

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

Employee

CASE NO.

MN842/2005

UD1105/2005

WT384/2005

against
Employer

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001
ORGANISATION OF WORKING TIME ACT, 1997
UNFAIR DISMISSALS ACTS, 1977 TO 2001**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms C. Egan BL

Members: Mr. D. Morrison
Mr. M. McGarry

heard this claim at Castlebar on 19th October 2006
and 7th December 2006

Representation:

Claimant(s) : Ms. Caroline Keane, Sweeney McGann, Solicitors, 67 O'Connell Street,
Limerick

Respondent(s) : Ms. Caroline Barry, Duggan & Barry, Solicitors, Castlebar, Co. Mayo

The determination of the Tribunal was as follows:-

Claimant's Case

The claimant gave evidence. She commenced work in another hotel in 1997, had attended college and received a business degree in 2000. She commenced work for the previous owner of the respondent's hotel in 2003 as a manager. It was suggested she be paid €40,000 plus a bonus of €10,000 per year but this was later changed to a gross figure of €50,000. She was also paid a sum of €1,950 quarterly but, after leaving the respondent, she discovered from the Revenue Commissioners that no tax of PRSI had been paid on this amount.

On May 2nd 2005 she was informed by the previous owner (known as Mr. C) that the hotel was to be sold and she would meet the new owner the following day. She had, subsequently, heard about the Transfer of Undertakings Regulation and felt she would transfer with the premises to the new owner. Mr. C asked would she transfer and she replied yes. The following day the new owner arrived but did not have time to meet her. It was decided they would meet on May 5th 2005.

On May 5th the new owner (known as Mr. M) met with the assistant manager, which she thought

unusual. Mr. M told her he had operational concerns about the premises. When she asked if her job secure she was informed, “everything had to be looked at”. She said that she felt insecure, as there seemed there was no job security. She continued work and attended a trade fair in Dublin. She explained that at the trade fair she had not been able to locate one of the respondent’s important customers and Mr. M had not been happy as when he arrived at the fair he had spotted the client himself.

On May 13th 2005 she rang the assistant manager and informed her she was unwell. Three days later Mr. M called to her house. He told her that his job was unpleasant and asked for her resignation. She was very surprised and received no answer to her question of “on what grounds”. He asked her to think about it and said “we would discuss it again”. The claimant stated that she had not resigned. She wrote to Mr. M on May 27th 2005 stating she had not resigned and was concerned to hear within her community that she had left.

She wrote to Mr. M stating she would return to work on June 15th 2006. She returned to work on June 15th 2005 and was asked to wait. Mr. M arrived half an hour later. They went to the financial controller’s office. He wanted her to resign. She asked what the redundancy package was and was told one week’s pay and a reference. She was asked to think about it. She later rang Mr. M and told him she was not accepting the offer and he told her that she knew what the consequences were – dismissal. She requested a letter to state she was dismissed but never received it. She again wrote to Mr. M on June 18th 2006 but received no response. She again wrote on June 27th 2005 but again received no response.

The claimant told the Tribunal that since her dismissal she registered with an employment agency but found it difficult to acquire employment. She registered with another agency and acquired a new position in a hotel with a reduction in salary of €21,000 per year.

On cross-examination she explained that on June 15th 2005 she had been asked to remain in reception by the receptionist. The financial controller had also been present and told her Mr. M wanted to speak to her. She agreed at that meeting she had been asked about items (a camera being one) that she had belonging to the hotel but said she had no idea of any dishes in her possession. She said that on that day she was asked to leave the premises without her belongings. She said that she moved house in September 2005. She explained that she had been spoken to on two occasions about her work.

When asked, she stated that she had submitted a cheque for the purchase she had made of a television and two drills (vat free) through the hotel. The previous owner had told her she could use this system when she had purchased her house.

When asked by the Tribunal, she stated that the nearest she had to a contract from Mr. C was a letter produced to the Tribunal. She said that the financial controller, at the meeting of June 15th 2005, had asked her about the lack of medical certificates. The claimant said that she had faxed then through to the hotel. She explained that she had asked for a representative to be present but was told by Mr. M that she would not deal with a representative.

Respondent’s Case

On the second day of the hearing the previous owner (known as Mr. C) gave evidence. He explained that he had told the claimant some months earlier that he had decided to dispose of his shares in the hotel. She was informed that from May 1st 2005 new owners would take over.

He spoke to Mr. M about the claimant saying she had lots of energy and enthusiasm but maybe her role was too big for her. She was too young, needed experience and her volume of work was low when you were not around. Mr. M told her that he would be more “hands on” and in charge in future. He would have section managers under him. The witness stated that he had no input into the running of the hotel

since May 1st 2005.

When asked the witness stated that he had discussed the matter of the claimant's purchase of the television through the hotel. She had submitted a cheque for €500 and he wanted to know what it was for. He said that he had told her, how dare she purchase items through the hotel. He said that the cheque did not even cover the cost of the items bought. He said that he had not given a reference to the claimant and having received a call from a prospective employer, told them that she had to be "driven".

On cross-examination the witness explained he was the main shareholder in the respondent company and said that the transfer of shares was to be completed in the near future. It had taken almost eighteen months. He said that he had told the claimant about the takeover and that Mr. M would be a caretaker. He said that the claimant had been employed as a manager and if she wanted to use the title general manager it was only egotistical but that he had no problem in the past with it. She had taken over from the previous manager of fourteen years.

He said that he had had to speak to the claimant on a number of occasions concerning a few functions that had not gone well. He stated that, at the time, there had been no disciplinary procedure in place or that there had been no written contracts of employment. This had changed after a previous hearing before the Employment Appeals Tribunal. He had asked the claimant to draw up contracts for all staff and could not understand why she had not drawn one up for herself. He stated the claimant had been paid all monies owed to her and could not understand why the claimant had felt the need to approach Revenue after she left.

He stated that on another occasion he had cause to speak to the claimant about two missing vacuum cleaners but on arrival to her home he was refused entry. When asked by the Tribunal, he stated that although the transfer of shares had not been completed, he had no act, hand or part in the running of the hotel.

The new owner (known as Mr. M) gave evidence. He stated that he had agreed with Mr. C to takeover the hotel but did not think it would have taken so long to complete. He frankly discussed the staff, including the claimant, with Mr. C. who had also told him that he had not been "hands on" in the past. Figures were slipping and staff seemed to be on the wrong salary. He said that he would try to be "handson" even though he was a shareholder in other companies in Ireland and abroad. He explained that he wanted to make changes in staff levels and procedures. He said that he had never met any one of the staff before May 1st 2005. He explained that it was a very quick takeover and everything had been finalised, except the shares, that weekend. He had no previous background in the hotel business.

He met the staff on Tuesday May 3rd 2005, including the claimant. It was an informal meeting. The following Saturday or Sunday there was a wedding held in the hotel and he attended in a managerial capacity. He left but later received a call from the claimant saying there had been a problem with the food but that it had been sorted out. He replied that it was okay but decided to go to the hotel only to find that all was not okay.

The following day the claimant was to attend a trade fair in Dublin. He decided he would attend with the assistant manager in order to gain some experience. He rang the claimant a number of times but got no answer. He met the claimant at reception and discovered the hotel had not been properly registered. This had to be paid for and he asked the claimant had she spoken to some of the tour operators. He was informed that she could not locate one of their customers but he did within five minutes. However, he was happy with how the day progressed. He did not discuss the claimant's job with her that day.

He said that he could not remember when the claimant went on sick leave but had contacted her while

she was out. The claimant submitted a letter stating she was returning to work. On his arrival on June 15th 2006, he thought it strange she was waiting at reception and asked her upstairs for a meeting. The financial controller also attended as a witness. He spoke to the claimant about her plans, how the hotel could be improved and as a manager, where the hotel was going. He said that he wanted to be fair to the claimant and knew that procedures had to be followed. He said that he wanted to see if the claimant was good enough to manage the hotel. He asked the claimant to consider her position and would have been happy if she had come up with a plan for the future. She said she would consider her position.

Later that day he received a call from the claimant saying she would return to work. He said that he did not know what to expect, he had the “under” managers covering the running of the hotel. He said that he had never told the claimant not to return. He explained that he called to the claimant’s house when she did not return to work but there was no sign of her. The claimant wrote to him but he admitted that he had not read the letter for some weeks. He admitted this was his fault but the hotel was going through its busiest time.

He explained that he was now running the hotel on a day-to-day basis and the previous assistant manager was now the manager. Mr. C later informed him that someone had telephoned about the claimant’s employment. And he felt Mr. C was the best person to give any information concerning her.

On cross-examination he stated that he, and the assistant manager, had arrived early on the second day of the trade fair. He said that he had no problem with the claimant’s work that day, just the mix up in the registration.

When asked about the claimant’s salary, he stated that she had agreed to take part of her wages in a tax avoidance scheme. She was fully aware how she was paid. She explained that the claimant was the only staff member who availed of the sick pay scheme. When asked, he said that he had not been present when the claimant arrived for work on June 15th 2006 and had expected to find her in the manager’s office. He said that he would not have denied the claimant a witness at the meeting if she had requested one. He said that he had never used the word “dismissed”. When the claimant did not return to work someone called to the house as she had keys and a camera belonged to the hotel. He said that he had since received the camera with twenty pictures on it of a client’s wedding. His solicitor took over the correspondence with the claimant. He said that he could have done better and that he should have replied to her letters.

The financial controller gave evidence. She explained that she was a qualified accountant.

On June 15th 2005 she was in the office behind reception when the claimant arrived. Mr. M had rang her to say he was on his way. The receptionist asked her was he on his way as the claimant had arrived. She asked the claimant how she was but she lifted up a paper and sat down in reception. Mr. M arrived and asked was her office free. All three went to her office upstairs. Mr. M asked the claimant her intentions and would she return to work. The witness said that she asked the claimant about some missing medical certificates. The claimant left and the witness went out to ask her about the missing camera and was told she would return it with the missing medical certificates. The witness said that it was her interpretation that the claimant would return to work.

On cross-examination the witness said that the meeting had been very short. She said that she could not understand why the claimant had waited at reception and not come into the back office. When asked she said that she had not heard what the receptionist had said to the claimant.

When asked by the Tribunal, she said that Mr. M had received no response to his question as to whether the claimant would return to work.

Determination

Having heard all the evidence adduced by both parties the Tribunal finds that the claimant was constructively dismissed but that the claimant did not give sufficient evidence of her efforts to mitigate her loss. Accordingly the Tribunal awards the claimant the sum of €9,550 under the Unfair Dismissals Acts, 1977 to 2001.

The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2003 is dismissed. The claim under the Organisation of Working Time Act, 1997 is dismissed due to the lack of evidence adduced.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN) Kate T.O'Mahony (MEMBER) D. Morrison (MEMBER) M. McGarry