

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIM(S) OF:

CASE NO.

EMPLOYEE - *claimant*

MN232/2009

UD238/2009

WT89/2009

Against

EMPLOYER - *respondent*

under

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

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. P. Quinn BL

Members: Mr. L. Tobin  
Ms H. Henry

heard this claim at Loughrea on 2nd September 2009  
and 21st September 2009

Representation:

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Claimant(s) : Purdy Fitzgerald, Solicitors, Kiltartan House, Forster St, Galway.

Respondent(s) : Ms Sinead Mullins, IBEC, Confederation House, 84/86 Lower  
Baggot Street, Dublin 2

**Preliminary Point**

At the commencement of the hearing before the Tribunal, the claim under the Organisation of Working Time Act 1997 was withdrawn by the Claimant.

In this case the fact of dismissal of the Claimant by the Respondent was not in dispute and in determining for the purposes of the Unfair Dismissals legislation whether his dismissal was unfair or not, it fell to the Respondent in this instance to establish to the satisfaction of the Tribunal, that the dismissal resulted wholly or mainly from one or more of the matters specified in section 6(4) of the Unfair Dismissals Act 1977 as amended, or that there were other substantial grounds justifying the dismissal of the Claimant.

The Respondent is a catering company who provides catering facilities at an industrial premises on a cost plus basis. As can be readily appreciated, the contract for this operation is of considerable importance to the Respondent's enterprise generally.

At all material times for the purpose of these proceedings, the Claimant was the Respondent's head chef at the aforementioned premises, having initially commenced employment with it on the 30th May 2005.

The Claimant was dismissed from his employment by the Respondent on the 21st August 2008 without notice.

As appears from the Respondent's Form T2, it was the Respondent's case, that the Claimant's employment was terminated by it for gross misconduct, due to gross incompetence and negligence on his part, involving an incident of food mishandling.

It was alleged that his actions were in breach of both health and safety and company policy and that the decision to dismiss him, followed an extensive investigation and a disciplinary hearing, held in accordance with the Respondent's disciplinary policy and the principles of natural justice, throughout which the Claimant was legally represented.

On the 2nd June 2007, the Claimant was appointed to his role as Head Chef and commenced in that position on his return from annual leave on the 3rd July 2007.

In the initial period following his appointment, it appears the Claimant received some training in this role from the Respondent and also reported to the Respondent's Catering Manager. Specifically, it is further apparent that throughout the months of April and October 2007 and April 2008, the Respondent had received training in from the Respondent's Quality and Safety Specialist in process control, labelling and traceability procedures, as well as H.A.C.C.P. ["Hazard Analysis and Critical Control Points"]

Furthermore, having had the conditions of his employment with the Respondent explained to him on the commencement of his employment with it initially, the Claimant had also acknowledged in writing that at all times he had to adhere to safe working practices and health and safety regulations.

In its material respects, the principal responsibilities of the Claimant as Head Chef were inter alia

- (i) to assume complete responsibility for the production of food in the catering operation, according to agreed menu cycles ensuring constant innovation
- (ii) as a member of the management team to fully familiarise himself with all company policies and procedures to ensure the daily implementation of same in his department
- (iii) to assume responsibility for the Unit in the absence of any other Senior Manager
- (iv) to assume responsibility for all time/temperature control records in line with Food Safety

Legislation, paying particular attention to H.A.C.C.P

(v) to assist at stock taking and be aware of daily accounting procedures

(vi) the performance of any reasonable task which assists with the service, food preparation, hygiene and other matters appertaining to the efficient running of the catering operation.

In addition a number of responsibilities pertinent to “Hygiene/Safety” were specifically assigned to and assumed by the Claimant, including inter alia responsibility for ensuring that any daily documents and records relating to his department were maintained appropriately.

In opening the case to the Tribunal, it was asserted by Ms. Mullins that the Claimant had sole responsibility for the handling, monitoring and labelling of food in his capacity as Head Chef with the Respondent.

In the month of July 2008, an incident occurred in relation to food handling and in particular concerning the service cycle of tandoori chicken.

It appears that on either the 14th July 2008, one hundred and ten pieces of tandoori chicken were cooked, of which twenty eight pieces remained over. As cooked chicken has a three day shelf life, the twenty eight pieces aforesaid were required by the Respondent to be recorded by, or under the supervision of, the Claimant, in terms of cooking and storage and labelling for further use and thereafter used or discarded, by Wednesday 16th July 2008, at the latest.

It appears that such was not done in this instance, to the extent that no control procedures whatsoever, were recorded in respect of this food, in terms of either the cooking or freezing records, in consequence of which, the said chicken remained in service as at the 22nd July 2008, notwithstanding the purported performance by the Claimant of a stock take, on Saturday 19th July 2008, which failed to identify this chicken remaining in a fridge.

It appears that on 22nd July 2008, the said chicken was still in service having been placed on the Deli Counter for consumption by third parties availing of the catering facilities that were being provided by the Respondent at the industrial premises aforesaid.

In the course of the Respondent’s investigation, it emerged that the twenty eight pieces of the cooked tandoori chicken had been washed off, contrary to all health and safety guidelines, so as to accommodate its subsequent use in another guise.

It appears that events first came to light on the 22nd July 2008 when the Respondent’s Catering Manager became concerned at the appearance of the cooked chicken as was presented at the Deli Counter. She had an awareness from the food cycle and service menu that the last occasion on which tandoori chicken had been cooked was one week previously.

She removed the offending chicken from service and inquired of the Claimant as to whether it had been frozen in the interim and was not provided with any response by him. She then proceeded to examine the traceability records in respect of the chicken, all to no avail.

Subsequently a Quality and Safety specialist was engaged and an investigation conducted. It was determined that the chicken, available for service on the 22nd July 2008, was the chicken which had been cooked on the 14th July 2008 and ought not to have remained beyond the 16th July 2008 and that such represented a process control failure on the part of the Claimant.

It was suggested that in the course of the Respondent's investigation, the Claimant had also approached a colleague, the Second Chef, for the purposes of having her accept responsibility for what had occurred.

A disciplinary process was instigated by the Respondent against the Claimant, in the course of which, such a breadth of procedural incompetency had emerged on the part of the Claimant, that it was determined by the Respondent to dismiss him on grounds of gross misconduct, he having accepted that procedural failings had occurred, for which he had sole responsibility.

The Respondent's Unit Manager of the premises in question testified on behalf of the Respondent.

It appears that the employment structure at the relevant location comprised the Unit Manager, the Claimant as Head Chef, a Second Chef and five Catering Assistants or Kitchen Porters, one of whom was part-time, who provided up to two hundred and fifty covers daily on a six week menu cycle. The Claimant reported to the Unit Manager whose sphere of responsibility was primarily devoted to financial, administrative and accounting matters.

Apart from discussions with the Claimant on a daily basis concerning the menu, ultimate responsibility for the entire food ordering, production, storage, recording and discarding enterprise was that of the Claimant alone and although it was acknowledged that the Second Chef would also exercise functions in and about the keeping of records, the Claimant was required to review same on a weekly basis and to sign off on them.

In so far as food would be left over following service, it was the Claimant's responsibility to make the decisions as regards what materials were discarded and what were preserved by the Catering Assistants.

Whereas this witness and the Respondent's Regional Manager, testified to previous incidents with the Claimant, concerning his attention to food hygiene, food preparation, H.A.C.C.P., health and safety issues and compilation of costings, necessitating discussions with the Respondent's Regional Manager about the Claimant's performance, the convening of "action meetings" involving the Claimant and the provision of assistance to him, the Tribunal is of the view that such evidence was not of considerable relevance to it, in and about its determination of the issues the subject matter of these proceedings, as the Respondent's case was not that of an ongoing situation which had culminated with a "last straw dismissal" of the Claimant, but rather an episode gross misconduct on the part of the Claimant in the period from the 14th July 2008 onwards, which warranted summary dismissal of him.

In any event, notwithstanding the tenor of the evidence of the Respondent, as regards the commendable manner by which it proceeded, namely with a personal improvement programme, in order to achieve an improvement from the Claimant concerning his work performance, it has to be recognised, that notwithstanding a letter to the Claimant of the 14th February 2008, at no time previously, had the Claimant really been subjected to, what could be really substantively regarded, as a formal disciplinary sanction, by the Respondent, in the course of his employment with it.

To all intents and purposes as far as the Tribunal is concerned, the Claimant had essentially a "clean slate" as at the 14th July 2008 for disciplinary purposes, although such is not of course, to entirely ignore the historical issues surrounding the Claimant's work performance with the Respondent, which were manifest to the Tribunal and which had necessitated "verbal counselling" of him. However in the interests of fairness, it is also appropriate to record that the Claimant had

successfully passed an internal food and safety audit in November 2007, although the degree of exactitude required by same was not considered by the Respondent, to be of considerable significance.

In so far as the week commencing the 14th July 2008 was concerned, the Unit Manager was scheduled to be in attendance at a training course off site and her position was being covered by her colleague, the Regional Manager, who was present at peak times.

Prior to her departure, the Unit Manager had prepared the menu and was aware that tandoori chicken was part of the service cycle for that week. In addition to the absence of the Unit Manager, during this week, the Second Chef reported an illness and was absent for almost the entire week, to be replaced by the part-time Catering Assistant, whose task primarily concerned inter alia the preparation of the product for the Deli Counter.

On her return on the 22nd July 2008, whereas the Claimant had reported to her that he had found the previous week quite stressful, the Unit Manager testified to being surprised to learn of this from him, given that he had not contacted her in the interim. The Respondent's Regional Manager also testified that whereas she had a telephone conversation with the Claimant during that week, no such difficulties were relayed by him to her either, nor were any requests made to her for additional personnel. A Relief Chef Manager employed by the Respondent testified in similar vein before the Tribunal.

In this context, in so far as the Claimant's Form T1A was concerned, the reasons outlined therein to ground his claim for unfair dismissal were that he was "left to do his job with little or no assistance due to absence and leave of other personnel and that when he raised an issue about certain food he was suspended and dismissed unfairly." In the light of all of the evidence adduced at the hearing before the Tribunal, the foregoing is considered to be a rather self-serving claim by the Claimant and utterly devoid of any substance.

While lunch was available on the 22nd July, the Unit Manager observed that something was seriously amiss with the chicken on display at the Deli Counter and immediately had same removed.

Fortunately, although it would appear that by this time, quite a number of the twenty eight offending portions had been consumed, it is the case that there has been no evidence of any third party having become ill, as a result of having consumed this chicken. Furthermore, whilst a series of tests were performed on the offending chicken, under the auspices of the Respondent's Quality and Safety Consultant, the results of same proved inconclusive.

When the Unit Manager inquired of the Claimant as to whether this chicken had been frozen, he did not respond to her. She examined the record books to elicit relevant details in relation to the chicken to discover that there was no record of the cooling of the chicken, or of its preservation. Thereafter she telephoned the Regional Manager to inform her of her findings and to seek advice.

When the Unit Manager attended at the premises on the following day, Ms. M., the Quality and Safety Consultant was in attendance conducting an investigation and re-training was in progress with all employees.

As the Unit Manager was not in attendance at the time, she was unable to contest the Claimant's assertion, as put to her by Mr. Purdy in cross-examination, that he had instructed the Second Chef,

after the tandoori chicken had been cooked, to perform the labelling function with regard to it, to indicate when it should have been used by.

Similarly, this witness was also not in a position to comment on another assertion by the Claimant that there had been re-labelling of chicken on the Friday 18th July, apart from reiterating that labelling was the responsibility of the Claimant.

In cross-examination, after this witness testified that it was a dismissable offence to use product, subsequent to the expiry of its service cycle, it was put to her by Mr. Purdy that, the Claimant's evidence would be, the chicken was relabelled Friday 18th July, used on Monday 21st July in accordance with that label aforesaid and incorrectly placed on display on Tuesday, 22nd July by Ms. D, the part-time Catering Assistant and consequently, in the light of the labelling, the chicken had not attracted the attention of the Claimant in the course of his stock take on Saturday, 19th July.

In response, this witness maintained that as the Second Chef had been absent in the period up to the 18th July and as the Claimant was aware of and had responsibility for the service cycle, the chicken ought to have been discovered by him in the course of his inventory for the stock take and had it discarded. The Tribunal is disposed to agree with the Respondent in this regard.

Whilst it was suggested to this witness that the evidence of the Claimant would be that when he compiled the stock take, there was no tandoori chicken as evidenced by the stock sheet, this witness testified that she presumed he had missed it. This witness also emphasised that the fridge in respect of which cooked meats are kept is located in a designated area and had the Claimant exercised due diligence in that regard, he ought to have located it. In this regard, the Tribunal observes that in fact there was no tandoori chicken present, as would in any event account for its omission from the stock sheet, because it had been washed off by then and therefore would have predominantly presented itself as mere chicken to an observer.

The Respondent's Regional Manager also testified on behalf of the Respondent before the Tribunal. Subsequent to receipt of a telephone call from the Unit Manager on the 22nd July, she telephoned the Respondent's Operations Director and Client Account Manager for the premises in question and informed them of the situation that had materialised on site and also engaged the Quality and Safety Consultant to attend the following day. Thereafter she communicated the preliminary findings of the Quality and Safety Consultant to the Respondent's Operations Director and was instructed to suspend the Claimant on full pay pending an investigation.

Consequently, the Claimant was suspended on full pay on the 23rd July 2008 pending an investigation into the matter.

In cross-examination, it was suggested to this witness that the Claimant did not wash the chicken and that if the Claimant had instructed the Second Chef to put it away, such was her responsibility. This witness responded that it was the Claimant as Head Chef, that she remunerated to manage the kitchen.

When it was suggested to this witness that it was within the Claimant's remit to delegate tasks to underlings, this witness testified that ultimately, no person other than the Head Chef was empowered to sign off on the cooling sheets and that it was the responsibility of the Head Chef to ensure that all records were signed off on.

A Mr. S. also testified on behalf of the Respondent. At all material times he was employed by it as

a Relief Chef Manager for the regional area and during the period of the Unit Manager's absence, essentially performed her functions from the 14th to 21st July and additionally assisted the Claimant with some food preparation on Wednesday, 16th and Thursday 17th July.

This witness confirmed that it was the responsibility of the Claimant to ensure adherence to food labelling procedures and that he had no function in that regard whilst he was in attendance, nor in respect of food processing, recording, or recycling, all of which rested with the Claimant.

In so far as the Claimant had insinuated that there had been re-labelling of chicken on Friday, 18th July, this witness testified that when he was in attendance on site shortly after 2pm that afternoon, the Claimant had already departed the premises, [which was disputed by the Claimant] although his normal working hours were not scheduled to conclude until 2.30pm.

This witness also testified that he was in attendance on site during the week commencing the 21st July, when he was approached by the Second Chef who exhibited some distress to him and felt she was being scapegoated, having been approached by the Claimant, to accept responsibility for the issues surrounding the washing and labelling of the offending chicken.

The Claimant's interpretation of this encounter was rather different and he disputed that the purpose of his approach to the Second Chef was to exert undue pressure upon her.

In cross-examination, it was suggested to this witness that the reason for the distress of the Second Chef was that she had realised her own mistake in presenting the offending chicken for service and that such constituted a dismissable offence.

The Second Chef also testified on behalf of the Respondent. As at the date of the hearing before the Tribunal she had been in the employment of the Respondent for a period of eighteen months.

She is a foreign national and her command of the English language was somewhat limited, which the Tribunal believes might serve to explain how her interpretation of the encounter with the Claimant on the 23rd July was markedly different from his perception of what occurred between them on that date.

The working day of this witness ordinarily commenced at 6am and she testified that as part of her duties she was responsible for the preparation of breakfast and of the constituents for the salad bar and the deli bar. In addition, she assisted with the preparation of desserts. She confirmed that her instructions were at all times received from the Claimant or the Unit Manager.

This witness testified that tandoori chicken had been cooked on Monday 14th July and following service that extra portions remained. She recounted how she approached the Claimant and requested whether such ought to be preserved or discarded. She recounted how she was instructed by the Claimant to preserve it and to wash it, such that use could be made of it on the following day, which she did.

The Second Chef testified that when left over food presented itself she always inquired of the Claimant as to what had to be done with same. In this instance having washed the chicken in the sink as she had done on previous occasions as instructed by the Claimant, she placed it in the blast chiller, removed it, labelled it from that day for three days and placed it in the appropriate receptacle for same.

The Claimant for his part testified that on Monday 14th July he requested the Second Chef to cool down the cooked tandoori chicken and to use it as Cajun spicy chicken by the addition of mayonnaise, spices and seasoning.

Whilst such is not germane to the determination of the issues in the instant proceedings, the Tribunal is disposed on balance to accept the testimony of the Second Chef in relation to the washing of the product.

Whereas the Claimant denied that he instructed the Second Chef to wash off the tandoori chicken, the Tribunal is unable to reconcile, how it was otherwise envisaged that tandoori chicken was to somehow metamorphose into Cajun spicy chicken, without the removal of the “tandoori” constituents from it.

Thereafter the Second Chef was absent for the remainder of the week through illness and returned to work on Monday, July 21st. On that date, she prepared the breakfast and the salad bar and deli counter as usual.

She testified how she went to the cold room to establish what was available, observed chicken, saw that it was in date and together with seasoning and mayonnaise, used same in the preparation of cajun spicy chicken on that date.

This witness testified that following service, the cleaning of the deli bar and storage of the constituent materials or otherwise would have been the responsibility of Ms. D., the part-time Catering Assistant.

This witness also testified that on Wednesday, July 23rd, she was approached by the Claimant who requested her to check fridges and labelling of product therein. Whilst attending to that task, she also apparently discovered bacon unlabelled and uncovered and requested of a kitchen porter, an explanation for same. It became apparent to this witness that nobody had instructed the porter to attend to this and she had a recollection of having discarded the bacon on that occasion.

This witness also testified that on the same date she was approached by the Claimant who requested her to make contact with the Quality and Safety Consultant and accept responsibility over the labelling of the chicken, which had remained on display at lunchtime on the 22nd July, which she refused to do.

In cross-examination it was suggested to this witness that, whilst the Claimant had advised her on the 15th July to preserve the chicken when she had requested of him what to do with it, at no stage had he instructed her to wash same and that it would have been a peculiar matter for him to have done so, in the light of a previous incident whereby gravy had been washed off chicken, which had resulted in a reprimand and prohibition of such practice.

When this witness was questioned as to why she did not complete the cooling record for the chicken on the 15th July, she testified that everything was new for her and had not previously done so. However, Mr. Purdy subsequently established and elicited from this witness that she had made entries in the cooling records on numerous occasions, to which the witness responded that whenever she had made such entries it would have followed the making of an enquiry of the Claimant as to proceed in that regard.

This witness really could not account for the failure to complete the cooling record on the 14th July



in respect of the chicken. She had received training in this regard in March 2008 and had undertaken this task for a period of approximately twelve weeks by then. It was suggested by her that she may have been unsure as to how to complete the record on this occasion and did not want to make a mistake.

In cross-examination, Mr. Purdy also elicited testimony from this witness, that the remainder of the cajun spicy chicken, as made up by her on Monday the 21st July was discarded by her, as per the label under which it had been stored. Furthermore, this witness testified that she cooked fresh chicken on Tuesday, 22nd July.

However it also emerged in the course of this witness' testimony that, on Monday July 21st, she did not inform Ms. D. the Catering Assistant, that such was the last day for service of the chicken which had been used to prepare cajun spicy chicken on that occasion, nor had Ms. D made any enquiry of this witness in that regard.

Ms. D the Catering Assistant also testified on behalf of the Respondent before the Tribunal. This witness covered for the Second Chef throughout the period of her illness from the 14th to the 18th July. In addition she was also in attendance on site on the 21st and 22nd July.

This witness testified that her normal duties commenced at about 10.30 am whereupon she would inter alia set up the deli bar, serve from approximately 11.45 to 1.30pm and clean up thereafter.

In the ordinary course of events, prior to her arrival, the constituents of the deli bar would previously been prepared for her by the Second Chef and maintained in a particular fridge. After service, this witness would be responsible for covering the constituents placing a day dot thereon and storage of product.

In addition, further product in the nature of ham, turkey, chicken was preserved in the cold room which this witness would have removed for the purposes of filling relevant containers for presentation at the deli bar.

This witness testified that as the Second Chef was absent through illness on the 15th July, she was contacted by the Claimant and requested to attend on site to cover some of the duties of the Second Chef.

She confirmed that she did no cooking during this week, nor did she do any labelling of product, apart from the aforementioned day dots. In addition, she had to ask the Claimant what was to be served at the deli bar.

In particular on the 16th July she was instructed by the Claimant to use chicken which was being stored in the cold room for use at the deli bar. This was the tandoori chicken of Monday, July 14th, which had been washed by the Second Chef. This witness estimated that she would have used approximately 4-5 portions of same for this purpose, leaving approximately twenty three portions of same stored in the cold room.

This witness does not recollect a label being present on same on that occasion and not being aware that it had been cooked on Monday July 14th, prepared product, which she testified as having been used up by Thursday July 17th.

On Friday July 18th, she removed some more of the remaining chicken from the cold room and

requested of the Claimant whether it was appropriate to use same. For all this witness knew, such could have been prepared on the 16th July and the Claimant instructed her to use same.

This witness testified that any food left over at the deli bar following service on July 18th and from the particular fridge pertaining to same was discarded by her on that date. However, this witness also testified that it was not her function to discard any product from the cold room. This would account for the deli fridge being clear as at the time of the stock take by the Claimant on Saturday, July 19th.

On Monday July 21st, as the Second Chef was in attendance on that date, when this witness attended on site, there was prepared Cajun spicy chicken available to her for display on the deli bar. Its appearance was unremarkable according to this witness.

After service on Monday July 21st, this witness testified, that, contrary to the testimony of the Second Chef, some Cajun spicy chicken was left over, which she placed in the appropriate fridge and on Tuesday, July 22nd, for the purpose of setting up the deli bar, she removed from this fridge what she had placed therein the previous afternoon, thereby accounting for how the offending chicken came to be discovered by the Unit Manager at lunch time on that day.

The Respondent's Quality and Safety Consultant also testified on its behalf before the Tribunal. This witness had educational qualifications in food technology and occupational health and safety. She provides a support structure to the Respondent's sites, through guidance and on site training in terms of food safety and health and safety, so as to ensure compliance with same and appropriate regulatory policies and industry practices.

On the 22nd July 2008, this witness was requested to attend on site to investigate the situation which had arisen concerning an apparent breach of food safety.

This witness testified that the facts of the situation which pertained in this instance constituted specific breaches of the Respondent's Process Control Procedures, in the areas of both preparation and cooling whereby foods held in refrigerated storage are required to be covered and labelled and products are labelled in accordance with the Labelling Procedure to ensure that product traceability is maintained and the cooling process is recorded and accurately for that matter.

Furthermore, in so far as the tandoori chicken may have been washed off under a cold tap such was likely to have increased cross contamination as regards preparation of product.

Indeed, this witness had provided a report to the Respondent on her investigation of the matter, which apart from the very serious and obvious risks of food borne illness, revealed what she considered to be major HACCP non-compliance in so far as there was

- (i) No record of cooling process for left over product from hot service.
- (ii) Washing of high risk food products under mains water to remove tandoori flavouring, Serious allergen and hygiene risk.
- (iii) Critical stock management and labelling non compliance
- (iv) Lack of moral duty to protect customers.

In essence this witness testified that she concluded that there was a serious lack of control manifest in the kitchen area, as a result of which consumers were exposed to serious risk of food poisoning and allergens, thereby endangering the Respondent's enterprise and for which as far as she was concerned, the Claimant had overall responsibility.

In cross-examination by Mr. Purdy it was admitted that the Claimant had at all times been forthcoming and co-operative with the investigative process. Furthermore, although it was acknowledged by this witness that it was appropriate for the Second Chef to have some responsibility as regards the maintenance of cooling records and for labelling of product, she was at pains to emphasise that ultimate responsibility for same at all times rested with the Claimant.

In so far as the conclusions of her report as set out above were concerned, in cross-examination by Mr. Purdy, it was put to this witness that it was the Second Chef who was responsible for the failure to make a record of the cooling process for the left over product from the hot service and further, that under no circumstances had the Claimant instructed her to wash off the tandoori chicken. In so far as the former is concerned, the view of this witness was that whomsoever had cooled the product, ought to have completed the cooling record.

It was further suggested to this witness that it was the contention of the Claimant that subsequent to a meeting with the Respondent in July 2007, it was agreed that thereafter responsibility for labelling of product would be devolved to the Second Chef. In support of this contention, a copy of the minutes of an "action meeting" with the Claimant on the 11th July 2007, as signed by the Unit Manager were introduced into evidence and which provided in material respects inter alia "The Second Chef will be responsible for.....putting away leftovers, recording, cooling and labelling"

In response to the foregoing, this witness testified that in this instance, in her opinion it ought to have been apparent to the Claimant as Head Chef, by way of an inspection, that the Labelling Procedure had not been adhered to and accordingly taken appropriate remedial action to ensure full and complete compliance in that regard.

In summary it was suggested to this witness that three of the four incidences of major HACCP non-compliance as identified by her in the report to the Respondent were in fact attributable to actions and omissions on the part of the Second Chef. In response this witness testified that she did not agree with this assertion and expressed the belief that full responsibility for the kitchen rested with the Claimant as Head Chef.

The Claimant received a letter from the Respondent's Regional Manager dated the 24th July 2008 which recited that the allegation against him was of "gross incompetence/negligence from an incident of alleged food mishandling".

This letter invited him to attend an investigation meeting on the 28th July to be chaired by the Manager of another Regional Area. He was advised that he might wish to be accompanied by a work colleague or union representative at this meeting. He was informed that he would be given an opportunity to review any statements or reports which had been gathered by the Respondent and would be afforded an opportunity to respond to same. He was also advised that the investigation may result in disciplinary action being taken against him, up to and including dismissal and for his perusal, he was provided with a copy of the Respondent's employee directory, containing the Respondent's disciplinary procedures.

It appears that no disciplinary action of any nature was ever contemplated, let alone taken by the Respondent as against the Second Chef.

In so far as summary dismissal is concerned, the Respondent's disciplinary procedures provided in

their material respects as follows

“Where an employee is involved in Gross Misconduct, the Company may determine that the employee should be dismissed without reference to any of the Stages of the Disciplinary Procedure.....Acts of Gross Misconduct are construed as being deliberate acts by you, or the negligent failure by you to act, to the serious detriment of the Company or others.....Examples of Gross Misconduct are as follows.....Gross incompetence/negligence .....flagrant/deliberate disregard of safety/health/hygiene precautions and procedures likely to endanger any person”

It is also appropriate to record that whereas the Respondent’s policy ordinarily provided for a graduated and progressive system of disciplinary procedures, the Company reserved the right to use any Stage in the procedure, including dismissal, should the misconduct be serious enough to justify it. The Respondent in its policy also enunciated an inexhaustive list of examples of matters constituting Serious Misconduct and which included a “failure to adhere to safety/health/hygiene requirements”

The Respondent’s Regional Manager who chaired the Respondent’s disciplinary investigation of the Claimant also testified on behalf of the Respondent before the Tribunal.

At the meeting on the 28th July, the Claimant was in possession of the Respondent’s employee directory, his job description and a copy of the report which had been provided by the Quality and Safety Consultant.

Following the meeting of the 28th July, the Claimant received a further letter from the Respondent dated the 31st July wherein he was advised by the Regional Manager conducting the investigation, that she was conducting further investigations and would be in contact in due course to arrange a follow up meeting. Subsequently, by letter dated the 5th August 2008, the Claimant was requested to attend a follow up investigation on the 8th August 2008 on similar terms as before.

At the meeting on the 8th August, the Claimant was in possession of a copy of a signed statement of the Second Chef in relation to the matter and which had been prepared for her by the Relief Chef Manager.

It is appropriate to record that at both meetings the Claimant acknowledged that there had been a total lack of multiple control procedures which had contributed to the chicken remaining in service on the 22nd July and for which he appeared to be genuinely remorseful.

Following the meeting of the 8th August, a letter was written to the Claimant on that date requesting him to attend an outcome of investigation meeting on the 12th August. At this meeting on the 12th August, the Claimant was notified that he was being summarily dismissed with immediate effect.

This witness testified to the Tribunal that in arriving at her decision to summarily dismiss the Claimant she had taken the entire factual matrix into account and that her decision to dismiss was based on grounds of gross misconduct/negligence on the part of the Claimant.

Her decision was based on the information imparted to her and that insofar as she determined that there was gross misconduct she was satisfied that there had been a number of breaches of food safety HACCP processes which had placed the Respondent’s customers at serious risk and which

potentially could have had huge implications for the Respondent's enterprise. She testified that she believed that the sanction imposed in all of the circumstances was an appropriate one.

By a letter dated the 21st August, the Claimant was informed that his actions of inadequate traceability on kitchen records, cooling records and stock control sheets could have potentially placed the health of the Respondent's customers at risk and the Respondent's business at the premises aforesaid, constituted such a serious breach of the Respondent's food safety procedures, that it warranted summary dismissal. In addition the Claimant was notified that he had a right to appeal the decision to a Client Account Manager with the Respondent within seven days of the date of that letter.

Under cross-examination by Mr. Purdy, this witness testified that in arriving at her decision she had considered the report of the Quality and Safety Consultant and relied on same and she also confirmed that the basis for the dismissal of the Claimant solely concerned the episode from the 14th July 2008 onwards.

In so far as the washing of the product was concerned, whilst it was readily apparent that there were conflicting versions from both the Claimant and the Second Chef in relation to this aspect of the matter, this witness admitted in cross-examination by Mr. Purdy, that in arriving at her decision to summarily dismiss the Claimant, she had not preferred one version of events over the other in that regard.

Accordingly, it appears to the Tribunal in this instance that, as there clearly were such diametrically opposed views expressed by both the Claimant and the Second Chef in so far as the washing of the chicken was concerned and in respect of which the Respondent does not appear to have made any finding, the Tribunal fails to see how, in such circumstances, the Respondent could have expressed a concluded view on that aspect of the matter as a factor in warranting summary dismissal of the Claimant, or the means by which it did, in the absence of such a finding.

In so far as the labelling issue was concerned, upon cross-examination by Mr. Purdy as to the manner by which such was determined by her, this witness testified that she took the whole process of labelling into consideration.

When enquiry was made of this witness as to how such could have ultimately lead to the summary dismissal of the Claimant, or how he could have been at fault in this regard, this witness testified that the Claimant had complete responsibility for same and that there was a failure on his part to exercise appropriate control over this function.

However, this witness testified to never having had sight of the job description of the Second Chef, let alone to have spoken to her and when questioned by Mr. Purdy as to why she had not considered apportionment of responsibility for the labelling to the Second Chef, this witness testified that her function was to assess the role of the Claimant as Head Chef.

In cross-examination by Mr. Purdy, it was also established that in so far as a finding of gross misconduct on the part of the Claimant was made by this witness, this witness admitted that she did not believe that the actions and omissions on the part of the Claimant as constituted same were deliberate on his part and in essence had found negligent failings on his part throughout a number of processes.

When asked to elaborate further in this regard, this witness testified that she was inter alia referring

to a lack of direction having been provided by the Claimant to his kitchen team as regards the completion of duties, although on further questioning by Mr. Purdy she accepted that the letter of the 21st August aforesaid made no such reference, but rather asserted his dismissal was for “Gross misconduct – Gross incompetence/negligence from an incident of food mishandling by yourself”

In cross-examination this witness also admitted that in arriving at her determination to summarily dismiss the Claimant, no consideration was afforded by her to the Claimant’s unblemished disciplinary record.

When it was suggested to this witness that her decision to summarily dismiss the Claimant might have been unduly harsh and that perhaps a period of suspension without pay would have been a more appropriate sanction to be imposed upon him in the circumstances, she disagreed and testified that she had felt that summary dismissal was the only outcome for the Claimant, although she went on before the Tribunal, albeit quite hesitatingly, to further recount how she had considered the imposition of alternative sanctions, such as a final written warning, but not a combination of a final written warning coupled with a period of unpaid suspension.

In exercising its function, the Tribunal is particularly mindful of the passage from *Bunyan v United Dominions Trust* [1982] ILRM 404 at 413 that “the fairness or unfairness of dismissal is to be judged by the objective standard of the way in which a reasonable employer in those circumstances in that line of business would have behaved. The Tribunal therefore does not decide the question, whether or not, on the evidence before it, the employee should be dismissed. The decision has been taken and our function is to test such decision against what we consider the reasonable employer would have done and/or concluded”

In deciding whether, within the band of reasonableness of decision-making, the Respondent’s decision to dismiss the Claimant was not unfair, the Tribunal has asked itself whether the Respondent has satisfied it, that its decision to dismiss the Claimant was reasonable “having regard to all the circumstances”.

By reason of the foregoing, “Having regard to all the circumstances of this case” the Tribunal is not so satisfied, that in this instance, the sanction of summary dismissal for gross misconduct/negligence as imposed upon the Claimant, was within the range of reasonable responses, having regard to all of the established facts and accordingly, the Tribunal determines that the Claimant was unfairly dismissed from his employment with the Respondent.

That being the case, to dismiss the Claimant for gross misconduct on the grounds which it did, was, in the unanimous opinion, of the Tribunal in all of the circumstances of the case, an excessive, unreasonable, disproportionate and unjustifiable remedy on the part of the Respondent.

That is not to say of course that the Claimant was entirely blameless in all of this. It has to be acknowledged that serious systems failures, for which he had assumed overall responsibility, had occurred in this instance. There clearly were gross shortcomings for which some blame has to attach to the Claimant. However, the Tribunal unanimously determines that in the light of all of the circumstances pertaining to this case, a dismissal of the Claimant by the Respondent on grounds of “gross misconduct” was not fair.

In this instance, the Claimant also opted to avail of the appeal mechanism that was afforded by the Respondent following its decision to summarily dismiss him and by letter dated the 5th September 2008, the Claimant was requested to attend an appeals hearing on Tuesday 23rd, September. By

letter dated the 12th September 2008, the Claimant, through his legal representative, furnished the Respondent with written grounds of appeal.

The Client Account Manager of the Respondent who dealt with the Claimant's appeal also testified on behalf of the Respondent before the Tribunal.

This witness testified that he received a telephone call from the Respondent's Human Resources division requesting him to hear the Claimant's appeal and he was forwarded the information in relation to same. Ultimately the Claimant's appeal was heard on the 9th October 2008 at which the Claimant attended accompanied by his father.

After having heard the Claimant's submission on the 9th October, this witness testified that he had spoken to the Quality and Safety Consultant, the Claimant's Regional Manager and the Regional Manager who had made the decision to dismiss the Claimant, which resulted in him deciding to uphold the initial decision to summarily dismiss the Claimant, which was communicated to the Claimant in a letter dated the 20th November 2008.

In so far as the sanction of summary dismissal was also agreed to by the Client Account Manager, he testified that as far as he was concerned everything originated from the absence of labelling and lack of control which would have had serious adverse effect upon the Respondent's business.

Upon cross-examination, this witness acknowledged that for the purposes of determining the Claimant's appeal, he had not spoken to the Second Chef or the part time Catering Assistant, nor did he make a finding in respect of the divergent views expressed by both the Claimant and the Second Chef as regards the washing of the product and that as far as he was concerned there was no information before him as would have warranted him to consult with her at all. Furthermore, this witness admitted that he was not aware of the duties of the Second Chef, as had been agreed at the meeting in July 2007 and minuted by the Respondent's Unit Manager.

In any event it is also the determination of the Tribunal, that notwithstanding such appeal was conducted ostensibly in accordance with the Respondent's "Disciplinary Policy & In-House Procedures," it could not serve to legitimise, or place a "stamp of respectability", on the flawed decision of the Respondent at first instance to summarily dismiss the Claimant.

## Redress

Having heard submissions from the parties' representatives on the matter, the Tribunal is satisfied that neither reinstatement, nor re-engagement, of the Claimant by the Respondent, would be a practical or appropriate form of redress for him and in the circumstances, the Tribunal unanimously determines that an award of compensation to the Claimant is the most appropriate form of redress in this instance. As at the date of the Claimant's dismissal by the Respondent he was in receipt of a gross weekly payment in the amount of €576.89. The Claimant was without employment from the date of his dismissal until in or about the end of the month of June 2009.

The Claimant testified that throughout this period he had completed a FAS course, obtaining an ECDL and had applied unsuccessfully for alternative employment, although there was an absence of corroborative documentation from the Claimant put before the Tribunal.

As and from that date, the Claimant had secured alternative part-time employment in the hospitality services industry for twenty hours a week and testified that as at the date of the hearing before the

Tribunal, he was in receipt of a grossly weekly payment in the amount of €220. So, for the purposes of this exercise, the Tribunal has accepted that, as and from the 1st July 2009, the Claimant has incurred an ongoing weekly loss in the amount of €356. Therefore as at the conclusion of the hearing before this Tribunal, it was established to its satisfaction, that the Claimant has incurred a financial loss to date on account of his dismissal and which was ongoing at that time.

In such circumstances, the Tribunal was disposed to also award the Claimant a sum for prospective loss of income attributable to his dismissal by the Respondent. However, it has to be acknowledged that the Tribunal's assessment in that respect has inevitably to be somewhat speculative, in the light of what may, or may not transpire for the Claimant or the Respondent, subsequent to the conclusion of the hearing before the Tribunal.

The Tribunal assesses the Claimant's financial losses from the end of the notice period to which he was statutorily entitled up to the end of June 2009, in the amount of €21,921 and thereafter in the amount of €9,279, having made some allowance for ongoing financial loss into the future as and from the 21st September 2009.

In all of the circumstances therefore and in the light of the findings as set out above, the Tribunal has unanimously determined that an award to the Claimant in the amount of €21,840, in all of the events which have happened, is just and equitable compensation for him pursuant to the provisions of the Unfair Dismissals legislation.

In so determining the amount of compensation awarded, the Tribunal had regard to what it unanimously considered was the not insignificant extent, to which the actions or omissions of the Claimant had contributed to the events which ultimately culminated in the decision of the Respondent to dismiss him from his employment with it.

It also follows from the foregoing that the claim under the Minimum Notice and Terms of Employment Acts also succeeds and the Tribunal therefore awards the Claimant the sum of €1,153.78 in that regard, being the equivalent of two weeks pay.

Sealed with the Seal of the  
Employment Appeals Tribunal

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(Sgd.)

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(CHAIRMAN)



