

## EMPLOYMENT APPEALS TRIBUNAL

### CLAIM OF:

Employee

- claimant

### CASE NO.

UD312/09

### Against

Employer

- respondent

### under

## UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. D. MacCarthy S C

Members: Mr J. Goulding  
Ms K. Garvey

heard this claim at Dublin on 4th September 2009 and 2<sup>nd</sup> November 2009.

### Representation:

Claimant: Mr. John Kennedy B.L., instructed by Doran W. O'Toole, Solicitors, Unit 3B, Woodland Office Park, Southern Cross, Bray, Co. Wicklow

Respondent: Mr. Conor Bowman B.L., instructed by Mr. Joseph Burke, McCartan & Burke, Solicitors, Iceland, House, Arran Court, Smithfield, Dublin 7

The determination of the Tribunal was as follows:-

Dismissal as a fact is in dispute.

### Opening statement by Counsel for the claimant:

In September 2008 the claimant's terms of employment were unilaterally altered. He was demoted. The claimant feared a significant reduction in pay. He received no contract of employment. There was no written statement of terms of employment given to the claimant.

The claimant worked with dedication and loyalty. His work involved preparing and cooking food. He was demoted for allegedly eating fish and eggs. No formal investigation took place. It is agreed two meetings were proposed. The claimant's claim is that this unjustified and unfair significant demotion constituted a constructive dismissal. The claimant felt aggrieved and upset that after four years of service and loyalty to the respondent that he could be constructively dismissed without reason. The claimant has been unable to secure another job. In September 2008 he secured a place

on a two-year training course.

**Opening statement by Counsel for respondent:**

The claimant's terms and conditions are he be a professed member of the XXXX organisation. The vows of the organisation are that one practices as a vegetarian and this was made clear to the claimant at his interview. The issue was raised in a letter to the claimant dated 17 September 2008 and the claimant responded by e-mail on 30 September 2008. The respondent was taken aback by the contents of this e-mail. A slur was cast upon the General Manager's character. The claimant copied letters and placed them on the walls. The claimant refused to discuss this. The claimant was given a contract of employment on 23<sup>rd</sup> September 2008. He was asked to move to another branch of the respondent company but refused. The claimant asked for his P45.

**Claimant's Case:**

The claimant is a Polish national. He commenced working in a restaurant owned by the respondent in October 2004 and was employed as a Head Chef. His role entailed preparing and cooking food and organising jobs for others. He was a member of the XXXX organisation in Poland but was not a committed member of that organisation when he commenced working for the respondent. He began eating fish and eggs in 2001. During his interview for the job conducted by the General Manager he had been asked about his work experience in Poland but never asked if he ate fish and eggs. He told the General Manager that he was not 100% committed to the XXXX organisation and the General Manager said that was no problem. He worked an eight-hour day six days a week. He often went home early on Saturdays. He often worked Sundays and Bank Holidays. If he wanted pay slips he had to ask for them. He was paid by cash every week. He never received a contract of employment.

He had no difficulties at work until he received a letter dated 17<sup>th</sup> September 2008 from the General Manager. This letter read:

“I am writing to you concerning a problem that has arisen regarding you continuing to cook for .....

It has come to my attention that you are no longer a strict vegetarian and you now eat, either from time to time, or regularly, fish and eggs. As you know someone who eats fish and eggs is not able to prepare prasadam. Given the primary purpose for opening our ..... restaurants is to prepare prasadam, I have to make whatever changes are necessary to ensure that the preparation of prasadam is maintained and not compromised.

Therefore I am offering you alternate employment that does not involve cooking. Your new employment will involve a combination of serving, cleaning and general floor duties and this change will come into force immediately.

Please let me know your thoughts on the above in writing by the 27<sup>th</sup> September 2008 at the latest”.

The claimant then sent an inappropriate e-mail to the General Manager, which we will not quote here. The claimant's solicitors wrote to the respondent on 13<sup>th</sup> October 2008 as follows:

“Please note that any attempt by you or ..... restaurant to carry out the course of action proposed in the said letter will result in a vigorous defence of our client’s employment rights through the appropriate legal channels as the proposed course of action constitutes a discriminatory change of our client’s terms of employment”.

The claimant posted two letters, one from the General Manager and one from his solicitors on the kitchen walls, as he wanted to avoid anyone saying anything behind his back.

The General Manager wrote to the claimant on 19th November 2008 and asked him to attend a disciplinary meeting at 11.45 on Saturday, 22<sup>nd</sup> November 2008 to respond to several issues. He did not attend that meeting, as he had no interpreter. He duly informed the General Manager that he would not attend. The General Manager re-scheduled the meeting for 2<sup>nd</sup> December 2008 at 11.45 a.m. He did not attend that meeting either. However, that day the General Manager came down to the kitchen and said he had had enough and to give him back the keys but the claimant refused to do so but said he would give them to his Manager. The General Manager asked him to report to a different restaurant owned by the respondent the following day and speak to the General Manager’s wife about his new duties. He finished work at 3 pm on 2<sup>nd</sup> December 2008 and went home. The restaurant provided overnight sleeping facilities for staff. He returned to the restaurant that evening with the intention of sleeping there. He wanted to keep his job. His plan was to prevent a new chef starting in the restaurant the following day. Later that evening the Gardai removed him from the restaurant.

Under cross-examination the claimant denied that he had been asked at his interview for his position if he was a vegetarian. He had not spoken to his solicitor before he sent the offensive e-mail to the General Manager and he now said he was very sorry for sending it. Having read the letter of 19<sup>th</sup> September 2008 from the General Manager he felt that a decision had already been made to demote him. He did not attend the meeting on 22<sup>nd</sup> November 2008 as he was awaiting advice from his solicitor.

### **Determination:**

The claimant’s case was that he was constructively dismissed. The Unfair Dismissals Act 1977 lays down the following definition:

#### Section 1 (b)

“(b) the termination by the employee of his contract of employment with his employer, whether prior notice of the 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 Tribunal is of the view the respondent’s first letter was an attempt to change the claimant’s contract of employment and the response of the claimant’s solicitor was appropriate and to the point. The Tribunal also attaches importance to the fact that the claimant had not been provided with written terms of employment on his original appointment, as required by law. Such a contract would be expected to include a specific provision that the claimant had to be a strict vegetarian in order to prepare prasadam. Such contract would also provide for disciplinary and grievance

procedures. The Tribunal finds fault with the respondent on both these matters.

However, the claimant's initial response was the offensive e-mail that he had previously sent to his employer raising questions on his employer's private life. Later the claimant displayed the letters from the respondent and his solicitors (but not the e-mail) on the kitchen wall.

Subsequently, the respondent made two unsuccessful attempts to hold meetings with the claimant to discuss various issues but the claimant refused to attend these meetings and gave the Tribunal reasons, which we do not accept. Finally, when the respondent attempted to move the claimant to another restaurant he brought in his rucksack and sleeping bag and attempted to stay overnight in his workplace but was later removed by the Gardai.

Having considered the evidence, the Tribunal considers it was the "conduct" of the employee not the "conduct" of the employer, which was most at fault.

The Tribunal finds that the claimant has failed to discharge his burden of proof that he was constructively dismissed under Section 1(b) of the Unfair Dismissals Act, 1977 and his claim fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)