

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

EMPLOYEE -claimant

CASE NO.

UD1254/2008

against

EMPLOYER -respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

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

Members: Mr D. Hegarty
Mr K. O'Connor

heard this claim at Tralee on 15th January 2009

Representation:

Claimant: Ms Katie O'Connell BL instructed by Patrick Mann & Co.,
Solicitors, 26 Ashe Street, Tralee, Co.Kerry

Respondent: Terence F. Casey & Co, Solicitors, 99 College Street,
Killarney, Co. Kerry

The determination of the Tribunal is as follows:-

Claimant's Case:

The claimant commenced employment as a part-time security man/doorman with the respondent on around 5 December 2006. He worked Saturdays and Sundays and, if there was a function, on Fridays as well. The roster is put up either Saturday or Sunday for the following week. He had been rostered for work on the weekend 18 to 20 January. On Friday 18 January 2008 when he and his fellow worker (AOC) arrived for work at 7.00 pm. they saw that a biro line had had been drawn through their names on the roster. When they raised this with the bar and restaurant manager (BRM) he told them that if they did not like it they could "f*** off". They left the hotel.

On 20 January the claimant telephoned the hotel to find out when he was rostered for work and the person on reception told him that their names (his and AOC's) had been removed from the roster. On 23 January the general manager (GM) telephoned him twice. In the first call GM offered him two hours work per week. The claimant told him that it was not much but it was better than nothing. In the second call GM asked him to send in a letter of resignation and told him that his P45 would then issue. He had received a letter of warning dated 22 January for failing to turn up for work on 20 January but he had not shown for work because he had been crossed off the roster.

The claimant had generally worked three to four hours on a Sunday. He denied that he resigned

because his weekly hours were reduced. He felt that he had been dismissed because he had instructed his solicitor to issue proceedings for an injury he had sustained at work in November 2007. While he had been disqualified from driving he had informed GM on 28 December 2007 that his licence had been reinstated. In cross-examination the claimant agreed that he had been paid for the weeks he was absent following the accident. He denied that he telephoned the respondent on Monday 21 January asking for his P45 and mentioning his difficulty in getting to work (since AOC had resigned on 19 January). He was struck off the roster and given his P45. When he telephoned about collecting his P45 MM in reception told him that there was a note attached to it stating that it was not to be given to him until he had tendered a letter of resignation. He never got or saw that note. He met MM a few doors away from the respondent's premises and MM gave him his P45. He did not submit a letter of resignation and he did not want to resign. He had never been given grievance procedure.

He was not with AOC on 16 January when the latter telephoned enquiring about the roster and was told that the Friday night hours were cancelled. On Friday 18 January the claimant told the respondent that they should have been notified of the cancellation of their hours and they would not have travelled in. The claimant was aware that AOC was talking about resigning. He agreed that he had been told, in the warning letter of 22 January, that he was rostered to work at 12.30 pm on 27 January and that it would have been peculiar for GM to state this if he had already been struck off the roster. He did not reply to GM's letter because he had been asked for a letter of resignation prior to receiving it. The claimant could not recall that he had only worked 2.75 hours on the previous Sunday, 13 January. He agreed that his personal injury claim had been settled. He further agreed that it is written on the rosters that they are subject to change. He did not turn up for work on 19 and 20 November because his name had been struck off the roster. Work on 19 and 20 January had not been discussed during the interchange with BRM on 18 January but they had been crossed off the roster for those days as well. He did not recall seeing the roster, which was produced in evidence.

The claimant's brother told the Tribunal that his company used to provide security for the respondent's hotel before his company closed down. He heard the telephone conversation between GM and his brother as it had been put on loudspeaker. GM had offered the claimant reduced hours, which he accepted; GM said that it would be in the best interests of the claimant and everybody else if he resigned. He agreed that there was a slow down in the hotel's work in some months but generally there was an increase in demand for security in early January and this declined from late January to St. Patrick's weekend. They always held their Saturday and Sunday hours.

Respondent's Case:

GM told the bar and restaurant manager (BRM) if security was required. The security requirements were then put on the roster for staff to see. When there is a fall in the number of customers for a function staff in different sections are cancelled. Nearly every week there are changes in the roster. The numbers of customers for a function on Friday 18 January dropped from 180 to 80 people. For this reason the decision was taken earlier in the week to cancel security staff for the Friday night. BRM had told AOC in a telephone call on Wednesday 16 January that both he and the claimant were not needed for Friday, 18 January. While BRM had not spoken directly to the claimant about the cancellation prior to 18 November he travelled to work with AOC and the respondent was satisfied that the claimant was informed of the cancellation. Both GM and BRM were amazed when AOC and the claimant turned up for work on 18 November. AOC was angry and abusive about the cancellation. When BRM reminded AOC that he had notified him on the previous Wednesday he (AOC) told him in abusive terms that he could keep his job. BRM replied that if that was how they felt they knew where the door was. There had been no conversation between BRM and the claimant.

AOC submitted his resignation by way of e-mail and letter on 19 January 2007. The claimant was rostered to work on 19 and 20 January but did not show. In a letter to the claimant GM referred to his failure to show for work on 20 January and informed him that a further failure to show for work would be taken seriously and reminded him that he was rostered for work on 27 January. Whilst this letter is dated 22 January GM was sure that he had prepared it before he received the claimant's telephone call on 21 January requesting his P45 and holiday pay and that he must have put the wrong date on it. GM had no recollection of requesting a letter of resignation from the claimant.

Sunday hours are the only guaranteed hours for security work. GM denied offering the claimant just two hours work on Sundays in his phone call of 23 January. GM denied that there was a biro line drawn through the names on the roster. However, a dotted line is put through the hours listed on the roster when a worker does not show for work or when the hours are cancelled; this is done for the purposes of payroll. (These rosters were produced in evidence.) The record shows that the claimant and AOC had not worked on Friday 11 November either. Waiting staff and bar staff were also cancelled. The respondent denied dismissing the claimant. GM first became aware that the claimant was considering bringing a personal injuries claim when he received a letter dated 30 January to that effect from the claimant's solicitor.

The respondent's handbook had been prepared subsequent to the claimant's commencement with the respondent and a copy was available at reception. GM agreed that he should have told the claimant about it.

The person in payroll/accounts told the Tribunal that it was she who pencilled through AOC's name on the roster sheet and had done so because she had notification of his resignation.

Determination:

Dismissal was in dispute in this case. In such cases the onus of proof rests on the claimant to show that there was a dismissal.

In considering the claimant's version of the termination as allegedly effected by the general manager (GM) in his second telephone call on 23 January, the Tribunal finds that the alleged statement would not constitute clear words of dismissal. The Tribunal notes that having received the respondent's warning letter, after that telephone call, informing him that he was rostered for work on 27 January the claimant took no steps to clarify the statement in the letter. The Tribunal is not satisfied that the claimant discharged the onus of proof that rested on him. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2007 is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)