

Correcting Order

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:

Employee

CASE NO.

UD139/2006

against the recommendation of the Rights Commissioner in the case of:
Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr D. Hayes B.L.

Members: Mr. J. Walsh
Ms. K. Warnock

heard this appeal at Navan on 21st March 2007

Representation:

Appellant(s) : In person

Respondent(s) : Mr Michael O'Sullivan, Castlelost West, Rochfort Bridge, Co. Westmeath

This case came to the Tribunal by way of appeal against Rights Commissioner Recommendation r-034282-ud-05/GF.

The determination of the Tribunal was as follows:-

This Order corrects the original Order dated the 23rd May 2007 and should be read in conjunction with that Order.

The correct title of the respondent is XXXX

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

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Respondent(s) : Mr Michael O'Sullivan, Castlelost West, Rochfort Bridge, Co. Westmeath

This case came to the Tribunal by way of appeal against Rights Commissioner Recommendation r-034282-ud-05/GF.

The determination of the Tribunal was as follows:-

At the outset it was stated that the Appellant's weekly gross wages were €127.50.

Appellant's Case:

The appellant gave evidence. He explained that he had been employed as a banqueting porter and reported to the Banqueting Manager (known as TI). He normally worked a seventeen-hour week over weekends. He had received a written contract of employment and a copy of the respondent's disciplinary procedure.

On the night of November 6th 2004, the appellant was hosting his 21st birthday party in a function room of the respondent's premises. At the end of the evening an incident occurred between his brother and the security personnel working on the premises. Having been removed from the premises, the appellant's brother tried to regain access through the front door to retrieve some personal belongings but was "set upon" and "assaulted" by the security personnel. The appellant approached the door (he had earlier left under protest due to the earlier incident of his brother's removal) to see what was going on. The bar Manager (known as Mr. H) was in

attendance that evening and was present at the scene of the assault. The appellant told the security personnel that he was a member of staff and wished to see the management. The reply he received was "you worked here". Mr. H then told the appellant to go home or he would be next and that was not to bother coming back.

On November 11th 2004 he received a telephone call from the Assistant General Manager (known as GS). The Appellant said his mother witnessed the call on loudspeaker. He was informed that he would not be asked back to work and GS apologised for being the bearer of bad news. He thanked GS and said goodbye. The appellant told the Tribunal that he had thought he might have received a telephone call about his employment but that it would have been from TI or the General Manager, NO'M. The appellant gave evidence of loss.

On cross-examination the appellant said that Mr. H had dismissed him on the early morning of November 7th 2004. On the night of the incident, the appellant said that his other brother had telephoned the Gardaí to the scene. He agreed that a lot of alcohol had been consumed that evening and that the Gardaí had also removed a second brother that evening but no charges were laid against either brother. The appellant told the Tribunal that he felt the security staff took the law into their own hands that night and left it up to his brother how to deal with the matter with the Gardaí.

When put to him, he said that he had not received any calls from any of the respondent's staff between November 7th and 11th 2004. He agreed that there was an outstanding bill to be paid to the respondent for services rendered on November 6th 2004. It was brought to his attention by one of the respondent's accounting staff eight or nine days after his dismissal. When asked, he told the Tribunal that he had contacted TI on numerous occasions for a reference; he received it in April 2005. When asked, he stated that the security personnel were not direct employees of the respondent. He had never received any previous warnings.

When put to him, the Appellant stated that he felt his employment had been terminated by Mr. H on the night of the incident. He said that he had fully expected to return to work the following week and did not think it was up to him to contact the General Manager about his position.

Respondent's Case:

The bar Manager (known as H) gave evidence. He explained that he was no longer an employee of the respondent company.

On the evening of November 6th 2004 he was the Manager on duty to oversee the running of the hotel. The appellant was holding a party that evening and after the party finished in the function room, some of the party moved to the resident's bar. The witness was at the reception area. At around 1.40 a.m. there was a knock of the front door of the hotel. A man and woman were outside looking to re-enter the hotel. The witness said that he recognised them from the party but refused them entry telling them the party had finished. There was further knocking on the front door but eventually it stopped. Ten minutes later he recognised the same couple in the residents bar. He asked them to leave. As they began to leave the appellant's brother grabbed his arm. The witness said that this person was abusive and as he was on his own, he radioed for assistance. The appellant's brother was escorted outside. The appellant had not been present during this time. On the appellant's return the party decided to leave.

A further commotion occurred outside the front door. Someone was banging and kicking the door. The witness said there was no request for a jacket. The appellant's brother was brought inside and restrained by security. Gardaí arrived and took him away and told all present to go home. The Gardaí arrived some time later and having been abused by the appellant's second brother, took him

away. The witness said that he had not spoken to the appellant. He spoke to the General Manager as soon as possible who told the witness that he would deal with the matter.

On cross-examination the witness said that it was “pandemonium” that evening. He stated that no one had been assaulted and that the security personnel were only protecting themselves. When asked, he said that three personnel restrained the appellant’s brother until the Gardaí arrived.

The General Manager gave evidence. He explained that there was a staff of around one hundred both part-time and full-time. He said that he made his business to know all the staff but did not know the appellant personally.

He told the Tribunal that all serious incidents were brought to his attention. He had been informed on November 7th or 8th (his next working day) about the incident on the night/morning of November 6th/7th. He said that, he felt, it had been very serious, as the Gardaí had been contacted twice. He said that he did not want the appellant to return to work until he had contacted the witness about the matter.

When put to him, he said that he was not aware of any call from GS to the appellant. He, the witness, had asked the appellant’s Manager, TI to contact the appellant. TI was told to tell the appellant to contact the witness. He said that he had not contacted the appellant and said that if the appellant was not available for work, some one else would do it. When asked, the witness said that if the appellant had come forward, apologised and paid the outstanding bill there would have been a job for him.

On cross-examination and when put to him if he knew when TI rang the appellant, he replied that he had asked TI to contact the appellant. He said it was up to the appellant to contact the witness.

When asked by the Tribunal he said that the appellant had dismissed himself. He told the Tribunal that duties were delegated to his Managers and it was normal for a Manager to contact a member of their staff. He said that it depended on the grade of an employee as to whether he would contact them and as the appellant was casual, he had asked TI to do it.

Determination:

The Respondent owns a hotel in Navan, Co. Meath. The Appellant was employed as a banqueting porter from November 2002 to November 2004. It was a part-time employment and he worked an average of 17.5 hours per week. His average gross weekly pay was €127.50.

On the night of the 6th November 2004 the Appellant celebrated his 21st birthday in a function room in the hotel. In the early hours of the 7th November difficulties arose at the front door as some guests sought readmittance, having left. There was a dispute between the parties as to the cause of the altercation but not as to its fact. In light of its other findings, the Tribunal does not need to resolve this dispute. In the course of the altercation the Gardaí were called and a man was arrested, although not charged. The Appellant was not directly involved in the altercation, although some of his guests were.

The Appellant was not due to work again until the 11th November. He says that on the morning of the 11th he received a telephone call from GS, an assistant general manager. He says that GS told him that his employment was terminated. The Respondent’s general manager, NO’M, told the Tribunal that GS was not told to dismiss the Appellant. GS was not called to give evidence and the Tribunal accepts the Appellant’s evidence in this regard.

NO'M said that he instructed the Appellant's manager, TI, to telephone the Appellant and find out what had happened. NO'M did not know whether TI had in fact telephoned the Appellant and the Appellant denied that he did. TI was not called to give evidence and again the Tribunal accepts the Appellant's evidence in this regard.

NO'M told the Tribunal that he did not want the Appellant to work again until a satisfactory explanation had been given. He said that he, himself, made no effort to contact the Appellant. He felt that it was for the Appellant to come to him rather than for him to have to look for the Appellant. He also told the Tribunal that the Appellant had not been dismissed. Rather, the Appellant had "dismissed himself" through not making contact.

The Tribunal is satisfied that the Appellant was dismissed. The Tribunal is also satisfied that there was no use whatsoever of a disciplinary process. The first contact that the Appellant received from the Respondent after the incident was a telephone call in which he was told that he was dismissed. None of the customary steps in a disciplinary process were taken. The Respondent simply expected the Appellant to approach them and to explain himself. He was dismissed when he did not do this. No matter how reprehensible an employee's conduct, he is nonetheless entitled to be dismissed fairly. The Tribunal is satisfied that the Respondent did not in any way fairly investigate the matter or discipline the Appellant. As a result, the Tribunal is satisfied that the Appellant was unfairly dismissed.

His employment with the Respondent was a part-time one while the Appellant was at college. He has now finished his studies and is no longer in need of such part-time employment. In the circumstances, the Tribunal is satisfied that compensation is the appropriate remedy. Accordingly, in respect of his claim under the Unfair Dismissals Acts, 1977 to 2001, the Tribunal awards to the Appellant damages in the amount of €2000.00 as being just and equitable in all the circumstances and thus upsets the recommendation of the Rights Commissioner.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)