

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE - claimant

UD952/11
MN1087/11

WT394/11

Against

EMPLOYER - respondent

Under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P. Hurley

Members: Ms M. Sweeney
Ms H. Henry

heard this claim at Limerick on 18th February 2013 and 17th April 2013

Representation:

Claimant: Mr. Thomas Wallace-O'Donnell BL instructed by Mark Murphy & Company,
Solicitors, 99 O'Connell Street, Limerick

Respondent: Mr. Emmet O'Brien BL instructed by Mr David O'Brien, McMahon
O'Brien, Solicitors, Mount Kennett House, Henry Street, Limerick

The determination of the Tribunal was as follows:-

The respondent contended that the claimant resigned, he denied that fact.

Claimant's case:

The claimant gave evidence that he came to Ireland in 2006 to seek a better life for himself. He didn't have to seek work as his friend was already working for the respondent and had organised a job for him. He began as a kitchen porter and worked anywhere between 40 – 60 hours per week.

His typical shift was eight hours without a break. If you took a break it meant working later so he

didn't. If he was rostered until midnight he often had to remain until 1 am or 2am and didn't get paid any overtime. In 2010 breaks and rosters were introduced along with Sunday Premium payment. He also received a contract at that time. The contract was in English only so he didn't understand all of it; everyone signed it so he did as well. The claimant never felt that there were any issues with his employment, he covered days off, covered holidays and there was never any serious conflict.

On Christmas Eve 2010 he was working with a colleague who was leaving his employment on that day. He went to work for midday and was told there was no hot water. It was a very busy day and they had to clean all day with cold water. It was so cold at one point his friend wanted to go to the doctor. His friend was due to leave at 6pm and he asked him to stay as a favour, to help clean the floor etc. They left at 7pm because they didn't have the strength to do any more, a few dishes were left. The next day (being Christmas Day) was a day off but the claimant heard that the boss didn't like the way the dishes were left and that he would be sacked. On the 26th he checked if he was on the roster with SR, he was, and nothing was mentioned again. At the end of February he was told by SR that this was his last roster, because he hadn't cleaned a table on the previous day. The claimant didn't know if anything was investigated, three people were working that day but SR blamed him.

Under cross examination the claimant told the Tribunal that the chef SR was in charge. He denied ever having an unclean uniform, he had two so they were rotated, he also denied wearing dirty boots. He didn't agree that his work ethic had started to slip, in the four and a half years his work remained the same. He also denied ever being late for work. Christmas Eve was the only incident where he remembered a problem but he never received a warning, either verbal or written. He didn't go to work because he was not on the roster. Asked about getting a final written warning from MR the claimant said no, he had no conversation with MR but SR told him he hadn't cleaned up properly.

Following the termination of the claimant's employment he was in receipt of social welfare benefits to November 2011. He then returned home to Poland. He secured work there from mid-June to the end October 2012. His family supported him during the winter months and he lived on his savings. He secured further employment in early April 2013 and is still working in Poland.

The claimant's colleague T gave evidence of working alongside the claimant on Christmas Eve. It was a very busy day and a lot of work had to be done. There was no hot water in the restaurant and while the dish washers were working the heavy kitchen utensils had to be washed in cold water and his hands were very sore from using the cold water. He decided to leave the dishes and went home. Both he and the claimant had two sets of uniforms and kept them in good order. T was let go from his employment that evening.

Respondent's Case:

SR is Head Chef and working in that role for twenty two years. Six commis chefs also work in the restaurant and four to five porters. He does the rosters for the staff every Sunday afternoon and gives a copy to the accounts section. He accommodates staff as much as possible when drawing up the rosters. SR is answerable to management and the owners of the restaurant. MR is General Manager and M is one of the owners.

SR was approached by the claimant seeking employment and following an interview the claimant was employed as a kitchen porter. The claimant had sufficient proficiency in English. The claimant's role was that of Kitchen Porter which entailed assisting the chefs and maintaining cleanliness throughout the kitchen. The claimant washed dishes and cleaned areas where staff had worked in the kitchen. The respondent implements the HACCP Plan which is a systematic preventative approach to food safety as is required in law.

On 12th September 2010 SR sent a note to M stating that he had to give the claimant a warning about his personal hygiene as he had turned up for work in a dirty uniform.

On 3rd October 2010 SR had a concern about the claimant's punctuality and gave him a warning. He sent a note to M in relation to his concern. The claimant's response was 'ok boss it won't happen again'.

Again on 9th October 2010 SR gave the claimant another warning about his personal hygiene and again sent a note to M.

On SR's arrival at work on 27th December 2010, A, the Duty Manager, told him that the kitchen had been left in a filthy condition on Christmas Eve and that floor staff had to finish cleaning it after the claimant and T had left work that day. The kitchen had been left in an unacceptable condition. The claimant was subsequently issued with a warning.

On Christmas Eve there had been a broken pipe in the restaurant. There was no hot water and water had to be boiled for washing heavy utensils. No complaints were received from staff. SR had left work at about 3 pm that day. The claimant had been rostered to 7 but had worked 12 to 6.

The claimant's standards were dropping over months and he told other work colleagues that he did not care about his work.

On 4th March 2011 SR found the kitchen to be in a dirty state again and spoke to the claimant. The claimant had worked the evening before. He gave the claimant two weeks notice. The claimant had been afforded every opportunity to improve his performance. He was not pulling his weight. The claimant's response was 'ok boss, when will I finish' and he then left. The claimant was due at work on 6th March.

MR is General Manager and is responsible for the kitchen and saw the claimant daily.

The claimant was issued with a contract of employment in August 2008 and MR explained the rules and regulations in the contract. The claimant was given a copy and was asked to speak to the General Manager if there was anything he did not understand in it. MR contended that the claimant's proficiency in English was good.

MR had casual conversations with SR regularly about staff. A lot of colleagues were unhappy working with the claimant.

MR had delivered a final written warning to the claimant on 14th January 2011. Issues raised were his personal hygiene, his general poor attitude to work, going home and leaving some of his work to be done by others and his treatment of his work colleagues and supervisors.

MR told SR to observe the claimant's performance. MR did not interpret the claimant to be dismissed on 4th March 2011. MR believed that the claimant walked off the job and had resigned. SR did not have authority to dismiss staff. The claimant did not turn up for work on Sunday 6 March 2011.

MR wanted to resolve matters and hoped the claimant would come back into work. He did not contact the claimant.

No investigation or disciplinary hearing was carried out by the respondent in accordance with the claimant's contract of employment.

The claimant has been replaced in his role.

Determination:

The Tribunal carefully considered the evidence adduced during the course of this two day hearing. Clearly there is a conflict of evidence between the parties.

The respondent was clearly in breach of its own procedures. No proper investigation was undertaken by the company. In addition, the respondent did not carry out a disciplinary hearing. The claimant was not afforded the right of appeal following the termination of his employment.

The Tribunal is satisfied that the claimant was unfairly dismissed and awards him €20,000.00 under the Unfair Dismissals Acts, 1977 to 2007. The Tribunal also awards the claimant €768.36 being the equivalent of two weeks pay under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

As no evidence was adduced in relation to holidays the claim under the Organisation of Working Time Act 1997 is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)