

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE - *claimant*

CASE NO.
UD901/2010
MN857/2010

against

EMPLOYER - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms O. Madden B.L.

Members: Mr. J. O'Neill
Mr G. Whyte

heard this claim at Dublin on 30th August 2011

Representation:

Claimant: Mr Colin Dunlea BL instructed by Ms. Avril Gallagher, Gallagher & Company,
Solicitors, 58 Ranelagh Village, Ranelagh, Dublin 6

Respondent: The director

The determination of the Tribunal was as follows:

Respondent's case

The owner of the respondent operates a catering business within a public house under franchise. The claimant commenced employment as a kitchen porter on the 1st January 2008 and worked in this position until his employment was terminated on the 24th January 2010. Also employed in the business were the chef and a part-time waitress. The claimant's job was terminated as he refused to do duties assigned to him.

As a result of a health and safety inspection in October 2008 in which the business received a verbal warning and the inspector instructed the director to carry out one big job a week, a weekly rota was placed in the kitchen. This weekly rota included a big job for the claimant to carry out. The director also wanted the claimant to attend a health and safety course in October 2009 but the claimant refused and told him if he let him go, he would sue him like the other employers he had sued. Every two weeks he had to speak with the claimant for not doing tasks assigned to him or not complying with the chef's instructions. These tasks would include descrubbing kitchen equipment,

canopies, tables etc. On the 26th October 2009 the director issued the claimant a written warning in respect of his work performance and attitude to him. He asked the chef to keep the claimant on his toes, but the claimant's under performance continued, the claimant still would not do the tasks assigned to him and would just leave the premises leaving the tasks undone.

As the claimant's poor performance continued the director decided to terminate his employment and issued him with a termination letter and two weeks notice on the 10th January 2010.

During the course of the claimant's employment the director had facilitated him when he wanted to do a six-month course in FAS. He also had to replace the canopies in the kitchen because the claimant refused to clean them and there was a build-up of dirt on them. The claimant received his meals and holiday pay while working for the respondent.

Originally when the claimant commenced he was paying him €369.00 per week, on the 10th April 2009 the claimant's pay was reduced to €300.00 as result of the downturn in business. At this time he had sat down with the claimant and explained the situation to him and the claimant was happy with the situation. On the 19th July 2009 the claimant went on a two-day week.

Under cross-examination the director explained that the claimant in his first year of employment met his expectations. However in his second year the claimant was not doing the cleaning duties assigned to him and he also refused to attend the course. When the claimant refused to do the course the director had issued him with a verbal warning. The claimant's representative explained to the witness that the claimant would say the first time he saw the written warning was the day he was dismissed. The witness denied this and explained that the head chef was there as a witness when he issued the written warning. When the director gave the claimant this warning he explained to him that his job was in jeopardy. The claimant's social welfare claim form was produced in evidence. He explained that the claimant had completed this form and he had signed it to enable the claimant to obtain his social welfare. The claimant's hours were cut to two days in July 2009. The claimant did receive his contract of employment, as he needed this for immigration purposes. The company handbook and accident report book are kept in the kitchen.

The director maintains that he had never asked the claimant to clean the canopies in an unsafe manner. He had absolutely not asked the claimant to clean these canopies on a Sunday, as this was their busiest day of the week.

The head chef (hereinafter referred to as HC) gave evidence on behalf of the respondent. At first when the claimant would normally do his work but then he began to get lazy and stopped. He would ask the claimant to clean out the fridge and when he would come in the next day it would not be done. He would do half the canopy one day and the other half the next day. He was there when the respondent gave the claimant a verbal warning but 2/3 weeks later the claimant had reverted back to his old ways. The canopies would never be cleaned on a Sunday, sometimes on a Saturday if business was slack. It got to the stage he could not do his own duties as the kitchen was unclean and he ended up cleaning it himself.

Under cross-examination he explained that the claimant began to get lazy around August 2008. They constantly tried to talk to the claimant and he would improve for a week or two but ultimately would end up going back to his old ways. They had issued the claimant with verbal warnings after verbal warnings and yet HC ended up doing the claimant's tasks. When the claimant was dismissed the part-time girl took over the washing of the dishes and HC took over the cleaning.

In reply to questions from the Tribunal, HC explained that initially the claimant worked Tuesday through to Sunday and when he was on a two-day week he worked Saturday and Sunday. Clean as you go is the rule in the kitchen.

The manager of the public house gave evidence on behalf of the employer. The insurers of the public house would not cover them because the canopies in the kitchen were not clean so they had to replace them. He knew from going in and out to the kitchen that the claimant had been asked to do this work but it was never done. He had never seen the canopies cleaned on a Sunday.

Claimant's Case

The claimant gave direct sworn evidence. He commenced employment as a kitchen porter on the 1st January 2008. His duties included helping with food preparation and cleaning in the kitchen. He was paid an hourly rate and in 2008 would sometimes work 5/6 days a week and 8 to 10 hours per day.

He was not asked to do a health and safety course in 2008 but in 2009 and had agreed to participate in the course but the respondent never brought him to the course which he says was the agreement. The respondent never had any issues with his work, nor had he ever been issued with a verbal warning. In April 2009 his wages were reduced to €300.00 per week, the respondent had explained to him that he could not afford to pay him his normal pay. Whatever hours he worked he got €300.00 but if he worked fewer hours than normal he got less. At this stage he was working a sixday week. Later on in the year the respondent had told him he would have to let him go as he couldn't pay him but then said he would keep him on for two days a week, Saturday and Sunday. For these two days the head chef would give him a list of things to do, even though it was too much he tried as he wanted to keep his job.

He was only provided with the first page of his contract the page he signed. He was not told what duties would be as a kitchen porter. He had not been provided with the respondents handbook nor was there one in the kitchen. There was no health and safety book in the kitchen either.

He was referred to the written warning of the 26th October 2009; he had never been given this and only received it on the day his employment was terminated. On Sunday 10th January 2009 it was a busy day he was washing the dishes as the dishwasher had been broke since October 2008. At about three o'clock the head chef told him to clean the walls next to the ovens which he did. Then later the head chef told him that the respondent wanted him to clean the canopies which he started by cleaning them with a brush but then the respondent told him to stand on a stool to clean them, here he refused and the respondent got angry and let him go.

Under cross examination he confirmed that he had agreed to go on the health and safety course but the respondent did not take him there nor did he know where it was to be held. He always did the canopies when he was asked to do them in a safe manner. The respondent had completed the social welfare form for him and he had signed the first page of this form. He had firstly claimed social welfare when he was placed on a two day week.

In reply to questions from the Tribunal, he never saw the handbook or the health and safety manual in the kitchen. He says the respondent should have informed him of their location. He also stated that he felt the respondent had wanted to let him go.

Determination

The Tribunal, having carefully considered all of the evidence adduced at the hearing are satisfied that the claim under the Unfair Dismissals Act 1977 to 2007 cannot succeed. Accordingly the Tribunal dismiss this claim.

The claim under the Minimum Notice and Terms of Employment Acts 1973 to 2005 was withdrawn during the course of the hearing.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)