

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE

UD2432/2010
MN2369/2010

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: Mr N. Russell
Members: Mr J. Browne
 Mr F. Dorgan

heard this claim at Waterford on 9th January 2013 and 26th March 2013

Representation:

Claimant:

Respondent:

Dismissal is not in dispute in this case and therefore it is up to the respondent to prove the fairness of the dismissal.

Respondent's Case:

Mr G a co-director gave evidence that the claimant was employed initially as a part time waiter in February 2009. He was later made full time. The claimant was in a position of trust, front of house and his responsibilities included managing the floor, stock, checking of tills, and cleanliness of restaurant and toilets. PG said that there were issues with the claimant's performance and he was spoken to on a number of occasions. He was shown the way things were to be done and what was required by Mr G and Mr M.

The claimant was given his first oral warning on 11th Sept 2009. He said "ok" to the warning and that he "would have to become better". The owners said they would help him and gave him a list of duties. For a few months things were better. By January things had gone downhill again. He was spoken to again on February 14th, as there was no change in his behaviour. On 23rd February he again said "ok, I'll try and be better". Things improved again for a few months but in July it slipped. Mr G would see that the floor wasn't cleaned, there were napkins left around and the toilets were not cleaned.

By the end of July Mr G decided to focus more on the claimant. There were CCTV cameras installed and everybody knew they were there. On checking the camera Mr G noted that the

claimant left the premises at 10pm but had signed the checking sheet in the toilet at 10.30pm. Asked why this had happened the claimant said that he took his break between 10.30pm and 11pm. A written warning was issued to the claimant on 27th July and he was once again provided with a list of his duties. He signed the warning and didn't dispute anything. There was a little improvement in his performance. On 28th August a regular customer called AM and said they would like a booking but would be late arriving. The kitchen remained open for them and when they didn't show up Mr M rang them to find out what had happened. They said that they had arrived but that the waiter told them that the kitchen was closed and food was no longer being served. On checking CCTV it was shown that people did arrive. On further examination of the CCTV Mr G stated that when the roster was checked over a three week period the claimant had worked 12 days. Of those 12 days there was evidence of 10 mistakes, the claimant was leaving before his roster ended and recording toilet checking when he was no longer on the premises.

The claimant was invited to a meeting on 2nd September. He was advised that he could bring someone with him. He showed up with his two year old son. All the issues were put to the claimant.

When asked about telling people the kitchen was closed he firstly said nobody showed up and when shown the evidence, he denied that it was the people who had made the booking, he claimed it was someone else. Asked about the roster times he said that he took his break at the end of each shift. Regarding a customer complaint he denied knowing about it, said it wasn't him, it was someone else.

Mr G and Mr M discussed his responses, they decided there were too many problems, the claimant was front of house and they couldn't trust him. They made a decision to dismiss. The claimant did not appeal the decision.

Mr M the co-director gave evidence that the claimant was a "bit cocky with staff and customers". The restaurant wanted a friendly relaxed atmosphere and he sometimes rushed people to leave. He recalled an incident where a customer asked for another bottle of wine before dessert but the claimant refused saying that the restaurant would soon be closing. At a meeting in September 2009 he spoke with the claimant. He told him he needed to improve his cleaning and serving. He also told him of two complaints from customers and the way the claimant talked to the other staff. It was a friendly meeting to clear the air. While the claimant said that he would try to do better he seemed to consider that nothing was ever his fault.

Mr M said that the claimant got a written warning because he didn't have any answers and didn't show any improvement. There was no discussion as to what may happen after the warning. The final incident was when a friend called and asked for a table, it was late but Mr M kept the kitchen open for them. The claimant turned them away, telling them that the kitchen was closed.

The claimant was called to a meeting and advised to bring someone with him. Mr M knew the answer to the question he asked about his friend being turned away but the claimant lied just like he lied about his rosters and other things. There was no longer any trust. Mr M stated that dismissal was not mentioned during the meeting but that a notice of dismissal issued on 3rd December 2010.

Claimant's case

The claimant was called to a meeting on 3rd December 2010. He thought that this meeting was to

discuss work related issues and did not know that it was to be a disciplinary meeting. He did not bring a representative to the meeting. In the course of the meeting he was accused of turning away customers who had pre-arranged with one of the owners to be facilitated for a later than normal booking. The claimant denied this allegation.

The claimant contended that he was not afforded fair procedures or natural justice. The letter he received on 3rd December 2010 placed him on a final written warning and at the same time dismissed him.

Determination

In this case the Tribunal was presented with evidence which tended to be somewhat confused on both sides. There were considerable factual conflicts between the parties and, indeed, there appeared to be a lack of consistency between the evidence of the two witnesses for the Respondent.

The Tribunal was not satisfied that the Claimant knew or that it was made clear to him at any time that his position was in jeopardy. Further, the Tribunal is of the opinion that the Respondent Employer had no real appreciation, nor understanding of its own disciplinary procedures. The Claimant did not enjoy due process.

The format of the Notice of Dismissal itself is clear evidence that the Respondent Employer was somewhat at sea in the process. Indeed, Mr M. who ultimately made the decision to dismiss informed the Tribunal that the meeting of the 11th of September 2009 where a verbal warning was given was a meeting where no sanction had been applied and that he didn't see the meetings of the 14th of February and 23rd of February, which saw a written warning issued, as having any disciplinary purpose.

In evidence Mr. M accepted that the Claimant was never told at any stage what might happen if his performance did not improve.

The Tribunal was informed that it was not envisaged that the Claimant would be dismissed at the meeting of the 1st September 2010 which was presented as a "Preliminary Talk" but that his perceived lie as to what happened with the customers on the 28th August was the occurrence that triggered his dismissal.

The Notice of Dismissal of the 3rd September 2010 itself is completely unclear. It characterises itself as both a Final Written Warning and a Dismissal. The Tribunal is completely satisfied on the evidence that, while a number of alleged infringements are listed, the sole reason for the Dismissal was the incident involving two customers on the 28th August. It is not accepted that the other factors listed were relevant to the decision that was made.

The Tribunal is of the opinion that the Claimant was not afforded an opportunity to Appeal. The Respondent Employer sought to fall back on the Handbook in evidence, yet could give no indication to the Tribunal as to how an appeal would work. Indeed, one of the witnesses seemed to think that the appeal was to a Solicitor.

It was clear from the evidence that the decision maker saw the process as consisting of friendly chats designed to help the Claimant improve his performance.

It is not necessary for the Tribunal to go further having found the Disciplinary Procedure to be

defective and to address the reasonableness of the decision to dismiss. Were the Tribunal required to do so it would have difficulty in finding that the Respondent Employer had acted reasonably given the confusion surrounding the incident of the 28th August 2010. The Tribunal was not satisfied that it had been provided with a completely accurate version of events by either party and, in those circumstances, the onus on the Respondent Employer would have been a heavy one. Specifically, the Tribunal was inclined to the view that, once Mr M left on the 28th of August before the two customers arrived and without leaving specific instructions, it would have been reasonable for the Claimant to conclude that it was too late for the customers who subsequently arrived to be accommodated.

The Tribunal was led to believe that Mr P and support staff were waiting to serve these customers on their arrival yet the Notice of Dismissal stated that it was “possible that either Arnaud or Patrice would have accommodated them”. There appears to be an inherent contradiction between the evidence given and this statement in the Notice of Dismissal.

However, as the Tribunal is holding against the Respondent Employer on procedural ground it is not necessary to undertake a forensic examination of the evidence to ascertain if the Respondent Employer’s decision to dismiss was reasonable.

The Tribunal awards the Claimant €10,000 in respect of his claim under the Unfair Dismissals Acts, 1977 to 2007 and €447.32 in respect of his claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)