

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE
- *claimant*

CASE NO.

UD1685/2010

against
EMPLOYER
- *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms D. Donovan BL

Members: Mr. R. Prole
Mr A. Butler

heard this claim at Dublin on 12th January 2012
and 22nd March 2012

Representation:

Claimant(s) : Mr. Brendan Archbold, 12 Alden Drive, Sutton, Dublin 13

Respondent(s) : Ms. M.P Guinness BL instructed by Mr. John Lynch, Whitney Moore,
Solicitors Wilton Park House, Wilton Place, Dublin 2

Claimant's Case

The claimant gave evidence that he was employed as a chef by the respondent company from December 2007 until June 2010. He worked at a food bar. He generally started work daily at 9am and his finishing hours varied between 6pm, 9pm and 12am. His shortest working day was 9am until 6pm. He worked on his own and never received any breaks. He had his meals as he worked, behind the food bar without a break. He complained to the head chef known as (TH) on a number of occasions and was told that he should organise his own breaks. He could not do this as he worked on his own and was not permitted to leave the food bar. His hours of work were recorded on a roster but these hours did not accurately reflect his working week. He usually worked an additional 5-10 hours per week which were not recorded on the roster. He was not paid for these additional hours. His working hours and conditions affected his health and he had three periods of absences on sick leave while working with the respondent. He was absent for 3 weeks in March 2009, he was absent from 20 November 2009 until 15 January 2010, and he was also absent from

March 2010 until the termination of his employment in June 2010. He provided medical certificates for these absences.

He complained to the Human Resources Manager known as CO'C on at least 20 occasions but nothing changed. He requested a transfer to a different department but this was not provided to him. He requested to change his working hours and eventually was allowed to work 7 hours per day based on a six day working week. He still did not receive his breaks. He gave further evidence that he received warnings from (TH) over his personal hygiene and food hygiene standards. He received three written warnings from (TH) but was not provided with copies of these written warnings. On 15 February 2010 he made a complaint of bullying in writing to CO'C and he received a reply on 20 May 2010. Eventually he resigned his position by way of letter dated 3 June 2010 as he felt that the company had taken no action to his reported instances of bullying and harassment regarding his personal hygiene issues and an allegation of food poisoning. There was also no resolution to the matter of his working hours and his meal breaks.

Under cross examination he confirmed that he was familiar with the company's grievance procedures. He accepted the findings of the Rights Commissioner in relation to his claim under the Organisation of Working Time Act and did not appeal that decision. He confirmed that he wrote to CO'C on 15 February 2010 concerning bullying towards him at work, issues of personal hygiene and allegations that his food was poisonous. He attended a meeting on 3 March 2010 with CO'C and accepted that he was told that if he was interested in moving to another role he should follow the internal application procedure. He did not follow that procedure but had written to the company on 26 January 2010 seeking a transfer to a different department. He asked if he could be moved to another position in the bar/shop and was told that there were no jobs available in the bar. He denied that he chose to take 6/7 smoking breaks daily rather than a 30 minutes break. The company wrote to him on 20 May 2010 outlining the outcome of the investigation into his grievances. He was informed that he could appeal this decision but did not do so because of the length of time that had already elapsed. He replied to that letter on 3 June 2010 informing the company of his resignation as the company had taken no action into his reported instances of bullying and harassment. He confirmed that he had been absent from work on sick leave since 17 March 2010 until his resignation. Since the termination of his employment he has secured alternative work and earns €1500.00 per month.

Respondent's Case

CO'C gave evidence that she was employed as the Human Resources Manager by the respondent company during the time of the claimant's employment. She confirmed that the claimant was provided with a contract of employment and the employee handbook. She gave evidence that the claimant had a number of sick leave absences due to back pain and the company made a decision to refer him for an occupational health assessment. Following advice from the occupational health practitioner the company created a specific shift for the claimant commencing at 9.30am and finishing at 4pm. On 26 January 2010 she received a letter from the claimant enquiring if it was possible to transfer him to a different department. She did not accept this as a formal request for a transfer and met with him on 29 January 2010. She made it clear to him that he should make his application through the standard internal application process and explained that procedure to him. She did not recall telling him that there was no job available in the bar area. The claimant never made a written complaint concerning his working hours. It was not unusual for employees to work more than 39 hours per week on occasions but this was due to

the nature of the job in hospitality. If employees worked in excess of 39 hours they were either paid for that work or given time off in lieu of the hours worked. She confirmed that this time off in lieu was not always recorded. During quiet periods employees were allowed to leave work early and would still be paid for 39 hours per week. She confirmed that the claimant may have raised issues regarding his working hours in general conversation within the workplace but he never made a written complaint about his working hours. She denied that the claimant worked 60 hours per week on a regular basis or that he was not either paid for overtime or given time off in lieu and that this was accepted by the Rights Commissioner in a claim made by the claimant under the Organisation of Working Time Act 1997.

Following the claimant's letter of complaint of 15 February 2010 she conducted an investigation into his complaints. She interviewed 7 employees including the claimant as part of her investigation. She had a follow up meeting with the claimant on 30 April 2010 and outlined to him what she felt were the key issues and advised him of the outcome of her findings. She believed that the issues had been resolved, that the claimant understood the outcome and was happy to return to work. She wrote to the claimant on 20 May 2010 and re-confirmed her findings to him. She found that while there may have been exchanges involving the claimant, the head chef and the chef de partie in which the parties used swear words and raised voices, this did not amount to bullying. She stated in that letter that "we do however need to ensure all communication is of a respectful and professional nature, as mutual respect is needed in order to maintain a healthy working environment" and she had spoken to all parties about this. In relation to the claimant's personal hygiene she found that this was an issue and advised the claimant that his line manager, TH is obliged to manage his team and this includes personal hygiene levels. She confirmed that TH had previously spoken to the claimant on a number of occasions concerning this issue. In relation to allegations concerning food poisoning the claimant was not singled out in relation to that issue. All employees were spoken with. She also stated in her letter that the claimant's colleagues have confirmed that they would welcome him back to work.

On 3 June 2010 she received the claimant's resignation letter. She was surprised to receive this as she believed that the issues had been resolved. She wrote to the claimant on 17 June 2010 requesting him to reconsider his decision to resign and inviting him to contact her to discuss any issues or concerns. Following this letter she had a further meeting with the claimant on 28 June 2010. The tone of this meeting was different to other meetings and the claimant wanted a letter from the company stating that he no longer worked for the company. He did not want to discuss the outcome of the investigation and did not want to appeal the decision. She believed that he had already made a decision to leave. She told the Tribunal that she had spent a huge amount of time dealing with the matter and believed that she had done everything to accommodate him.

Under cross examination she gave evidence that hospitality work is seasonal and it is common to work longer hours at some periods of the year than others. She confirmed that rosters can change at short notice due to a change of events. That is typical of the industry and unsocial hours are part of the industry. She, herself worked a shift pattern and every employee is part of a team. The claimant was told to take his breaks and was also told not to eat food behind the counter. She never witnessed (TH) telling the claimant to eat while he worked. She stated that the kitchen area of work is a fast paced environment. Conversations can get heated and shouting across the kitchen is normal. Service is done at a fast pace and the hospitality environment can be a fiery environment but the use of swear words is not appropriate. She accepted that swear words were used but nobody was singled out or treated differently to anyone else. She confirmed that an employee, (K) made a complaint of bullying at a later stage.

Determination

Having considered the evidence adduced at the hearing the Tribunal finds that the claimant was unhappy in his job as Chef with the respondent. The Tribunal accepts that the claimant may have had reasons to be unhappy but also accepts that this was in the main due to the nature of the claimant's job rather than bullying or harassment. The Tribunal finds that the claimant would have remained with the respondent had he been given a job in the bar. The Tribunal finds that some of the working conditions that the claimant complained about would have also applied to bar work.

The Tribunal finds that the respondent acted in accordance with its grievance procedure and finds that the claimant's assertion that nothing had changed was unfounded in circumstances where the claimant was absent from work within two weeks of the first meeting on the 3rd March 2010 until he handed in his resignation. If there was any conduct such as entitled the claimant to consider himself constructively dismissed this was negated by the claimant's failure to appeal the decision taken by the respondent following the investigation of the claimant's complaint. Accordingly, the Tribunal finds that the claimant was not entitled to consider himself constructively dismissed and the claim under the *Unfair Dismissals Acts 1977-2007* fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

