

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE *-claimant*

CASE NO.
UD313/2011

against

EMPLOYER *-respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P. O'Leary B L

Members: Mr T. O'Grady
Mr F. Keoghan

heard this claim at Dublin on 13th June 2012 and 10th September 2012

Representation:

Claimant: Mr. Brian Conroy B.L. instructed by Lavelle Coleman, Solicitors,
20 on Hatch, Lower Hatch Street, Dublin 2

Respondent:

On 13th June 2012: Peninsula Business Services (Ireland) Limited, Unit 3,
Ground Floor, Block S, East Point Business Park, Dublin 3

On 10th September 2012: Mr. Tom Mallon B.L. instructed by Matheson Ormsby Prentice,
Solicitors, 70 Sir John Rogerson's Quay, Dublin 2

The determination of the Tribunal was as follows:

Dismissal as a fact was in dispute between the parties.

Background:

The respondent is a hotel within which the claimant commenced working in 2008, as general manager.

Summary of evidence:

The claimant outlined his previous experience and qualifications to the Tribunal. He started in his position with the respondent in August 2008. The employment was largely uneventful until February 2010. The claimant was attending a hotel conference in Galway when he received a telephone call informing him that his son was ill and that he was being brought to hospital. The claimant departed Galway and travelled home to Dublin. He subsequently received a number of voicemail messages from a director of the hotel as to his whereabouts.

The possibility arose that the Government might legislate for the position of directly elected Lord Mayor. The claimant was previously a Lord Mayor and he informed the director, that he might have an interest in campaigning for such a position, should it arise. When speculation began in the media, the claimant was regularly mentioned in interviews but he stated that he neither confirmed nor denied these reports to the media, as he was aware that such a process takes a considerable amount of time and was only in its infancy at that time.

During the course of this evidence the claimant stated that he had explained to the director that he was unwilling to give up his position with the respondent on an aspiration. He did not give a departure date of any description to the director during their discussions but he always kept the director informed of his thoughts on the matter.

The director's sister was holding her wedding reception in the hotel at the end of May 2010 and she asked the claimant if he would manage the wedding function. Although the claimant was not usually involved in such functions in a "hands on" way he did accept this responsibility. The claimant became aware that a special exemption had not been applied for to permit a bar extension. He was concerned and raised this issue with the director who said he would take care of it.

The claimant stated that there were a number of such conversations with the director who was the signatory on the applications for such exemptions and with whom the responsibility for the applications lay. The previous year the cost of this license had more than doubled and the director had complained about this which the claimant could not understand at the time, as this cost was passed on to the customer.

The claimant stated that the director's signature was present on all exemption applications up to a certain point in time and he alleged that there were a number of fees taken from customers without the exemption actually being applied for. The claimant was concerned and raised this issue with the director who became irate.

The claimant issued a memo to staff regarding unpaid leave. This followed from a meeting with the director where it was agreed that staff could be accommodated with an unpaid leave of absence after August during the quieter months in the hotel industry. This also suited the claimant at that time as he was under so much pressure from the director at the time and he thought a period of leave might diffuse the situation. The claimant intended to take this leave in or around late August into September 2010.

The claimant was not working on Friday, 9th July 2010. He was on the hotel premises on Saturday, 10th July 2010 when he opened an email which the director had sent the previous day which stated that they had discussed that the claimant would be "...heading off to do other things" and that his final date was supposed to be after the wedding in May. The director wrote that they would, "...have to put a date down or it will just drag on. Therefore I think your last

week should be the week commencing 18th July.” The letter concluded with the director stating that he was leaving on holidays and may not see the claimant before this date. When the claimant received the email he wondered what to do with the fact that in or around that time he had raised with the director about the issue of the special exemptions and also about another issue of a more sensitive nature.

The claimant refuted the contents of the email including that he had told the director he was leaving. Had he been resigning, he would have provided this in writing to the director but had not done so. The claimant was never provided with a verbal or written warning during the course of his employment, nor did he receive any indication of the dismissal prior to reading this email. The claimant was extremely upset to find that his employment was being terminated without due process.

The claimant was angry after reading the email and he confronted the director that day. The claimant asked categorically what to do with the issues he had raised with the director but the director angrily denied it was not. The claimant described that he received a “tirade of abuse” from the director during this confrontation and he was quite upset and taken aback by the director’s behaviour which he found irrational. The director told the claimant that the matter was not up for discussion and that he was finished working there.

Following this confrontation the claimant wrote an email to the director, which he described as a move to try and protect himself. The email stated,

“You seem a little confused as to my finishing date. As discussed with you on more than one occasion it was always my intention to finish up at the end of August.I notified you that Kwasi was going to be on annual leave from the 9th of August until 16th. I informed you that I would be departing at this stage. You can take this as my official letter of resignation and finishing date.”

The claimant wrote this email in absolute haste and in hindsight he stated that he would have clarified that he was referring to the period of leave that he intended to take. His main concern at the time of writing was how it would look if he was dismissed, even though it was through no fault of his own. The director subsequently responded to the claimant later that day stating that he had expressed his displeasure with the claimant’s performance at a previous meeting with the claimant. The claimant disputed this.

The claimant subsequently attended for work on 12th July 2010 although he felt his position was untenable, nonetheless he attended for work and hoped it would be easier in the absence of the director who was leaving on holidays. As he was taking responsibility for the hotel when the director was away he wanted to ensure the special exemptions were in place for the approaching functions.

He emailed the director in this regard asking that he would let him know as soon as possible. During a later telephone conversation the claimant told the director that if there was no license in place he would have to remove the cost from the wedding bill. The director told him he was “sacked” and had no business being in the hotel and would have the claimant removed from the premises. The claimant stated that after this he quite clearly could not carry out further duties. The claimant gave evidence pertaining to loss.

During cross-examination the claimant stated he did not complete the relevant form regarding

the period of unpaid leave he intended to take, as it was a “fluid situation” at that time.

A number of issues were put to the claimant concerning issues that had arisen in the hotel and that were brought to his attention by the director. The claimant stated that the issues raised referred to the general day-to-day business of operating a hotel. He offered to meet the director if he wished to discuss any of the issues raised.

It was put to the claimant that Ms. C for the respondent would give evidence that she managed functions for a period of time and during that time she had raised with the claimant the issue of late licenses for approaching functions but was told by the claimant to just leave the bar open without applying for the license. The claimant refuted this. It was also put to the claimant that at function meetings he would make a joke about applying for the late licenses by banging the table and saying “granted.” The claimant completely disagreed this had happened.

It was put to the claimant that it was the normal role of a general manager to ensure that licensing was in place. The claimant replied that he had worked in other establishments but he had not applied there either as special exemptions were applied for by either the accountant or a group general manager.

It was put to the claimant that he had informed a number of people that he was leaving his employment with the respondent. The claimant stated that any such statements were about the possibility of a position becoming available as Lord Mayor. It was put to the claimant that Ms. H of the respondent would give evidence that the claimant had spoken to her about the fact that he intended to depart the employment. The claimant replied that it was all speculation at the time.

It was put to the claimant that it was clear from the contents of the email dated 10th July 2010, that he was resigning from his employment at the end of August 2010. The claimant replied that while the email may have been badly written, given the confrontation that had just taken place with the director, the email referred to the unpaid leave he intended to take.

The claimant later accepted that there was a meeting with the director at which his performance was discussed but he disagreed that he had said that his focus lay elsewhere. He asked at the time if it was a formal meeting and was told it was not.

The claimant was cross-examined on loss.

Ms. C for the respondent gave evidence that she worked for eight years in the hotel as a reservations manager but that there was a period of time when she was responsible for functions. Ms. C recalled a conversation with the claimant regarding bar extensions. The claimant told her they would “just leave the bar run.” When the function sheet was readdetailing the requirement of a bar extension, the claimant would bang the table at the function meeting and say “granted” in a joking fashion. Ms. C did not dispute this with the claimant as he was the manager. It was her understanding that it was usually the general manager’s role to apply for late licenses.

Ms. C recalled the claimant telling her that he would depart by October 2009 and later telling her that he would depart by March or April 2010. The claimant told her that he would return to take care of the director’s sister’s wedding in May 2010 and Ms. C understood from this

that the claimant would already have left the employment by then.

During cross-examination Ms. C accepted that the claimant had never informed her of a specific date of departure.

Ms. C did not bring the issue regarding bar extensions to the director's attention as she was unwilling to cross the claimant.

Ms. H gave evidence that she has worked in the position of bar supervisor with the respondent for over eight years. Ms. H recalled the claimant saying that he would campaign for the Lord Mayor's position and would leave his employment to fulfil the position but he did not mention a specific date to her.

A director of the respondent gave evidence that when the hotel opened in 2004; a general manager was in place. It was the general manager's responsibility to apply for a special exemption to the bar license. The director never attended personally to apply for such an exemption. The director stated that he did not direct that bar extensions should not be applied for.

During March 2010 he asked the claimant to an informal meeting as there were issues surrounding the claimant's work performance for a number of months. He expressed to the claimant his dissatisfaction with his work performance. The claimant said that he also wanted to talk to the director as he would be leaving to run a campaign for the position of Lord Mayor. The director asked the claimant when he intended to leave and the claimant said after the wedding of the director's sister which was on 22nd May 2010. The director therefore believed that the claimant would be leaving the employment at the end of May. The director told the claimant at this meeting that he would not employ a replacement but instead would employ a duty manager with food and beverage experience to support the banqueting manager, the director also intended to become more "hands on."

However, May came and went and there was no sign of the claimant leaving. The director made some comments to the claimant who remarked that he was helping out the director while the banqueting manager was on annual leave. The director stated that he needed, "to put a line under it." He left matters as they were for the month of June but subsequently wrote the email of the 9th July 2010 to the claimant. The director stated that while he saw the claimant from a distance on the 10th July 2010, he disputed the claimant's evidence that they had a confrontation on that date. He believed the claimant's email of the 10th July was a response to the email he wrote the previous day

The director was to go on annual leave for three weeks and when he arrived at the airport abroad on the 12th July 2010, he saw that he had received a number of missed telephone calls from Ms. C and the banqueting manager. The director was informed by the banqueting manager that the claimant was trying to cause an issue with a bride regarding a bar extension for her wedding function taking place that day. The claimant was threatening to tell the customer that the bar would close at 11pm as a special exemption had not been applied for.

During cross-examination it was put to the director that he had a motive not to pay the fees for the bar extensions. The director replied that following an investigation, An Garda Síochána

found that every bar application was applied and paid for except for an interim period during which the claimant was employed and that no prosecution has ensued. The claimant was responsible for applying for the bar extensions and the director was unaware the relevant application was not being made.

Determination:

The Tribunal considered the evidence adduced in this case by the parties and note the admission by the claimant of his intention to leave the employment by August of 2010. It was for the employee to set this date by giving the employer the notice required by this contract. In setting the date for the claimant to leave the employment the respondent was in fact dismissing him. In the circumstances the Tribunal finds that the claimant was dismissed and that that dismissal was procedurally unfair. The Tribunal also decide that the most appropriate remedy is compensation. In view of the claimant`s stated intention to leave in August 2010 and that he was paid a month`s pay in lieu of notice the Tribunal find that the claimant had little loss. In the circumstances the Tribunal award the claimant the sum of € 5,384.60, which is four weeks pay.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)