

## EMPLOYMENT APPEALS TRIBUNAL

**CLAIM OF:**

**CASE NO.**

EMPLOYEE  
- claimant

UD218/11

**Against**

EMPLOYER

- Respondent

**under**

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr N. Russell

Members: Mr J. Browne  
Mr F. Dorgan

heard this claim at Waterford on 13th November 2012 and 10<sup>th</sup> January 2013.

#### **Representation:**

Claimant:

Respondent:

The determination of the Tribunal was as follows:-

#### **Claimant's Case:**

The claimant commenced employment in April 1993 and was employed as head chef/kitchen manager in restaurant D. Another chef and some part-time staff worked in the kitchen with him. He attended regular informal meetings. During his tenure he had difficulty getting time off to go on holidays. A replacement for him had to be sourced from a nearby hotel. He had almost daily contact with MB, owner of the restaurant. They had mutual respect for each other. The claimant was more or less left alone to his own devices. MB paid a pension for him over a two years period. The claimant was most grateful.

The claimant contended that MB could be offensive and hurtful on occasion. He encountered difficulties with MB whenever he sought a pay rise. When he felt issues needed to be addressed with MB he was met with 'not again'.

The projected gross profit on food for the restaurant was 63% - 64%. There was an agreement that when the figure went over 63% a bonus would be paid.

In 2007 the claimant suggested doing a course in Ballymaloe Cookery School. He paid a third of the cost of the course while MB paid for the remaining two thirds. The course ran from Monday to Friday over a three month period. MB accommodated the claimant by permitting him to work Friday evenings and full days on Saturdays and Sundays. The claimant tried to better himself and increase his repertoire.

The claimant discussed the purchasing of a chargrill for the restaurant. As the restaurant would profit from the use of a chargrill and one was purchased. On 23 June 2010 the claimant worked a split shift, 10am – 2.30 pm and 5.30pm – 10 pm. The new chargrill was to be installed that day. The claimant agreed to stay back to sort out the installation. He had difficulties deciding where to install the chargrill and as to which piece of kitchen equipment he would need to remove in order for it to fit. It was not as straight forward as he thought it would be. He took a break and had his lunch upstairs and watched TV. MB came into the room while he was there and said “that he was no f..... good to him watching TV”. MB said “if you don’t f..... do it, (fit the grill) then I’ll get someone else who will do it”. The claimant had been trying to do his best and contended that he could no longer work for the respondent. He then took his belongings and left the premises.

The claimant did not accept an offer of reinstatement in July 2010. He felt he was, neither needed nor wanted, when he left his position on 23 June 2010 and his opinion did not change after that. He did not consider it to be a genuine offer of employment.

Since he tendered his resignation on 23 June 2010 the claimant was in receipt of the job seekers allowance and also sought alternative work. He worked for an eight to ten week period in 2010 covering maternity leave. In 2011 he did not secure any work. However in December 2011 he received a telephone call from newly appointed Manager MI of restaurant D enquiring if he would be interested in returning to work in the restaurant. He met MB and discussed remuneration. He accepted the offer of employment and only worked for two and half weeks in January 2012. He experienced difficulties obtaining his wages initially in his first week and again when he decided to leave. Nothing had changed so he left. During 2012 he secured part time work in April, May and September and full time work in June, July and August. He is now in the process of securing a new job.

### **Respondent’s Case:**

MI, the current manager of restaurant D, commenced working in the restaurant in December 2011. MB suggested that he call the claimant and offer him employment. MB told him that the claimant had been an exceptionally good chef during his tenure in the restaurant but that he had a few issues with him. Money was spent on an advertising campaign welcoming the claimant back to work. MI was aware that MB and the claimant had agreed terms and remuneration and that the claimant was offered the position of Head Chef.

The restaurant closed for the period 7 January 2012 to 26 January 2012 but work was available for the claimant. The claimant had recommenced employment during this period. MI contended that the claimant did very little cleaning during his first week back. The claimant told him at the end of his second week that he had not been paid. MI obtained a cheque from the accountants but was awaiting a second signature before he could hand it over to the

claimant. MI offered the claimant cash instead but the claimant refused to accept the cash payment. The claimant did not accept the cheque either and immediately left the premises.

MB gave evidence of being in business for 43 years. The claimant was in charge of the kitchen and was a good cook. MB felt that when things were good the claimant was in charge but when things weren't going to plan he was in charge. Wages were always a hobby horse with the claimant and MB would always say "where am I going to get the money?". He felt that he was fair to the claimant and operated a bonus scheme on a year to year basis, if he made money so did the claimant.

A chargrill was bought for the kitchen and it remained in its box for month. MB asked the claimant on several occasions to put it in a position that suited him so that it could be connected. On the morning of 23<sup>rd</sup> June the claimant said he would do it later on. MB found the claimant in the bar that evening watching a football match, the grill was still in the same place it had been earlier. MB went to him and said "what the f... is happening?" The claimant flung stuff on the ground, drove his car to the back door, threw all his kitchen stuff into it and drove off. MB didn't hear from him but did expect he would return as he had left in similar circumstances on two previous occasions. MB stated that he wasn't trying to humiliate or embarrass the claimant, he was annoyed with him but not aggressive. He wrote to the claimant offering him re-instatement on 5<sup>th</sup> July.

In December 2011 MI contacted the claimant. He came back to work and was asked for his last tax form so he could be put on payroll. The claimant never submitted it, so he had to be paid by cheque. The cheque was missing a signature so he was immediately told he would be paid in cash but the claimant walked out again.

### **Determination:**

This matter came before the Tribunal by way of a claim of constructive dismissal. The question for the Tribunal was whether the claimant left his employment in circumstances in which, because of the conduct of his employer, it was reasonable for the claimant to terminate his Contract of Employment. There was conflicting evidence on a number of issues, some of which seemed to have no direct bearing on the claimant leaving his employment.

The Tribunal has found nothing in the employer's conduct to be of sufficient seriousness as would entitle the claimant to leave of his own volition and then claim that he had been unfairly dismissed.

There were some disagreements between the parties but the Tribunal did not consider these to be significant and, where they occurred, they seemed to be borne out of the common desire of both the claimant and respondent to improve the business and were nothing more than would be expected in a creative business environment. It was during one of these "spats" that the claimant walked out. A subsequent offer to re-instate was not taken up by the claimant yet he returned to work for the respondent for a short period some 18 months later. The claimant did not give that fresh opportunity for the parties to work together any realistic chance of being successful and left again.

The claimant has not succeeded in meeting the onus which is on him to establish that he was constructively dismissed. Accordingly his claim under the Unfair Dismissals Acts 1977 to 2007 fails.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

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