

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE – *claimant*

CASE NO.
UD138/2009
MN127/2009
WT52/2009

against

EMPLOYER – *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Taaffe

Members: Mr. G. McAuliffe
Mr. N. Broughall

heard this claim at Dublin on 30th June 2009

Representation:

Claimant(s): Mr. Brian Conroy B.L. instructed by Ms. Joanne McInerney, Able,
Solicitors, 72 Tyrconnell Road, Inchicore, Dublin 8

Respondent(s): Mr. Marcus Dowling B.L. instructed by Ms. Sinead Likely, McDowell
Purcell, Solicitors, The Capel Building, Mary's Abbey, Dublin 7

The determination of the Tribunal was as follows:-

Respondent's case:

In his sworn evidence, Da confirmed that during the relevant time of the claimant's employment with the respondent, he had been the restaurant manager. Da's employment with the respondent commenced in 2008 and ceased in March 2009.

When Da commenced employment with the respondent, the claimant was already employed there as a waiter. The respondent's previous owner had employed the claimant and his employment had transferred when the restaurant was acquired by new ownership in June/July 2008. The running of the restaurant had been left to management.

Towards August/September 2008 as the restaurant began to establish itself, there were problems with the claimant such as his reporting late for work or of being absent. At least once every two weeks, the claimant would be late for work by a half hour to an hour.

Da denied the claimant's allegation that he had bullied the claimant because the claimant was

French. He had French friends and in Ireland, he treated everyone the same. He had never said anything to the claimant that could be categorised as bullying. The claimant would try and get away with things, such as using his telephone while on duty, which was against the respondent's rules. Da was there to implement the rules but he never did anything extraordinary that could be considered bullying or harassment.

Da confirmed that he had experience in the restaurant business, prior to his employment with the respondent. The respondent's business had been extremely busy and a high volume of people wanted to dine in it due to the celebrity chef who owned it. All the staff worked and pulled together. Maybe a month after opening, Da had complimented the claimant as a good guy. Guests liked him, as did Da. He was a bit cheeky with a sense of humour. The claimant had been happy with this compliment.

In regards to the claimant's poor time keeping in September, Da described this as the claimant getting too relaxed and taking his eye off the ball in relation to his employment. His lateness for work was as a result of the claimant's partying and then, coming in to work smelling of alcohol and with blood-shot eyes. His coming to work smelling of alcohol and with blood-shot eyes would happen on a weekly basis. One night around Halloween 2008 when Da was doing the cash, the claimant had come back in to the restaurant clearly on alcohol and drugs. Da knew that the claimant was on drugs from his huge pupils. He asked the claimant to leave the premises but the claimant did not go.

The claimant was late for work on numerous times after October. Da would have to telephone him to find out where he was and would be told that, because he had not slept, the claimant would be an hour late for work or that he would not be in at all. Da put this behaviour down to the claimant's partying.

The claimant was dismissed due to his failure to come to work over a period of three days. The claimant had telephoned in sick. Da had put pressure on him that if he was not going to be in work on the next day, he was to telephone again. The claimant did not do this so Da telephoned the claimant instead but the claimant could not come in to work that day. The third day, the 11 December, was very busy in the restaurant with all hands on deck and again, the claimant was not at work. Da therefore took the action of telephoning the claimant again. While admitting that procedures were not followed, Da said that because of the pressure, he did not want to set a precedent of staff being allowed to call in sick or of not showing up for work. This had been the reason why he had ended the claimant's employment. When asked what he said to the claimant in that last telephone call, Da replied that it would have been along the lines of "if not coming in, then don't come back."

When asked about bullying the claimant for taking a cigarette break, Da replied that the respondent's rule was that there was no break when evening service was about to start. However, the claimant would go for a cigarette break at that time so Da spoke to him about it. In relation to the claimant's joking with Da, Da explained that there were times when staff needed to focus on work. If he found the claimant was making light of information that was being given to him in relation to work, Da would treat him coldly.

In cross-examination, Da confirmed that the respondent opened in June/July 2008 and he had commenced employment two weeks prior to this. The claimant had been employed there before Da's employment commenced. Da had never heard anything bad about the claimant and had no reason to believe that there had been any issue with him prior to the commencement of Da's employment.

Da did not accept that the claimant was only ever late for work by ten minutes. Being ten minutes

late happened two to three times per week but the lateness by a half hour occurred every second week. Furthermore, just because service was being set up when the claimant arrived for work did not mean that he could be late. Being late or going for a smoke or coffee break did not mean that the shift had not started. Da made only two records on his computer of the claimant's late starts because he did not have time to do more. Formal records of the claimant's lateness were not kept because they were extremely busy in the restaurant. However, managers would talk about the claimant's lateness and same would be noted. Those occasions when the claimant was five minutes late were not noted.

When Da commenced employment with the respondent, both he and the claimant got on well and there was a little bit of give and take. For the first few months, the claimant had been a good employee. However, when his behaviour started to happen on a continuous basis, Da did not want such a habit creeping in among the other staff. Staff had been very busy for the first few months.

Da confirmed that he was inspired and infused with energy by the respondent's new owner. He had felt under pressure while working there. He lost his temper with the staff including the claimant. He did not know if some of the staff might have been scared of him.

In an incident that happened in early September, the claimant had come in to work under the influence. Da asked him if he was able to work. The claimant had been laughing and Da attempted to send him home. However, the claimant came around from the influence he was under, though the staff commented on his condition. When put to Da that the claimant's evidence would be that he – *the claimant* – had come in to work very hung over from an engagement party on the day before, that he – *Da* – had given out to him but he – *the claimant* – had wanted to work his shift, Da agreed that this could have been the case. However, Da denied that the claimant had worked for twelve hours that day. He remembered that the claimant had requested that day off. The claimant had worked a half day that day and from what Da could remember, he had done his job. Nothing was put in writing about this incident. A meeting had been held in regards to what should be done but the view of the respondent had been to try and give staff the benefit of the doubt.

In relation to the Halloween incident, Da had been on the premises doing the cash. The claimant had not been scheduled to work that night. Despite the claimant being described as a chirpy and friendly person, Da did not recall any of the other staff asking him to come in and display his Halloween costume, nor was it true that staff would have asked the claimant to come in to the restaurant to show off his costume. Staff do not come in when they are off. It had been at 12.30am when the claimant arrived. The staff were downstairs and all of the customers had left so the situation had not been embarrassing. However, it was not acceptable that when Da had been doing the cash, the claimant had come in running around. Da agreed that both he and the staff had been laughing. Initially, Da had thought that it was amusing to see the claimant in the clear state of being under the influence of drugs and alcohol. The claimant had not been told to go home after ten or fifteen minutes. He had stayed for twenty minutes and it had been uncomfortable for Da and the staff.

Da could not remember specific dates in October or November when the claimant was late for work, except that lateness was becoming the norm for him. There were instances where the claimant was late by ten to fifteen minutes and there were also times when he was a half hour late for work. Da denied that the claimant would telephone to warn when he would be more than twenty minutes late. The claimant had lost his telephone so it was always Da who telephoned him.

On 9 December, Da agreed that the claimant had telephoned that he was sick. In this telephone call, the claimant said that he had the flu. However, sick certificates were never supplied. The

claimant had not said that he would be out the next day, nor did he telephone the next day to say that he was still sick and would be out. It had been Da who telephoned the claimant on 10 December and on 11 December. It could have been 10.00am when Da telephoned the claimant on 11 December, which could have been a half hour after the claimant had been due to commence work. Da had telephoned to find out if the claimant was coming in to work, and had told the claimant that if he was not coming in that day, then not come in, in the future. Da was aggrieved that the other staff had to pick up the slack created by the absence of the claimant. Da stated that though he did not follow procedure, he was annoyed that the claimant was “taking the mick”.

Da confirmed that there are procedures in place and, as a manager he would know that they exist. He was also aware of the claimant’s contract of employment. Therein under the title of “Sickness” is stated in part “If you are absent from work due to illness or injury or any other reason, you are required to notify the company as soon as reasonably possible on your first day of absence, explaining the reason for your absence and its expected duration.” Da stated that the claimant did not telephone again nor did he say for how long he might be out. If he had done either of these things, Da might not have reacted as he did. The fact that the claimant did not telephone again was the reason why Da had telephoned the claimant on 10 and 11 December. The issue had not been about the non-submission of a medical certificate but about the claimant not coming in to work.

Da confirmed that the claimant would have started shifts at 3.00pm. Seating was at 5.30pm and serving was at 6.00pm. Last orders were taken at 11.00pm. On some occasions, the restaurant closed at 9.00pm or 10.00pm. In relation to the allegation that the claimant did not receive rest breaks, Da stated that the staff had plenty of time for a sit-down break or a smoke break though there was no allotted time for breaks because the place was so busy. However, breaks were worked out between the staff and same worked well.

Replying to the Tribunal’s query in relation to a sickness profile of staff comparable to that of the claimant, Da said that when the respondent commenced business, there were a few staff who did not want to be there and so, had left. After the first month, staff got on together. However, the claimant stood out due to his sickness and lateness records. Others were spoken to about their sick record. In relation to the claimant, he was dealt with by Da due to the reoccurrence of his behaviour and his “taking the mick”. Da added that unfortunately, he did not follow procedure in the way he dealt with the claimant.

Claimant’s case:

In his sworn evidence, the claimant confirmed that he was twenty-four years old and from France. He came to Ireland in November 2006. He had worked as a waiter in France for approximately two years.

The claimant worked for a number of other businesses prior to starting with the respondent. He had ceased working in those other places of employments on good terms. He commenced employment with the respondent in October 2007 and encountered no problems there for the first nine months.

The claimant confirmed that being late for work by five or ten minutes happened once every two weeks. The management did not make big trouble over his being late for work. If the claimant was going to be late for work by more than five minutes, he would telephone the respondent to make this known. However this kind of lateness did not happen often. Also, it may have happened once that the claimant was off sick during this period.

Da commenced employment with the respondent in June 2008. The claimant stated that he thought that Da was very rude to him. He was told by Da that he would have to ask him and tell him when

he – *the claimant* – wanted to go for a cigarette break. Da did not treat the other staff in this way. The claimant felt that Da did not like him.

The claimant stated that his lateness for work happened mostly towards the end of his employment. Once or twice a week, he would be five to ten minutes late. Being a half hour late happened when the claimant missed his bus and on the occasion when his bicycle was stolen. Such lateness happened once a month. However, no one complained to him when he arrived late for work.

The claimant agreed that it was on 6 October when he came in to work in a hung-over state and under the influence of drugs. He stated that this was the only time that this happened and he was not proud of it. He had been at a friend's engagement party the night before. He had asked for that day off but had not been given it. He was probably ten to fifteen minutes late for work that day and Da had complained, and he had apologised. Da told him to go home but he – *the claimant* – had wanted to stay and work his shift, and receive his rest breaks. He did work the shift but did not receive a break. That day, the claimant maintained that he probably started his shift at 10.20am/10.30am and worked until midnight. He never went out on a work night after that, or took drugs.

In relation to the incident that occurred at Halloween, the claimant had gone in after the shift was over. He had been at a Halloween party and was dressed in a wig, slippers and a bathrobe. Some of the other waiters had asked him to come in and display his costume. He had gone upstairs and downstairs and had stayed for about a half hour. He was then told by Da to go home but there were no taxis available. He confirmed that when Da asked him to leave the restaurant, he just left.

The claimant confirmed that in November, he was late by five to ten minutes about twice a week because he was not motivated. He did not receive a warning about being late but was told that it was not to happen again.

On 9 December, the claimant had been scheduled to work. However, he telephoned Da to say that he had the flu and a crick in his neck and that he could not come in that day. He also told Da that he would telephone again the next day. When the claimant tried to telephone the day after that, he found that the battery of his telephone was dead. That was when Da contacted the claimant on the telephone of the claimant's girlfriend. In that telephone conversation, the claimant told Da that he was still sick and had a crick in his neck. Da had replied that if he – *the claimant* – did not come in now, then "don't come in ever". The claimant stated that he was not motivated so he did not return.

The claimant established his loss for the Tribunal. He sent out lots of emails seeking alternative employment. However, it had been really hard and he had no success except for a two-week trial in April 2009. By mutual agreement, he had not stayed in that employment because of there being too much pressure. He continued to seek employment, but decided to return to France in late April 2009, where he has yet to be successful in finding employment.

In cross-examination, the claimant confirmed that he sought alternative employment in restaurants and shops subsequent to his dismissal, through the sending out of lots of emails. His dismissal occurred on 11 December and he probably contacted his legal representative a week later. When put to him, the claimant agreed that he must have contacted his legal representative between the dates of 11 December and 19 December, as his claim form (*Notice of Appeal*) was dated as signed by him on 19 December 2008.

The claimant was examined on his efforts to secure alternative employment by way of the emails that he sent. He had sent emails because the replies to same were the physical proof of his efforts. He had also dropped his curriculum vitae to two businesses but had no proof of this. It was put to

the claimant that the replies he received to his emails were, in the main, automotive replies authored by the same person and had not come independently from individual employers. In reply, the claimant stated that he had answered jobs, which were advertised on jobs.ie and had sent his emails separately to lots of shops and restaurants over a period of a week.

The claimant confirmed to admitting to coming to work on 6 September under the influence of alcohol and drugs. Also, it was because he was de-motivated that he was late for work by five to ten minutes. He only partied two to three times a week, which would cause his lateness for work by five to ten minutes. Being a half hour late for work was rare and only happened once or twice a month, and being late by five or ten minutes happened twice or three times every two weeks

In the claimant's written statement to the Tribunal, he has written that "Tuesday 09 and Wednesday 10 I was really sick and I had a pain/crick on my neck". When put to the claimant that he had not written that he had the flu, he replied that he had said that he was sick. When it was also put to the claimant that he had been out on the night of 8 September, he denied this and said that he had just been sick. He had telephoned Da on the first day of his sickness and Da had telephoned his on the third day.

The Tribunal examined the claimant further on his efforts to secure alternative employment from the date of his dismissal to March 2009.

Closing statements:

Counsel for the respondent stated that they accepted that no procedures had been applied in the dismissal of the claimant. However, the claimant contributed to his dismissal due to his blasé attitude. The claimant appeared for work while under the influence of alcohol and drugs. In his evidence, the claimant said that he was de-motivated and in the respondent's evidence, it was heard that the claimant took "the mick". The claimant did not take his job seriously. He partied two to three nights per week, came in to work late and did not telephone when he was out sick.

In relation to the claimant's three day absence from work, he telephoned the respondent on the first day of that absence and not thereafter so Da telephoned the claimant. Da took the view that the claimant was not sick but was out of work "on a bender". The question for the Tribunal is whether Da's opinion and reasonable belief that the claimant was not sick, was reasonable. It is the test of the reasonable response of an employer. In the claimant's evidence, he could not remember why he had not telephoned in as being sick. Failure to attend for work was a repudiation of the contract of employment.

The claimant had shown no credible evidence to the Tribunal that he had tried to mitigate his loss. He only received a trial in places where he had physically dropped his curriculum vitae. Otherwise, all the claimant received was customised replies to his emails. Accordingly, the claimant's efforts to mitigate his loss were less than satisfactory and he made no attempts to get alternative employment after December.

Counsel for the claimant highlighted the respondent's admission that no procedures had been applied in the dismissal of the claimant. Telephoning the respondent on the first day with the information that he was sick and then, being out of work on the two subsequent days could not be described as gross misconduct justifying summary dismissal. In line with the claimant's contract of employment, it would have been reasonable for the claimant to have received a disciplinary hearing. However, no evidence was produced to show that any procedures were applied.

In relation to the claimant's effort to mitigate his loss, the claimant had applied on-line for jobs and

this was not a wrong way to apply for jobs. He also applied for jobs from January onwards.

If the Tribunal find that the claimant was unfairly dismissed, then his claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 is also entitled to succeed.

In relation to the claim under the Organisation of Working Time Act, 1997, section 12(1) of same provides “*An employer shall not require an employee to work for a period of more than 4 hours and 30 minutes without allowing him or her a break of at least 15 minutes.*” On the evidence of Da, it was heard that the claimant worked from 5.30pm until 12.00am, without a break. The respondent appeared to have been an environment where no breaks were provided. Accordingly, the claim under this Act should also succeed.

Determination:

Having carefully considered the evidence adduced, the Tribunal finds that the claimant was summarily dismissed and no procedures were applied in affecting that dismissal. Accordingly, the claimant’s dismissal was unfair within the meaning of the Unfair Dismissals Acts, 1977 to 2007. However, the Tribunal also finds that the claimant made a substantial contribution to his own dismissal by his cavalier attitude towards his employment. Accordingly, the Tribunal finds that the claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds and awards the claimant compensation in the sum of €10,000.00.

The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 also succeeds and the Tribunal awards the claimant €474.75 in lieu of notice, this being the equivalent of one week’s pay.

A claim under the Organisation of Working Time Act, 1997 comes to the Employment Appeals Tribunal in relation to a complaint that a person had not received their statutory entitlement to paid holidays. The Tribunal has no jurisdiction to award compensation in relation to a complaint that a person did not receive rest breaks. As no evidence was adduced in relation to a claim that the claimant was due for unpaid holidays, the claim under the Organisation of Working Time Act, 1997 is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)