

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE - claimant

UD726/2011
MN781/2011

against

EMPLOYER 1- **respondent**
EMPLOYER 2 - **respondent**
EMPLOYER 3 - **respondent**
EMPLOYER 4- **respondent**
EMPLOYER 5- **respondent**
EMPLOYER 6 - **respondent**
EMPLOYER 7- **respondent**
EMPLOYER 8- **respondent**

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: Mr P. Hurley
Members: Mr J. Browne
Ms S. Kelly

heard these claims at Portlaoise on 23 July, 31 October, 1 November and 18 December 2012

Representation:

Claimant: Ms Joan Walsh BL, instructed by Ms Fidelma Barry,
Behan Barry, Solicitors, Claregate Street, Kildare

Respondent: Mr David O'Riordan, Sherwin O'Riordan, Solicitors,
74 Pembroke Road, Dublin 4

The determination of the Tribunal was as follows:-

Dismissal being in dispute it fell to the claimant to prove the fact of dismissal

The claimant, who worked as a chef, began his employment in October 2003. His duties included cooking for lunches and tea time. He had to ensure the kitchen area was kept clean at all times. His hours of work were 8-00am to 2-00pm and 3-00pm to 6-00pm two or three days per week. The head chef (HC) did not work on the same days as the claimant. It was the claimant's position that the employment was uneventful until a new director of nursing (DN) was appointed in February 2010.

DN was appointed following receipt of a report from the Health Information and Quality Authority (HIQA) which highlighted the need for improvement in the operation of the respondent. It is common case that some of this called for improvement involved the operation of the kitchen. The claimant's position was that DN's manner was a problem when it came to dealing with staff, in particular in the kitchen.

On 10 May 2010 the claimant suffered a panic attack when at work. The claimant's position was that this was caused by the way he was being bullied by DN. The respondent's position was that this was due to the difficult domestic circumstance in which he found himself. The claimant's position was that he did not make complaints at the monthly meetings because he felt that the bullying he was receiving from DN would get worse and he was afraid of her.

In August 2010 the claimant received complaints from DN about the cleanliness of the kitchen and waste bags not having been disposed of. The claimant's position was that this was unfair as he had not been working the previous day when the kitchen was left in an inappropriate state and the waste bags had not emanated from the kitchen. DN wrote to the claimant to confirm her complaints on 17 August 2010.

During the early autumn of 2010 a former employee made a complaint to HIQA regarding certain aspects of the respondent's operations. Part of this involved a complaint of bullying against DN. As part of the investigation into this part of the complaint sixteen staff members at work on 28 October 2010, including HC, were interviewed. As a result of this investigation it was concluded that there was no substance to the bullying allegation.

During the week of the claimant's appraisal meeting with DN in mid-October 2010 DN became aware that the claimant was on medication which she was concerned might impact on his ability to operate machinery in the kitchen. Whilst there is a dispute as to whether the August incidents were raised by DN during the appraisal it is common case that the issue of rostering arose. Among the changes introduced by DN had been a reduction of one hour per day in the hours of all the chefs. As a result of a chef leaving the employment DN was anxious to cover for the days this person had worked. The claimant's position was that DN was proposing that HC work Monday to Thursday and the claimant work Friday to Sunday. This was confirmed in a letter to the claimant from DN on 11 November 2010. This was unacceptable to the claimant who was unavailable for work on alternate weekends because of his domestic circumstances, something which DN was well aware of.

On 16 November 2010, his first day off following four days at work, HC complained to DN about the state of the kitchen. DN contacted the claimant by text, the claimant phoned DN and arrived at the kitchen at around 09-15am. Present in the kitchen were DN, HC and a catering assistant (CA) who regularly worked with the claimant. An altercation then occurred between the claimant and DN. It is common case that during the altercation DN's legs began to shake and that the claimant accused DN of bullying him and indicated he would put a complaint in writing about this.

DN was inspecting the areas that were not up to standard and when the claimant approached, DN backed into the corner with the claimant standing in front of her. The claimant's position was that he had worked 45 minutes beyond his time the previous evening in order to clean the kitchen. He told her that he had left 45 minutes late the previous day and the kitchen was

spotless. He had spoken to DN in a raised voice and DN had regained her composure when the claimant moved away. His position was that his behaviour had been appropriate, he was no longer afraid of DN because the situation had become so unbearable.

After the altercation agreement was reached for kitchen staff, including the claimant, to clean the kitchen later that evening. The claimant went home and later received a phone call from one of the partners (P1) in the company in which he was told that he was suspended with pay following further investigation into the altercation in the kitchen that morning.

The claimant lodged a letter of complaint against DN, alleging bullying and harassment, with P1 on 16 November 2010. A statement was received by the respondent from DN and on 18 November 2010 2 other partners (P2 and P3) in the respondent wrote to the claimant acknowledging his claim of bullying and harassment against DN and asked him to prepare a statement setting out the basis for his complaint. The claimant supplied such statement to the respondent in a document dated 4 December 2010. In this document the claimant stated that the altercation of 16 November was an example of bullying by DN.

P2 and P3 also wrote to the claimant on 18 November 2010 about the incident of 16 November 2010 and set out a complaint of gross misconduct against him arising out of the incident. The claimant's conduct was alleged to have been extremely aggressive and intimidating. The claimant was advised that there would be a disciplinary hearing at which he could bring representation and that dismissal was a possible penalty in light of the gravity of the accusation.

The disciplinary meeting was held on 10 December 2010. The claimant had submitted his version of the events of 16 November in a letter to P2 and P3 on 29 November 2010. He had sight of DN's statement before submitting his response. The statements of HC and CA were shown to the claimant shortly before the meeting. He was given the opportunity to speak to both HC and CA about their statements.

The meeting was attended by P1, P2 & P3, DN, HC, CA and the claimant who opted not to have representation or be accompanied. The claimant rejected the contents of all 3 statements and denied that his actions towards DN had been aggressive and intimidatory. On 13 December 2010 P2 and P3 wrote to the claimant to advise that, notwithstanding their finding that he had behaved in an aggressive and intimidatory manner towards DN such as to constitute gross misconduct, there would be a sanction of a final written warning, of twelve months duration, conditional on the claimant making an apology to DN, HC and CA for his behaviour on 16 November, improving his attitude towards, and being able to accept criticism from, DN.

In a letter of 15 December 2010 the claimant declined the conditions set out for his return to work in particular reminding P2 and P3 that he had made a complaint of bullying and harassment against DN which had not been investigated. He also declined the opportunity to appeal against the disciplinary finding against him. P2 wrote to the claimant on 21 December 2010 accepting his decision and stating that there would be an inquiry into his complaint against DN. In fact the respondent decided that, in light of the very recent finding that there was no substance to the earlier allegation of bullying against DN, there was no imperative to investigate the claimant's complaint.

Determination

There can be no doubt but that an allegation of bullying and harassment against such a senior member of staff as DN represents a potentially very serious matter for the management of any organisation to have to deal with. The Tribunal is satisfied that the claimant played no part in the making of the allegations which were the subject of the interviews on 28 October 2010. The claimant made allegations against DN as a result of the events of 16 November 2010. Apart from the letter from P2 on 21 December 2010 suggesting that there would be an inquiry into his complaint in January 2011 the respondent took no action whatever to investigate the complaint made by the claimant. The respondent's position was that the October investigation was sufficient to exonerate DN and pending the outcome of the disciplinary hearing against the claimant there was no point in investigating the claimant's bullying complaint.

The Tribunal is satisfied that, in regard to the events in the kitchen on 16 November 2010, the actions of the claimant were seriously remiss. It was the respondent's decision not to dismiss him, rather to set conditions for his continuing in the employment. The Tribunal is satisfied that, taken with his earlier concerns about being expected to work every weekend, the conditions being imposed on the claimant were such as to pre-judge the outcome of any inquiry which might be held into the complaint made by the claimant and therefore it was reasonable for the claimant to conclude that the bonds of mutual trust and confidence in the contractual relationship between them had been shattered in such a manner as to justify a claim of constructive dismissal. Taking all factors into consideration the Tribunal measures the award under the Unfair Dismissals Acts, 1977 to 2007 at €5,000-00.

This being a case of constructive dismissal a claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 does not arise.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)