

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

Employee

UD91/2008

against

WT63/2008

Employer

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. S. Mahon

Members: Mr. B. O'Carroll
Mr. P. Clarke

heard this appeal at Athlone on 19 June 2008

Representation:

Claimant:

Ms. Noelene Geraghty, Anthony Barry & Co, Solicitors,
Northgate Street, Athlone, Co. Westmeath

Respondent:

Mr. Alan Barry, IR/HR Officer, IBEC,
Confederation House, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

The fact of dismissal was in dispute between the parties. The claimant was employed as a chef in the respondent's kitchen from 26 May 2007. He was one of four chefs working under a head chef. The head chef reported to the food and beverage manager (FBM) or in his absence to the assistant food and beverage manager (ABM). The claimant's position is that he did not sign any contract of employment. The respondent opened a contract to the Tribunal that had not been signed by the claimant. The previous head chef left the respondent some time before the events that led to the termination of the claimant's employment. This put pressure on the remaining chefs and the claimant received a significant pay rise from 15 June 2007. The employment was uneventful until 12 July 2007 when the claimant, who was on annual leave and due to return to work on 14 July 2007, was the victim of an assault. The claimant attended hospital and was given a medical certificate to cover him for absence from work on 14 and 15 July 2007. The claimant reported his situation on 13 July 2007 to the head chef (HC), who had been employed from around the time that the claimant received the pay rise, and told HC that he would return to work on 16 July 2007. His position is that HC told him to bring the medical certificate when he returned to work. In the event when the claimant returned to work on 16 July 2007 he did not take the medical certificate with him.

Whilst at work on 16 July 2007 the claimant was slapped on the back by a colleague who was unaware of the earlier assault. The claimant's condition then deteriorated and after going outside for a breather the claimant was sent home by FBM who described the claimant as looking "shook". The claimant attended hospital again on 17 July 2007. He was examined by a neuro-surgeon and was given a medical certificate for two weeks. He was diagnosed as suffering from physical trauma and post traumatic stress in addition to two broken ribs. He was discharged from hospital against medical advice at around 3-00pm on 17 July 2007. The claimant's position is that he attempted to contact HC on the telephone on 17 July 2007 without success and subsequently left voice mails and text messages to inform HC that he would not be in work for the next two weeks. HC did not give evidence to the Tribunal. The claimant did not send the two-week medical certificate to the respondent.

On 29 July 2007 the claimant sent a text message to HC to enquire about his rostered hours for starting back to work the next day. Some two hours later the claimant received a telephone call from FBM to ask for his address so that the administration officer could send the claimant's P45 to him. The respondent's position is that the claimant should have contacted FBM and not HC on both 13 and 17 July 2007 to inform the respondent of his absence from work. The putative contract states, "The Company must be notified immediately if you are sick and if it appears that you will be unable to attend work". The respondent's position is further that ABM, who lived close to and was friendly with the claimant, called to the claimant's house on several occasions between 17 and 29 July 2007 but did not find the claimant at home. The respondent was busy at the time, FBM assumed that the claimant had gone to work elsewhere and the claimant was replaced. The chef who replaced the claimant had demanded to be made permanent. FBM stated, "Text is no means of communicating". The claimant's position is that on 30 July 2007 when he went to collect his personal effects HC confirmed having received the claimant's text message on 16 July 2007.

Determination:

The Tribunal is satisfied that the claimant was dismissed on 29 July 2007 during the telephone conversation between FBM and the claimant. The respondent never wrote to the claimant to warn him that his position was in jeopardy; rather the respondent assumed that the claimant had gone to another position. The claimant's evidence that he contacted HC on 16 July 2007 and that HC confirmed this on 30 July 2007 was uncontroverted. The dismissal was without any, or fair procedure. It must follow that the dismissal was unfair. The claimant could have avoided this assumption on the part of the respondent if he had submitted the medical certificates before 29 July 2007. The Tribunal is not satisfied that the claimant has made reasonable attempts to obtain employment at the same level of remuneration as he was receiving from the respondent. For these reasons the Tribunal measures the award under Unfair Dismissals Acts, 1977 to 2001 at €11,000-00. No evidence having been adduced under the Organisation Of Working Time Act, 1997 the claim under this Act must fail.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)