

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

Employee
- **Claimant**

UD746/2008
MN688/2008

against

Employer
- **Respondent**

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. McAveety

Members: Mr. D. Morrison
Mr. P. Clarke

heard this appeal at Sligo on 12 November 2008
and 10 February 2009

Representation:

Claimant:

Mr. Anthony McCormack, SIPTU,
Hanson Retail Park, Cleveragh, Sligo

Respondent:

Mr. Terry MacNamara, IBEC,
3rd Floor, Pier 1, Quay Street,
Donegal Town

The determination of the Tribunal was as follows:

This being a claim of constructive dismissal it fell to the claimant to make his case.

The claimant was employed from 6 September 2006 as a Night Manager and reporting to the Front Office Manager (FM). The claimant was furnished with a contract of employment from the outset. The employment was uneventful for the first twelve months. The claimant's position is that there were outstanding monies owing to him from a situation that arose in September 2007. This complaint formed no part of this hearing by the Tribunal and should properly have been addressed to another forum.

The claimant's position is further that, from around this time he began to have issues with the level

of security being provided for late night functions in the hotel. The respondent's position is that the General Manager (GM) was not made aware of any such concerns. The claimant was briefly hospitalised following an incident that occurred towards the end of a function on the morning of 1 December 2007 at around 2-00am. This incident involved some patrons at a function smoking inside the hotel. At the equivalent function some twelve months previously security staff had been employed, it was not felt necessary to use security personnel on this occasion. The claimant complained about his treatment on this occasion in an e-mail sent on 2 December 2007 to FM, GM and the Human Resource Manager (HR). This complaint was acknowledged in a letter from HR to the claimant on 4 December 2007.

At around 7-00am on 4 January 2008 the breakfast chef (BC) asked the claimant for information about the numbers for breakfast over the next few days. BC was unhappy about the information provided by the claimant and then approached the senior receptionist (SR) on duty for more accurate information. After BC had spoken to SR and was on his way back to the kitchen BC turned back and confronted the claimant. As a result of this altercation the claimant sent e-mail about one hour later to GM and FM in which he complained that he had been subject to both serious physical threats and racial abuse from BC. He alleged that BC had threatened to cut off his head and throw it in the bin. BC approached GM the same day and told him there had been an argument, he admitted a lesser form of racial abuse than had been alleged by the claimant. SR produced a statement that day in which he suggested that BC had threatened to put the claimant back in hospital.

HR, who was on annual leave at the time of this incident and returned to work on 7 January 2008, met the claimant on 9 January 2008. The claimant declined HR's invitation to take part in a three-way dialogue with her and BC; he was equivocal about pursuing a formal complaint against BC. Later that day BC was suspended with pay pending further investigation of the matter. BC then submitted a formal complaint about the claimant's part in the incident and other aspects of the claimant's behaviour not related to this incident. He accused the claimant of telling him to "fuck off back to the kitchen". He apologised for the racial abuse he had directed towards the claimant.

On 14 January 2008 HR along with the Regional Human Resource Manager (RH) met the claimant who had now decided to proceed with his formal complaint against BC. The claimant was told of BC's complaint against him and that an investigative meeting would be held into BC's complaint. HR and RH also met BC on 14 January 2008 and postponed further progress on their investigation into him, as there were now statements available from SR and the Meeting and Events Sales Executive (ES). As HR no longer considered that BC represented a threat to the claimant his suspension was lifted effective 17 January 2008. The claimant was unable to attend an investigative meeting set up for 18 January 2008 and on that day HR wrote to the claimant to reschedule the meeting to 22 January 2008. This date as well as 25 January also proved problematic in regard to the claimant's personal circumstances and the claimant's objection to the conditions being placed on the level of representation he was to be allowed at the meeting. The claimant was warned that the allegations against him amounted to gross misconduct and if proven could lead to his dismissal. HR and RH held an investigative meeting with BC on 18 January 2008.

An investigative meeting attended by the claimant, his union representative, HR and RH was held on 30 January 2008. On or around 18 January 2008 the claimant was interviewed for a position in a different hotel. He was successful at interview and signed a contract of employment on 31 January 2008. On 1 February 2008 the claimant submitted his resignation to FM, citing the lack of security at the incident on 1 December 2007 and the incident involving BC as his reasons. His employment with the respondent ended on 28 February 2008 and he commenced with his new employer on 3

March 2008.

On 21 February 2008 HR issued BC with a final written warning for both racist and abuse remarks. Whilst it was not clear that BC had assaulted the claimant he had approached the claimant in a threatening manner. BC was required to attend anger management classes. The same day the claimant was issued with a written warning for not being helpful to BC, exaggerating the incident and for using abusive language.

Determination

This was a difficult case for the Tribunal to consider for a number of reasons, not the least of which concerns the serious and unpleasant nature of the allegations surrounding the incident on 4 January 2008 between the claimant and BC. This task was made much more difficult by the fact that the only person with direct involvement in the incident from whom evidence was heard was the claimant. Accordingly the claimant's evidence of the incident is uncontroverted. Whilst the Tribunal did see the CCTV footage of the incident and it is clear that a serious altercation took place, there is no sound on these recordings and there was no evidence to substantiate the claimant's assertion of physical assault. In these circumstances the Tribunal must give weight to those assertions. The Tribunal has come to a majority decision in this case with Mr. Clarke dissenting. The majority is in no doubt that the respondent took the incident seriously, nevertheless the enquiry into the incident was somewhat protracted, initially because HR was on annual leave and later because of problems in setting up meetings with the claimant. Finally BC went on leave for two weeks in February 2008. Whilst the majority is satisfied that the claimant was subject to both physical threats and racial abuse from BC it is not satisfied about the extent of those threats and abuse to the extent that it is not satisfied that the claimant was left with no option but to resign his position on 1 February 2008 at a time when the disciplinary/grievance process was still ongoing. Indeed the claimant withheld his resignation until after he had signed a contract with a new employer and still felt able to work out his notice. For all these reasons the majority find that the claimant has failed to meet the onus of proof required in a claim of constructive dismissal.

Mr. Clarke in his dissenting opinion found that the uncontested evidence of the claimant is that he suffered a physical and verbal assault including serious threats as to his future well being along with racial abuse from BC. Claimant reported this immediately, but no action was taken until five days later. Following a phone call between HR and BC, the latter lodged a complaint against claimant. BC was suspended but this suspension was lifted before any investigation commenced. The day after BC returned to work, claimant sought alternative employment. Given these circumstances and a previous incident involving hotel customers (whereby the claimant was assaulted and hospitalised) I believe it was wholly reasonable for the claimant to seek such alternative employment. As regards the failure of the claimant to exhaust procedures, I note that, having made a formal complaint in relation to BC, the claimant was informed by letter of 22 January 2008 that a disciplinary hearing, which could result in his dismissal, was to take place and that he could not be extended full representational rights by his Trade Union. A previous letter (dated 16th January) from his Trade Union addressed to the General Manager seeking a meeting to discuss all the claimant's concerns was ignored. I do not believe that it was necessary for the claimant to resign unilaterally in order for his claim to succeed. I feel it was reasonable for him to seek alternative employment and prudent of him to mitigate his loss. I believe, therefore that his claim under the UD should succeed. The appropriate remedy is compensation. However I note that the actual loss was two days, but I believe that he should be awarded four weeks pay in accordance with section 7 (1) (C) (ii) of the Unfair Dismissals Acts, 1977 to 2007.

Accordingly, by the afore mentioned majority, the claim under the Unfair Dismissals Acts, 1977 to 2007 fails. A claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 does not arise in a case of constructive dismissal. Accordingly the claim under those Acts must fail.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)