

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:
EMPLOYER
EMPLOYER
PW288/2010
- *Appellant*

CASE NO.
UD1968/2010

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

- EMPLOYEE
- *Respondent*

under

PAYMENT OF WAGES ACT, 1991 UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms V. Gates

Members: Mr D. Peakin
Mr. S. O'Donnell

heard this appeal at Dublin on 22nd February 2012

Representation:

Appellant: In Person

Respondent: In Person

The determination of the Tribunal was as follows:-

Appellant's Case

This case came before the Tribunal by way of the appellant appealing against the recommendation of the Rights Commissioner, ref: r-084750-ud-09/RG and the decision of the Rights Commissioner, ref: r-084753-pw-09/RG.

The Tribunal heard evidence from the Appellant, JD, who is the owner and director of the company. He told the Tribunal that the respondent had been dismissed from the company for gross misconduct. There were a number of instances for which the Respondent had received warnings from the manager. He was made aware of these warnings by the manager although he did not administer the warnings himself. JD made the decision to dismiss the respondent in consultation with the manager.

A health and safety meeting was scheduled for all staff in July 2009 but the Respondent failed to attend. JD spoke to the manager about this and she informed him that the Respondent had slept in and could not attend. The failure to attend the meeting had potentially serious consequences for JD as it was a requirement of his insurance renewal that staff attend health and safety briefing.

JD told the Tribunal that in September 2008 the Respondent had received a verbal warning from her manager about timekeeping. In March 2009 the Respondent received a verbal warning for failure to lock the back door to the premises and leaving a chip pan smoking after the restaurant had closed.

It was as a result of these two verbal warnings and the Respondent's non-attendance at the health and safety meeting on 1st July 2009 that the Respondent was dismissed for gross misconduct. JD had received a phone call from the Respondent's manager who told him that she had a conversation with the Respondent over the phone and she felt that the Respondent's position was now untenable. Based on this JD phoned the Respondent on 3rd July 2009 and dismissed her.

JD told the Tribunal that he did not initially write a letter of dismissal to the Respondent but when she requested something in writing he provided her with a final written warning dated 1st July 2009.

JD disputed that he did not provide the Respondent with terms and conditions of employment. The terms and conditions are posted on the staff room wall for the attention of all staff and the Respondent would have received this information in the training manual she was given at the commencement of her employment. The training manual is an unsigned, standardised document relative to all employees.

JD could not confirm if the Respondent was informed of her right of appeal or whether the training manual contained information for employees about their right to appeal a disciplinary decision.

The Appellant disputed the award made to the Respondent by the Rights Commissioner under the Payment of Wages Act, 1991. He explained to the Tribunal that employees receive a day in lieu of public holidays to take at their own discretion. However, JD did not provide the Tribunal with any evidence to support this arrangement.

He also disputed the fact that the Respondent was entitled to be paid in respect of minimum notice on the basis that she was dismissed for gross misconduct.

During cross examination JD confirmed that for safety reasons the lock up of the premises was always carried out by two people, one of which was a supervisor with responsibility for the keys. JD maintained that the Respondent did receive a verbal warning from her manager in September 2008 and the manager had told him by phone about this warning.

When questioned about the health and safety meeting JD explained that the meeting was scheduled twice, it was cancelled once and then rescheduled.

Respondent's Case

The Tribunal heard evidence from the Respondent, JW, who disputed that she ever received a verbal warning from her manager in September 2008. In relation to the failure to lock up properly in March 2009, the Respondent said that she felt that the primary responsibility lay with the supervisor who was also responsible for locking up on the night in question and that it was the responsibility of the chef to ensure that all kitchen appliances were turned off after use.

JW accepted that she failed to attend the health and safety meeting on 1st July 2009. She was on a day off on the 1st July and the meeting had originally been scheduled for Tuesday 30th June 2009. On 2nd July 2009 JW attended work at 11am she was approached by her manager who was angry about her non-attendance at the health and safety meeting. JW's manager shouted at her and said that she had worked very hard to arrange the meeting. The Respondent apologised but her manager said that her apology meant nothing to her.

The Respondent finished work at 5pm on 2nd July and on her way home she received a phonecall from her manager who told her that she could not work with her anymore. She then received a phone call from JD who told her that she had a bad attitude. He told her that her manager had complained to him about her and could no longer work with her. The Respondent was shocked. She then received another phonecall from her manager and she asked her if they could talk about things. The manager said she would give the Respondent another chance.

The following day, 3rd July 2009, the Respondent was scheduled to work from 6pm until closing time. She received a call from JD earlier in the day and he informed her that she was dismissed because she did not get on with her manager. The Respondent attended work as scheduled at 6pm because she presumed that she was required to work her notice period. When she arrived at work JD asked her what she was doing and she explained that she was working her notice in order to get paid for it. JD told her that she did not have to work notice and she would receive payment for what she was owed.

The Respondent requested confirmation in writing about her dismissal and JD provided her with a letter dated 1st July 2009. This letter stated that any further incidents deemed worthy of a warning would result in her immediate dismissal.

The Respondent met with JD a couple of weeks later to collect her P45 and final cheque. The Respondent told the Tribunal that the amount of the cheque was incorrect and JD did not specify what it was for. She did not receive her holiday pay or payment in respect of minimum notice. The Respondent said that she had been promised double pay for working bank holidays. She had worked 3 public holidays between January and July 2009 and did not receive double pay or time off in lieu of these days.

During cross examination the Respondent confirmed that she had previously locked up the premises with the supervisor on duty and that she had a responsibility to do her job well. She also confirmed that when she commenced employment in the Appellant's company she did receive double pay in respect of public holidays worked but this arrangement only lasted for the first year of her employment. The Respondent also explained that she did not take all of her holidays in one year and JD told her that she would receive payment in respect of holidays in the first payslip of the following year.

Determination

The Tribunal heard conflicting evidence from both parties in respect of all aspects of the case. The Respondent was in a position to refer to a work diary in relation to days and times worked. Given the evidence adduced by both parties, the Tribunal is of the opinion that the decision of the Rights Commissioner ref: r-084753-pw-09/RG pursuant to the Payment of Wages Act, 1991 should be upheld.

The Appellant alleges that he was justified in dismissing the Respondent on the grounds that the three incidences in and around September 2008, March 2009 and July 2009 constituted gross misconduct on the part of the Respondent. The Tribunal finds as a fact that the respondent provided a reason for her failure to attend the health and safety meeting and was not primarily to blame for the failure to unplug a kitchen appliance and to properly lock up the premises. In the circumstances the Respondent's behaviour did not amount to gross misconduct justifying dismissal, particularly in light of the evidence given by both parties that there was also an ongoing personality clash between the Respondent and her manager and on the balance of probabilities this was the actual reason for dismissal. Further, the Tribunal finds that if verbal warnings were in fact given, which was disputed, the same were not given sufficiently clearly and the Appellant failed to advise the Respondent of her right to appeal the dismissal or to give her any or any adequate opportunity to set out her side of the story before reaching the decision to dismiss.

The Tribunal finds that the Respondent was unfairly dismissed and taking her loss, which was speedily mitigated, into account, varies the recommendation of the Rights Commissioner, ref: r-084570-ud-09/RG under the Unfair Dismissals Acts, 1977 to 2007 and awards the Respondent the sum of €1,332.00.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)