

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

Employee

CASE NO.

UD462/08

Against

Employer

under**UNFAIR DISMISSALS ACTS, 1977 TO 2001**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Mac Carthy S.C.

Members: Mr. J. Reid
Ms. A. Moore

heard this claim at Dublin on 24th July 2008 and 24th November 2008.

Representation:

Claimant : Mr. Blazej Nowak, 19 Talbot Street, Dublin 1

Respondent: Mr Mark Connaughton SC instructed by Ms. Anne Marie James, Kirwan McKeown James, Solicitors, 22 Kildare Street, Dublin 2

The determination of the Tribunal was as follows:-

Respondents Case:

The first witness for the respondent gave evidence that he was employed as a sous chef from September 2007 until May 2008. During that time he worked in the Suffolk Street branch of the restaurant. There were two kitchens in the restaurant, the production kitchen and the service kitchen and the witness worked in both kitchens during his employment. The kitchen rosters are posted up two weeks in advance to let employees know their work pattern. The letter S is marked on the rosters to distinguish the service kitchen from the production kitchen. The waiting staff dealt with the service kitchen.

The witness worked with the claimant on many occasions and was her boss when the head chef was not working. He gave evidence that she was a volatile person who had many arguments with other employees. He witnessed her expressing negative racist comments and on one occasion in January 2008 heard her say that a member of staff looked like a gorilla. She was openly homophobic and stated to him that she hates gays. The witness found her remarks to be offensive and reported them to the head chef. He overheard the claimant shouting at a staff member that he should not be eating food that had been removed from the kitchen area to the restaurant area when she saw him do so.

On one occasion on a Sunday in April 2008 the claimant reported for work but refused to work in the service kitchen when instructed to do so by the witness as the letter S was not marked beside her name on the roster. After contacting the head chef who was on a day off the claimant agreed to work in the service kitchen. She left to do so without informing the witness.

Under cross-examination the witness confirmed that he heard the claimant making homophobic comments to gay members of staff and arguments involving the claimant and other staff members were generally initiated by the claimant. He agreed that it was not permitted for staff members to remove food from the kitchen area and said that a notice to that effect was posted on the kitchen door. He confirmed that the claimant's time keeping was very good.

The second witness gave evidence that he was employed as a waiter for the respondent company in the Suffolk Street restaurant from 2003 until 2008. He worked from Monday to Saturday. During his period of employment he reported to two different managers. The witness remembered the claimant starting work and found her to be a very quick worker. She discovered that the witness was gay and her demeanour towards him changed. She said that all gays will go to hell and was constantly in a bad mood. Using Polish language she called him gay and he found her behaviour towards him very upsetting. He challenged the claimant about her behaviour but it did not change.

Under cross-examination the witness confirmed that the claimant made remarks to him twice weekly about being gay. He agreed that he did not report all the remarks to the manager as he was trying to deal with the matter himself. He confirmed that the claimant was temperamental with other staff members also and agreed that he had removed food from the kitchen on one occasion. He agreed that he should not have done so and had apologised to the head chef for this.

On the second day of the hearing an assistant manager gave evidence. She worked with the claimant whom she found to be uncooperative. The claimant called the other staff members names if they made a mistake ordering dishes. The witness spoke to the claimant informing her that she should not call other staff members names. She had spoken to the head chef about the behaviour of the claimant every time a problem arose.

Next to give evidence was a member of the waiting staff who has worked for the respondent for eight years. He explained the process of ordering and the set up of the service area. Initially when the claimant commenced work everything was fine and he could not recall when the relationship between the claimant and the floor staff had started to deteriorate. If he took a special order deviating from the menu the claimant would raise her eyes to heaven, mutter under her breath and slam things in the kitchen. He had not been directly involved in a fight with the claimant but had witnessed them. He complained to his manager about the claimant's behaviour and hoped that he would not be rostered to work with her. He found the claimant very difficult to work with.

A chef gave evidence that she had been employed by the respondent for eight or nine years. She works in both kitchens. Her relationship with the claimant was okay apart from one direct incident that she mentioned to the head chef. She witnessed the claimant verbally abusing the sous chef on a number of occasions. The witness was not a manager at that time but she spoke to the claimant as she had difficulties with her attitude and behaviour.

Under cross-examination she explained that the claimant was fairly good on service and was a quick worker. She confirmed the policy that waiting staff are not allowed in the kitchen however sometimes when it is very noisy they will come to the kitchen door to give an order. She could not

recall any waiting staff entering the kitchen and taking food.

Next to give evidence was the head chef. He explained that in total there are about fourteen chefs who work five days out of seven. The claimant commenced work in August 2007 as a chef de partie, she had slotted in quite well and within a week her work was satisfactory. At the beginning of September the claimant had handed in a week's notice but the following Friday the claimant returned and asked for her job back and he acceded to this request.

His sous chef had first brought the claimant's behaviour to his attention and other staff also raised it with him. He brought specific complaints to the attention of the claimant; she always said it was never her fault. He had several informal chats with the claimant about her behaviour and these chats became more frequent. He gave her a formal verbal warning at the end of November and asked her if she wanted a witness before doing so. He did not take a note of this warning.

A member of his staff had reported to him that the claimant had called him gay. He informed the claimant that this was not acceptable and she replied, "I hate the gays" and was totally unrepentant. On one occasion his sous chef had witnessed the claimant mimicking one of his other employees by acting like a gorilla. The head chef said her attitude was not acceptable but she appeared nonchalant about these issues.

A letter of the 5th January 2008 from the head chef to the claimant was read in to evidence. He explained that he had held a disciplinary meeting with the claimant and he had asked her if she wanted a witness but she declined. He had wanted to hear her explanation of her behaviour. After the meeting he issued this letter telling her that her behaviour towards some of her colleagues was not acceptable, and racist and homophobic comments would not be tolerated within the workplace. He explained that after this letter the claimant's behaviour only improved for a week or two. He moved the claimant to the production kitchen so he could observe her and try and reduce the ongoing issues.

On Sunday morning the 13th April 2008 he had received a phone call from the claimant who was upset and was screaming. As he was on his day off he rang the sous chef to check what was happening. The sous chef explained that he had asked the claimant to work in the service kitchen, but she began to shout and scream and stormed out of the kitchen. The witness then telephoned the claimant and told her that she needed to carry out the instructions of the sous chef or go home.

Following a disciplinary meeting the witness issued a dismissal letter to claimant on Monday 21st April 2008. He informed her that he was letting her go and she replied that he could not sack her, as she was pregnant. He confirmed that the claimant had received a copy of the respondent's disciplinary procedures on her commencement with the respondent's group in July 2006. He agreed that he had not exactly followed the disciplinary procedures in this case, as the claimant was not suspended when she was dismissed. The claimant's behaviour was one of serious misconduct and he had handled the issue on the basis that his duty of care was to his other employees. He had dismissed the claimant.

Under cross-examination he explained that the claimant had worked in two of the respondent's other stores and as far as he was aware they never had problems with the claimant. About five or six weeks after the claimant commenced staff started to complain to him about her behaviour. The disciplinary meeting of the 5th January 2008 had taken place in a private area on the stairwell. When he had spoken to her about her racial and homophobic comments, she did not dispute the facts. He had referred to the respondent's disciplinary procedure at this stage.

On the 20th February he issued her with a final warning as he was receiving more complaints from waiting staff. He had spoken to each of the individuals involved and had moved her to the production kitchen to keep an eye on her. He confirmed the sous chef starts work at 8 am on Sundays and the rest of the chefs start at 9.30 am.

He listed three reasons within the letter of dismissal, unacceptable behaviour i.e. being verbally abusive, refusal to obey instructions from the sous chef and thirdly acting in an unprofessional and unreasonable manner in the kitchen. He had not explained that she had a right to appeal to the executive chef, however she would have known as she had a copy of the disciplinary procedures. He had complied with the employee handbook in view of the quantity of complaints in respect of the claimant.

In replying to questions from the Tribunal he confirmed that he had no problem communicating with the claimant and that her English was good.

Claimant's Case

The claimant gave sworn evidence through an interpreter. She commenced employment with the respondent's group in October 2006 as a commis chef and had worked in two other stores and had received no warnings or had no problems with members of staff before she had moved to this outlet. She was asked to move stores.

At the beginning she liked it a lot, she had a good manager, but she had encountered problems with waiting staff entering the kitchen taking food, but they would ignore her. Prior to the 20th February 2008 she had not received a warning, she stated that she had never seen the letter of the 5th January 2008. She did recall receiving two verbal warnings regarding being quicker serving foods and not to have arguments with staff.

On the 19th February 2008 she had an argument with a member of the waiting staff over two orders that were returned to her as the waiter said they were not the orders that he had placed. She had done the orders and words were exchanged between both of them. In respect of the meeting of the 20th February with the manager, she recalled that it only took a few minutes and he spoke to her about the row the previous day. A letter issued as a result of this, she was not told she could appeal.

In relation to Sunday 20th April 2008 she was rostered to start at 7.30am in the production kitchen, she started preparing salad when the sous chef had told her to go downstairs to the service kitchen. She had told him that she was to work in the production kitchen. The sous chef said if she did not like the situation she could go home. She rang the head chef at about 10.00am to ask him where should she work, he had told her to follow the instructions of the sous chef. The claimant said she continued to work that day and left at 5.30pm.

She received the letter of the 21st April 2008 and had a conversation with the head chef the following day regarding her dismissal. She was not told she could appeal this decision. She did have arguments with the waiting staff, some were entering the kitchen and taking food and this was not allowed.

Under cross examination she confirmed that she had told the chef de partie she did not like gays and when the head chef had spoken to her about this she had said she did not care as this was her opinion. It was put to her that was not the opinion of the respondent, she agreed and stated she

never said it again. She denied being rude to the chef de partie and said they had a good relationship at the beginning of her employment. The chef de partie had in fact told her he was gay. He was not offended by her comments and would have told her if he was. She denied mimicking one of her colleagues by acting out like a gorilla.

When asked about when the head chef had spoken to her about different incidents, shouting and using foul language and making racist and homophobic comments, she replied saying she was not a racist. It was a joke that she hated gays and she had told this to the chef de partie. The sous chef had challenged her about making negative remarks about gays, she denied saying if her baby was gay she would kill it, however she did remember saying to him that her baby would not be gay.

She reiterated that she had not received the letter of the 5th January 2008 and that the first time she had seen it was today. Counsel for the respondent explained to her that he had showed all the documents they were to rely on to her representative on the first day of the hearing and none of this was put to their witnesses in the course of them giving evidence. She denied that the head chef had spoken to her about her comments she had made to the chef de partie and also about her mimicking a gorilla. She pointed out she had not signed this letter of the 5th January 2008 and that every other letter she had signed.

She then denied that she had signed the letter of the 20th February 2008; she said it was not her signature. She was asked if she had signed her T1A, she confirmed that she had. She was asked to compare both and said it was her signature on the claim and that she had the original letter of the 20th at home.

The claimant reiterated she had problems with waiting staff taking food from the kitchen. She denied she had difficulty in accepting instructions, nobody had ever complained about how she was serving food. Sometimes when she was under pressure she would speak to the waiting staff but not in an insulting way.

It was put to her that she had simply lost her temper on Sunday 13th April 2008, she said it was the 20th April and that she had not been informed of the changes in the rota. She stated that she had started at 7.30am on that Sunday, the day before she had checked the rota and her start time was 7.30am and later it must have been changed to 9.30am. She had come to work much earlier than she should have and got stressed, as she did not know where she was supposed to work.

She explained she was off on the Monday and Tuesday and she had gone in to work at 8.00 am on Wednesday 23rd April 2008 where she had met with the head chef who had told her that she was no longer working there. She had told him that she was pregnant and could not be dismissed. She was called two days later to come in and collect documents she refused to sign for these documents and a member of management signed as a witness to say she had received them.

In replying to questions from the Tribunal she was asked why did she wait to ring the head chef at 10.00am on the Sunday when she was in at 7.30am. She had said she was looking for the phone number and found it in the production kitchen. She confirmed that in the course of her employment she had never read her terms and conditions.

Determination

Having heard all the witnesses the Tribunal accepts the evidence given by the respondent's witnesses and therefore rejects the evidence of the claimant.

We find that the respondent has shown "substantial grounds justifying the dismissal" under Section 6(1) of the Unfair Dismissals Act, 1977

"subject to the provisions of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, to be an unfair dismissal unless, having regard to all the circumstances, there were substantial grounds for the dismissal"

and Section 6(4)(b) of the Unfair Dismissals Act, 1977

"Without prejudice to the generality of subsection (1) of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, not to be an unfair dismissal, if it results wholly or mainly from one or more of the following:

- (b) the conduct of the employee"

The Tribunal also considered Section 5(b) of the Unfair Dismissals (Amendment) Act, 1993:

"(7) without prejudice to the generality of subsection (1) of this section, in determining if a dismissal is an unfair dismissal, regard may be had, if the rights commissioner, the Tribunal or the Circuit court, as the case may be, considers it appropriate to do so –

- (a) to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal, and
- (b) to the extent (if any) of the compliance or failure to comply by the employer, in relation to the employee, with the procedure referred to in section 14(1) of this Act or with the provision of any code of practice referred to in paragraph (d) (inserted by the Unfair Dismissals (Amendment) Act, 1993) of section 7 (2) of this Act".

and does not consider it "appropriate" to apply this provision in this case.

Accordingly, the Tribunal dismisses the claim under the Unfair Dismissals Acts, 1977 to 2001.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)