

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE – *claimant*

CASE NO.
UD324/2009
MN326/2009
WT139/2009

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: Ms P Clancy

Members: Mr T Gill
Mr O Nulty

heard this claim at Loughrea on 9th June 2010 and 10th November 2010

Representation:

Claimant(s) : Mr Alan Ledwith BL, instructed by:
Ms Joanne Page
Cormac McCarthy Solicitors, Swangate, Athenry, Co Galway

Respondent(s) : On first day of hearing:
Ms Angela Grimshaw
Peninsula Business Services Ireland Limited
Unit 3, Ground Floor, Block S, Eastpoint Business Park, Dublin 3

On second day of hearing:
Mr Tom Mallon BL, instructed by:
Mr John Brennan
IBEC West Regional Office
Ross House, Victoria Place, Galway

The determination of the Tribunal was as follows:

The respondent's representative raised a preliminary issue concerning the fact that the claimant had a copy of the employee handbook at the time of his dismissal, which outlined the right of internal appeal, but he did not invoke the appeals process. The representative contended that the claimant's failure to invoke the appeals process meant that the Tribunal did not have jurisdiction to hear the claims.

The Tribunal decided that they needed to hear all the evidence and would consider the application as part of the overall evidence.

Respondent's Case:

The first witness for the respondent was General Manager (GM) at the time of the claimant's dismissal. He worked at the nursing home from February 2007 until October 2009. The claimant was employed as a chef from March 2007 until October 30th 2008.

While the claimant was on annual leave in Sep/Oct 2008 the GM hired a temporary chef to cover in the kitchen. While he was showing the temp around he noticed things he wasn't happy with and decided to have a complete stock check done in the claimant's absence. The findings included items not properly rotated in the stock room, out of date herbs beside the cooker, frozen items not properly labelled. He brought the report to the attention of the respondent and they decided to suspend the claimant on full pay pending an investigation.

From time to time the GM and respondent carried out checks in the kitchen. They brought issues to the attention of the claimant by way of bullet points on a sheet of paper which they would discuss with him. The claimant would always reassure them that he would correct the issues. The Respondent had a difficulty with the lack of meals variety the claimant produced and did not like his attitude. There was an incident when the Respondent rang the chef to ask for a sandwich and the claimant refused, as he was too busy.

They called the claimant to an investigatory meeting, which was incorrectly referred to as a disciplinary meeting on the letter to the claimant, as he felt that the practices were not safe in the kitchen. The claimant was informed that there were three areas of concern; rotation of dry goods, out of date stock (primarily herbs) being used in cooking and samples of food not being kept for testing in case of illness in the home.

The claimant answered but asked if he could provide a written reply, which he was allowed to do. However the GM was not satisfied with the written answers as he felt there was an inconsistency with what the claimant had said at the meeting. In regard to keeping food samples the claimant had said at the meeting 'do we do that?' Whereas in his reply he stated that it was not a legal requirement. He discussed it with the Respondent and they decided to organise a disciplinary hearing, as they were not satisfied with the answers given. A copy of the disciplinary procedure was enclosed with the letter to the claimant. The hearing scheduled for October 20th 2008 was adjourned as the claimant brought a legal representative and the GM felt it would be best if the respondent had legal representative also. He was not present for the next meeting.

During cross-examination the witness stated that the HSE (Health Services Executive) inspections

were fine for the most part. He did not have a copy with him. It was primarily his decision to proceed to a disciplinary hearing. The claimant had not been issued with any verbal or written warnings, as the GM was reluctant to go down the full disciplinary route. The letter of October 30th 2008 did not refer to the claimant's right to appeal.

The respondent gave evidence that if there was an outbreak of food poisoning in the nursing home it could have very serious consequences for the residents. He took hygiene very seriously. He organised the claimant and two other members of staff to attend a HACCP (Hazard Analysis Critical Control Point) refresher course. As head chef the claimant was responsible for the correct recording, labelling, thawing and reheating of food. He expected the claimant to keep a sample of food served to the residents. The owner was unhappy if any item was used which was past its use-by or best before end date.

The owner usually brought the claimant with him on his kitchen inspections. He pointed out anything that concerned him. The claimant always reassured him that these issues would be rectified and the owner was satisfied with that. He was not present at the meetings with the claimant. He dismissed the claimant as he posed an unacceptable risk to the patients' health and the nursing home's reputation.

The owner was present at the disciplinary meeting held on October 22nd 2008. The claimant admitted that on occasion he did not always record food temperatures due to the pressure of work. The claimant agreed with the owner that if something wasn't right it had to be fixed and took full responsibility. The owner was not happy with the claimant's answers and after thinking about it for a while he decided to dismiss the claimant by letter of October 30th 2008.

During cross-examination the owner stated that he had not put a hygiene procedure in place in the kitchen. He expected that the head chef would do that. He expected that the claimant would follow on the practices of the previous head chef whom the owner was happy with. The claimant would have seen the frozen samples in the freezer. He didn't think that he should have had to tell the claimant what to do. There was no occurrence of food poisoning while the claimant worked at the nursing home.

He contended that he might not have followed the disciplinary procedures exactly but he had applied them as fairly as he could. He couldn't live with the procedures if it meant someone became ill or died. The claimant was not issued with a formal warning. The claimant never said to him that he was overworked.

An expert in HACCP procedures gave evidence. He stated that record keeping was critical. He considered that it was within the competency of a chef to design and implement HACCP procedures within the kitchen. It is never acceptable to use products after the use by or best before end dates.

Claimant's Case:

The claimant commenced his employment with the respondent as head chef on March 26th 2007. On the day he was interviewed he was given a tour of the kitchen and his terms and conditions were discussed. There were no written procedures for the kitchen. He had a lot of experience as a chef and had previously run his own restaurant. He informed the respondent that he was not HACCP trained. He received a copy of the employee handbook within two to three weeks of commencing.

During his employment the respondent would occasionally raise issues with him concerning the kitchen. They informal discussions about it. The first time he received HACCP training was when the respondent sent him on a course in March or April 2008.

After he returned from annual leave in October 2008 he received a letter dated October 6th 2008 which stated that he was suspended pending an investigation and that he was to attend for an investigatory meeting on October 14th 2008. He had not received any formal warnings. Three issues were to be addressed, namely:

- Failure to follow food hygiene regulations
- Mismanagement of stock
- Breaches of HACCP

The claimant addressed the issues at the meeting but asked if could respond fully in writing. The issues were in regard to stock rotation and out of date stock, the out of date stock were primarily herbs and additives beside the cooker. The claimant asked for a list of products found out of date, but was not given it. He said he didn't use them often. The last issue concerned the non-freezing of food samples. The claimant answered 'do we do that?' and stated that it was not a standard procedure.

The claimant responded in writing to the GM on October 15th 2008. He could only respond in general terms, as he had not been provided with the list of items. In regard to stock rotation the claimant contended that he always rotated stock and operated a first in first out process. He contended that he always discarded food by the 'use by date' but retained some past their 'best before end' date, as these could still be used. After attending the HACCP course he discussed the freezing of food with the two other staff members who had attended the course and they decided that, while it was best practice, the cost of freezing samples was prohibitive.

The claimant was then invited to a disciplinary meeting on Monday October 20th 2008. The meeting ultimately took place on October 22nd 2008 as the claimant brought a legal representative with him on the original date and the GM adjourned the meeting so that the respondent could enlist legal representation. The claimant believed that the decision to dismiss him had been made by this time. The claimant was dismissed by letter of October 30th 2008. The claimant gave evidence of his loss.

During cross-examination accepted that his role was an important one. He did not believe that using products past their 'best before end' date posed a risk to the residents. He denied that he discontinued recording soup temperatures since June. He agreed that he might have missed some recordings. He only discovered the practice of freezing samples at the HACCP course. He discussed these issues with the GM not the respondent. He accepted that an outbreak of food poisoning in the home could cause serious illness or possibly death. He contended that he was very conscientious in his work. He stated in the disciplinary meeting that he took full responsibility as he felt he was in a 'kangaroo court'. He disagreed with the allegation that he had not recorded thawing since June.

He contended that there was a fridge inside the kitchen door in which employees put food which had been brought in by family members for their relatives. It was difficult to ensure that all the products in that fridge were in date. He agreed that it was an unacceptable risk to use out of date scone mix and decide if it was acceptable to serve by taste. He accepted that his failure to run the

kitchen properly put patients at risk and that he contributed to his dismissal. However, he was never given an opportunity to address his procedures.

He believed the respondent took a dislike to him after he told him he was too busy to make him sandwiches as he was serving lunch to the residents. He felt things weren't going well after that when the respondent cancelled his leave which had been approved by the GM.

The claimant's representative withdrew the claims under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and the Organisation of Working Time Act, 1997.

Determination:

Having heard all the evidence the Tribunal finds that the respondent failed to establish that the dismissal was fair and he failed to follow his own stated procedures or fair procedures. The respondent failed to issue either a verbal or written warning such that the claimant would appreciate that this job was in jeopardy. He was relying on HACCP training but he did not send the claimant on a HACCP course until a year after his commencement. There was also a lack of formal induction procedures and no written procedures in place in the kitchen.

The claimant, in his own evidence, admitted that he contributed to his dismissal by his failure to implement best practice, however, he was not warned of the possible implications of this. The claimant also failed to invoke the internal appeals process, however, the Tribunal is unclear as to who the appeal would be heard by given that the decision to dismiss was made and communicated by the respondent personally.

Taking everything into accounts the Tribunal awards the claimant €22,500 (twenty-two thousand five hundred euro) under the Unfair Dismissals Acts, 1977 to 2007.

The claims under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and Organisation of Working Time Act, 1997, were withdrawn during the hearing.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)