

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE

- claimant

CASE NO.
RP1131/2009
UD991/2009
MN1008/2009
WT437/2009

against
EMPLOYER

- respondent

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J. Revington S.C.

Members: Mr J. Flanagan
Ms. E. Brezina

heard this claim at Dublin on 30th March 2010
and 5th July 2010
and 6th July 2010
and 23 November 2010

Representation:

Claimant(s): Mr. Peter Maguire BL instructed by Thomas Loomes & Company,
Solicitors, 1 Coolock Village, Malahide Road, Dublin 5

Respondent(s): Colm MacCarvill BL instructed by Mr. Paddy Madigan
Madigans, Solicitors, 167 Lower Kimmage Road, Dublin 6w

The determination of the Tribunal was as follows:-

Claimant's Case:

The claimant gave evidence. She explained that she was a single mother of 2 children. She had worked for the respondent previously for 10 years as a waitress. At the time her boss was known as MAC. She enjoyed working there so much she returned after a 2-3 year break. Originally she worked 4 days a week, which was reduced to 3, and after an injury she sustained it was reduced to 2. The shift was 5.00 p.m. to 1.00 to 2.00 a.m. but could be later. A new Manager (hereafter

known as H) was now employed by the respondent.

Two years previously she had sustained her injury and could not go to work. She contacted a colleague who agreed to cover the shift, as she needed the money. At 5.00 p.m. she received a call from H asking where she was and to get “the hell in here”. She replied that her colleague was covering the shift and was told she had not turned in and to “get in now”. She informed H she could not go in as she was injured. She contacted her colleague who said she had not been asked to work. H rang her again and told her if she did not come to work he would “kick her up and down the street”. She was so upset she contacted MAC and told him what H had said to her. Her sister was present at the time. He replied if H had said that he would not be working there and asked for the three of them to meet. H denied calling her a whore and she accepted his apology. She returned to work. H and N both spoke in Arabic and N made kissing noises and told her that she had a lovely bum and that he would like to take her home. H and N were trying to intimidate her. She complained to MAC that H had told her to wear tight trousers and that he told her she was so sexy. N drank every night. The sexual comments continued, she told MAC and he told her he would do something about it. A remark was made by MAC that a waiter O was in hospital with AIDS and he did not know if he got it from the claimant or another staff member J. It became impossible to work there. She dreaded going to work but she needed the money.

On 20 March 2009 at 3.50p.m. the restaurant was very dirty, and she went out to buy windowlens and obtained €5 to buy it. H was in a bad mood and he asked her where she was and that she was late and she explained where she was. H told her to take boxes of wine to the cellar, she refused and told him she was not taking it anymore. Her sister telephoned MAC and he said he would sort it out. The claimant was suffering from stress, had pain in her shoulder and was on anti depressants for a time as a result of the stress. She could not return to work. She had no previous problems and no complaints were ever made about her until H complained about her. She did not receive a contract of employment and the respondent had no grievance procedure. The respondent had no health and safety procedures and no policy regarding sexual harassment.

In cross-examination she stated that she worked upstairs and downstairs. She relayed an incident where a member of staff N grabbed her by the arm and told her to get out. A kitchen porter had hurt his head and she wanted to establish if he was alright. This was before the incident on 20 March 2009. She spoke to MAC and he told her he would talk to N. MAC came to work after 7p.m. and stayed until the restaurant closed. She agreed that H would let her go early. H told her to take the wine boxes to the cellar. She told her solicitor that she was sexually harassed. She reiterated that she complained N to MAC. She was involved in a car accident the previous year.

She was willing to accept her job back as she had two children. She was very happy in her job until H started working in the restaurant. When asked the reason that she did not report for work was that she had an argument with her ex partner she replied she was telling the truth. When put to her if it was an argument with her ex partner or that she had a sore back she replied that she suffered with her back. There were problems before H took up employment with the respondent.

She told H on a number of occasions that his behaviour was unacceptable. N drank at night and he changed after this and H never drank. She was good friends with N until H arrived. She told N’s wife about H.

When asked in relation to an allegation regarding AIDS and that MAC had said that O had picked up AIDS from either her or another employee she replied that there were three male chefs employed. She knew O was Muslim and that MAC said this was a joke. A cleaning lady came in first thing in the morning to clean the premises, she washed the floors but not the tables. Restaurant staff waited for customers to leave before cleaning the tables. Customers remained in

the downstairs restaurant until 3 to 4a.m.

On 20 March 2009 she reported for work at 4.50p.m. and there were twenty wine boxes against the wall. She went to a nearby store to buy windowlene, as she did not have cleaning agent. She purchased one bottle of windowlene. When put to her that she had four to five bags of shopping she replied she had probably bought one or two items and she would have one or two bags but not three or four. She told H that she was getting windowlene. She agreed that it was reasonable for a manager to question her regarding her being late. She was asked to take wine to the cellar and she refused. He told her to shut the fuck up and get the fuck out. When put to her that H told her not to leave, as they would be in trouble she replied she went upstairs, had a smoke, she was shaking and went to her sisters. She was informed she should work upstairs, N and H were upstairs. H was general manager of both the upstairs and downstairs restaurant. She needed the job but it was made impossible for her to work there. When she was asked if H had a Masters Degree in Business she replied that he did not have experience in the restaurant and the staff trained him and gave him a lot of help in December until January. At staff meetings she was sure that H discussed time keeping. A number of customers gave gratuities.

After she left her employment she worked in a crèche for two months but she had to give it up. She was in receipt of social welfare benefit when she left her employment with the respondent. She had been a waitress for sixteen years. She obtained alternative employment in February 2010. The restaurant had two sittings at 5pm and 7p.m. and had fourteen tables downstairs. She earned €100 per night and on occasion it could be more. A service charge of 10% was on the bill. She was sure that MAC knew about the service charge. Tips were in cash, €70 would be considered a low amount and €140 to €150 considered high. All staff received the same tips. The tips upstairs were not as good as downstairs; the downstairs restaurant was more expensive than the upstairs restaurant. She had worked upstairs for many years. She did not know how much was left incash on the table. The turnover in the restaurant some nights was €6.000.

In re-examination she stated that she had a good work record. The main problems occurred when H commenced work in the restaurant. After she left in March 2009 she met with MAC some days later, he offered her a job. He knew she was not at fault, she did not have to deal with H anymore and it was well known that there was a problem with H.

In answer to questions from the Tribunal she stated that there was a bar upstairs and downstairs. The cellar was located downstairs. On a number of occasions she brought crates from downstairs. She would not take the job upstairs, as H was the general manager.

The claimant's sister MD told the Tribunal that in 2009 she lived near her sister and met her every day. She worked in the respondent's restaurant part time from 2004 to 2006. She relayed an incident, which occurred prior to March 2009. She was sitting next to the claimant when she received a telephone call. She could hear someone on a mobile phone in a loud voice. The claimant became upset. She told the claimant to contact MAC that he would sort it out. The claimant was too upset to contact MAC and she (MD) telephoned MAC. She told MAC that N made passes at the claimant. MAC told her that he would get it sorted and get the claimant to talk to him. Floor staff made a pass at staff and N made a pass at her. She relayed an occasion when N tried to kiss her and she did not feel it necessary to report the incident. The claimant was naïve in comparison to her and was very sensitive. The claimant was upset and had to take medication for depression.

On the 20 March 2009 after the claimant left the restaurant she was upset and she told the claimant

not to return there. She did not make any further calls to MAC. She worked in the upstairs restaurant and never worked downstairs. MAC went home early some nights. Staff cleaned the tables and glass tops were cleaned with windolene.

In cross-examination she stated that she lived in Greece and she worked in the restaurant for probably four to five months. Both restaurants opened late. She trained in H at Christmas. If anyone said something rude to the claimant she became upset. N tried to kiss her on one occasion but she brushed him off. She did not make a complaint. She did not work on the ground floor of the restaurant.

In re-examination she stated that her sister would be upset if inappropriate sexual advances were made to her.

In answer to questions from the Tribunal she stated that MAC took a drink.

JM told the Tribunal that she worked in the same building as the claimant. She left in 2006 to go on maternity leave. H was not working at the time but he was in the restaurant every day. She received a telephone call from the claimant after she left. The claimant told her that an employee O who worked in the restaurant was in hospital and had AIDS and O did not know whether he got AIDS from the claimant or from the witness. The witness told the claimant that she was going to contact MAC about the matter. She contacted MAC and asked him what it was all about and she told him that it was not a joking matter. She did not have AIDS and MAC apologised for it.

Respondent's Case

MAC told the Tribunal that the restaurant had operated since 1986. He was director since 1995. He attended the restaurant from 12 noon to 4.30p.m; he then went home and returned at 8.30p.m. and remained until closing time. The claimant did not complain to him about sexual harassment and she did not tell him that H made comments to her that she had a nice bum. If the claimant had made a complaint he would have called N and the claimant. She did not make a complaint that H had told her that he would kick her up and down the street. He had a meeting with the claimant and H. He believed the claimant was happy in work. He had no knowledge that N drank at night. He was not aware of a third allegation and that he had stated that O who was a chef had AIDS and did she not know that he could have contacted it from her or another employee J.

The respondent employed a cleaning lady who came to the restaurant six days a week. The restaurant closed at 11p.m. during the week and it closed later on Friday and Saturday. Prior to the smoking ban customers remained on the premises but after the smoking ban was introduced customers left at 12.30a.m. The clean up took some time after that. From 11.30p.m. onwards customers started to leave. He was not in the restaurant on 20 March 2009. He spoke to the claimant and she told him that she came in and H verbally abused her. He told her that he would sort it out. He came in to the restaurant at approximately 8pm. and spoke to H but his version of events differed from that of the claimant. He offered the claimant the choice to work upstairs.

There were no boxes in the wine cellar. The restaurant could accommodate 44 to 46 for a large party. From 1986 to 2010 the respondent did not have a service charge and the tips were in cash.

On occasion if a bill was paid by visa a customer would add a gratuity. Staff would receive approximately €80 in tips on Friday and Saturday. The turnover in the restaurant on Friday was €2,200 and on Saturday it was €2,600 and €2,700. The restaurant had two sittings on Saturday; the first sitting was the early bird. Even if there was a party of fifteen to twenty

there was no service charge.

In cross-examination he stated that he was originally from Baghdad. He came to Ireland as a student and completed his mechanical engineering in Bolton Street. He was good friends with the claimant and she was a good worker. He would have hoped that the claimant relied on him. H denied calling the claimant a whore but the claimant did not tell him that H called her a whore. The claimant told him that she had an argument with H and he told her to fuck off. The claimant left and he told her not to leave. H told him that the claimant had told him to fuck off and he told her to fuck off. N was the head waiter and H was the manager, all staff were close and it is a small business. Staff spoke Arabic to each other but in different dialects and N and H did not understand each other all the time. On his instruction they were told not to speak to each other in Arabic. The communication between him and H was very good. The claimant thought that H and N were talking about her. He agreed that if it were true that N told the claimant that she was so sexy and that he would love to take her home tonight that it was disgraceful. He could not comment on the fact that H put his hand on her shoulders and attempted to give her a massage. He did not ask the claimant to wear tight clothes. Staff were expected to wear proper clothes; sometimes the claimant wore trousers that were too long.

He did not know how many times N gave the claimant a lift home from work. He intervened when a member of staff M had a problem with N. He had no indication that sexual harassment was occurring in his restaurant. He reiterated that the claimant was a nice person and she had her faults. Staff were under pressure from 7p.m. onwards. He did not bring the matter of sexual harassment to H's attention as the claimant did not bring it to his attention to do something about it and he could not investigate something that he had not heard. He agreed that an employee M was involved in an incident with the claimant and H. He had never heard that H was in a relationship with employee M. In his restaurant staff did not harass women. O was employed with him for a long time, he drove a taxi after he left and he returned to Algeria for a few months.

When asked if the fact that the claimant said that it was a joke that O had AIDS he replied that he did not know. Certain comments were not acceptable.

H had his own restaurant in Beirut, it was an Irish pub and restaurant. H arrived in Ireland in July 2006. The claimant's sister had finished working in the restaurant at that point and she did not work with H. H started work in March 2007. A belly dancer performed in the restaurant for years and belly dancing was their tradition. He stated that there was a clash of personalities with H, the claimant and M.

He was the boss and he accepted responsibility for the health and safety of staff. The relevant authorities inspected the restaurant. Staff were not given written contracts of employment. It did not have a complaints policy and a policy for employees to refer to if they were not been treated fairly. It was his duty to ensure that the claimant was treated fairly and with respect. He had a verbal policy regarding staff problems and if anything happened it could be sorted out. He received a few telephone calls from the claimant after she left and she told him about the first incident. Employees had worked with the respondent between five and twenty years. He did not have a written policy in place regarding sexual harassment and he had a verbal policy regarding sexual harassment.

In re-examination he stated that the claimant told him about the allegations and H disagreed with it.

On 20 March he knew about the incident and he tried to offer the claimant alternative employment with different hours. He heard of the other allegations that the claimant made in the Tribunal.

In answer to questions from the Tribunal he stated that he used to drink but he gave it up prior to 2002. He did not have an office in the restaurant. He would be aware if staff took a break as they could be monitored from his PC. The claimant was never in his house. He had five cameras on CCTV, three downstairs and two upstairs. He would give good customers a complimentary drink with food. He was in contact with the restaurant at all times. He thought that he would be able to resolve the incident on 20 March. He tried to talk to the claimant six times and he did his best to retain staff. He did not look at the CCTV footage of 23 March and all it showed was a picture. He had the CCTV in place before 2007. Staff probably had a glass of wine after work but in the last three years it was not allowed and if it did happen it was on someone's birthday. The claimant and H have very nice personalities. He did not observe the claimant wearing white runners on CCTV.

The last time he received correspondence from the Revenue was in 1995 when he received a form consisting of four to five pages, and he was asked a question regarding service charge. Tips were distributed each night

The second witness for the respondent H told the Tribunal that he came to Ireland in July 2006. He commenced working with the respondent in March 2007. Prior to coming to Ireland he owned an Irish pub/restaurant in Beirut. He had a master's degree in Economics from Spain. He met the claimant's sister once or twice but they never worked together. When he commenced employment in the respondent he accepted the job as manager. He called staff to a meeting and introduced himself and told them that rules had to be followed from now on. The claimant attended these meetings. He had a very good working relationship with the claimant and he allowed her to go home early in summer. The claimant always had a problem with timekeeping and she let the respondent down at bank holidays. He found the claimant to be a good worker. He never said to the claimant that he would kick her up and down the street and that she was a whore. On 4 August 2007 the claimant made a complaint and they met with her after work along with MAC and A. The matter was resolved and they returned to work. The restaurant opened on Friday and Saturday at 5.30p.m. He never tried to intimidate the claimant from behind the bar. H's native language was Arabic, N was from Morocco. He did not witness N making inappropriate comments to the claimant.

H stated that he is a Muslim, he did not drink alcohol and he took his job very seriously and he had never drunk alcohol. He could smell drink right away and N was the headwaiter. Stocktaking was done on a daily basis and he had all kinds of drink on the premises. If there was anything missing he let the waiters pay for it. Staff did not drink during working hours. He always told employees that the uniform was black trousers and a white/black shirt. If employees had dirty trousers customers would complain. He never asked the claimant to wear skinny trousers. All employees cleared up after customers left.

On 20 March 2009 he reported for work at 4.50p.m. and parked his car in the lane. He went to the upstairs restaurant. He went downstairs at 5.15p.m. and asked where the claimant was. The claimant came to the restaurant at 5.35p.m. and she was rostered to work at 5.30 p.m. She had four to five bags of shopping. H looked at his watch and said to the claimant "for god's sake you are late". She told him that she was not the only one late. She told him that she did not have to take that shit from him and she told him that he was a big motherfucker. He told her to fuck off and the claimant was in a very bad temper. He was really shocked and did not believe what happened. The respondent bought windowlens from a cash and carry every week. A week to two weeks prior to this incident she told him that the windowlens that the respondent used was not good and he told her that she could get windowlens. He was the manager and he had to know what

was happening. Four people worked in the kitchen. He never left boxes of wine in the cellar. He was shocked when the claimant left. After the incident he told MAC to call her back to work. When the customer paid by laser it registered on a computer screen and the customer could add a gratuity.

At the resumed hearing on 23 November the Tribunal were shown photographs of the cellar. H stated that it was impossible to put boxes beside the cellar unless the tables were taken out. The cellar was located between Table No. 4 and No. 5.

In cross-examination he stated that no work was undertaken on the cellar since the claimant left and there were no leaks in the cellar. Wine was kept in both the upstairs and downstairs restaurants. When put to him if there was a delivery of wine on 20 March 2009 he replied that the delivery was going to the upstairs restaurant. He thought three boxes were delivered that day. It was not true that he asked the claimant to carry the twenty boxes of wine down to the cellar. He abided by his religion. He was not aware that the claimant was sexually harassed at work. He never heard the words "fuck off home and I'll kick you up and down the street" been spoken. He did not use those words to the claimant. He was not aware that there were no problems in the restaurant before he started. When put to him that MAC had said that there was never a problem before the witness started he replied that he did not hear that. The claimant was supposed to come to work, she did not show up, she sent him a text that she was in Wexford. The witness was in the restaurant at 5p.m. No one was allowed to change their shift without him knowing. He telephoned the claimant and asked her why she did not come to work and he reiterated that he did not say "where the fuck are you". He did not know that M was going to deputise for the claimant. Five employees were working upstairs and three downstairs on that day. M finished at 4.30 and took her break and many waiters work double shifts. It was not true that M was prepared to deputise for the claimant. He needed employees on Saturday, as it was a very busy day.

N was employed in the restaurant when the witness commenced, they both spoke Arabic dialect, if N spoke Moroccan he could understand what he said. He did not smack his lips at the claimant. He never went behind the claimant and put his hands on her shoulders. He did not tell the claimant to wear tight clothes. On many occasions he allowed the claimant to go home before she had finished her shift. He always worked downstairs and he managed the entire premises.

On 20 March 2009 he arrived in work at 4.30p.m. He went to the upstairs floor and went downstairs at 4.45pm. At 5.15p.m. he asked where the claimant was and the claimant came in at 5.35p.m. It was not true that the claimant got money for windowlens. He did not receive expenses for windowlens or a receipt for windowlens. He did not know if the claimant had come to the restaurant prior to 5.35p.m. He did not know if MAC spoke to the claimant after 20 March and offered her alternative employment. He never spoke to the claimant after 20 March.

Mr. K told the Tribunal he was employed in the restaurant for seven years. He never heard MAC joke about O. having AIDS.

N the headwaiter in the restaurant told the Tribunal that the first time he heard allegations that the claimant had made was at the Tribunal hearing. H had a very good relationship with the claimant. He did not speak to H in Arabic. He never told the claimant that she was so sexy and that he would love to take her home. The claimant knew his wife, she never made a complaint against him and they were best mates. His relationship with the claimant was getting stronger and stronger. He did not drink shots and if he did so this would be reflected on the stock take. The claimant was never left to clean the premises on her own. On 20 March 2009 the claimant arrived in work at 5.35p.m.

she had a few shopping bags. H told the claimant that she was late, the claimant told him that she was not going to take that shit from him, she told him to fuck off and H told her to fuck off. He never carried boxes of wine, there were no boxes of wine on the floor that day and he was ready to begin work. H was a gentle polite man.

The restaurant did not have a service charge on its bill and he never wrote a service charge on a bill, cash tips were distributed at the end of the night and they were not part of the official pay slip. Staff made €70 to €100 in tips on a good night and €30, €40 and €50 on a quiet night. He expected the claimant to return to work after 20 March 2009.

In cross-examination he stated that he drank but he did not drink in work. He never went across the road to the local bar. He was not allowed to drink in the restaurant. He would have one or two drinks in the restaurant after work. He never drank in the bar when MAC was not there. He never took a drink from H and H did not drink. A service charge was not included on the bill. All mail sent to the restaurant was given to the owner. He never told the claimant she was sexy and that she had a lovely bum. He did not make passes at staff. He never tried to kiss the claimant while she was getting into a taxi. He knew the claimant's family, the claimant was a very sensitive person and very generous. The claimant knew his wife and spoke with her on the telephone. He never worked with the claimant's sister.

Determination

The claimant was employed with the respondent for four years. An incident took place on 20 March 2009 which resulted in the claimant leaving work and the claimant took a case for constructive dismissal.

The Tribunal finds that the claimant was unfairly dismissed by reason of failure to provide any or proper procedures but considers the claimant made a substantial contribution to her own dismissal in particular by failing to complain to the owner.

The Tribunal awards the claimant compensation of €5,000.00 under the Unfair Dismissals Acts, 1977 to 2007.

The claimant is entitled to compensation of €460.00 which is equivalent to two weeks gross pay (€230.00 per week) under the Minimum Notice and Terms of Employment Acts, 1973 to 2005

The claims under the Redundancy Payments Acts, 1967 to 2007 and the Organisation of Working Time Act, 1997 fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

