondence followed from the claimant's solicitor and the claimant directly where she confirmed she was still unable to attend the disciplinary hearing due to pregnancy complications. The correspondence that followed set a date of 5<sup>th</sup> October for the disciplinary hearing and stated that full pay would cease on 26<sup>th</sup> September. The claimant's solicitor responded by letter dated 22<sup>nd</sup> September 2006 asking that her salary would continue to be paid until such time as she was medically fit to attend a disciplinary hearing or she would have no option but to resign. This letter also stated that the claimant would be willing to submit to a medical examination by a doctor nominated by the respondent. A response was requested by 26<sup>th</sup> September. No response was received and the claimant tendered her resignation by letter dated 28<sup>th</sup> September 2006 as she felt she had no choice since the respondent kept insisting she attend a disciplinary hearing even though she was medically unfit to do so. Were it not for the advice from her doctor she would have attended the disciplinary hearing. Her priorities at this time were the health of her unborn child and her own health.

In cross-examination witness said that while she was familiar with the respondent's terms and conditions in relation to gross misconduct it was not followed to the "letter" in practice. While she was familiar with the long-term sick pay scheme it did not apply to her. The remark from the senior operations manager in relation to her family plans she felt very inappropriate. When

asked if the explanation concerning the pizza was given on the basis of the auditors visit witness said she would not have done something dishonest. She ripped the bill to make it look tidy as there might possibly be confusion with the amount paid and she did not think it was a big thing at the time, however in hindsight it obviously was. The bill was also entered on computer and sent to head office. As far as the claimant was concerned she had done everything correctly and only found out three weeks later. She had made a paperwork error and the original bill was shown to the Tribunal during the course of the hearing. In relation to the meeting with the senior operations manager she felt uncomfortable and nervous by his treatment of her in a small office with door locked. While it was intimidating she did not ask him to unlock the door, as he was her boss. The remark made by the senior operations manager was "for clever girl ---this very stupid". The inference was that she had taken the money and the senior operations manager told her at best she was incompetent or at worst she was guilty of gross misconduct. Prior to this she never had any problem at work. The fact she was a mother had a bearing on the issue that arose between her and the respondent.

In relation to her being requested to attend a disciplinary hearing she felt it would have been fair if the respondent had waited until she was well enough to attend. She was medically advised not to attend the disciplinary hearing and the respondent set a date for this hearing knowing she could not attend. She was not willing to let the disciplinary hearing go ahead in her absence. The stress brought on by the manner in which the respondent dealt with the claimant, contributed, she felt to her pregnancy complications. Personally she thought she would be fired.

In answer to questions from Tribunal members witness said the till prints two receipts. The transaction is recorded on computer in addition to the cash sheet and its also put on screen.

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

The Tribunal heard evidence from the senior operations manager who was in charge of all the respondent's restaurants in Ireland. He was based in Ireland for fifteen months and had been there eight months at the time of this incident. He had been working with the respondent for ten years in the UK. He had been involved in the disciplinary process many times. He referred to a management weekend in Glasgow, which was a team-building event. During the course of the weekend as they were walking back to hotel he started talking with the claimant. He remembered asking the question in relation to her plans to have more children but it was light-hearted and he himself had become a father again around that time. Prior to this he would have found it difficult to mention his commitment at home since managers had to work day and night shifts. There was no malice intended by this remark, it was just general conversation. The claimant gave her answer without hesitation that she was not planning to have children at the moment. He had known the claimant five or six years and had the greatest of respect for her. He was not the claimant's immediate line manager, it was E. He had a conversation with her line manager about moving the claimant and she thought the claimant might have been struggling with her role. For business purposes also a move was contemplated. The Dawson Street branch was much bigger and more prestigious for a manager. The Temple Bar branch was in need of refurbishment. There was no intention to undermine the claimant. The assistant manager moved from Temple Bar as she decided she could not mix home and work life. There were never any problems with the claimant and he had no difficulty with her as a mother returning to the work place. He prefers women as managers and they are better at multi-tasking.

He was at a meeting when he received a message from the claimant's line manager saying that the auditor had arrived. They visit every three to six months and at minimum twice a year. The audits

were not announced. He went in to see how the audit was going and wanted to get feed back. The auditor was in the basement of the restaurant and said there was a problem and brought out a visa slip. Witness felt it did look suspicious and noticed a bill matching that same amount. Witness gave a statement, which was opened to the Tribunal, as were copies of the bills in question. He rang the claimant but as she was abroad on holidays he did not want to worry her at the time. On her return she contacted witness and they arranged to meet and he felt he had a duty to find out what happened with the bills in question. There was no intention to undermine the claimant. He spoke to other staff who worked on the night and when he looked at the bill he noticed it had a piece missing and felt it had to be deliberate. He then looked at the bills on either side of that particular one. It happens a lot that pizzas are comped and the procedure is to comp the pizza and not all the food on the bill. Neither of the people who were involved knew anything and there were too many unanswered questions. A great element of trust is placed in managers in relation to giving comps and its indicative on how a manager runs his/her restaurant. The claimant had not given that many comps but when a procedure is not followed this is what an auditor would pick up on.

The meeting with the claimant took place on 21<sup>st</sup> June 2006 and since this was a sensitive issue and her integrity was being questioned he decided to have this meeting outside of the restaurant. Prior to the meeting he was in a room at the back of the restaurant and they went to his office, which is located at the end of the corridor, which was close to a refuse room and staff entrance. He arranged the chairs and since he is tall he sat on a lower chair so as not to overpower the claimant. He was conscious of going into a room with a female and did not want to undermine her. He did not ask another manager to the meeting, as he wanted to deal with the matter one to one. The claimant sat down and he left the door ajar. He noticed a member of staff pass by and there was a lock and key on the door. There was no reason for him to lock the door and could not understand how the claimant said he had done so. He tried to address the matter in a sensitive way. The claimant was sure that M was the waiter on the night. A manager should know which bill she was comping and it did not add up. The bill she comped had a house wine and he said this was glaringly obvious. Witness kept pressing her but she did not give satisfactory answers. The auditor does not know how to get electronic journals and witness did not know that it existed at the time. The claimant was on the night shift and she was saying this happened at the change over period. She told him she had torn off the bottom of the bill to mislead the auditor. Even if this could be explained there was a big question and the tearing off of the bottom of bill shocked him. He was not aware there was a practice going on to gain points with the auditor. The claimant was an experienced manager for seven years and this needed to be addressed in a formal manner and he needed to have more facts.

The claimant told him she had manipulated the paper work. He knew the claimant for some time and was aware she had a family and this was not an enjoyable thing to do. He then told the claimant he would contact her once the investigation was carried out. He had some unanswered questions. He did not want her to adjust anything and he wanted to protect the interests of the company. He told her she was being suspended and there was no malice involved. They both walked to the office to collect her bag. He found pots full of change, which he did not think was normal. A couple of days after the meeting with the claimant he received a letter from her dated 23<sup>rd</sup> June 2006 and attached a medical certificate stating she was suffering from stress. He was distressed to see a reference in the letter regarding her family as she was suspended for unrelated matters and there was no discussion about family. This was uncovered when she was on holidays and the conversations regarding family would be more likely with her line manager. He thought this was some spurious claim to get her off the hook. He made contact with Oscar who was in China. He had poor English and he was vague about the night in question. Witness gave a statement of this conversation dated 3<sup>rd</sup> July, which was opened to the Tribunal. Oscar's last day

to work for the respondent was 3<sup>rd</sup> June 2006. Witness felt he knew the claimant too well to do the disciplinary hearing and as there are only two or three others at his level, he choose somebody below him whom he knew to be very thorough and a person he trusted and respected. The claimant contacted him a couple of times by telephone and letter but he had no real discussions with her after that. He left the respondent at the end of 2006 having spent eleven years with the company and he now lives in the UK. At the time he had considered issuing procedures against the claimant for defamation of character and he found her comments about family matters upsetting him being a family man himself. The reason he did not do so was that he felt sorry for the claimant and she was pregnant at the time. He said that the claimant had also issued defamation procedures, which had settled for small compensation, but this was not his decision.

In cross-examination witness said that the purpose of the investigation was to answer the unanswered questions. The first question to answer was why the bottom part of the bill had been torn off as it was against company policy and she had falsified documents. He believed it was potentially more serious and that it was wrong to cover up anything. Witness did not accept it was an innocent mistake and did not believe her side of the story. The comment about family matters in Glasgow was intended as a compliment and he admired the claimant. He did not make a comment as to how the claimant juggled work and family. Witness did not see the move to Dawson Street as a demotion. He accepted that the email from Oscar supported the claimant's version of events on the night in question. When asked what was the falsification of documents he answered that the claimant had comped the wrong bill and there was a concern that money had been stolen. The reason the claimant was suspended was that she had changed paper work. While he agreed that the claimant did not mislead him he was dissatisfied with the reasons she gave him.

In answer to questions from Tribunal members as to why he did not ask the next manager in line to conduct the investigation and then report to him and in that way the appeal could go to witness, his response was that he knew the claimant quite well and could deal more sensitively with the matter. He agreed it was slightly unusual for witness to investigate and then have the appeal to go to somebody more junior. He did not adjourn the meeting with the claimant on 21<sup>st</sup> June as she had changed things to mislead the auditor. As he was the senior person in company the next more senior was in the UK. After the meeting he walked back with the claimant as all the information was in the office and he was afraid she would alter something. He had made up his mind that she had falsified documents. In relation to the electronic journals he said he had to contact the I.T. and it was difficult to find on the computer. He sought corroboration of the email from Oscar, as it was just two lines in length. Even though the claimant had an impeccable record he was suspicious because the receipts were €20 over and there should be no “overs”. When he met the claimant on 21<sup>st</sup> June he did not bring with him all the bills for the day and the electronic bills as he thought there would be a simple explanation.

The employee relation’s manager in his evidence said he looks after and advises on disciplinary matters. He is based outside London and oversees Ireland and the UK in relation to these matters. His involvement was in terms of the letters between the parties and the postponement of the disciplinary hearing. As the claimant was not well enough to attend the disciplinary hearing he thought that as a reasonable employer he would write to her on 15<sup>th</sup> August 2006 confirming that this hearing would not take place until such time as she was fit to attend. This letter was opened to the Tribunal during the course of the hearing. This letter also confirmed that she would be paid her full salary whilst she was on her current period of sick leave. In this regard he did not think she would be on sick leave a long time and felt it would be reasonable, not thinking this period would be many months down the line. The disciplinary hearing could not be postponed indefinitely. When it got to September and they were not in any way closer to the disciplinary hearing being

eld he felt that at this stage a reasonable period had elapsed. He wrote to the claimant on 19<sup>th</sup> September 2006 confirming that her full salary would only be paid for a further seven days and the disciplinary hearing was set for 5<sup>th</sup> October 2006. The disciplinary process needed to finish and it was up to the disciplinary officer SC but witness may have facilitated the process. The claimant tendered her resignation by letter dated 28<sup>th</sup> September 2006.

In cross-examination it was put to witness that if the claimant was still with the respondent she would have benefited from her share options and he responded that other managers in Ireland were able to exercise their options. In relation to the claimant not being well enough to attend a disciplinary hearing and his comment that he did not think it would go on “forever”, he was asked did he not think she was sick and he responded that he was not a doctor. He did not respond to letter from the claimant’s solicitor of 22<sup>nd</sup> September 2006 stating she was willing to be examined medically by the respondent’s nominated doctor as she resigned and he was trying to conclude the process.

In answer to questions from Tribunal members as to why the date of the disciplinary process was brought forward he answered that they needed some kind of closure and if they did not draw a line it could be going on forever.

### **Determination:**

The Tribunal having carefully considered all the evidence find that the claimant was constructively dismissed. The Tribunal came to this conclusion by reason of the fact of the manner in which the

employer conducted the investigation into the incident that occurred in relation to the docket in question. The manner and the level in which the investigation was conducted was totally disproportionate to the incident itself. The necessity for a member of management to escort her to her place of work in front of employees whom she had managed, and off the premises was distasteful and unnecessarily embarrassing to the claimant.

The Tribunal also find that the company acted in a very hasty manner in precipitating the disciplinary hearing when there was uncontroverted medical evidence that the claimant was unfit to attend such a hearing. The Tribunal awards the claimant compensation of €61,000 under the Unfair Dismissals Acts, 1977 to 2001. The claimant is entitled to two weeks holiday pay in the amount of €1546.16 under the Organisation of Working Time Act, 1997.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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



