

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee

UD1373/2006

Against

2 Employers

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr S. Ó Riordain BL

Members: Mr J. J. Killian
Mr. T. Kennelly

heard this claim at Waterford on 14th April 2008
and 3rd November 2008

Representation:

Claimant: Mr. Joseph Lavan, E.A. Ryan & Company, Solicitors,
Dungarvan, Co. Waterford

Respondent: Mr James Burke, B.L, instructed by David Burke & Co., Solicitors,
24 Mary Street, Dungarvan, Co. Waterford

Claimant's Case:

The claimant who had qualifications in hotel management and several years experience in that business plus experience in the pub business commenced employment with the respondent in April 2005. Following an interview with the owner prior to his commencement the witness was appointed as general manger with responsibility for the smooth running and improving standards of the hotel. He understood that other staff had responsibility for sales, marketing, stocktaking and other aspects of the hotel. However, his employer neither furnished him with a contract or a statement of his terms and conditions of employment. Initially "things went well with the owner" but when the respondent become more active in the hotel in the summer of 2006, following a lessening of his involvement with a hotel building project in Wexford, the claimant felt a change in the owner's attitude and behaviour towards him.

That change manifested itself in the form of shouting, bullying, and undermining the claimant's position and work at times in front of other staff. He was accused of rostering "too many or too few staff" and was criticised for suggestions for improvement in uniforms. The respondent, who was now in the hotel three days rather than one day per week was dealing direct with staff and excluding him from meetings. The claimant was also accused of inappropriate behaviour towards one colleague and of making another colleague cry, which he denied, and which he said were never properly investigated. He was incorrectly blamed for difficulties with the hotel's organising of arrangements related to a jazz concert. New staff including another manager were recruited without any input from the claimant. Periodic meetings with the owner had ceased and, in effect, he ended up performing more as a duty manager rather than as general manager of the hotel and he began to consider other employment. He described the owner as aggressive and brash and added that he was not an easy person to deal with. The claimant put all his grievances to the owner on 5 November 2006 at a meeting in the hotel lobby. The respondent told him that he was being paid €50,000 per annum and that, if he wanted to go, he should go. The claimant felt that his position was completely undermined and that he had no other option but to resign with effect from 12 November 2006. He gave details of his subsequent employment and remuneration.

In answer to questions from Tribunal members the claimant stated that the owner wanted everything to go through him and he also recruited the staff whereas previous to this the claimant was involved in recruitment.

In cross-examination witness said that the working relationship with the owner changed in July 2006. There were no channels through which he could bring his grievance other than through this Tribunal. He also indicated that he had not, prior to the meeting on 5 November, 2006, raised his concerns or complained to the owner about his position being undermined and he had not mentioned them to any other staff member. He agreed that the issues relating to complaints about his alleged behaviour towards colleagues had not been further pursued once he offered his response to the owner. He said his job was different from when he was originally recruited. It had become more operational and he was not involved in discussions with the owner about the future direction of the hotel. He agreed that both sides had raised issues at the meeting on 5 November, 2006 and that he had said that he would leave the employment.

Respondent's case:

The owner gave evidence of having been in the hotel business for thirty years. The claimant was appointed as general manager and was responsible for all roles. Since the claimant was coming from the UK he did not have the local knowledge whereas witness with his long experience was in a better place in relation to recruitment. He felt that his relationship with the claimant was good. The owner was involved in another hotel project in Wexford and while he was away he wanted someone to take control of the Dungarvan business in all respects. Another man had been in charge of stocks and he subsequently left. There was never a problem with union or staff. It was a family run business and there was no need for a union. None of the staff ever came to him to say they wanted to join a union. While the Wexford hotel opened in

June 2006 it was in or around October / November 2006 when it was fully opened. At that stage he reduced his frequency there from five days to two or three.

He was shocked when the claimant said he was leaving and this was at a busy period for the hotel. In relation to the issues raised by the claimant in his evidence, he had, at the time they arose, told the claimant about complaints from two employees. In relation to one of the individuals the claimant said she was not doing her job and he was told he would have to deal with people properly. The complaints had been dealt with at the time and were not ongoing issues as far as he was concerned. He never shouted at or hassled the claimant and he felt it was better to let the staff get on with their work. When the Wexford hotel opened and he was spending more time back in the hotel in Dungarvan the claimant did not complain. It was always his policy that staff would come and talk to him and as far as he was concerned the claimant's job did not change. The claimant never approached him. In relation to uniform employees have different ideas and if something was not right he would say it and do so. In relation to the recruitment of staff he felt it appropriate since he knew the local people that the claimant tell him who he was taking on. He always took financial responsibility and signed the cheques.

On 5 November 2006 he spoke to the claimant behind the reception area and asked why the hotel was not getting the Christmas parties and enquired if offices and factories had been written to in order to encourage the business. He was taken aback when the claimant announced his resignation. The claimant's wife had just had a baby and he would not like to see him stuck and he offered to retain him until he got another job. The claimant worked for a further week and resigned of his own accord on 12 November, 2006. The claimant was replaced but this had taken some time. While he never undermined the claimant he did question certain things in the running of the hotel from time to time as he was entitled to do.

In cross-examination and in questions from the Tribunal the witness stated that he now issues contracts of employment to his employees. The approach he had taken to grievances was that anyone could raise an issue with him, or he with them, and he would sort it out. He denied that the absence of a formal grievance procedure created difficulties for the claimant as he was unaware of the claimant's grievances until the day on which the claimant decided to leave. He would have expected that a person employed at general manager level would have previously raised complaints.

Determination:

The claimant is alleging constructive dismissal. The onus is, therefore, on the claimant, under section 1 of the Unfair Dismissals Act 1997 to establish that his resignation was not voluntary. Constructive dismissal is defined in the Act as follows:

“The termination by the employee of his contract of employment with his employer whether prior notice of termination was or was not given to the employer in circumstances in which, because of the conduct of the employer, the employee was or would have been entitled or it was or would have been reasonable for the employee to terminate the contract of employment without

giving prior notice of the termination to the employer.”

The respective position of the parties is set out in the evidence. In summary, the claimant is alleging that his position as General Manager was, subsequent to the greater involvement of the respondent in the running of the hotel from July 2006, undermined by the conduct of the respondent to such an extent that he had no alternative but, in effect, to limit his work to that of Duty Manager and ultimately to resign in November 2006. The respondent in his evidence accepted that there was somewhat of a greater involvement by him as owner in the running of the hotel in the autumn of 2006 but he fundamentally disagreed that his behaviour was in any way inappropriate or that he had undermined the claimant or that he wanted him to leave his position. The claimant had worked his week's notice and resigned his position. There was no question of constructive dismissal. The representative of the respondent suggested that the claimant was oversensitive and drew the attention of the Tribunal to the case of *Higgins -v-Donnelly Mirrors Ltd UD104/1979*.

The Tribunal has very carefully considered the evidence of both sides. The Tribunal was struck by the extent to which the claimant, under cross-examination, was unable to substantiate by numbers of specific and material examples his claims that the respondent undermined him or shouted at him and he has not called any supporting witnesses in this regard. Equally, the claimant's evidence lacked substance in relation to the extent to which the work he discharged had changed after July 2006. While the Tribunal considers that the complaints by the two staff could have been better dealt with under an appropriate grievance procedure, if such had existed, there is no evidence that either of these matters, once dealt with by the respondent, featured in the further relationship between the parties or were grounds which could justify constructive dismissal.

Consideration of the claimant's range of duties by the Tribunal was not helped by the fact that the respondent, contrary to law, did not provide the claimant with a written contract outlining his specific responsibilities but, to the extent that there may have been differences between the parties, there is no evidence that the claimant sought ongoing clarification from the respondent as matters arose which prompted his concerns that his role was being taken over. The claimant was correct in drawing attention in his evidence to the fact that, again contrary to law, no grievance procedure existed – other than the respondent's “speak to me and I'll deal with it” approach – and he has offered this as a further reason why he had no alternative but to terminate his employment. This would, in the Tribunal's view, have been more persuasive if the claimant over the months had previously raised core issues with the respondent, rather than first outlining the extent of his dissatisfaction at the meeting of November, immediately before giving notice and at a stage at which, in the mind of the claimant, the “differences” were irreconcilable and incapable of resolution. It is difficult not to disagree with the respondent's contention that, if there were matters of grave impact, the claimant, as General Manager, should in the ordinary course of business have raised them as they arose with a view to their resolution. It may well be that the relative inexperience of the claimant as General Manager acted as a break on his pursuing this when the respondent owner, who was intimately familiar with the running of the hotel and the local business scene and perhaps of a more commanding personality, began to spend more

time in the hotel in autumn, 2006.

The Tribunal considers that the claimant has not succeeded in discharging the burden of proof necessary to justify his claim of constructive dismissal and, therefore, determines that his claim of unfair dismissal under the Unfair Dismissals Acts, 1997 to 2001 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)