

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

EMPLOYEE
MN2470/2009

- *claimant*

CASE NO.

UD2644/2009

WT1134/2009

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: Ms F. Crawford B.L.

Members: Ms J. Winters
Mr T. Brady

heard this claim at Dublin on 31st March 2011

Representation:

Claimant: Mr Brian Conroy BL instructed by Ms Joanne McInerney, Able, Solicitors, 72
Tyrconnell Road, Inchicore, Dublin 8

Respondent: Ms. Ursula Sherlock, Licensed Vintners Association, Anglesea House, Anglesea
Road, Ballsbridge, Dublin 4

The determination of the Tribunal was as follows:

The claim under the Unfair Dismissals Acts, 1977 to 2007 was one of constructive dismissal, accordingly it fell to the claimant to make his case. The claim under the organisation of working time act, 1997 was withdrawn during the course of the hearing.

The respondent has two licensed premises both of which serve food, bar A and bar B.

Claimants Case

The claimant gave evidence; he commenced employment as a chef in bar A with the respondent in July 2006. He worked 10.00 to 15.00 then took a break until 17.00 and finished at 21.00, five days a week. There were 4 to 5 others working in the kitchen along with the head chef.

One day about eight to nine months before his employment terminated the Head Chef informed him that he would have to work until 22.00 hours, and that this was going to be his finish time from then on. He spoke with the asst manager as he wanted to know would he be receiving time in lieu or pay for this extra hour, the asst manager did not revert back to him on his query. So he continued to work the hours he always had finishing at 21.00.

On 27th October 2009 when he came in to work one of his colleagues referred him to the rota. He was down to work six days a week instead of his normal five. The hours were four days 9.00 to 21.00 and two days 10.00 to 14.00. He did not want to work six days a week, he explained as it was he left home at 8.00 and did not return until 23.00 five days a week. There was nobody there that day to speak with and he had to wait until 29th October 2009 to speak with the managing director. He queried his new working hours with the managing director, who informed him that in future he would have to work the six days or there would be no job for him. He raised the issue that the hour changes should have been discussed with him firstly but the managing director informed him that it was his business and he did not have to. The claimant confirmed with him that was his position so he requested his wages and left.

Under cross-examination he confirmed that originally there were five full-time and one part-time chef in the kitchen when he commenced. He agreed that the managing director had offered him the position of head chef in Bar B in early 2009. He disagreed that the chef who moved from bar A to B to take up this position was not replaced in their kitchen. The head chef had never discussed the changes of hours with him, the only time he mentioned the rota to him was to see what days he wanted off. He was not aware that the other kitchen staff had changed their working hours.

The claimant gave evidence of loss. In reply to questions from the Tribunal, he had not received a contract of employment.

Respondent's case

The managing director gave evidence on behalf of the respondent. They have two premises and employ about 25 – 30 fulltime and part-time staff. There was a downturn in business in bar A and to address this situation they needed to change the rosters. A chef from bar A was moved to Bar B and was not replaced. The number in the kitchen of bar A was then reduced to 4 full-time chefs and 1 part-time, or other part-time chefs when they needed cover. As a result of this they required one chef to commence work at 9.00 and also another chef had to stay until 22.00 on a daily basis. He liaised with the head chef to implement these changes. Chefs were given a 16.00 start time one day a week as a result of the rota changes. The head chef spoke to all the kitchen staff regarding the changes in the rota. Over the course of a few months there were 3 to 4 changes in the rota and the claimant was the only one who refused to change his hours. He was not aware at first that the claimant was refusing to work the new hours, and that the head chef was facilitating the claimant. At this stage all the claimant was required to do was start an hour earlier or stay an hour later for two days a week.

The head chef was putting proposal rotas up on display. The claimant came in to him on the 29th October 2009 and threw the six day rota on his desk. At this stage he asked the manager to come in to his office as a witness. He informed the claimant that the rota was a proposal and would he consider it, he needed him to work with the other chefs. He further explained to the claimant that he was not asking him to work a six-day week, but he needed him to compromise. The claimant refused and reiterated that he was employed to work 10.00 to 21.00. The witness denied that he had said to the claimant “if you don't take the six days you won't have a job”. The claimant left the office.

The claimant met him a few weeks later and they agreed the holiday pay outstanding to him.

Under cross examination he explained that the head chef did the rotas, and as far as he was aware there had been meetings between the head chef and the kitchen staff in respect of the rota changes. He never wanted to get rid of the claimant; he still has four full-time chefs in bar A. The claimant

had found the proposed rota on the wall; this witness could not say where the rota was however there would have been another rota there for the actual hours to be worked that week. This rota was not available at the hearing. With this proposal the chefs would be required to work six days every second week. He would have continued to let the claimant work his normal hours and sought another compromise but the claimant had not given him that chance as he had left. He did not contact the claimant after the 29th October 2009, as he was busy.

The manager of bar A gave evidence on behalf of the respondent. In early 2009 he had to reorganise the bar and floor staff to address the downturn in business while the head chef dealt with the kitchen staff. He had spoken with the head chef in respect of this but had no involvement in changing the kitchen staff hours. All staff were consulted regarding the changes, he spoke with the bar and floor staff. At no stage did the claimant approach him about the rota changes. On the 29th October 2009 he was present when the managing director and the claimant met. The managing director explained to the claimant that they had put up 2-3 rotas for consideration and that they were proposals. The claimant just refused to listen said no and had walked out. He followed the claimant and pleaded with him to think about it and explained that everyone had to change his or her hours. The claimant had told him he thought it was unfair that he would have to do extra hours a week and it would be too much of a burden. Prior to the 29th October 2009 he had not spoken to the claimant about the rotas. It was never said to the claimant that there would be no job there for him.

Determination

The Tribunal carefully considered all the evidence adduced at the hearing. The claimant is making the case that he was constructively dismissed as his employer had created a situation such that he could no longer reasonably be expected to work there. The onus is on the claimant to prove his case on the balance of probabilities.

There was no formal process in place to consult with the staff over the proposed changes to their working hours. The claimant perceived that the six-day week was the actual rota. It was not credible that while the respondent put forward the argument that they were willing to compromise with the claimant at the time as they did not contact him after he left the premises on the 29th October 2009. The Tribunal accepts as reasonable that the claimant was left thinking that there was no position available to him if he did not work a six-day week. Therefore on the balance of probabilities the Tribunal finds that the claimant was unfairly dismissed and awards him €9,000.00 under the Unfair Dismissals Acts, 1977 to 2007

As this case was one of constructive dismissal the claimant is not entitled to an award under the Minimum Notice and Terms of Employment Act 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)