

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE - *claimant*

CASE NO.
UD2575/2009

against

EMPLOYER – *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms V Gates BL
Members: Mr F Moloney
Mr G Whyte

heard this claim at Dublin on 24th March 2011 and 23rd January 2012

Representation:

Claimant:

Mr Michael Meegan, Divisional Organiser, Mandate
Trade Union O'Lehane House, 9 Cavendish Row, Dublin 1

Respondent:

On 24th March 2011 Ms Mairead McKenna BL, instructed by:
Ms Johanne Duignan, Byrne Wallace, Solicitors, 2 Grand Canal Square, Dublin 2

On 23rd January 2012 Mr. Connor Kearney BL instructed by Ms Fleur O'Shea
Byrne Wallace, Solicitors, Grand Canal Square, Dublin 2

The parties agreed that the claimant commenced employment on the 4th April 1998

Respondent's Case:

The claimant served food at the hot counter of an in-store restaurant of one of the respondent's stores. She worked from 11am until 3pm and was therefore not entitled to a lunch break. The claimant was dismissed for gross misconduct for eating the food on display while working at the hot counter, which was a breach of company policy. There were eight employees in the restaurant including one manager.

The then Store Manager gave evidence that in July 2009 it came to management's attention that local traders were getting food for free in the in-store restaurant. He asked the head of security to monitor the restaurant. The CCTV was monitored over three days, July 2nd, 3rd & 6th 2009. He received a report back that staff members were eating the food. He described it as

‘continuous grazing’ by staff of food at the hot counter. On July 2nd the claimant was viewed six times eating in view of the camera. On July 3rd the claimant was viewed eating three times. On July 6th the claimant was viewed eating on more than ten occasions.

There was no evidence of the claimant paying for the food. On July 6th 2009 the claimant was viewed eating chips and sausages and drinking tea and minerals. She either took items from the display or while she was carrying a tray into the kitchen to dispose of the items. This was inconsistent with the claimant’s excuse that she tasted the food. Tea and minerals were taken from the dispenser. Approximately one third of the occasions were in public view. At other times she brought food into the kitchen to eat.

Food was checked by temperature using a thermometer. All staff were required to wear gloves whilst handling food. If they put their hand to their mouth they were required to wash their hands and change their gloves. The claimant was not seen washing her hands after eating the food.

He held an investigatory meeting with the claimant on July 8th 2009. The Security Manager was also present. The claimant declined to have a representative present and declined to view the CCTV at that time. He went through the times and incidents with her. She said she was ‘picking’ at the food. At that meeting she did not suggest that she had been tasting the food. The claimant was not given a copy of the notes.

He held a further meeting with the claimant fifteen minutes later, which he described as disciplinary. The claimant said that she understood the seriousness of the situation. The claimant was suspended with pay until the next meeting, which was held on July 10th 2009.

The claimant was told that she could bring a colleague but she declined to do so. At this meeting the claimant changed her story and said that she was tasting the food for temperature and taste. They discussed the use of the thermometer and the claimant agreed that she knew how to use it. The claimant opted to view the CCTV footage.

The claimant did not deny anything she just changed her explanation. When asked why she ate a whole piece of apple pie to taste it she said that she was checking into the middle of it. Food that is gone off is recorded and disposed of. The claimant did not record the apple pie. The claimant said her teeth weren’t good which was why she ate so much of the food. She said she drank the company’s tea as hers had run out. She agreed that she only tested food she liked. The meeting was adjourned until July 20th 2009.

At the next meeting, the final disciplinary meeting, the Store Manager and the HR Manager were present with the claimant. The claimant did not bring a representative. She contended that a manager said she could have a mineral during a period when the water cooler was out of service. The meeting was adjourned for twenty minutes. They then informed the claimant that she was being dismissed. They had considered other sanctions but considered that the claimant’s actions were a serious breach of trust and that dismissal was the only appropriate sanction. The claimant did not appeal the decision. He did not point out her right of appeal. It was in the handbook on the notice board and was well known. Another employee had appealed.

He was following the old procedures, not the new ones in the handbook. The only difference was the appeal procedure. The new version was on all the notice boards. All the employees of the restaurant were subject to the same investigation. One resigned, two continued, one was disciplined and five were dismissed. There was no disciplinary action in regard to one employee.

The Tribunal heard evidence from the head of catering who gave evidence as to the procedures and processes and HACCP information.

Claimant's case:

The Tribunal heard evidence from (LS) who was the cook in charge of hot food. She explained that she always tasted the food. The claimant worked at the food counter and therefore she was responsible to see if the food was up to standard. The witness was asked if management told them not to test food and she replied "No".

The waste forms were filled in each day but sometimes the forms were not there. They were supposed to be updated on training every three months but she had not had hygiene training in three years.

The Tribunal heard evidence from the claimant. She worked in the respondent for eleven years. She worked in the canteen service area and also shared cooking duties with a colleague. She received training every two to three years; "testing food was not highlighted". She did not get a copy of an updated handbook. Her hours were eleven to three five days per week. She and her colleague shared the cooking duties and she also worked on the serving area.

Regarding the meeting disciplinary or investigation she was not told of the purpose of the meeting. She was not offered the right of a trade union representative, as the respondent does not recognise the trade union. She was called into an investigation on 08th July 2009. She noticed that the other women who had been to a meeting were crying. She thought this was because of an impending move. She was in shock, as she did not think that she had done anything wrong, she had just done things as she had always done. She would have appealed the decision rather than awaiting the EAT hearing. She was not issued with a new company handbook.

She was not told that the CCTV was updated. She was not told that the CCTV was there to monitor the staff. She was not told that the practice (of testing/eating food) was incorrect. She had never before received a warning.

The claimant was asked about "handfuls of chips" and she explained that it was one or two chips to test if they were cooked properly and that the customers complained if the chips were cold as the serving unit equipment would not reach the required temperature and management was aware of this.

The water fountain broke down and management, the manager at the time, allowed the staff to have cold drinks because it was so warm. She did not know that the water fountain was subsequently fixed as she was out sick.

Regarding the food waste record documents, "most of the time some of them would not be there". The management were aware that the documents were not always there, and the staff filled the forms out at a later date.

Cross-examination:

She explained that she never knew that she had a right to appeal the decision to dismiss her.

When she was asked about drinking tea she explained that the staff themselves brought tea bags.

Regarding the testing of temperature with the temperature probes, the probes were broken and they were not told to probe chips or potatoes only the Meat produce that they served. Regarding a cream cake she did test it to make sure it had not gone off. She accepted that she took minerals and this was because the water fountain was broken and the manager had permitted her to.

Determination:

The claimant was employed by the respondent for a period of 12 years and was dismissed from employment on the grounds of misconduct in failing to pay for drinks and for grazing on food being served in the Café during the course of the day. In reaching the decision to dismiss the claimant, the respondent relied on its own staff handbook in relation to the procedures to be adhered to by staff and management in the workplace whereby dismissal for misconduct may be imposed without recourse to previous stages of the disciplinary procedure. Further, according to the handbook, a decision to dismiss will be taken only after thorough investigation of all relevant facts.

The claimant, in the course of the investigative process, informed the respondent that the manager of the premises gave permission to staff to take bottled water during a period when the water cooler was broken and never warned or reprimanded her or any other staff member for “grazing” on food from the counter. The respondent adduced no evidence of having checked or confirmed with the manager the veracity of such defence. Such failure was unfair and unreasonable and constitutes a failure on the part of the respondent to adhere to its own procedures in undertaking a proper and thorough investigation of the situation.

The Tribunal is of the opinion that the claimant’s behaviour in “grazing” on food, whilst clearly reprehensible did not amount to misconduct in circumstances wherein the manager of the café failed to ensure the implementation of company policies in relation to hygiene and staff sales. Therefore the respondent ought to have issued a verbal or written warning to the claimant prior to dismissal that her actions were in breach of company regulations. The respondent also failed to inform the respondent of her right to appeal its decision to dismiss.

In the circumstances the claim under the Unfair Dismissals Acts 1977 to 2007 succeeds and the Tribunal determines compensation to be the most appropriate remedy. Accordingly, the Tribunal awards the claimant the sum of €10,000.00 in compensation.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)