

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

Employee

RP439/2008
MN488/2008
WT229/2008
UD540/2008

against

Employer

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001
ORGANISATION OF WORKING TIME ACT, 1997
REDUNDANCY PAYMENTS ACTS, 1967 TO 2003
UNFAIR DISMISSALS ACTS, 1977 TO 2001**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms N. O'Carroll-Kelly BL

Members: Mr J. Hennessy
Mr. J. Dorney

heard this claim at Carlow on 14th January 2009

Representation:

Claimant :

Ms Michelle Tracey, Fleming O'Flaherty & Brown, Solicitors,
Greenville, Athy Road, Carlow

Respondent:

XXXX

The determination of the Tribunal was as follows:-

Respondent's case:

The respondent's director gave evidence that the respondent took over the restaurant on 1st November 2007. The claimant started working with him on that day. The claimant was assured her job would not change and that his brother would be taking over from the previous director. The claimant was assistant manager or duty manager with the previous respondent. The claimant was

late every day and she always had an excuse. She would go for break or lunch and there were times when she came back smelling of alcohol. On the week in question money had gone missing and while the respondent does not have proof, the claimant had locked up that day. The following week which was 27th / 28th November 2007 there was a complaint about a group of staff acting in a loud and abusive manner and drinking in the restaurant. The person making the complaint stated that the claimant was accompanied by a young man. The claimant denied it was she who was in the restaurant. It was also noted that her meal and drinks were not paid for. The claimant was given two weeks notice 30th November 2007 She was abusive when she was told she was not in a fit state to work. She was paid a full weeks wages for that week plus the following week also.

In cross-examination witness stated that the claimant did receive verbal warnings however there were no notes on file. He had no evidence of the claimant smelling of alcohol, it was verbal only. In relation to till allegations witness stated there had been extra money in the till and he did not know who took it but that the claimant had locked up. The claimant did not receive a written warning in this regard as there was not sufficient evidence. They had three independent witnesses stating that the claimant was in the restaurant on the night in question. He gave the claimant a favourable reference as it was close to Christmas and he wanted to give her the chance to get another job.

In answer to questions from Tribunal members witness stated that the till was down by €30 on the day in question. This was shortly after the take-over of the business, it was the transition period and it was hectic. Witness has been an employer for thirty years. The person who made the complaint about staff in the restaurant was a patron who was not known to witness. The date of the restaurant incident was 26th November 2007 and the complaint was made on 27th November. He does not like giving a bad reference. When he bought the restaurant part of the deal was that the previous owner would pay redundancy and all outstanding entitlements to the employees. He is aware that the claimant was not paid her statutory redundancy by the former owner of the restaurant.

Evidence was also given by the lady who did the wages for the former owner of the restaurant. All the employees including the claimant received a P.45 and in or around the end of October 2007. The claimant gave her a list of outstanding holidays due. She remained on when the current owner took over the business. She received the telephone call from the customer in relation to being in the restaurant the previous night, stating that some person was very loud and he thought it was a member of staff. She passed on the message to the director.

The Tribunal also heard evidence from M, a brother of the director who was the manager at the time and has continued to be manager. The claimant was late on numerous occasions. On one occasion she came in smelling of alcohol. The previous witness passed on the message to him in relation to the customer's complaint about a group being loud and abusive in the restaurant. This was a serious complaint and he offered the customer a voucher which he did not use. The claimant said she was not in the restaurant on the night in question. He was instructed by his brother to give the claimant her notice.

In cross-examination witness stated that it is a matter of fact that staff do not drink in the restaurant.

In answer to questions from Tribunal members the customer who made the complaint was in the restaurant between 7pm and 9pm. The claimant's shift finished around 6pm. The claimant was late for work once a week. When the claimant smelled of alcohol it could have been as a result of being out the night before. She was never incapable of doing her job. There was never a complaint of her not being able to do her job because of alcohol. The complaint was that the group of people with

the claimant were very loud. The director said that when asked the manager on the night refused to answer and she left her employment shortly after that.

Evidence was also given by Mr W an employee who worked in the restaurant on the night in question. The complaint was in respect of a group of staff in the corner who were drinking and were noisy. He served them drink but was not sure if they paid. The supervisor told him to give them drinks and he did not take money. Sometimes after work, as far as he knew, staff would sit down and have some drinks. He did not drop the claimant home that night but to the house of a friend.

In cross-examination witness stated that after work the previous owner allowed staff to have a beer or glass of wine. When the current owner took over staff were told they were not allowed drink after work. They did not receive a letter in this regard. The supervisor just told him to serve drinks to the group and she herself also served them. There was not mention of money. The claimant was a friend of the supervisors.

Claimant's case:

The claimant in her evidence told the Tribunal that she had been working in the restaurant for six years and had started there when she was in college. She was manager when the current owner took over. There was talk of a take-over but she was never told formally. All she was told was that her position would be the same. One morning she was greeted by the director and his brother M and this was around the 1st November 2007. She was told that M would be giving her a hand but he started giving her orders and she was the manager. M was to be there a week or two only and the claimant understood that she was in the same post as prior to take-over. The more she worked with M the more he was taking away her duties. The claimant was manager there for so long and she had the feeling she was going to be pushed out.

She mentioned the restaurant incident referred to by the respondent. A friend of hers was getting a take-away and they bought a bottle of wine. She finished her shift at 6pm. On the 30th November 2007 she was told she was being let go because of the re-structuring yet there was a sign on the window looking for staff and M's girlfriend now works in the restaurant. She never once received a verbal warning. She had nothing to hide, she paid for the bottle of wine and at 8.30pm one of the employees, Mr W who worked in the restaurant that night gave her a lift home. She always got on well with her fellow workers but from the time M took over lots of employees left. She did not have a written contract of employment.

In answer to questions from Tribunal members witness stated that she did have a contract with her previous employers. She was never instructed that there was to be no drinking at work. On the night in question Mr W sat down with the claimant and her friend in the restaurant. There are cameras recording in the restaurant over the tills and she did not verbally abuse customers. She thinks that the director sent in customers to pick up on staff. There were four members of staff there on the night in question and they were coming up and down to the claimant and her friend and joined in the laughing and joking. When she was manager she gave warnings to staff and there was a file for such records. On the day of the take-over she was told her job was safe and that she was taken on as part of the business. She did not have a need to query it but when the director's brother M took over things changed. A lot of staff left and more were taken on. She was not paid redundancy. At the time she was let go they were looking for full and part-time staff.

The claimant then told the Tribunal of her efforts to obtain alternative employment.

Determination:

The Tribunal is satisfied that there was a Transfer of Undertakings in this case and the claimant's service is deemed to be continuous. The claimant therefore has the required service to entitle her to take a case under the Unfair Dismissals Act 1997 to 2001. The Tribunal is satisfied that the respondent company failed in its obligation to adopt and carry out any procedures in relation to disciplinary action. In all the circumstances she was unfairly dismissed and the Tribunal award the claimant the sum of €5,250 under the Unfair Dismissals Acts, 1997 to 2001. The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 is dismissed. No award is being made under the Redundancy Payments Acts, 1967 to 2003 and the Organisation of Working Time Act, 1997.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

