

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

Employee

CASE NO.

MN192/2008
UD235/2007

Against

Employer

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr W. Power
Mr. S. O'Donnell

heard this claim at Naas on 20th December 2007 and 9th May 2008.

Representation:

Claimant: Mr. Gordon Henderson, Red House Business Centre, Ballisk, Donabate, Co. Dublin

Respondent : Mr. Nevan Powell B.L., instructed by Fitzgibbon O'Riordan, Solicitors, 49
O'Connell Street, Limerick

The determination of the Tribunal was as follows:-

Dismissal as a fact was in dispute.

Respondent's Case:

In November 2005 the respondent took over a company (the Branch) which operated a crèche where the claimant worked as a cook. On the take-over all staff including the claimant transferred into the respondent company. The respondent has facilities in Dublin, Wicklow and Kildare and currently employs a total of 174 staff and has just under 1,000 children.

The respondent's ethos is to provide the highest quality of childcare. Hygiene standards stipulated in the Environmental Health Acts are strictly adhered to. The respondent follows the HACCP standards. Its slogan is, "Because you want the best for your child". The respondent employs a qualified nutritionist. A Branch Manager (the Manager), unit leaders/child care

assistants and a cook are employed in the Branch.

On the take-over of the Branch, the Director of Operations who is also joint Managing Director, set about refurbishing the premises. Some €250,000 was invested in refurbishing the Branch and buying new toys. He met all the staff in the Branch to discuss the changes that were to take place over a twelve-month period. The cook was provided with new menus designed by the nutritionist and there was to be a daily change in the menu over a three-week period. Food was to be cooked daily. The Director of Operations discussed the changes taking place in the Branch, including the newly designed menu, with the children's parents.

In general, each staff member was given a document outlining her duties and if the claimant was not given one her duties were imparted to her through training and meetings. The Manager was responsible for ordering food and could, if she so wished, delegate this function to the cook. The Manager's ordering the food would free up time for the cook to concentrate on her work. Head Office selected the food suppliers. A cookbook was introduced in 2008 after the claimant's dismissal.

On 22 April 2006 the Director of Operations invited the cooks and managers from all branches and the nutritionist to a meeting. Menus were discussed. The claimant had not raised any objections at the meeting. The general consensus was that the new arrangements would work.

In order to cause as little inconvenience as possible the kitchen was renovated over the Christmas period. The industrial-sized fan was replaced as it was far in excess of requirements. The Director of Operations denied that the new extractor fan did not work for a year, as alleged by the claimant, and added that it may not have worked for approximately one month. The evidence of the respondent's maintenance/IT manager was that whilst required improvements to the ventilation system were identified in a HSE Environmental Health Officer's report early in 2006 none were identified in a subsequent report some three months later.

Prior to April 2006, the Director of Operations became aware that there had been a number of incidents between the claimant and the Manager in the kitchen and that the Manager was unhappy with her because she was pre-cooking food and not following the menu. The Director of Operations took steps to prevent further animosity developing between the Manager and the claimant and arranged for a cook from another branch to help the claimant and give her some tips.

On 5th October 2006 a verbal warning was issued to the claimant for pre-cooking meals (hours or days in advance), freezing the food and then thawing it out when instructed not to do so; ignoring an instruction not to order fruit and vegetables; and verbally abusing the Manager. That same day, 5th October 2006, the claimant aggressively threw dinners into the bin in the presence of children and a staff member and she ignored the manager's request to clean the resulting mess from the wall and skirting boards. Subsequent to a further meeting with the claimant on 9th October 2006 where these and the earlier issues were discussed the Manager issued the claimant with a written warning on 11th October 2006 with a right of appeal. The claimant had a representative with her at the meeting. The claimant appealed to Head Office.

Following two further instances of pre-cooking food, on 23rd and 24th October 2006, contrary to instructions, a disciplinary meeting was held on 24th October 2006 and the claimant was issued with a final written warning on 26th October 2006.

The claimant, her representative, the Operations Manager and the Director of Operations attended

the claimant's appeal meeting on 3rd November 2006. The claimant indicated that she was appealing both warnings. The claimant disputed some of the facts relating to the warnings and she provided a written statement on these to the meeting. In particular she denied having aggressively splashed dinners over the walls and skirting boards. At the meeting, the claimant alleged that the Manager had harassed her on about five occasions but she could not recall or provide any examples of the alleged incidents. The claimant further alleged that it was this harassment that caused her to shout and use abusive language to the Manager. The respondent undertook to investigate the refuted facts and in this regard he subsequently interviewed the Manager, a unit leader and another member of staff who had witnessed the incident on 5th October. The appeal was unsuccessful.

Arising from the claimant's allegations of harassment made at the meeting held on 3rd November 2006 the respondent also interviewed the claimant and the Manager at separate meetings on 20th November 2006. The Operations Manager, the Director of Operations as well as the interviewee were present at both meetings. At the meeting with the claimant, she admitted that the alleged incidents of harassment related to alleged failures by the Manager when ordering food. The claimant complained that she was not given sufficient notice of change of meals and that despite her requests she was not given assistance peeling the potatoes. The Operations Manager admitted that he had been at fault in not allowing the claimant to have a witness present at that meeting. The respondent had made attempts to meet the claimant before 20th November but she was absent on sick leave. At the meeting with the Manager, she (the Manager) agreed that she did not always adhere to the claimant's shopping list but this was because the particular items on the list were not available or she was adhering to the set menu rather than the claimant's interpretation of it. Following these meetings the respondent concluded that the claimant's allegations of harassment were not well founded. From the discussions he believed that there was a clash of personality between the claimant and the Manager.

A final disciplinary meeting was held on 23rd November 2006 to discuss the claimant's refusal to make dinner for a baby who had arrived late, at around 9.55am, on 8th November 2006 and her failure to obey the Manager's instructions to keep the kitchen door closed and food covered at all times because she (the claimant) had reported noticing rodent droppings outside the door. The respondent did not accept the claimant's excuse that the ventilation in the kitchen was inadequate. At the conclusion of the meeting the claimant was suspended pending the respondent's decision on the matter. These issues had been previously discussed at an informal meeting, on 9 November 2006, between the Manager and the claimant. After the latter meeting the claimant was absent due to illness for eight days.

The Operations Manager regarded the claimant's failure to ensure the safety of the food to be a serious breach of health and safety regulations. As these latest breaches of company standards were committed after a series of warnings the respondent took the decision to dismiss the claimant. This decision was communicated to the claimant and her representative at a meeting held on 27th November 2006 and confirmed to her by letter of even date.

The new cook, who was formerly employed as a child-care assistant in the Branch, enjoyed her new role and has her own routine for her duties. She cooks for 100 children (about 30 more than the claimant cooked for). She is responsible for ordering potatoes, fruit and vegetables but does not have to peel the potatoes. There are two fans in the kitchen. In her role as unit leader she took notes at the disciplinary meetings held on 9th and 24th October 2006. Her notes were not verbatim but the Manager finalised them. She confirmed that the Manager discussed the various complaints she had about the claimant at those meetings. The Manager had shown her the pre-cooked food in the fridge and whilst she did not witness the claimant throwing the food into the bin on 5th October the

Manager had shown her the food on the wall and skirting boards. She heard the Manager offering to help the claimant in the kitchen. The witness had on occasion helped the claimant to peel the potatoes.

Claimant's Case:

The claimant has vast experience in the restaurant trade both in the day-to-day management of restaurants and as sole owner of a wine bar. She was employed in the Branch as a cook by the former owner in June 2003 and transferred to the new respondent in November 2005. Her hours of work were 8.30 to 15.30 Monday to Friday. Under the former owner she took care of the shopping. She spent much time preparing the food prior to cooking it. She enjoyed her work there. She was her own boss and was responsible for ordering food. On the take-over by the respondent, her workload increased. The Manager ordered the food but she frequently purchased incorrect quantities; she did not understand budgets so well either. The new extractor fan installed over Christmas did not work from installation and it had not worked up to the day she left the respondent. She reported this to the maintenance manager on several occasions.

On 5th October 2006 the claimant attended a meeting with the Manager and the unit leader and was issued with a verbal warning. At the meeting the Manager just read out the list of complaints and did not give her a copy of them at the time. The claimant adamantly denied hearing the Manager tell her not to order fruit and vegetables and she complied with the HACCP requirements in the preparation of food. She later apologised to the Manager for verbally abusing her. On 6th October 2006 a cook from the Blessington Branch came to assist her in her duties but she felt very distressed watching someone else cooking in her kitchen so she refused to stay.

As regards throwing the food into the bin the claimant told the Tribunal that when she returned to collect the trays on the day she noticed that the children had not touched their food and while gathering the trays they destabilised and food fell over the bin. She cleaned up whatever she saw. The Manager spoke to her after that incident and asked her to remove the food from the wall but there was no food on the wall. She was invited to a disciplinary meeting on 9th October 2006. The claimant had asked the Area Manager to come to the meeting but she did not attend. Prior to this meeting a copy of the verbal warning was handed to her. She did not see or get the minutes of the meeting of 9th October until 23rd October 2006.

The claimant had a good relationship with the Manager but this deteriorated towards the end of August 2006. This came out of the blue. No matter what she did it was wrong. She was very harassed by the haphazard way in which the Manager ordered the ingredients and food. She was responsible for eighty children. Her feedback from parents was that they were very happy and had no problems with her.

Determination:

Having carefully considered the evidence adduced at the hearing the Tribunal is satisfied that the respondent had cause to be concerned about the claimant's attitude towards her work and her manager over the latter months of her employment. Despite reminders, disciplinary meetings and the issuing of warnings the claimant persisted in refusing to follow instructions and this culminated in the decision to dismiss her on 27th November 2006. The respondent is involved in a highly regulated business and carries a heavy onus to ensure compliance with all relevant health and safety regulations. In the circumstances the respondent acted reasonably in invoking the disciplinary procedures and ultimately in dismissing the claimant for the final breach of food

safety standards.

It was the claimant's evidence that her allegations of harassment were based on "the haphazard" way in which the Manager ordered the food. Whilst unfortunately the Manager was not available to answer this allegation there was no evidence before the Tribunal that she demonstrated any bad will towards the claimant in ordering the food. The claimant's evidence was that the problems arose because the Manager did not have sufficient knowledge of food. The Tribunal finds that this does not constitute harassment. It accordingly finds that the respondent's decision, made on the completion of the investigation into the allegation of harassment, was fair.

The Tribunal finds that the dismissal is not unfair and the claim under the Unfair Dismissals Acts, 1977 to 2001 fails. As the claimant did not receive her entitlements under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 the Tribunal awards her €717.50, being the equivalent of two weeks' pay in lieu of notice under the Acts.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)