

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE – *claimant*

CASE NO.
UD164/2009
MN164/2009
WT63/2009

against

EMPLOYER – *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005 ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Taaffe

Members: Mr. G. McAuliffe
Mr. A. Butler

heard this claim at Dublin on 15th July 2009

Representation:

Claimant(s): Ms. Fiona Duffy, Patrick F O'Reilly & Co, Solicitors,
9/10 South Great George's Street, Dublin 2

Respondent(s): In person

The determination of the Tribunal was as follows:-

Introductory point:

At the commencement of the hearing, the Tribunal noted that the respondent had appeared with his own interpreter/translator/friend, due to his poor understanding of English. The Tribunal highlighted the difficulty in the use of a non-officially appointed interpreter/translator. It was explained to the parties of the existence of a Tribunal service whereby an independent interpreter could be appointed by the Tribunal, on application for same. The Tribunal highlighted that they wanted to ensure that the parties to this case were treated fairly and justly, and especially as the respondent was representing himself. The respondent was given time to consider his position. Having considered the matter, the respondent confirmed that he was happy for the hearing to proceed. The respondent was allowed use his own interpreter/translator in a personal capacity.

Respondent's case:

In affirmed evidence, the respondent stated that he had no problem with the claimant and had never stopped the claimant working with him. The claimant commenced work with the respondent in April 2003 as a chef in the restaurant in T Bar.

The respondent himself worked at the premises in T Bar as a chef and was employed by a third party (*hereinafter referred to as AKh*). He commenced work as a chef with AKh in 1993 and had no other responsibilities. From 2003, he leased the restaurant in T Bar from AKh and since that time, has operated that business and worked there as a chef. He agreed that he took over the business and paid the wages of the claimant and the other staff who worked there. The claimant was his nephew.

In relation to the incident on 26 September 2008 that resulted in the claimant dismissal, the respondent maintained that he knew nothing about it and that this was properly a case against AKh. AKh had owned two restaurants, the one in T Bar and another in R Street. AKh had the work permit for the claimant and the claimant had worked in the restaurant in R Street, though the address given on the work permits for the place of the claimant's employment was at the restaurant in T Bar. In 2003, AKh had said that if the claimant did not want to work with the respondent, he could work in R Street. The respondent denied that the claimant had worked with him in the restaurant at T Bar. However, the respondent maintained that he had never said that the claimant could not work with him.

In cross-examination, the respondent confirmed that the claimant came to work in the restaurant in T Bar in 2001. At that time, the respondent had worked there as a chef and AKh was his employer. In 2003, the respondent began renting the restaurant. He agreed that from 2003, he was no longer an employee but the boss. He was the claimant's boss in the restaurant in T Bar for one year in 2003. When the claimant moved to the restaurant in R Street, nothing changed. The claimant's work permits had been made out for the claimant to work in the restaurant in T Bar. While the claimant had worked for the one year with the respondent, the respondent had paid him, but when he went to work for AKh, it was AKh who had paid him. The respondent had no involvement or control over the restaurant in R Street.

The respondent denied that he sacked the claimant. The claimant was his nephew. He had no problem with the claimant and would employ him. AKh was still the owner of the restaurant in T Bar and the respondent had rented it for the last eight years. The lease was in the respondent's name and he paid the rent and the wages.

The Tribunal put it to the respondent that the copies of the P35L forms that had been opened to the Tribunal bore his name as the claimant's employer. The respondent agreed that he had been the claimant's employer in 2003. AKh had completed the P35L forms and AKh was his brother-in-law. The respondent agreed that the P35L form for the year 2008 also indicated that he was the claimant's employer and that same indicated that he had paid the claimant's tax and wages. The respondent agreed that, on paper, he was the claimant's employer. However, the claimant had worked at the premises in R Street.

The respondent confirmed that the "employer's registration number" as it appeared on the P35L forms for the years 2004 to 2008 inclusive and the copies of the claimant's P60 forms from the years 2006 and 2007 were his number. When put to him, the respondent agreed that the P35L form for the year 2008 indicated that the claimant had been his employee and had worked for him for 46 weeks in 2008. However, he maintained that when he took over the running of the restaurant in T Bar in 2003, the claimant's work permits had been in the employer's name of AKh and he – the respondent – had not changed this detail. He had never stopped the claimant working with him.

The problem had been between the claimant and AKh and it had been AKh who had said that the claimant was not allowed in.

The respondent confirmed that he currently has employees and he pays their wages. He also confirmed that he understood that the P35L forms are revenue forms but that same are prepared by his accountant. He has P35L forms for the other employees and these forms are in his name as their employer. The respondent denied that it was his signature on the claimant's P35L forms and P60 forms. When put to the respondent that the figures on the P35L form and the P60 form for the year 2006 did not correspond, the respondent replied that the accountant had prepared the forms and that AKh gave the figures to the accountant. Both AKh and the respondent use the same accountant.

AKh was the respondent's brother-in-law. It was AKh who had brought the claimant to Ireland and who had gotten the work permits for him. The work permits gave the place of employment for the claimant as the restaurant in T Bar and the respondent explained that he had never changed this detail on the permits. While agreeing that he was therefore the legal employer of the claimant, he again said that he never sacked the claimant.

When asked again by the Tribunal, the respondent stated that the claimant had worked for him in 2004.

Claimant's case:

The claimant's legal representative submitted that the claimant came to Ireland in 2001 at the behest of AKh. AKh organised the claimant's work permits. He commenced work in the restaurant in T Bar and in 2003 or 2004, he moved to work in R Street. The claimant always considered that AKh had been his employer. It was this person who had given the claimant his instructions and it was this person who dismissed him.

In his affirmed evidence, the claimant confirmed that he came to Ireland in 2001. AKh employed him at the restaurant in T Bar and he worked there for three years until 2004. At that time, AKh asked the claimant to move to the restaurant at R Street. The claimant worked at R Street until 2008. He earned €300.00 per week and €50.00 was deducted to pay for rent. He denied that he had received the figure that was indicated as his wage on his P60 form for the year 2006.

On 25 September, the claimant went in to the restaurant and was told by AKh to look for a new job as he had no more work for the claimant. The claimant thought that AKh was joking and so went in to work again on 26 September. On that occasion while working, AKh had appeared, asked the claimant why he was in work and told him to leave. When the claimant asked AKh was he was being asked to leave, AKh had replied that there was no reason. The claimant had not worked in the restaurant since.

The claimant believed that AKh had been his employer and not the respondent. AKh had organised everything for him including the work permits. He received no notice of the termination of his employment. He received his last week's wages but did not receive holiday pay since the start of his employment.

The claimant established his loss for the Tribunal. He confirmed that he secured alternative employment in security four weeks subsequent to the termination of his employment and is receiving a greater rate of pay than he did while working in the restaurant.

Replying to the Tribunal, the claimant said that he received his wages in cash and never received payslips. His weekly wage was €300.00 received in cash and €50.00 was deducted from this for

rent. He was also charged €150.00 for his work permit.

Closing statements:

The respondent stated that he had never sacked the claimant and the claimant could work for him.

The claimant's representative stated that her instruction had been that the claimant had been employed by one party but the documentation that had been presented to the Tribunal appeared to show that his employer had been another. The matter was therefore in the hands of the Tribunal.

Replying to the Tribunal, she confirmed that referrals had also been made to the Labour Relations Commission in relation to this case. As the issue in relation to the claimant holiday entitlements had been dealt with at that forum, she was formally withdrawing the claim under the Organisation of Working Time Act, 1997 on behalf of the claimant.

Determination:

It is common case in this matter that the dismissal of the claimant was a fact.

The case made by the claimant and the respondent was that another party had employed the claimant. However, the documents that were opened to the Tribunal indicated that the respondent had been the claimant's employer. The respondent accepted that his name appeared on the claimant's P35L forms and on the claimant P60 forms. Furthermore, the respondent's "employer's registration number" also appeared on these forms. Based on these documents, the Tribunal considers that for the purpose of the Unfair Dismissals Acts, 1977 to 2007, the named respondent was the claimant's employer and the claimant comes within the scope of the Acts.

Based on the evidence adduced, the Tribunal finds that the respondent abdicated his responsibilities in relation to the claimant and an agent of the respondent summarily dismissed the claimant without reason. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds and the claimant is awarded compensation in the sum of €1,000.00. The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 also succeeds and the Tribunal awards the claimant €1,000.00 which is the equivalent of four week's pay in lieu of notice.

The Tribunal notes that the claim under the Organisation of Working Time Act, 1997 was formally withdrawn.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)