

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
Employee

CASE NO.
UD877/2007
MN697/2007

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001

I certify that the Tribunal
(Division of Tribunal)
Chairman: Ms N. O'Carroll-Kelly BL
Members: Mr F. Cunneen
 Mr G. Lamon

heard this claim at Dublin on 10th January 2008

Representation:

Claimant: Mr Paul Henry, SIPTU, 7th Floor, Liberty Hall, Dublin 1

Respondent: Mr. James O'Mahony, Solicitor, 16 Stoneybatter, Dublin 7

The determination of the Tribunal was as follows:

Respondent's case:

The Respondent in this case is a restaurant. The Claimant was a head waiter/supervisor. The Tribunal heard evidence from the former acting general manager of the respondent. He told the Tribunal that the manager that preceded him told him that the Claimant was not clocking out properly. He called the staff together and told them that the issue of not clocking out correctly had come to his attention and if anyone was caught in the future it could amount to a dismissal. He told the Claimant that in future he would check the clock cards. The Claimant clocked in and out properly for a few days and he then reverted to not clocking properly.

The manager explained that the Claimant had the authority to sign off on employees' cards who had not clocked in or out. The Claimant did not have the authority to sign his own clock card.

An employee told the manager that the Claimant had asked him to clock out for him. The witness approached the owner about the repeated behaviour of the Claimant and it was decided to dismiss the Claimant. He summarily dismissed the Claimant.

In cross-examination the witness explained that he had a meeting (prior to the dismissal) with the Claimant and he did not have a witness at this meeting. He warned the Claimant at this meeting. He told the Claimant that he was aware of what "was going on", and the owner was aware also. He told the Claimant that he was "giving him a chance". The witness explained that he and the owner both drafted the letter of dismissal and that it was a "group decision".

The Tribunal heard evidence from the staff member who alerted the previous witness to the Claimant's behaviour. He commenced working for the restaurant in July 2006 as a waiter and later became a manager. The Claimant told him that the clocking cards were never checked in the office and that at the end of each week it was possible to accumulate some extra hours. The witness did not want to partake in this practice. The Claimant asked him to clock him out and he refused. The witness explained that there is a notice beside the clocking machine that if a manager does not sign their cards, (if an employee forgets to clock) then they will not get paid for the hours in question, (unless a manager signs the card). The witness explained that he told the acting general manager that someone else had clocked out for the Claimant. He told him this in case it might be assumed the he himself clocked out for the Claimant.

Claimant's case:

The Tribunal heard evidence from the Claimant. He commenced working for the Respondent and was told that his position would be as head waiter. His job included in totalling the cash at the end of the evening and to close the restaurant. His hours were thirty-nine hours per week and his overtime was decided if targets were met. He worked more that thirty-nine hours.

He was asked if there was a public meeting about the clocking and he explained that if there was he was not present. He was not aware of getting a warning and no meetings took place. He did not have a contract of employment.

Cross-examination:

The Claimant was asked about his hours. He explained that his contract that was agreed with the general manager was for thirty-nine hours. He worked more that this and only sometimes got paid for forty-five hours. His card was not a clocking card it was just to prove to the former manager the hours that he had worked. Most days he did not take a break

In answering questions from the Tribunal he explained that some weeks he worked sixty hours and was paid for forty-five. He did not get any verbal warnings or written warnings.

Determination:

The Tribunal having heard all of the evidence produced during the hearing of the matter have concluded that due to poor case management there was a lack of factual evidence produced by the Respondent in relation to their dismissal procedures. However, based on the oral evidence produced to the Tribunal and on the balance of probabilities the Tribunal conclude that the Claimant's case must fail. The claim under the Unfair Dismissals Acts, 1977 to 2001, fails. The claim under the Minimum Notice and Terms Of Employment Acts, 1973 to 2001, fails.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)