

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
EMPLOYEE - *claimant*

CASE NO.
UD699/2009

against
EMPLOYER - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J. Fahy BL

Members: Mr P. Pierson
Ms H. Henry

heard this claim at Loughrea on 9th February 2010
and 28th April 2010
and 29th April 2010
and 21st June 2010
and 23rd June 2010

Representation:

Claimant: Mr. Pat Flannery, Assistant Branch Organiser, SIPTU, Galway No 2 Branch,
Forster Court, Galway

Respondent: Mr. John Brennan, IBEC, West Regional Office, Ross House,
Victoria Place, Galway

The determination of the Tribunal was as follows: -

Respondent's Case

The first witness for the respondent hereafter known as GB, gave evidence that he is the chief executive of the respondent company and has been employed by the respondent since 1989. The respondent is a hospital with a total capacity of approximately 100 beds. The claimant was employed as acting head chef and worked in the kitchen department that had a total workforce of 12 people. The kitchen provided meals for patients, staff and visitors.

The kitchen department reports to the hotel services manager, which is a position within the hospital. In April 2008 the hotel services manager informed the witness that she was of the view that outside catering services were being provided from the hospital kitchen area. It was also discovered that the claimant had placed an advertisement within the hospital offering a catering service for events including communions, confirmations and 21st birthday parties. The contact

details of the claimant were included on the advertisement that was placed on one notice board within the hospital, close to the theatre.

The witness was shocked when he discovered this and immediately set about carrying out an investigation. He appointed an independent investigator hereafter known as PC, to carry out the investigation. The claimant was at all times throughout the investigation represented by her trade union official. The investigation unearthed evidence that outside catering was being provided from within the hospital. This outside work involved the operation of an outside catering service, using company equipment on company time for personal gain on behalf of the claimant. The witness agreed that some monies were lodged to the company in respect of this outside catering but the investigation could not link these monies definitively to work carried out. Some receipts were produced by the claimant indicating payments made but there was a complete lack of traceability to these receipts.

During the investigation the claimant was placed under surveillance. The witness could not give a precise quantification of the amount of monetary loss to the respondent company but was of the opinion that it was in the region of a few thousand euros between the months of April and May 2008. There was a serious lack of clarity in terms of a cash trail and any monies paid by the claimant.

The witness, in taking into account his decision to dismiss the claimant relied upon the facts that there was no attempt to seek permission or approval before embarking on her non- work related catering service. The outside catering was carried out on the company premises and on company time using company equipment. There was also personal gain for the claimant from her activities. Items including crabmeat and smoked salmon were ordered even though they were not on the hospital menu. The action of operating a catering service from within the hospital was inappropriate and a serious breach of trust and an abuse of the claimant's role as assistant head chef.

The witness agreed that he had on one occasion previously availed of the hospital kitchen facilities in February 2008 following a bereavement of a relative of his neighbour. This was an extreme situation and he did so out of kindness to his neighbour at a difficult time. He agreed that food was provided to a number of people and he sought and paid the bill for the food provided. He also enquired as to who had prepared the food and gave a gratuity of €50 to that person hereafter known as MD. Under cross examination he stated that this once off situation was entirely different from the situation where catering was being advertised and carried out for communions, confirmations and 21st birthdays. He accepted that the bill, which he had paid, did not include the use of gas and company equipment.

Under further cross-examination he could not recall if the hospital kitchen facilities were made available to other local organisations. He was aware that the odd cake was provided in the event of someone's birthday. He agreed that there was no formal system of recording payment for these cakes other than a cashbook being used to record any payments for the cakes. During the period of time that the claimant was under surveillance quantities of raw materials far in excess of normal quantities were ordered and it was the responsibility of the claimant to order those raw materials.

In response to questions from the Tribunal he confirmed that the claimant had admitted to him that she had personally gained from providing outside catering. He confirmed that he was involved in the disciplinary hearing and it was his decision to dismiss the claimant.

The Independent Investigator (PC) received a phone call from the respondent HR manager (AD)

requesting she carry out an investigation into the actions of the claimant. PC set out the terms of reference for the investigation in an e-mail based on the telephone conversation with AD. The investigation was to ascertain if the claimant was jointly, *'running a catering service out of the hospital using company equipment, on company time, for personal gain.'*

PC interviewed twenty-six people including the claimant during the course of the investigation; the witness statements are included in the investigation report. The claimant was accompanied to the investigation meeting by her union representative. PC informed the claimant of the purpose of the meeting, the procedure that would be followed and that she would have the opportunity to see and confirm all notes taken at the conclusion of the meeting.

A conclusion of the investigation was that there was a,

'custom and practice to make cakes for hospital staff. Kitchen staff provides rare catering for hospital staff and also cater for their own family events. All levels of staff have availed of both of these service.'

The claimant said that for catering events 'you did them on your own time or at home'. Payments were made to the respondent for utilities used in the preparation of food for both staff and 'non-staff members.' The payments could not be adequately traced back to specific events,

'This leaves the hospital in an unacceptable situation which the claimant has created.'

In addition the claimant admits she received payment for the catering services she jointly provided both during and outside of working hours;

'the claimant confirmed taking a portion of the money paid over by staff and non-staff members for themselves which constitutes a catering service which is a commercial undertaking, which they did not have permission to operate, regardless of the fact that they claim to have covered all hospital costs.'

The HR manager had requested that PC should also make a recommendation at the conclusion of the investigation. PC made the recommendation that,

'the relationship of trust between the respondent and the claimant has been undermined and breached and, as this breach constitutes gross misconduct, consequently I recommend termination of employment for the claimant under the respondent disciplinary procedure.'

On receipt of the investigation report the claimant's representative objected to the report as uncontested evidence was accepted and used as a basis for the conclusions. The claimant's representative provided a list of the witnesses they wished to cross-examine. Two of the six witnesses agreed to the cross-examination, the remaining four provided a letter stating they were standing over their original evidence. PC was present at the cross-examination of the witnesses.

The investigator provided a supplemental report on the 10th of September 2008. This report includes a response to the 27 points raised by the claimant's representative. The investigation conclusions did not change in the supplemental report as the material events had not changed with the additional information.

Under cross-examination PC stated that it was normal to carry out an investigation without agreed Terms of Reference. Before the investigation commenced PC met with the HR manager who briefed her on the situation but did not inform her that the claimant had been under surveillance. PC agrees that the conclusions of the investigation were based on uncontested evidence. PC resolved the conflict of evidence based on all the information provided and the frequency that witnesses repeated the information. The cashbook went missing so there was never an opportunity to verify the receipts provided by the claimant. PC established that there was a catering practice in place within the respondent. PC was aware that the respondent CEO had availed of the catering service. There are no means of substantiating the loss to the respondent. The claimant did not have the opportunity to view the CCTV evidence showing them removing food from the kitchen. PC was aware of inter-personal difficulties between the claimant and a number of the witnesses. PC made conclusions and recommendations on the instruction of the HR manager.

A staff member of the canteen (DB) gave evidence that the day the claimant was suspended she came to her house informing her that the bills weren't put together yet for the weekend. The witness was asked to say she owed the claimant money and that's why she had given her €60, which was actually payment for 2 cakes.

The claimant mostly paid DB when the catering services were provided but on occasion people would pay directly. DB recorded the payments in a cashbook and put the amounts in the till as 'open food.' DB was not aware of any additional catering activities except for the cakes. The cakes were in the fridge when DB started work at 7.30am. Due to the increased activity and resulting pressure on staff there was a terrible atmosphere between the kitchen staff. DB independently introduced a system where payments were logged as 'cash on account' and also written in the receipt book so everything could be cross-referenced and would tally at night.

The Hotel Services Manager (TCF) gave evidence that on the 20th of April she saw a flyer in the theatre area of the hospital advertising a catering service. TCF was shocked and photocopied the flyer then replaced it where it was. TCF asked a kitchen staff member (AmP) what was going on. AmP thought she was aware of what was going on because it was 'being done so openly'. TCF spoke to other staff members and decided that if a commercial catering service was being provided it was 'to big of a situation' to handle herself. TCF checked the kitchen stock and decided there was excessive cake making ingredients that did not equate to the menus.

On Tuesday the 22nd of April TCF met with the CEO to inform him of the situation, the CEO called the HR manager to his office to discuss the situation. TCF asked the other members of staff to 'keep an eye on' the claimant's activities, TCF does not recall if the CEO or HR manager asked her to do this. The surveillance of the claimant continued for a few weeks. On the 16th of May TCF discovered the claimant in the kitchen when she was not rostered to work. On the 20th of May after the claimant was suspended TCF instructed her assistant to take pictures of all the stock in the kitchen. TCF also found instruction notes for food preparation that was not on the menu. TCF cannot quantify the scale of the outside catering as it was done in an 'underhand' manner. Due to the kitchen stocktaking system in place, there is no way of telling exactly what comes in and out of the kitchen.

Under cross-examination TCF stated that she visited the kitchen more often when she became aware of the claimant's activities. TCF asked three of the kitchen staff members to watch the claimant after consultation with the CEO and the HR Manager. TCF was aware of the inter-personal difficulties between the kitchen staff members. TCF did not approach the claimant regarding the activities, as the activities would have ceased if the claimant was aware TCF had been

alerted to them. TCF has ordered cakes from the claimant previously. TCF knew that if she ordered the cake in the morning it would be ready by the evening therefore it was made during working hours. If permission was given to cater an event TCF advised that it was up to the claimant to calculate gas and electricity contribution, there were no definitive guidelines in place.

The CEO, HR manager and TCF had decided to suspend the claimant before the claimant was called to the meeting on the 20th of May. TCF asked the claimant to come to the meeting but does not recall saying, 'come to a meeting in the x-ray department immediately.' After the claimant was informed she was suspended she was going to finish her work for the day but TCF informed her she had to leave immediately and escorted her off the premises. TCF had no benchmark to decide if the stock in the kitchen was excessive.

TCF did not ask for any details of the functions she authorised the claimant to cater. The respondent currently has the practice of catering for 'hospital' functions only and making cakes on a small scale. TCF only involved herself in the kitchen if she was asked to.

The chef (BmN) that took over when the claimant and the other chef were suspended gave evidence that the stock levels in the kitchen appeared excessive and consisted mainly of cake making ingredients.

Following a meeting with the CEO the decision was taken to suspend the claimant on Thursday, the claimant was informed verbally on the following Tuesday the 20th of May. AD and TCF met with the claimant where they put the allegation of engaging in 'outside catering on hospital time using company equipment.' AD informed the claimant that she was suspended pending an investigation with immediate effect. AD informed the claimant that the details would be put in writing; the letter was issued by registered post on the 20th of May. AD stated in the letter that,

'You will be given an opportunity to interview any witnesses'

The claimant was initially given a copy of the investigation report excluding the witness statements, but these were forwarded the following week. The claimant's representative requested that the witnesses be made available for cross-examination. AD informed the claimant's representative by letter that most of the witnesses did not want to be cross-examined,

'all have written to state that, for varying reasons, they do not wish to be interviewed. We have decided therefore, given these statements, to move the process forward. On foot of this, we are now arranging the Disciplinary Hearing for next Tuesday 22nd of July.'

By letter dated the 21st July the claimant's representative raised numerous issues including,

'I am disturbed by the content (of the above letter) as it denies the claimant any semblance of natural justice. They are being denied the opportunity to interview staff who contributed to the outcome of the investigation, where PC recommends the termination of their employment. PC's investigation was flawed as she accepted all statements from those interviewed as fact.'

'I must advise you that you are in breach of the Code of Practice 146 2000 Grievance and Disciplinary procedure, as you have denied them an opportunity to defend themselves. Any statement where the source is unwilling to be questioned regarding its content will have to be admissible.'

After seeking legal advice AD responded to the claimant's representative's letter of the 23rd of July,

'Having considered the position further, I propose to again contact the individuals named by you who contributed witness statements, I will contact you again with a list of those who agree to attend.'

The claimant's representative responded with additional issues including an accusation that the witnesses were being discouraged from taking part in the cross-examination. AD denies this accusation. The supplementary report was compiled to take account of any additional information from the two witnesses who agreed to take part and the points raised by the claimant's representative. The supplemental report was submitted on the 10th of September and sent to the claimant's representative on the 11th of September including a request for a response by the 26th of September. The respondent did not receive a response by the deadline so extended it to the 2nd of October before making a decision. The supplemental report's conclusions had not changed from the original.

The CEO (GB) wrote to the claimant on the 8th of October outlining the investigation steps taken to date and outlining that the findings of the report require a disciplinary hearing. The charges listed were,

1. Breach of trust and confidence in running a catering service out of the hospital using company equipment, on company time, for personal gain.

2. Breach of Sections 9.3.2 and 9.3.6 of the company's Disciplinary Policy

Corrupt Practices

Receipt of money or goods for services rendered

Dishonesty

If in the course of an employee's contract there is a suspicion of fraud, theft of any property or money belonging to the Organisation, its staff, patients or any other person with whom the employee comes into contact through their employment, this will be investigated. Where theft or fraud is proven against a member of staff, this will result in the immediate dismissal, and if possible prosecution to recover company losses.

The claimant attended the disciplinary meeting with her representative. AD was present at that meeting to take notes. The CEO dismissed the claimant by letter dated the 29th of October outlining the claimant's right to appeal. AD did order cakes from the claimant on two occasions.

Under cross-examination the Human Resources Manager told the Tribunal that she worked for the respondent since 2005. She was not aware that employees holding management positions had availed of the hospital catering facilities previously. She agreed that she had received two cakes previously from the deputy head chef (JM) who had volunteered to bake the cakes. The witness paid for those cakes in the canteen. She regarded (JM) highly and confirmed that (JM) had received extra payment following her appointment as acting head chef.

The witness confirmed that the claimant was placed under surveillance as the respondent had reason to believe that something untoward was going on. Following the conclusion of the surveillance period and the investigation a decision was taken to suspend the claimant on full pay. The claimant's phone number was on the advertisement offering catering services and it was reasonable to assume that she had placed the advertisement. There was also a profit element

attached to the advertisement for the claimant. She accepted that there was a culture within the organisation of providing cakes to employees for special events such as birthdays. She confirmed that the supplemental report produced by the respondent cured deficiencies that were in the original report.

In response to questions from the Tribunal she confirmed that she gave terms of reference to PC who carried out the investigation. She agreed that the report provided recommendations even though recommendations had not been sought. Finally she stated that it was completely new to management when they discovered that the claimant was providing anything other than cakes.

Claimant's Case

Witness for the claimant hereafter known as (MMcD) gave evidence that she commenced working for the respondent in May 2000 as a grade 2 chef. She was later promoted to a grade 1 position. She no longer works for the respondent, leaving of her own volition in August 2009. She told the Tribunal that employees made requests on several occasions for catering services to be provided. Employees regularly called to the kitchen and requested cakes and salads. At Christmas time requests were made for cakes, puddings and salads. Requests were written on a white marker board in the kitchen and a note was made of the date on which the food was required. Nobody's request was refused. This extra catering was carried out during the working day or sometimes done at evening times. It was done on company time and the head chef (PL) was fully au fait with this.

She gave further evidence that she catered for her own son's communion and (PL) catered for his child's communion. This extra catering was done throughout her tenure of employment. When (JM) was appointed to the position of acting head chef there was no change and the same practices continued. The food was costed and the recipients of the food were told to pay for the food in the canteen. It was done on trust and there was no follow up to see if payments were made.

Under cross examination she confirmed that she had previously carried out a catering request for an employee who worked in the hospital lab. (AMcP) had made the decision to cater for that request. Twenty portions of curry and salads were provided to that employee. She could not confirm if the food had been paid for as (AMcP) had done the costings. She also catered for a request from an employee, (JC) for food for a fishing outing. She catered for this request in conjunction with the head chef. She provided Irish stew and baked potatoes for approximately 70 people. She was not aware that this outing had been sponsored by the hospital. She confirmed that on occasions she received she received gratuities or a bottle of wine from the recipients of the catering as a thank you gesture.

The next witness gave evidence that he commenced working for the respondent as a kitchen assistant in December 2006. (PL) was the head chef at that time. He took instructions from the chefs in the kitchen. He was aware that cakes were baked for employees. He was asked to prepare food but did not know the identity of the people for whom this food was intended. Under cross examination he agreed that he had availed of the cake service on one occasion. He placed his order for the cake with (PL) but did not know who actually baked the cake. He paid €5 for the cake.

The next witness gave evidence that she commenced working for the respondent in 2002. She is responsible for housekeeping and canteen duties and also works as a relief supervisor. She has received cakes for communions and paid for those cakes in the canteen. That system of payment was based on trust. She did not receive anything other than cakes. She saw the advertisement for J& M catering services in the hospital theatre area. She could not recall the

exact date which she noticed the advertisement. She did not bring the advertisement to anyone's attention.

The claimant gave direct evidence that she commenced working for the respondent in 1986. Prior to October 2006 she was employed as deputy head chef. She assumed the position of acting head chef following the departure of PL. She had total responsibility for the operation of the kitchen area. For as long as she can remember employees in the hospital had always availed of extra catering provided from the kitchen. During her tenure of employment for over twenty years she catered jointly with every head chef for employees family functions. There was no protocol involved in requests for catering services. Requests were made and they were written on the notice board in the kitchen. 90% of employees including management availed of the service. The food was available at a cheaper price than anywhere else. On some occasions she prepared and cooked the food on her own time. She factored in extra money into the costings for her own time on those occasions.

She told the Tribunal that the Financial Controller availed of the catering service on a number of occasions. It was done openly and was not covert in any respect. The CEO of the organisation requested hot foods and salads in 2003 and this was provided to him. She costed the food on that occasion and received a gratuity for her work. Receipts were not given to everybody and payments for the catering were made in the canteen.

The witness accepted that she was involved in the creation of the advertisement offering a catering service under the name of J & M Catering. This advertisement was placed on a notice board. She did not give much thought as to how the advertisement might be perceived by management as all sections of management were aware that extra catering was being provided. It was done openly and she was stunned by the reaction of management. She told the Tribunal that she was unaware that some events for which catering had been provided had been sponsored by the respondent.

On 20 May 2008 she was informed by AD that she was suspended on full pay. AD told her that she had had been found guilty of gross misconduct and she would be contacted in writing. The reasons for her suspension were not outlined to her until one week later when she received a letter from AD. On 20 May 2008 she was told to leave the workplace immediately and not to speak with anybody as she did so. She was not given the opportunity to challenge witness statements taken during the investigation and was of the view that crucial witnesses were not listened to by the respondent. She gave further evidence that the use of company equipment was never a problem and any personal gain she received was for her own time. She confirmed that in a particular 6 weeks period she, and her colleague MD made a profit of approximately €450 for the extra catering provided. She had never been the subject of any disciplinary sanctions prior to her suspension and dismissal.

Under cross examination she stated that all chefs with whom she had worked alongside were involved in the provision of extra catering over and above the hospital requirements. It was not done in a covert manner. Payments for the extra catering were hit and miss. The systems in the kitchen were very loose in relation to the extra catering. She agreed that she had disagreements with PL when he was employed as head chef. In particular she disagreed with him over his choice of suppliers. He was receiving free weekends away from suppliers and she brought this to the attention of management.

She accepted that she gained financially for the extra catering provided but only for her time. She agreed that she provided extra catering for a local club sponsored by the hospital. She accepted that she had difficulties in her working relationship with PL. Her employer organised a mediation

process to help resolve those difficulties. Her employer supported her throughout this process and paid for counselling sessions that she attended. Following PL's departure she was appointed acting head chef and she received an allowance for this position. She also received an increase to her salary.

She accepted that the purpose of the advertisement under the name J & M Catering was to attract business. She did not realize it would cause such difficulties as extra catering had always been provided. She agreed that the advertisement was not on the hospital's notepaper, it was on her own notepaper. The contact details on the advertisement did not contain any details for the kitchen area of the hospital. It contained contact details for herself and MD. She disagreed that the provision of extra catering had a negative impact on the service provided for the normal users of the service. With the benefit of hindsight she does not know if she would have done anything differently. She agreed that on the day of her suspension she visited the home of DB and asked her to lie about the fact that she had paid for extra catering. She accepted that her actions in this respect were wrong but denied that she attempted to intimidate DB.

Determination

The Tribunal heard lengthy and detailed evidence in relation to this case. The Tribunal is satisfied that there was a culture in the respondent hospital, which existed for some time, whereby staff at all levels and grades, from within the hospital and the wider public availed of catering services provided from the hospital kitchen. The Tribunal is further satisfied that the system in place for recording or knowing the level of catering provided for non hospital requirements falls far short of expected standards.

There was evidence given by the respondent that the claimant purchased through the hospital many items of food that did not appear on the hospital menu, but was used in the catering business run by the claimant during company time and using company equipment. However the Tribunal notes that at no stage during the cross examination of the claimant was such a claim made.

The Tribunal is satisfied that the investigation carried out by the respondent was incomplete. The respondent put in place a surveillance on the claimant through CCTV, however the independent investigator failed to review CCTV as part of her investigations. The investigator did not afford the claimant an opportunity to confront all the personnel interviewed by the investigator. A subsequent and supplemental investigator's report sought to cure this deficiency, which was confirmed to the Tribunal by the HR manager but was done so after taking legal advice.

The Tribunal is further satisfied that an unpleasant tension existed between the claimant and another kitchen staff member, who as part of the investigation made certain allegations against the claimant, however the claimant was not afforded a face to face opportunity to challenge the allegations.

The Tribunal is satisfied that the independent investigator exceeded the remit given in the terms of reference, by recommending the dismissal of the claimant in circumstances where her sole function was fact gathering and reporting. The Tribunal also notes that the respondent failed to ascertain with any level of approximation, the losses to the respondent because of the activities of the claimant, which the Tribunal believes is due to the poor system of recording within the hospital structure.

The Tribunal is further satisfied that the decision taken to dismiss the claimant was taken in circumstances where an incomplete investigation had taken place, where the claimant was not afforded an opportunity to confront some of the allegations made against her.

The Tribunal notes that the claimant when confronted with the allegation that she was engaged in catering activities for her own personal gain, which were carried out using company equipment and within company time, contacted a third party and sought the third party to lie on her part. The Tribunal is satisfied that this was an attempt to cover her tracks and was unwise, when she knew that she had not handed over at that time monies collected for catering activities which were carried out the previous week. The decision to dismiss an employee should only be taken following a thorough and careful exhaustion of all other forms of discipline open to the employer and having regard to the gravity of the breaches of conduct by the employee.

The Tribunal is satisfied that this case did not merit a dismissal as the circumstances were such that a culture existed of providing catering to hospital staff and the wider community and this culture was not objected to by the respondent. Accordingly the Tribunal determines that the claimant was unfairly dismissed but further determines that the claimant contributed to her dismissal in some way by seeking to have a third party lie on her behalf.

The Tribunal determines that the claimant should receive compensation in the sum of €22,000.00 under the Unfair Dismissals Acts 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

