

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

Employee

UD1469/2003
MN2879/2003

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr. M. Forde
Mr. K. O'Connor

heard these claims at Tralee on 4 March, 16&17 June, 13-15 September 2005 and
17-19 January 2006

Representation:

Claimant: Mr. Donal Tobin, SIPTU, Park Road,
Killarney, Co. Kerry

Respondent: Mr. Henry Downing B.L. instructed by Mr. Seamus Given,
Arthur Cox, Earlsfort Centre, Earlsfort Terrace, Dublin 2

The determination of the Tribunal was as follows:

The respondent employed the claimant from 1997 as a night porter; the employment was uneventful until the incidents, involving three different people, in 2003 that led to his suspension and ultimate dismissal. The first incident occurred late at night or in the early hours of the morning on 20 May 2003 and involved a guest (GP) who was also a performer in the respondent's hotel. GP became frustrated at the difficulty he had in obtaining service in the resident's bar. The respondent's position was that when GP was served he felt that he was subjected to excessive scrutiny as to his being a guest in the hotel. Later on that morning when another individual in his group commenced a singsong with a guitar in the lobby, the claimant aggressively ordered them to stop, as residents were asleep overhead, and picked on GP accusing him of being a "troublemaker", an "upstart" and having "hassled his colleagues in the bar". GP felt aggrieved because he was not the person who was playing the music. Whilst there was a heated exchange and he left to stay in another hotel that night GP decided

against making a complaint to the general manager (GM) of the respondent. However, the claimant and his colleague in the bar (NPS) made a written complaint to GM about the conduct of GP. At a subsequent event in the hotel in early September 2003 when GP met and spoke to the claimant in a friendly manner, he was subjected to an unprovoked barrage of abuse and foul language from the claimant. As a result GP reported both this and the May incident to GM and at GM's request he submitted a written complaint on 1 October 2003.

The claimant's position in regard to the May 2003 incident was that it was a busy night in the bar where NPS was on duty. GP was annoyed at the length of time it took to get served. GP's room had been block-booked in a company name and NPS was trying to confirm that he was a resident. GP became abusive in the bar and later that night he went to the writing room in the lobby with a group of his friends, one of whom proceeded to play a guitar. The claimant asked the group in a polite manner to stop as guests were sleeping overhead. GP remonstrated with him and the group left the hotel. The claimant had received directions from management regarding the noise level at night and no music was allowed in the lobby. NPS and the claimant made a written complaint to GM about GP's behaviour. Whilst the Industrial Relations manager (IR) told NPS and the claimant that an apology would be forthcoming from the company GP had been working for on the night in question; however, no such apology materialised.

The claimant's position in regard to the September 2003 incident was that he went to the conference centre where a performance involving GP was finishing. When GP saw the claimant he made a derogatory comment. The claimant replied that, "I'm not going through what I went through last time" and walked away. The confrontation lasted about one or two minutes. The claimant did not lodge a complaint to anyone and denied that he was abusive on the night.

The second incident concerned a letter of complaint the respondent received from a doctor (DR) about the attitude of two night porters on the morning of 2 October 2003, one of whom was the claimant. She complained about her secretary receiving a belligerent call from the claimant demanding an explanation why a guest at the hotel was not receiving a house call and why the patient had to attend the clinic. She explained that the decision was a clinical one, confidential to the patient, who had been perfectly pleasant and did not complain.

The claimant's position to this event was that on the morning of 2 October 2003, he telephoned DR because an elderly guest was ill and the doctor would not come to the hotel. He spoke to the DR's secretary and told her that it was ridiculous that DR would not make a house call. The guest's wife was annoyed at the service and the elderly guest was still in the lobby when the claimant finished duty over an hour later. His colleague on duty that night (NPM) wrote a report of the incident in the night porter's logbook. Nobody from management approached the couple or the claimant after that night. His main concern was to get the guest to the surgery. He denied being belligerent in his call to DR's secretary. He telephoned DR to enquire why the doctor was not coming. There was no reason at all for DR to send a letter of complaint. The claimant had no recollection of why his entry for that morning in the night porter's logbook was whited out. He assumed it was because NPM had already made an entry.

The third incident occurred on the night of 16 July 2003, before the DR incident, but did not become known to senior management of the respondent until a conversation between the claimant, Garda T and NPS in the hotel lobby at around 2.30am on 1 October 2003. The respondent's position is that the claimant told NPS and Garda T about how he had asked a guest with a Mercedes (MG), who had parked at the steps of the hotel, to move his car. MG threw the keys to the claimant and told him to move it himself. When the claimant relayed this incident to his colleague (NPM) who was on duty in the residents' bar, NPM said, "I'll take care of him"/"I'll fix him". The claimant told them that NPM trebled MG's drinks on three occasions. The claimant then phoned the gardai and MG was subsequently arrested for drink driving. NPO had not mentioned drugs in the conversation in the lobby.

NPS reported this conversation to management and ultimately it was brought to the attention of GM who decided to investigate it. GM established from the CCTV that a conversation between the three individuals did take place in the lobby on the morning in question. On 3 October 2003, GM and the Divisional Accountant (DA) met with the station sergeant and relayed the information to him. He identified Garda T from the CCTV as the garda who was present on the occasion in question. The sergeant got a frank and detailed account of the conversation from Garda T and subsequently got his account in writing. From garda records the sergeant established that Garda M was the arresting officer and established the particulars of the arrest from him. On the Garda Superintendent's instructions, a full garda investigation file was prepared and it, along with a covering report, were submitted to the Director of Public Prosecutions (DPP). A decision was made not to prosecute MG. The only entry in the Night Porter's Book for 16/17 July is a short reference to security and a statement saying, "Nothing else to report". There was no reference in it to any incident. Nor was there a vague reference to it, as is the practice, in the Duty Pass-Over Book.

Garda T confirmed the contents of the conversation in the lobby in his evidence to the Tribunal. Garda F (the station orderly on duty on the night of 16 July 2003) received the first phone call from the claimant regarding MG who was drinking and intending to drive. She radioed the patrol car with this information. She emphasised to the Tribunal that there was no mention of drugs in that phone call, as if there had been, she would have involved plain-clothes officers and she would not have used the radio.

Garda M confirmed receiving the call from Garda F at around 2.30am that MG was drunk and was about to drive from the hotel. As it was race night and busy, the patrol car was unable to respond immediately. When Garda M was at the station at 4.00am, he received a phone call from the claimant again informing him that MG was drunk and about to leave and this time the claimant furnished the registration number of MG's car. In this call, the claimant also informed him that MG was passing "e-tabs" in the bar. Garda M subsequently arrested MG outside the hotel for drink driving. MG was courteous and co-operative. In the course of a routine search of MG in the garda station, Garda M found no controlled substances in his possession.

The sergeant reverted to GM and informed him that Garda T's account confirmed the details of the conversation as reported to him by NPS. GM was very upset about the events and extremely worried about the potential implications for the hotel's license and reputation. NPS, who was reluctant to get involved in the respondent's investigation, confirmed the details of the conversation in the lobby to GM and DA.

He would not provide them with a written statement but would give evidence at a hearing. Unknown to management the rumour that NPO and the claimant had got a fellow from Limerick “bagged” had been circulating around the hotel since July. NPO himself had also told this to NPS in July.

Although concerned about how MG would respond to the alleged events that occurred in July, GM and DA met him on 6 November 2003. MG’s recounting of the events of 16/17 July 2003 confirmed the details already known to them (with slight variation on the times and the manner in which he gave his keys to NPO). He further told them he had a few drinks in the bar and paid for them by cash. Knowing that he was unfit to drive MG asked the claimant for a room but NPO had told him that there were no rooms available either in the respondent’s hotel or in the two other hotels he had telephoned at MG’s request. A friend offered him a spare bed in his room but as he was walking towards it NPO insisted that he move his car from the front of the hotel. When he moved his car he was arrested. MG submitted a written statement to GM for the investigation. MG confirmed these facts to the Tribunal and according to his evidence he was served twice and another guest (AG) had also bought him a drink. For one of the rounds MG handed the claimant a €50.00 note and told him keep the change. The respondent’s evidence to the Tribunal was that after normal closing hours cash is not accepted in the resident’s bar and drinks are charged to guests’ rooms. No cash was returned to the respondent for that night/morning and there were fourteen rooms vacant in the hotel that night.

The Conference and Banqueting Manager was in the bar between approximately 1.45am and 3.30/3.45am on 17 July 2003, roughly the same time that MG was there. She spoke to both the claimant and NPM at the desk on her way in. In the bar she sat at the counter with her friends and the duty manager joined them for some of the time. The claimant served her a round of drinks and charged them to the manager’s account. She did not notice MG nor was he brought to her attention. GM asked her about the night but he did not ask her to write a report about it. AG, whose evidence played no part in the dismissal, was a guest in the hotel and in the bar at the relevant time. MG, who was a stranger to him and had been going from group to group in the bar, joined his table and they tolerated him. He insisted on buying them a round of drinks and AG, most likely also included him in a round. Whilst AG saw him order the drinks at the bar, he did not see how he paid for them. Some time later MG became a pest. He produced a Viagra tablet, which caused offence to the females in the group, and the group asked him to leave. AG informed NPM about the Viagra incident and NPM escorted MG from the bar. Whilst AG was the spokesman for the group, all at the table complained to the claimant when he came over to them. They did not mention tablets to the claimant. Nor did they say to him that MG “was passing drugs”. No female left their table to complain.

The claimant’s position was that MG parked his Mercedes at approximately 1.20am on 17 July 2003 at the front of the hotel in the bus bay. The claimant asked MG to move his car and MG replied that he was not a guest but he was just going in to pick up friends. MG said he would only be five minutes “and if you don’t believe me, here are my keys”. MG went into the bar and a few minutes later NPM, who was on duty in the resident’s bar, phoned the claimant at the front desk berating him for allowing a non-resident into the bar where he had tried to get a drink but had been refused by NPM. The claimant told NPM that MG had said he would only be there for a short

time. About ten minutes later the claimant went into the bar and asked MG to leave. MG was in company so the claimant “left him be”. Sometime later he got a call from NPM to say that he was sending out a woman who was complaining that MG was offering drugs/tablets to her husband in the bar. She was upset when telling the claimant and he telephoned the gardai who said they would attend as soon as possible. It was a busy night. The claimant had used his own mobile phone, as there were problems with the handsets and walkie-talkies provided by the hotel.

The claimant felt that it would be inappropriate to escort/remove MG from the hotel as it might be deemed assault; it was a job for the gardai. The claimant telephoned Garda M again around 3.00am and explained about MG offering drugs/tablets in the bar. Garda M said, “Leave it with us, we’ll be up”. He had mentioned the drugs in the first phone call as well. It was his reason for calling the gardai.

MG came out to the claimant and asked for a room. The claimant thought he was intoxicated and told him he had no rooms available. MG asked the claimant to phone other hotels but the claimant didn’t do so, even though he gave MG the impression that he had. He told the Tribunal he did not want to “inflict” MG on anyone. MG asked the claimant for his car keys back. The claimant told him to take a seat on the couch where he could keep an eye on him and if he fell asleep there would be “no bother”, but MG refused, asked for his keys again and threatened him so the claimant gave him his keys. MG walked towards the bar and the claimant saw the squad car outside at this stage.

The claimant went out to speak to the driver (Sergeant F) and told him that he had telephoned twice about MG who had tablets/drugs in the bar. Sergeant F said, “Leave it with us”. MG passed him on the steps as he went back into the hotel. MG got into his car and drove off. He never spoke to the gardai after that. He denied assisting in getting MG arrested. About forty or fifty minutes after this, he met with NPM. He didn’t think that they discussed MG’s drinks but he might have told NPM about the garda call and MG being arrested. His big fear at all times was about the drugs. He had telephoned the gardai on previous occasions when problems had occurred.

The claimant was called to a meeting with GM and DA on 21 October 2003. At this meeting the claimant and his shop steward were informed about the complaints from DR and GP and were given copies of both letters of complaint. The claimant was suspended with full pay, in accordance with the agreed disciplinary procedure, pending further investigation of the complaints. Despite the fact that rumours of MG’s arrest for drink driving had been circulating around the hotel since July 2003 and while NPS had told management about the rumour of the claimant’s and NPM’s involvement in it, he was unwilling to put it in writing. Furthermore, Garda T’s statement was in the garda file, which they were awaiting. GM therefore felt unable to raise the allegation of the drink driving arrest with the claimant at the meeting on 21 October 2003.

The claimant and his union official (TU) attended a disciplinary meeting on 28 October 2003. He was provided with an opportunity to answer the complaints given to him at the previous meeting. A further complaint about the arrest of MG in July was raised at this meeting. The claimant was asked if he knew anything about this incident and if he had anything to do with it. The claimant admitted to telephoning the gardai

from his own mobile phone, as a colleague NPM had informed him that a lady in the bar had made a complaint about something being passed. GM informed him that a garda investigation was ongoing and that the gardai may want to speak to him at a future date about making a false report, wasting garda time and the perversion of the course of justice and that the matter may have serious implications for the hotel. The claimant's shop steward understood this to be by way of advice but felt that it had some effect on the claimant. A further meeting was arranged for a week later.

At a meeting on 5 November 2003 the specific allegations in Garda T's report were disclosed to the claimant. He denied making the comments. TU sought the name of the garda and the NPS to whom the allegations in relation to the drink-driving incident had been made. He was informed of the time and date when the conversation with the garda had taken place, and told if he wanted this name, he needed to contact the garda station directly. The sergeant had advised GM not to release the name of the garda until the file was returned from the DPP but had agreed to disclose this name to TU. The identity and statement of the Garda would be available once the file was back from DPP. Further discussions were then held regarding the other incidents. The transcript from DR was to be available at a later date. The claimant was told that GP was willing to attend a meeting with the claimant to confirm the details in his letter of complaint, which was given to the claimant on 21 October 2003.

Thereafter there followed a course of correspondence between the parties in which GM arranged a further meeting for 14 November 2003. In these GM offered to have DR, GP, MG, a representative of the Garda Síochána and NPS present at the meeting and forwarded a list of the hotel guests who charged drinks to their room on the morning of 17 July 2003, the one transcript available of the conversations with DR/her secretary (for technical reasons the others were not available), the specific details of the conversation in the lobby (as per Garda T's report), as well as MG's statement and he put the claimant on notice that he would be raising questions, arising from MG's statement: MG's paying cash for drinks and his being told that rooms were not available in the hotel on the night. All of those mentioned had agreed to attend the meeting. Although TU on behalf of the claimant had sought the names of some of these, in his letter, which crossed with one of GM's, he did not avail of the offer to have them at the meeting and accordingly GM, with notice to TU, stood the witnesses down. In his latter letter to the claimant GM commented:

"As I have spoken to each of the persons listed, conveyed to (the claimant) their comments and furnished all available documentation, I do not believe that it is necessary to call any of them now that (the claimant) has decided not to exercise his right".

On 14 November 2003, in what turned out to be the final disciplinary meeting, the CCTV stills, names of the Garda T and NPS were furnished to the claimant and TU. TU denied the allegations on behalf of the claimant. GM noted that the claimant had declined to meet with any of the persons who made complaints against him. TU, on behalf of the claimant, denied the statement made to Garda T and denied that the claimant was guilty of the charges alleged against him. The claimant when asked if he had anything to say, replied, "No comment".

GM did not believe the claimant's denials and felt that he had acted inappropriately in

relation to DR, that he had used grossly offensive language to GP and that he had wrongfully colluded with another member of staff in procuring the arrest of a guest as described to Garda T and NPS on 1 October 2003. GM regarded the claimant's behaviour as a serious breach of trust and confidence and it sundered the relationship between employer and employee, in particular considering the senior position of trust the claimant held in the hotel. He felt that this amounted to gross misconduct and as a result the claimant was dismissed.

The claimant's response to the allegations put to him during the disciplinary process was that he did have a conversation on 1 October 2003 in the hotel lobby with NPS and Garda T. They were discussing sport and other general things and the subject of an arrest for drink driving came up in the conversation. He couldn't remember who initiated the subject, but all he said was that the customer "must have been drinking doubles or trebles in the bar because he was fairly drunk when he came out". It was an off-the-cuff remark and just a joke.

The claimant felt that he was suspended on 21 October 2003 without being afforded the opportunity to explain. He was not told under which disciplinary procedure the issue was being dealt with. During the meeting on 28 October 2003, GM had made a reference to Section 12 of the Criminal Justice Act, 1976, where allegations of making a "false report", "wasting police time" and "perverting the course of justice" were thrown at him. He felt shook, very afraid and said he was, "only a mere layman". After this meeting he took legal advice and was advised not to say anything that could implicate himself under this Act but to attend meetings and co-operate as far as he could. He was advised to say nothing that may implicate him in a criminal justice matter.

The claimant was under the impression that Garda T was the complainant and formed that opinion during the meetings, but he could not remember why. He denied the three allegations in relation to making a "false report", "wasting police time" and "perverting the course of justice". No Garda had ever called to his door. He felt he was entitled to know who made accusations against him under the Act. It was a very serious offence he was being accused of. He never made a false report.

Determination:

The Tribunal wishes to state that the claimant accepted, during the hearing before it, that the allegation that MG was involved in the passing of drugs whilst on the respondent's premises was wholly unfounded. The gardai confirmed this.

The fact that there were two parallel investigations arising from the same allegation, a criminal investigation by the gardai into the safety of a prosecution and an investigation by the respondent for the purposes of the disciplinary process, created some difficulties for the respondent.

The claimant and NPM were both dismissed for their alleged involvement in procuring the arrest of MG for drunken driving. On application to the Tribunal by their union representative (TU), both cases were heard separately.

In cases of gross misconduct the function of the Tribunal is not to determine the

innocence or guilt of the person accused of wrongdoing. The test for the Tribunal in such cases is whether the respondent had a genuine belief based on reasonable grounds arising from a fair investigation that the employee was guilty of the alleged wrongdoing.

The allegation that the claimant had colluded with NPM to procure the arrest of MG arose from a statement made by the claimant himself during the course of a conversation with NPS and Garda T in the respondent's hotel lobby on the morning of 1 October 2003. NPS's and Garda T's account of the conversation were almost verbatim. This was confirmed to the respondent by the station sergeant. In the course of the investigation the claimant denied having made such a statement and contended that he had phoned the gardai on the night as NPM said a lady had complained about tablets or drugs being passed by MG.

The Tribunal finds, by majority, that it was reasonable for the employer to believe the contents of the conversation as related by the claimant to Garda T and NPS in the lobby on the morning of 1 October 2003. This finding is supported by the following facts. Neither night porter recorded in the Night Porter's Log an event, so serious that it merited calling the Gardai on two occasions. Neither of them reported it to either the Duty Manager or to the Conference and Banqueting Manager although both were in the bar at the relevant time and instead they decided to telephone the gardai. The evidence shows that the claimant must have known that the Conference & Banqueting Manager was in the bar. Nor did they contact GM whose home and mobile phone numbers were available to them. NPO's refusal to give MG a room or to seek one for him, as requested by him, as well as the claimant's denial that he served MG drinks in the face of evidence to the contrary from MG also go to the reasonableness of the respondent's conclusion.

Furthermore, the testimony of both Garda F and Garda M, given before the Tribunal, is strong corroborative evidence for the version of the incident as relayed by NPO in the lobby on 1 October 2003. It seems to the majority that the respondent was not aware of their evidence as to why the gardai had been called, at the time of the decision to dismiss. Similarly, the evidence of AG strongly corroborates that version as well as the fact that there was no problem about drugs in the bar on 1 October 2003. AG's evidence also corroborates MG's evidence that he bought drink in the bar on the morning of 17 July 2003.

At the meeting of 21 October 2003 the claimant was suspended on pay on the basis of the two complaints involving GP and DR. He was not informed of the MG complaint at that stage as NPS was unwilling to give a written statement and the respondent did not have the Garda statement. This was in the file, which was being submitted to DPP. While it would be best practice to have informed the claimant at this stage that he was being suspended for gross misconduct, this suspension was provided for in the agreed disciplinary procedure. The claimant was represented by his shop steward and according to the disciplinary procedure, suspension with pay only occurs in cases of gross misconduct.

The majority is satisfied that the respondent carried out a fair investigation into the allegations. Whilst the identity of both NPS and Garda T was only disclosed to the claimant at the final disciplinary meeting the full contents of the

conversation/allegation as related by the claimant on 1 October 2003 were disclosed and put to the claimant as early as 5 November 2003. Furthermore the date and time of that conversation were also revealed to him as well as affording his representative the opportunity to meet the sergeant. The claimant declined the respondent's offer to have the various witnesses attend at the meeting on 14 November 2003. The majority is satisfied that the claimant was afforded a fair opportunity to deal with the allegations. The majority does not accept that the mention by GM, at the meeting of 28 October 2003, of possible Garda questioning into making a false report, wasting Garda time and the perversion of the course of justice adversely affected the claimant's participation in the process or rendered the process unfair. This point was never raised throughout the disciplinary process and was first introduced at the Tribunal hearing.

In determining the reasonableness of the respondent's decision to dismiss the claimant the Tribunal has not taken into account the DR incident as DR did not give evidence to the Tribunal. The Tribunal was given conflicting versions of both encounters between the claimant and GP. Following the first encounter there was a complaint to GM from both the claimant and NPS, GP decided against making any complaint as he felt that there was fault on both sides. However, following the second encounter, which occurred in a public place immediately following his performance, GP was so outraged at the unprovoked barrage of obscenities that he sought out GM to make a complaint. Having considered these facts and the whole of the evidence of the incident the majority, on the balance of probability, prefers the evidence of GP in this regard.

For these reasons and having considered all the evidence the Tribunal, by majority, is satisfied that it was reasonable for the respondent to believe that the claimant's behaviour constituted gross misconduct, sundering the relationship of trust and confidence between the employer and the employee. In the circumstances the dismissal was fair and reasonable. It follows that the claim under Unfair Dismissals Acts, 1977 to 2001 fails. This being a dismissal for gross misconduct the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 also fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)