

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYER

CASE NO.
UD635/2010

- appellant

against the recommendation of the Rights Commissioner in the case of:
EMPLOYEE

- respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr G. Hanlon

Members: Mr. A. O'Mara
Mr O. Nulty

heard this appeal at Drogheda on 28th April 2011

Representation:

Appellant(s) : Mr. Padraig Lyons BL instructed by:
Branigan Berkery, Solicitors, 29 Laurence Street, Drogheda, Co Louth

Respondent(s) : Mr. Niall Neiligan BL instructed by:
Mr. John Greene, Pc Moore & Co, Solicitors, 17 South Great George's Street, Dublin 2

The determination of the Tribunal was as follows:-

This case came to the Tribunal as an employer's appeal against the Rights Commissioners recommendation r-079299-ud-09/RG that the respondent employee be paid the sum of € 20,000.00 in compensation under the Unfair Dismissals Acts, 1977 to 2007.

Appellants Case:

The husband (SV) of the owner of the appellant business gave evidence. The business encompassed a sit-in Italian restaurant and a take-away service that were located side by side. The hours of service were 6 p.m. to 11 p.m., staff started work between 4.30p.m. and 5.00 p.m. The respondent was hired in March 2006 as a pasta chef. Their working relationship was good, they got on very well and he said he was his "right hand man". The respondent resided in an apartment located above the appellant's premises. The relationship all changed on the night of May 7th 2009.

SV was on the premises in Drogheda but had to leave to attend another premises in Duleek. He told the staff he would return in an hour. On his return at 9.30 p.m. he found that an order for pasta had been

placed some time ago and the respondent was not on the premises to cook it. He rang the respondent but there was no answer. The respondent returned to the kitchen and was asked where he had been as the customer's order was outstanding. He replied that he had been upstairs in his apartment as there was a problem with his daughter and he had to mind her. He told SV that he could no longer work in Drogheda as he was having difficulties with his ex-wife coming to the premises and causing him problems. SV offered him a position in the Duleek premises. The appellant shouted at him, said he needed to go and asked for his P45. The appellant texted SV later and requested 2 days wages owed to him and his P45. SV told him to contact the accountant.

On cross-examination he stated that he had not wanted the respondent to leave and was "a nice guy". When asked he stated that the appellant was paid € 20 per hour for 6 hours work, 6 days a week. He stated that he had left the Drogheda premises between 7.30 p.m. and 7.40 p.m. The journey to Duleek took around 20 minutes to get to; he spent about 15 minutes there and then drove back to the Drogheda premises.

When asked he said it was normal for staff to take a break after asking permission from him or the respondent, if he was not there. He explained that a few of his staff lived above the premises but this premises was not owned by the appellant. On the night in question there were 7 staff working, at the weekends there were usually 11. When asked he said that he had not lost his temper and had not told the respondent to leave, he said he was leaving. After a few days he met the respondent and offered him € 700, the monies owed to him. A dispute ensued and the respondent called the Gardaí.

The pizza chef (MB) employed by the appellant business gave evidence. The appellant had employed him for 10 years. He opened the premises between 4.30 p.m. and 5.00 p.m. and he worked in the take away. Closing time could vary between 11.00 p.m. and 12.a.m., the shift finished when all the customers were gone.

On 7 May 2009 an order for bolognese was made by telephone at between 8.45 p.m. and 9.30 p.m. He took the order into the kitchen for the respondent to prepare. SV came in 20 minutes after the order was made. He was in the kitchen cutting mushrooms when SV and the respondent were present. He told the Tribunal that he left the kitchen as SV and the respondent were arguing and he did not want to be present. On his return he asked a colleague (OZ) what had happened. OZ told him the respondent had left.

On cross-examination he said he was still working for the appellant. When asked he again said closing time could vary, they could close earlier. He stated that he had been a quiet night; there had been 20-25 customers. When asked he said SV left the premises at 8.40 p.m. and returned at 9.30 p.m. He had not heard the respondent was leaving.

When asked by the Tribunal he said he had left the kitchen when SV and the respondent were in the kitchen, as he did not want to be present when they had a discussion. He told the Tribunal that the respondent did the cooking and that OZ helped, he was the commi chef. When asked he said that he was very clear what time the order was placed, as it would have been on the order sheet. This sheet was not available at the hearing. When asked he said that he had taken breaks after telling a colleague he was taking it. The respondent had taken breaks in the past and SV or OZ would take over the cooking from him.

When asked he said that 2 people had been present in the kitchen on that night. He later told the Tribunal that there were 3 people - the respondent, OZ and another colleague (M). He told the Tribunal that the order had been cooked by the time SV arrived back on the premises.

The owner (KV) of the appellant business gave evidence. She stated the restaurant and take away

remained open until 11.00 p.m. and the respondent was obliged to cook for both the restaurant and take away until then.

On cross-examination she stated she did not work on the premises during the week but was present at the weekends. Staff did take breaks but she was unhappy if they took them upstairs. She stated that at the time of the incident OZ was not a chef.

Respondent's Case:

The respondent gave evidence. He had been employed by the appellant company as a pasta chef. There was a good relationship between SV and himself and there had been no previous problems. The week before the incident SV had spoken to him saying if there was a fight he was not to discuss SV's secrets. The respondent felt SV was planning something, as his wages were too expensive. He said that he had taken a few breaks during his time working for the appellant but he had never gone up to his apartment before.

On 7 May 2009 he was working in the kitchen. At 10.30 p.m. he received a call from his partner to say his daughter wanted him to put her to bed, she usually stayed at weekends but sometimes stayed during the week. He told M what he was doing and told her to give him a shout if any orders came in. He was upstairs for about 10-15 minutes. M rang him and told him he was needed, SV never contacted him. He told the Tribunal that he had not been ill and neither had his daughter. SV asked him why he had left the business alone. SV began to curse at him. He told SV he had been with his daughter putting her to bed and asked SV what the problem was. He also asked SV why he was speaking to him like that. SV told him in an abusive manner that he did not need him and he was to leave. He asked why and was again told to get out. He went home.

3 days later he got a call to meet SV to collect monies owed to him. SV did not offer him another job. He requested his P45 and was told to go to the Accountant. SV tried to give a cheque for € 700 but the witness refused it. SV tried to push it on him and the witness called the Gardaí.

The witness gave evidence of loss.

On cross-examination he said the incident had occurred on a Thursday night. When asked how he remembered what time it occurred and replied because it was the worst day of his life. He said that he was very upset at what had occurred. Other staff had taken breaks upstairs in their homes and had not been reprimanded. He said that he had asked for his P45 on the night.

When asked by the Tribunal he only took "smoke" breaks when it was not busy. He told the Tribunal that he had only received 1 payslip and this was because he had asked for it for legal proceedings with his ex-wife. When asked he said that when SV told him to get out and was not needed he knew he was dismissed. When asked if he had lived 3 miles from the premises would he have gone home to tuck his child in he replied no.

A former colleague (OZ) of the respondent gave evidence. He had been present on the day in question. The respondent had gone for about 15 minutes. SV had returned and asked where the respondent was. SV rang him and told him to come down. He was present for some of the conversation between SV and the respondent. SV was shouting at him. He had made up the pasta order.

Some time after the respondent's dismissal SV approached the witness and asked him to attend the appellant's solicitors office. A statement was made but he told the Tribunal that the details in it were not completely accurate.

On cross-examination he stated. He could hear raised voices on the night in question as he was outside having a cigarette. When asked he stated he had been let go in July 2010.

Determination:

Having heard the evidence and submissions by both parties in the case the Tribunal find the respondent was dismissed and it was unfair. However the Tribunal upset the recommendation of the Rights Commissioner in respect of the amount awarded. The Tribunal award the sum of € 13,000 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)