

## EMPLOYMENT APPEALS TRIBUNAL

**CLAIM(S) OF:**  
EMPLOYEE

**CASE NO.**  
UD1223/2010

*- claimant*

against  
EMPLOYER

*- respondent*

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr N. Russell

Members: Mr J. Hennessy  
Mr J. Flannery

heard this claim at Clonmel on 7th February 2012

#### **Representation:**

Claimant(s) : Mr Colin Morrissey, English Leahy, Solicitors, 8 St Michael Street,  
Tipperary Town, Co Tipperary

Respondent(s) : Brian D. Hughes & Co., Solicitors, "Longmall", Slievenamon Road, Thurles,  
Co. Tipperary

The determination of the Tribunal was as follows:-

#### **Background:**

The claimant was employed as a waitress working on a part-time basis from November 2005. There were no major problems until a new Manageress commenced employment in 2008. The claimant refused to carry out tasks requested of her by the Manageress. She was also reprimanded for arguing in front of customers. The owner spoke to the claimant.

The claimant walked out but later contacted the owner concerning her job. She met the owner and the Manageress and apologised to her. She was given a written warning and informed if these problems arose again within three months her employment would be terminated. No more major problems occurred although the claimant was late for work on numerous occasions.

In April 2009 another incident occurred. The owner was returning to the restaurant floor when he witnessed a man, a distressed woman and a child come into the restaurant. The man informed the owner, in a rage, that the claimant had followed them out of the restaurant and accused him of damaging her boyfriend's car. The owner spoke to the claimant about the

incident and again the claimant walked out. Later that week she contacted the owner who gave her her job back. She was given a written warning and informed that if anything of that nature occurred within the following six months she would be let go.

In December 2009 the owner had reason to speak to the claimant regarding the social welfare benefit she claimed on the days she did not work. Again no more major problems occurred until the following February. On 4<sup>th</sup> February 2010 the owner gave the claimant a written warning due to her lateness, not finishing on time and the till had been short € 9.72 and € 8.55 respectively when she had been working on it. This fourth warning would stay in effect for one year. Some days later a disagreement occurred between the claimant and the owner and the claimant walked out.

### **Claimant's Case:**

The claimant gave evidence. There had been no major problems for the first couple of years of her employment. She agreed that she had been late to work on some occasions but this was only by five – ten minutes. She told the Tribunal that she felt the owner picked on her and treated her differently to the other staff.

She agreed that she had apologised to the Manageress in February 2008 but stated that she always carried out any task she was asked to and was never abusive especially in the public area. She also agreed that an altercation occurred in April 2009 with the customers. She had been working at the time, had followed them out of the restaurant and had “words”. She agreed that it had been inappropriate. She agreed she had been given her job back on both occasions.

She received a written warning in February 2010 regarding her time keeping and the shortages in the till. She told the Tribunal that she felt she was being accused of theft. She attended work on her day off, February 17<sup>th</sup>, to collect her wages. (*This date could not be agreed by both parties – 17<sup>th</sup> and 15<sup>th</sup> February*). She requested her wages and the owner slammed some social welfare benefit slips on the counter asking her “what the f\*\*k this was” and said she had filled it out incorrectly. She was very stressed with situation, felt afraid of the owner and walked out.

She met a relative in her distressed state and both returned to the restaurant to get her wages. They were left waiting for about twenty minutes. The owner told her that he wanted a letter of resignation. She received her wages and the owner told her she could go further if she wanted. The claimant gave evidence of loss.

### **Respondent's Case:**

The owner of the business gave evidence. He agreed there had been no major problems with the claimant until a new Manageress started in 2008. Over the period of time from February 2008 to February 2010 the claimant received four written warnings. She did not follow instructions, was late for work, shouted in front of customers and left others to pick up work. When she received her warnings she did work well but after time old habits returned. She had left on two occasions but was offered and accepted her job back.

The witness told the Tribunal that he had occasion to speak to the claimant in December 2009 regarding her social welfare benefit. On February 4<sup>th</sup> he had reason to give the claimant her fourth written warning regarding her time keeping and advising of cash shortages in the till. He explained that the matter of cash shortages had occurred also when other staff were working on

the till and he had addressed the matter with the person involved in each instance. He never accused her of theft.

On February 15<sup>th</sup> 2010 the claimant came to the restaurant to request and receive her wages. The claimant handed him her social welfare benefit form for that week. He found what he believed to be an error on it. The claimant told him it was none of his business. He told her if she amended it it would not be a problem. The claimant left. Later that evening he received a call from the claimant informing him that she'd had an interview and got another job. He told her not to be hasty but she replied that she was leaving and wanted her P45. He asked for a letter of resignation.

On February 19<sup>th</sup> 2010 the claimant came to the restaurant. He had not expected her. It took time for him to organise her P45 and monies owed. When asked the owner said that he had never used abusive language towards the claimant or any staff, and to do so was sure way to lose customers.

**Determination:**

The Tribunal is mindful that there was no suggestion in this case that the claimant was ever responsible for any theft nor does the Tribunal believe that she was accused of theft. On two occasions in the past the claimant had walked out of her employment and, on discussing matters with the owner, was offered her position back.

The Tribunal has carefully considered the sworn evidence adduced and documentation submitted. In cases of constructive dismissal the onus is on the claimant to prove that their employment became so untenable that she had no choice but to leave her employment.

Having considered the matter carefully the Tribunal finds that the claimant has failed to meet this onus and that, accordingly, she was not constructively dismissed. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)