

## EMPLOYMENT APPEALS TRIBUNAL

**CLAIM OF:**

EMPLOYEE,

- *Claimant*

**CASE NO.**

UD2365/2011

MN2378/2011

Against

EMPLOYER

- *Respondent*

under

### MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005 UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms J. McGovern B.L.

Members: Mr T. O'Grady  
Mr M. O'Reilly

heard this claim at Dublin on 20th March 2012 and 21st March 2012

**Representation:**

Claimant:

Respondent:

The determination of the Tribunal was as follows:-

**Claimant's Case**

The claimant told the Tribunal that she commenced employment with the respondent company in March 2010 as a waitress. In the beginning of her employment she noticed she was being treated differently. A member of staff, her manager, was making jokes that made the claimant feel uncomfortable. He then asked the claimant out on a date and also began to touch her inappropriately. She was shocked and hoped it would stop.

A number of letters were sent to the respondent in respect of several issues with the claimant's manager, the most serious of which was the personal touching which happened a number of times. The respondent company commenced an investigation into the issues. The claimant was not allowed a representative at the investigation. She told the respondent she did not feel comfortable being at the investigation alone.

The claimant found the experience so terrible that it affected her health and her personal life. On

19<sup>th</sup> February she brought her concerns to the respondent and she was sure he would do something about the situation because he told her that he would gather evidence and get rid of the manager. After this meeting with the respondent the manager's attitude toward the claimant changed. He would not talk to her and when he did his manner was aggressive.

The claimant sought advice from her trade union and her representative subsequently wrote to the respondent on her behalf on 16<sup>th</sup> March 2010 asking what steps they propose to take to deal with the claimant's grievance. The claimant attended another meeting with the respondent around the 19<sup>th</sup> March 2010 at which she was not afforded the opportunity to have a representative present.

On 27<sup>th</sup> March 2010 a meeting took place to discuss the outcome of the investigation into the claimant's complaints. The claimant was informed that her grievance was substantiated and the company would be taking appropriate action. She was also informed that she had the right to appeal the decision to the respondent. The respondent told the claimant that she would no longer have to work with her manager and they would be separated so that there would be no further contact. The manager would work in a second restaurant of the respondent located across the city when the claimant was scheduled to work at the Dundrum restaurant. However, the claimant asserted that she did have further contact with the manager at staff meetings and changeover of shifts. She was also asked to work directly with him.

The manager was not suspended from his position. The claimant never received a draft report of the respondent's findings from the investigation. On one occasion the claimant found herself having to work with the manager for a full shift.

On 21<sup>st</sup> May 2010 the claimant requested some time off because she had friends coming to visit. She was told that she would have to ask her manager for the time off. She phoned her manager and explained that she had something to ask him. He told her he was too busy and would call her back. He did not call her back and the following day she attended work. When she arrived for work her manager was there. She phoned the respondent and did not get an answer. She then phoned the respondent's wife who told her that she understood the claimant would not be there. The claimant attended a meeting with the respondent and his wife to discuss this. The meeting turned into a heated discussion with the claimant on one side and the respondent, his wife and the manager on the other.

On 22<sup>nd</sup> May 2010 the claimant had a panic attack and lost consciousness. She attended the doctor and was absent from work on sick leave. While on sick leave the claimant received a text message from the respondent asking her to attend a staff meeting on 2<sup>nd</sup> June 2010. She attended the staff meeting and afterwards was asked to stay for another meeting with the respondent and his wife. The claimant said that she did not feel comfortable and refused to answer any questions without her representative being present at the meeting.

On 15<sup>th</sup> June 2010 the claimant tendered her resignation because she no longer felt safe in her workplace. The situation had affected her health and she felt she could not return to work.

During cross examination the claimant confirmed that she received a statement of her terms and conditions of employment and safety statement. She also had the respondent's contact details and would meet him quite regularly in the restaurant.

The claimant agreed that her manager was the second manager she worked for since the commencement of her employment with the respondent company. She explained that the

inappropriate behaviour had started from the beginning of her employment but it got worse when her first manager left because her manager then had control over the rosters and was not fair to her in distributing hours.

The claimant explained that when she was making her complaints about her manager she informed her colleagues that she was doing so, should they wish to also make complaints. The respondent began to investigate her complaints on 9<sup>th</sup> February at which point she informed him that her manager had touched her inappropriately. In March she provided the respondent with further details at his request. The claimant agreed that she could not provide the respondent with specific dates on which the inappropriate behaviour took place.

The claimant worked with her manager on a few occasions after she complained about him but she only agreed to this because the respondent told her he had no choice. She told the respondent she was not happy about this but would try to work with her manager. On 27<sup>th</sup> March the company doctor certified the claimant fit for work and she was offered counselling sessions. She refused these sessions because she felt that if she did not have to work with her manager she would not need the counselling sessions.

The claimant disputed that she had informed colleagues on 21<sup>st</sup> May that she intended to call in sick for work on 22<sup>nd</sup> May. The claimant agreed that she attended a meeting on 26<sup>th</sup> May to discuss what happened on 22<sup>nd</sup> May and at this meeting she was told that she was lying about what happened on 21<sup>st</sup> and 22<sup>nd</sup> May. The respondent's wife was raising her voice and she felt attacked. She reacted by throwing menus on the floor and storming to the back of the restaurant. She did not stay in work until 5pm that day. She went outside and had a cigarette while she waited on her boyfriend to collect her.

On 2<sup>nd</sup> June the claimant received a text message from the respondent about a staff meeting which she attended. After the staff meeting the claimant was asked to attend another meeting. She said that she did not feel comfortable and did not outline any issues because she did not have a witness or representative with her. She then received a letter dated 2<sup>nd</sup> June in which she was asked to outline areas of concern in writing. She did not respond to this letter.

The claimant tendered her resignation on 15<sup>th</sup> June 2010 and on 16<sup>th</sup> June 2010 the respondent wrote to her asking her to reconsider. She did not respond to this letter because she had left the employment and did not want any more contact with the respondent.

The Tribunal heard evidence from PLG, the claimant's boyfriend, who previously worked for the respondent as a part time chef. He told the Tribunal that he witnessed the claimant's manager inappropriately touch another member of staff.

During cross examination PLG confirmed that he did not witness anything directly between the claimant and her manager but she was affected by the situation at home. He did not approach anyone at the time because he was leaving it between the claimant and her boss.

## **Respondent's Case**

The Tribunal heard evidence from MK, the director of the respondent company. The manager started working for the company in 2009 when they opened their restaurant in Dundrum. The claimant was a waitress and became a supervisor. Prior to 9<sup>th</sup> February 2010 MK was not made aware of any issues with staff and the manager. He was also in attendance all the time and never

observed any issues. He was then shocked to receive 4 handwritten complaints from the claimant and three other employees. MK immediately initiated disciplinary procedures and began to investigate the issues raised.

While MK was investigating the claimant's complaints he endeavoured to keep her and the manager separate by assigning the manager to work hours in one of their other restaurants and he also took some unplanned leave. Prior to this the claimant and her manager would have worked approximately 3-5 days together. Before reaching a decision in the investigation the claimant and the manager overlapped a few times but MK was in attendance to oversee them working together. After the outcome of the investigation, if it was necessary for the claimant and the manager to work together, MK sought their approval beforehand.

On 11<sup>th</sup> February 2010 MK issued a memo to all staff assuring them that if they had any issues within the workplace they could contact him directly.

MK told the Tribunal that during the investigatory meetings the claimant did not ask MK to have a representative present. MK said that it was difficult to investigate the claimant's complaints because when they were singled out into separate incidents the claimant could not provide specific dates and times. The claimant could not provide clarity about when the incidents occurred. While MK was investigating the claimant's complaints she was sporadically absent due to sickness.

When MK informed the manager about the allegations he denied the ones of sexual nature

On 13<sup>th</sup> March MK had the result of his investigation ready to give to the claimant. MK and AK carried out a return to work interview with the claimant and asked her how she was doing and would she go to see the company doctor. The claimant went to see the doctor on 21<sup>st</sup> March and on 27<sup>th</sup> March they carried out a return to work. At the return to work interview MK and AK offered the claimant counselling sessions and follow up doctor's appointment.

On 15<sup>th</sup> April 2010 MK and his wife held another meeting with the claimant and scheduled a doctor's appointment for 20<sup>th</sup> May 2010. On 19<sup>th</sup> May 2010 the claimant said that she did not want to attend the doctor's appointment and it was cancelled.

MK scheduled a staff meeting for 8am on 26<sup>th</sup> May 2010. The claimant did not want to attend so MK arranged two separate meetings, one at 8am and one at 10am. After the staff meeting MK asked the claimant about what happened on 22<sup>nd</sup> May between her and her manager. He asked the claimant if she had told a fellow employee that she intended to take a day off work sick and she replied in the negative. MK decided to talk to the claimant and her manager together to establish what happened. The claimant's manager put his version of events to the respondent and the claimant threw some menus on the floor and stormed off.

At the return to work meeting which took place between the respondents and the claimant, the claimant did not want to discuss things. The claimant said she was going to get herself a drink of water and did not return.

On 8<sup>th</sup> June 2010 MK wrote to the claimant asking her to contact him in respect of her schedule. The claimant responded to MK on 11<sup>th</sup> June stating her surprise at receiving his letter of 8<sup>th</sup> June due to the fact that she had sent him a sick note covering her absence and also had communicated directly with MK via text message.

On 14<sup>th</sup> June 2010 MK wrote to the claimant again reminding her of the company sickness policy. He also asked her to clarify the issues of concern that she was unwilling to discuss at the return to work meeting on 2<sup>nd</sup> June. He asked her to submit her areas of concern to him in writing in order to deal with them through the company's formal grievance process. The claimant did not raise any further issues with MK. She sent him a letter of resignation on 15<sup>th</sup> June 2010 to which MK replied offering the claimant the opportunity to reconsider her decision to resign.

During cross examination the respondent, MK, told the Tribunal that they tried to do the best they could for the claimant during the investigatory process including asking the claimant's manager to take some annual leave to allow them time to investigate the allegations made by the claimant. MK did not suspend the claimant's manager.

MK explained that there were 57 allegations made by the claimant, some that could be proven and some that could not. The outcome of the investigation was based on this.

MK agreed that he did not respond to correspondence from the claimant's trade union representative, dated 16<sup>th</sup> March, in which they asked to be allowed to take part in the process because at this stage the outcome of the investigatory process had been reached but the situation changed over the weekend resulting in the claimant being absent on sick leave and the respondent was unable to provide her with the outcome. MK told the Tribunal that the process did not require to have a union representative involved.

MK insisted that the claimant was only rostered to work with her manager if she agreed in advance and she was not compelled to work with him.

MK confirmed during cross examination that the written outcome of the investigatory process was sent to the claimant in April but he did not go through the items in detail with her. The letter informed the claimant of her right to appeal the decision to MK, the respondent. When asked about the inappropriateness of this the respondent told the Tribunal that if the claimant had appealed the decision they would have invoked the services of an external HR company.

MK confirmed that the meeting scheduled for 26<sup>th</sup> May 2010 was a staff meeting and could not explain how the claimant found herself to be in a return to work meeting when the staff meeting was concluded. MK agreed that the claimant's representative had written to him asking permission to represent his member.

The Tribunal heard evidence from AK, director of the respondent company. She became aware of the claimant's complaints in February 2010. She was shocked because there had been no complaints prior to this. AK took the minutes at the meetings with the claimant and the respondent.

On 22<sup>nd</sup> May 2010 AK received a phone call from the claimant who was upset and annoyed because when she arrived to work she was required to work with the manager about whom she had complained. AK told the claimant that she understood if she needed to leave. AK phoned the manager later that day to find out why he was in work at the same time as the claimant. He informed her that he had received a call from the claimant the day before who informed him that she was sick and needed cover for the following day.

On 26<sup>th</sup> May 2010 a management meeting was arranged for 8am. The claimant did not want to attend this meeting. A second meeting was arranged for 10am, which the claimant attended. The

claimant was given the minutes of the earlier meeting. The claimant was then asked about the circumstances surrounding the 22<sup>nd</sup> May that resulted in her and her manager being in work together. The claimant was asked to attend a meeting with her manager present to establish what happened. This meeting did not progress very far because the claimant got upset, threw some menus on the floor and stormed out of the meeting.

On 2<sup>nd</sup> June 2010 the claimant was due to return to work after a period of absence. A front of house meeting had been scheduled for that day but this was cancelled because AK and MK wanted to focus on carrying out a return to work meeting with the claimant in order to introduce her back to work in a safe way.

During cross examination AK confirmed that the claimant was not informed that the front of house meeting scheduled for 8am on 2<sup>nd</sup> June 2010 was cancelled. AK could not remember if the claimant was made aware that her manager had been given a first and final warning as a result of the investigation process into the claimant's allegations.

The Tribunal heard evidence from GM, the restaurant manager. GM received a phone call from the claimant on 21<sup>st</sup> May 2010 informing him that she was sick and would not be attending work the following day. He told the claimant to call him back in half an hour. The claimant did not call him back. He decided to go to work the following day and when the claimant arrived she asked him if he was working. He told her that he was and she left.

GM attended a management meeting at 8am on 26<sup>th</sup> May and after lunch he was asked to attend a meeting with the claimant in attendance. At the meeting MK asked GM to explain what happened on 22<sup>nd</sup> May. He tried to explain but the claimant called him a name and stormed off.

The Tribunal heard evidence from RK, a bar man and waiter. On 21<sup>st</sup> May 2010 he was cashing up and heard the claimant say to a colleague that she would be sick the following day and not attending work.

## **Determination**

The claimant made complaints and serious allegations against her manager around February 2010. The respondent addressed the issues quickly and formed a decision by mid March. The issuing of this decision was delayed due to the absence of the claimant through illness. It was subsequently communicated to the claimant in April that some her allegations were substantiated. However, in contravention of company policy no detail of the substance of the investigation, the content or the reasons for the outcome were communicated to the claimant.

The claimant was given the opportunity to appeal the decision to the decision maker. However, the Tribunal concludes there was no substance to appeal and furthermore that the appeal was to MK, who made the decision and so could not be considered a valid appeal option.

While MK gave evidence that he would have sent an appeal to an external third party this was not communicated to the claimant and the claimant had no way of knowing this. It's acknowledged by the Tribunal that the respondent made stringent efforts to keep the two parties apart following his decision. However, it was never communicated to the claimant that she would have complete certainty that the process would continue or whether this arrangement could be sustained by the business.

In the circumstances the Tribunal feels that the investigation process was flawed. The Tribunal has no evidence of the content of the investigation and following this the Tribunal does not believe the claimant had a “safe environment” to work in as suggested.

An issue arose in late May for which there is conflicting evidence. A further meeting was held on 26<sup>th</sup> May where the employer sought to resolve issues with the claimant and her manager which broke up in disarray. This does not alter the Tribunal’s decision on the substantive issue. Subsequent to this meeting correspondence issued from the claimant’s union seeking a meeting which was ignored and instead the employer sought to engage directly with the claimant. It is noted by the Tribunal that this seemed to be a common occurrence during the history of this case.

The Tribunal accepts that the claimant thought she had no choice but to leave her employment. The Tribunal considers the investigation process ineffective and the claimant had no choice but to leave her employment. The Tribunal awards the claimant the sum of €20,000 under the Unfair Dismissals Acts 1977 to 2007.

The claim under the Minimum Notice and Terms of Employment Acts 1973 to 2005 was not addressed by either party and the Tribunal dismiss the claim under this Act.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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