EMPLOYMENT APPEALS TRIBUNAL

Claim of: Case No.

Employee UD780/2007

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Mahon BL

Members: Mr. M. Flood
Ms. E. Brezina

heard this claim at Dublin on 7th January 2008 and 15th April 2008 and 23rd July 2008

Representation:

Claimant: Mr. Nicholas Hosey B.L. instructed by Mr. Bobby Kennedy, Sheeran & Company, Solicitors, 7a Drummartin Road, Goatstown, Dublin 14

Respondent: The manager of the respondent.

The respondent did not attend the hearing on 15th April 2008, while the claimant and her legal representative did attend. The Tribunal adjourned the hearing on a peremptory basis against the respondent.

The claimant's representative made an application for costs on 23 July 2008, in relation to the respondent's non-attendance at the hearing on 15 April 2008. The Tribunal, having considered the matter in the context of the regulations, dismissed the appeal.

The determination of the Tribunal was as follows:

The Tribunal heard that dismissal was in dispute between the parties.

Claimant's Case:

The claimant worked for the respondent for almost 16 years. In November 2005 a new restaurant manager (EC) commenced employment with the respondent. EC changed everything. The claimant felt that EC wanted to replace the existing staff with new staff.

Prior to 2005, the business was taken over by a new owner (KO'N) in 2003. The claimant discussed the hours that she would work with the new owner and her manager at that time. The agreed hours for the claimant were 10am to 3pm on Monday, Wednesday, Thursday and Friday. The claimant also worked 10am to 6.30pm on Tuesdays. The claimant had an agreement with the previous owner that she received a bonus every week and this was given to her as ten hours extra in her wages.

When EC started in November 2005 the claimant's hours were changed. The claimant raised this with the owner who told the claimant it would only be for a week or two. When EC displayed the rota the claimant's hours had changed. The claimant stated that she did not check her hours on the rota, as they were always the same. EC told the claimant that she should check the rota, as her hours were "not set in stone." The claimant felt victimised.

The claimant stated that on a number of occasions her workplace had a health and safety audit. The claimant's hair was short but EC told her to put the hairnet over her fringe and wear a hat. The claimant found that she was being victimised as other staff members had long hair tied back tight but with loose, long strands of hair at the front.

The claimant's mother-in-law was very ill. For years the respondent's employees were able to answer personal calls in work. One day, when the claimant was on her break, her husband phoned to say his mother was being admitted to hospital. The phone connection was poor and he phoned again on the landline at the claimant's place of work. EC told the claimant that she was not to take personal phone calls in work. The claimant explained to EC why she needed to take the call. One of the claimant's colleagues told the claimant that she had received a personal call in work and that EC had not said anything to her about it. The following day a sign was put up stating that employees were not to take personal phone calls at work.

In November 2006 the claimant received a verbal warning. EC said that she had received a complaint about the claimant. The complaint was received from one of the claimant's colleagues. The complaint was read to the claimant. The claimant asked for a copy of the complaint but she did not receive it. The claimant told EC that she would talk to her colleague about the complaint. When the claimant spoke to her colleague, the colleague told the claimant that she had written it on behalf of another employee. The claimant's colleague also told the claimant that she was bullied into writing it. The claimant told the Tribunal that she thought the complaint related to a day when her colleague had difficulty understanding a customer. The claimant had explained to the customer that her colleague did not have very good English. The verbal warning was outlined in a letter dated the 5 December 2006. The following day the claimant approached her two colleagues about the complaint.

The staff usually received a Christmas bonus. In December 2006 the claimant received alcohol and biscuits but she did not receive a Christmas card. One of her colleagues had received the bonus in

the Christmas card. The claimant's colleague told the claimant that she would get into trouble for telling the claimant she had got a bonus.

On Thursday, 4 January 2007 the claimant approached EC and asked her about her Christmas bonus. EC told the claimant that she did not deserve a Christmas bonus and pointed out that the claimant had received alcohol and biscuits. The claimant felt that she was being victimised again. The claimant said to EC "you are some person." The claimant said to EC that her colleague was bullied into writing the complaint against the claimant. The claimant also raised the issue with her manager that her colleague had been forced to write that the claimant was racist. She told the claimant that she was tainting her character. The claimant replied "what about my character?" EC told the claimant that she was going to speak to the owner. The claimant stated that she was going to take it further. The claimant was suspended the following day the 5 January 2007.

On the 5 January 2007 the claimant was asked by EC to attend a meeting. Both EC and the accountant were present. The claimant told them that she was not willing to go in to the office on her own for the meeting and that she wanted representation. None of the claimant's colleagues were available to attend the meeting with her and the meeting commenced. The claimant was told that she was being suspended for two weeks with pay, pending an investigation. She received a letter to this effect from the respondent on the 8 January 2007.

A union representative wrote a letter to EC on the claimant's behalf. This letter was dated 11 January 2007. The claimant stated that she was the only employee who was a member of a union. The claimant subsequently received a letter dated 16 January 2007 from the respondent, which stated that a union representative could not accompany the claimant at the next meeting to discuss the outcome of the respondent's investigation.

The claimant telephoned EC and agreed to a meeting on the 23 January 2007. After the meeting was concluded the claimant recorded what had happened at it. EC wanted an apology from the claimant for the accusations that the claimant had made against her. EC asked the claimant why she interrogated people. The claimant refuted these statements. At the meeting the claimant had raised the issue of a colleague becoming a supervisor because she would "do the dirty work." With regard to the complaint written about the claimant, EC said that the claimant's colleague must have misunderstood what EC had said to her. The claimant said "we are not getting any further" and the claimant told EC that she had attended the meeting to get the outcome of the investigation. EC told the claimant that she had no outcome. The claimant asked EC to write to her with the complaints, as the claimant had not been presented with them. The claimant subsequently received a letter dated the 23 January 2007, which stated that the claimant was to remain suspended without pay.

The claimant received a letter dated 5 February 2007 from the respondent. The letter stated that the claimant's position remained open subject to resolving the issue surrounding the claimant's suspension. The claimant contacted her union and a letter dated the 19 February 2007 was sent to the respondent which outlined that the claimant wished to retract her statement about EC and return to work.

The claimant received a letter dated the 27 February 2007 from the respondent, which stated that the claimant's letter of the 19 February 2007 was not a satisfactory response. The claimant believed she was dismissed from the time that she received this reply. The last letter the claimant received from the respondent was dated the 27 September 2007.

The claimant stated that she did not receive a copy of a grievance or disciplinary procedure.

The claimant gave evidence of her loss.

During cross-examination the claimant stated that she had felt victimised by EC when she was warned about wearing a hairnet on the salad counter. The claimant accepted that there were previous problems when a health inspector found a contaminated food product at the salad counter. It was put to the claimant that she was addressed over the hairnet not as a personal matter but because it was a work-related matter. The claimant accepted this but stated that EC was always "getting" at her. It was put to the claimant that the matters raised with her were all related to health or hygiene. The claimant accepted this.

The claimant stated that her hours were changed on the rota from January 2006. Her hours were changed to 11am to 3pm instead of 10am to 3pm.

It was put to the claimant that on the 30 November 2005 EC had provided her with conditions of employment, but the claimant threw them back at EC and that the claimant had told her colleagues not to sign the conditions of employment. The claimant replied, "no, that is not true." The claimant accepted that she had been told what would be tolerated from her after she had called members of the travelling community, "knackers."

It was put to the claimant that the respondent's disciplinary procedures were enclosed in a booklet that the claimant had refused to sign. The claimant replied that she had never refused to sign it.

In reply to questions from the Tribunal, the claimant stated that her union was not getting any further from February 2007, so she engaged a solicitor in July 2007 and signed the T1A form on 11 August 2007. She received a letter from the respondent on 27 September 2007.

She said she was paid €268 gross per week. She was now on social welfare (sickness benefit) at€197.50 per week, and had not worked since leaving the company, and still hadn't got her P45. Shewas still on medication. She received no correspondence from the company asking her back. She felt she was dismissed the day she walked out. She met EC, but got nowhere, so she knew there wasno way forward. She never asked for her P45 because she was told never to set foot in therestaurant again.

Respondent's case:

The restaurant manager (EC) gave evidence that she had a meeting with the claimant when the claimant said that the previous manager had favoured foreigners, and referred to Travellers as "knackers". The claimant was asked to work additional time, but refused unless she was paid cash in hand. She was always resistant to a change in her hours, and never showed any courtesy to her (EC). When KO'N took over the ownership, the claimant strove to make things as difficult as possible in the restaurant. She is still on sickness benefit, so how can she say she wanted to return to work. What began as a verbal warning, she took as a much greater issue. She (EC) said that she didn't favour anyone except the person who was best at the job. The claimant was a good worker, and they didn't want to get rid of her. She said that she never refused phone calls to staff, but wanted customers dealt with first. The claimant continually questioned everything she did, and even questioned the Environmental Health Officer herself, which was not within her remit. The claimant made a claim to a Rights Commissioner under the Payment of Wages Act, 1991, saying she was paid €8.00 an hour, whereas she was actually paid €11.90 an hour. The claimant didn't turn

up for the Rights Commissioner hearing.

An issue arose over a bonus payment. The claimant complained that she hadn't received a Christmas bonus, but EC explained to the claimant that she had received spirits and chocolates, and that a small bonus would only be paid to staff who had agreed to work additional hours, and the claimant had not agreed to this. She said that the claimant then said to her that she was "some sort of person". The claimant was asked to retract this remark and apologise, but she refused. It was decided to suspend her then, and a letter to this effect was sent to her on 8 January 2007. On 23 January 2007, a letter was written to the claimant offering her a return to work if she retracted her remark and apologised. The claimant wrote back on 19 February 2007, but the letter didn't make any sense, it was neither a retraction, nor an apology. She did not want to dismiss the claimant. She said that the claimant refused to take the conditions of employment document.

The supervisor (CN) gave evidence that most restaurant staff were friendly, but that she didn't find the claimant very helpful. She said that when the claimant got suspended, the claimant told her that she better watch it, that she could be next. She said that she got a copy of the company's grievance procedure in October/November 2005.

The restaurant Accountant (MW) gave evidence that he worked there since 1990. He said that there had been an arrangement in place before KO'N took over, whereby the claimant had been paid €65 a week off the books in order to avoid tax, but KO'N discontinued this, and instead 10.5 hours were added on to her wages. Thus, she was one of the highest paid members of staff. He said that the restaurant ran on a loss or break-even basis. He said that a P45 wasn't issued because the claimant hadn't asked for it.

Respondent's concluding remarks:

The claimant's job was still open. No P45 was issued because there was no dismissal. The claimant had no real or valid complaint. She was given a verbal warning because of her treatment of other staff. She made a verbal assault on her (EC), and her character. The restaurant is unable to pay compensation, but is open to resolve it otherwise. The claimant was given the right of reply to the allegations.

Claimant's concluding remarks:

The problem between the claimant and one of her work colleagues was sorted out in November/December 2006. The company's procedure in dealing with the issue between EC and the claimant was not adequate in regard to law or fairness. EC was both jury and executioner in this exercise. Procedures were not carried out properly. Somebody other than EC should have investigated the issue, and the claimant should have been given the right to be heard. EC's letter stated that a retraction of the claimant's remark was necessary and that this retraction was given by the claimant, but she was left in abeyance afterwards.

Determination:

The Tribunal very carefully considered the evidence adduced, statements made, and documents submitted, during the three-day hearing. Members of the Tribunal particularly noted that the situation was aggravated by a lack of implementation of fair procedures, which fell short of the reasonable standard expected in the context of current industrial relations and human resource

practice.

Having regard to all the circumstances, the Tribunal unanimously finds that a constructive dismissal did not occur. Therefore, the claim under the Unfair Dismissals Acts, 1977 to 2001, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)