EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	CASE NO.
EMPLOYEE	UD430/2010 MN397/2010
and	
EMPLOYEE	UD431/2010 MN398/2010
against	
EMPLOYER	

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. P. Clancy

Members: Mr. T.L. Gill
Ms. S. Kelly

heard this case in Limerick on 5 March 2012 and 29 June 2012

Representation:

_____

Claimant(s):
Mr Michael Fitzgibbon, FB Keating & Co, Solicitors,
91 O'Connell Street, Limerick

Respondent(s):
Ms. Amy Field and Ms. Colette Neville, (both of) McNulty Boylan & Partners,
Solicitors, Clarkes Bridge House, Hanover Street, Cork

The determination of the Tribunal was as follows:-

It was alleged on behalf of the first-named claimant (hereafter referred to as SV), a chef, that on 5 October 2009 she was unfairly dismissed from a job with her employer (hereafter referred to as MI) after an employment that had begun on 1 January 2007.

It was contended that SV had been accused of theft and unfairly dismissed without the two weeks' notice to which she was entitled. MI had allegedly accused her of stealing meat from a fridge following which there had been a July (2009) meeting. Employees were allegedly told that it was not a problem to take leftovers from dinner or supper in the hostel where they worked but they were allegedly warned not to take meat from the fridge.

On the day of SV's dismissal MI allegedly showed her a (CCTV) disc and said that, if she made any legal claim, the disc would immediately be sent to the police.

It was alleged on behalf of the second-named claimant (hereafter referred to as TA), a cleaner, that on the abovementioned 5 October 2009 she was also unfairly dismissed from a job with the same employer (the abovementioned MI) after an employment that had begun in October 2005.

TA's claim was similar to that of SV but TA's claim mentioned that her husband was recorded walking with a bag and that this had been used as evidence of theft but it was contended that TA had used this bag to take her laundry to and from the hostel.

The name of the employer claimed against was subsequently amended to that of the respondent (a company of which MI was a director).

The respondent's defence to the claims was that the claimants had been dismissed for theft.

Giving sworn testimony on the first day of hearing, MI said that, in the summer of 2009, he had been told of claimant theft of company goods. He looked at CCTV footage and saw them remove items. He discussed this with his manager (KE).

MI held individual meetings with SV and TA. He told them that the theft was illegal and showed them CCTV footage. TA denied all knowledge but SV disclosed everything and was remorseful. KE attended the meetings and took notes. MI decided on a clean-slate attitude.

During the conversations it became obvious to MI that there had been confusion about the taking of produce from the hostel site and so MI had explained to the claimants that it was not acceptable. He gave the claimants another chance and they went back to work as normal. There was no time to sit around and discuss because they were very busy.

The respondent decided to upgrade the CCTV. MI told the staff that it was for security reasons and that the cameras would show the areas used for taking food. Subsequently KE told MI that it was happening again. MI went through the footage, saw a claimant bag leaving the premises and told staff that, unfortunately, he was again investigating theft. He called in each claimant and gave them both a letter of dismissal for gross misconduct.

MI said that his business ceased in 2010.

On the second day of hearing only the respondent's representative appeared for the respondent. She said that she had thought that MI would attend but that she had heard otherwise very late. The claimants' representative said that MI had had to send him the CCTV evidence but that he had not received it. The respondent's representative said that in June 2009 SV had admitted taking food.

Giving sworn testimony through a Tribunal interpreter, TA (the second-named claimant) said that she had commenced employment with the respondent in October 2005. Asked if left-over food could be taken from the hostel, she replied that they could take some food and that, when they asked for higher wages, they were told that their wages were enough because they had free food. TA said that the respondent had asked her if food had been taken by any of her colleagues but that she had replied that she had seen nothing because she had been cleaning and that she had no time to watch others because she had a lot of cleaning to do.

TA admitted that staff took food that was waiting to be thrown in the bin and said that the respondent had said that this was no problem.

Regarding the laundering of clothes, TA said that the manager brought his own clothes and asked that they be watched in case someone took them. Others washed their clothes at the hostel. No-one said that this was not permitted. However, she thought that someone had taken something from the fridge.

TA admitted that she sometimes brought a green bag to wash sheets and clothes. He husband would take away the full bag because she did not want to leave it in the canteen. No-one prohibited this and the manager knew that they could take food. They would also give an apple that was damaged (but not to be thrown out) to the security man because he carried heavy bags. TA denied taking fresh food or meat from the fridge or any of the food of hostel residents.

On 5 October 2009, the day of her dismissal, TA had been cleaning but was called to reception. On the way she saw SV in SV's own clothes rather than SV's work clothes. TA was given a dismissal letter, was told to go home and it was indicated to her that she would go to jail if she complained. She told the Tribunal that she had not received any previous warnings about stealing and that she did not receive the allegations against her in writing. MI subsequently asked for the return of her dismissal letter. She surmised that he had decided that he had not dismissed her correctly.

Asked at the Tribunal hearing if she had been told that there would be an investigation or if she had ever been searched when leaving the respondent's premises, TA said no and reiterated that she had been told that she would go to jail if she complained.

Asked if she had been told that she had a right to question people and a right to appeal her dismissal, TA said that she had just been dismissed whereupon she had sought to vindicate her rights.

TA said that, when employed by the respondent, she had been very happy to have work in Ireland but that she had not been able to get work subsequently. She distributed CVs and went to FAS but could not get any job for which she applied. She was a music teacher but could not

even get work of that nature because of her weak English. She felt that jobs were going to people younger than her. Her son had helped prepare her CV but to no avail. She was on social welfare.
Giving sworn testimony, also through the interpreter, SV (the first-named claimant) said that her employment with the respondent had begun in January 2007 and that she had worked three days per week as chef/cook and as a cleaner on other days. She received no contract or written procedures but had training in cooking and fire safety. Asked what were the rules about eating or taking food, she replied that there were none when she started in that the respondent said nothing. Asked what she had understood she could eat, she replied that her superior had said there was no problem and that, indeed, she saw all staff (including security) taking food and saw that no problem resulted. SV said that staff could take food that was waiting to be thrown out. MI knew that she was doing this and, when she asked for a payrise, MI told her that she was eating there. She was not told that she was doing anything wrong and when MI came to the kitchen, he said that all was fine. She told the Tribunal that she was never told not to take food home and, asked if she would store food before taking it home, she replied that she would put it in her bag and take it home.

SV also said that all staff did laundry at the respondent's premises and that she was never told not to do so. She did not see MI do laundry at the respondent's premises but she saw KE manager) do so.

Asked about a meeting with MI on 30 June 2009, SV said that she was off that day but that KE (manager) had called her. She had wondered why they had called her and had thought that the kitchen needed help. She was shown footage. She had brought fruit to a security man because he had been there twelve hours. She was asked what she had brought home. She said that she had brought home bread and milk and meat but she had meant that it was food waiting to be thrown out.

It was put to SV at the Tribunal hearing that she had admitted stealing food. SV replied that she had not admitted it but that she had said that she had taken home bread and milk and meat. She added that MI had not said that the taking of food was prohibited.

Asked if she had apologised, SV said that she had not because MI had said that it was not a problem and had not said that rules had been broken. MI had not given her a warning. She admitted to the Tribunal that her English was middling rather than good but said that she had been able to understand what MI had said to her and that she had not thought, after that meeting, that rules had changed. The respondent had not approached her to say that taking food was wrong.

Regarding 5 October 2009 SV told the Tribunal that MI had called her from the canteen to go upstairs with him quickly whereupon he had shouted at her and said that she had been stealing. He took paper started writing (a dismissal note) and told her to leave.

SV told the Tribunal that she had understood that MI had thought that she had been stealing but that she had never stolen and had been very happy to have the job. Asked at the Tribunal hearing if MI had shown her a copy of CCTV footage on 5 October 2009, SV replied that he had shown her the disc to threaten her.

Subsequently, SV went to the hostel for her P45 and a reference whereupon she was told to

bring the dismissal note she had received.

SV told the Tribunal that she had taken no fresh food, that she had received no disciplinary procedure and that she not been given any allegations against her in writing. Neither had she been told of any investigation against her. She had not had the chance to see any evidence against her and respond to it. Neither was she told of a right of appeal. She had never been searched when working at the hostel nor told that she was breaking any rule.

Asked about after her job with the respondent, SV said that she had replied to an advertisement for a job in Dublin but had got no answer. She was looking for work in Limerick and Shannon. She had been with Social Welfare and FAS. FAS had called her but had never called her back after the interview. She was hoping that she might have a chance of getting some work in Newcastle West. She was on social welfare at the date of the hearing.

Closing the claimants' case, their representative submitted that MI might have thought that there had been theft but that there had been custom and practice of taking food, no disciplinary procedure had been given to the claimants and no rights of reply or appeal had been given to them. Rather, it was just summary dismissal. It was submitted that they had sought work even if they had not obtained it and that they were entitled to had incurred two years' loss as compensation.

The respondent's representative did not refute the submissions of the claimants' representative.

Determination:

Having considered the evidence adduced, the Tribunal was not satisfied that the claimants were fairly dismissed for gross misconduct. Their guilt was not proven. The respondent's procedure was too sloppy. There was no indication that the respondent had put up notices on walls in Russian (or English) advising of possible penalties for the removal of particular foods from a hostel where pay increases might be refused on the grounds of on-site food provision.

The claims under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, succeed because the claimants were not found guilty of gross misconduct. Under the said legislation the Tribunal awards the first-named claimant (SV) the sum of €920.00 (this amount being equivalent to two weeks' gross pay at €460.00 per week and the second-named claimant (TA)the sum of €719.00 (this amount being equivalent to two weeks' gross pay at €369.50 per week.

Having awarded two weeks' gross pay to each claimant under the minimum notice legislation, the Tribunal is unanimous in awarding 102 weeks' gross pay to each claimant under the Unfair Dismissals Acts, 1977 to 2007, because the Tribunal finds them to have been unfairly dismissed. Under the said legislation the Tribunal deems it just and equitable to award the sum of €46,920.00 (this amount being equivalent to 102 weeks' gross pay at €460.00 per week) to the first-named claimant (SV) and the sum of €37,689.00 (this amount being equivalent to 102 weeks' gross pay at €369.50 per week) to the second-named claimant (TA). The Tribunal was

satisfied that the claimants had made proper efforts to mitigate their loss and that they could not be deemed to have contributed to their dismissal.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)