

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

Employee
-**Claimant**

UD1015/2007

Against

Employer
-**Respondent**

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony, B.I.

Members: Mr. M. Forde
. Mr. K. O'Connor

heard this appeal at Killarney on 16 December 2008
and 21 April 2009

Representation:

Claimant:

Ms. Katie O'Connell B.L. instructed by Mr. Tom Browne,
Padraig J. O'Connell Solicitors,
Glebe Lane, Killarney, Co. Kerry

Respondent:

Mr. Eoin Clifford B.L. instructed by Ms. Deirdre Crowley
on the first day, Ms. Alice Crowley on the second day,
Ronan Daly Jermyn Solicitors, 12 South Mall, Cork

The determination of the Tribunal was as follows:

Summary of the Evidence

The claimant was employed as bar manager by the respondent, from 20 June 2004, in its five star hotel. The General Manager (GM) told the Tribunal that there had been some informal complaints from bar staff that the claimant was taking advantage of his position as manager as regards rostering and that duty managers had felt nervous about his attitude.

On Friday 22 June 2007 at around 10.00pm the claimant entered the bar area and saw a

barman(BM) pouring cranberry juice into a glass containing a clear liquid which he believed to be an alcoholic drink, because of the way the drink broke. Consuming alcohol constitutes gross misconduct, which could warrant summary dismissal under the respondent's grievance and disciplinary procedures. The claimant did not confront BM at the time because the bar was busy and someone at a nearby table saluted him. It was the claimant's evidence that he followed BM out the back and heard him throw some of the drink down the sink. It was BM's evidence that he had prepared himself a drink of sparkling water and cranberry juice and took it to the back and consumed it over the next hour. The claimant reported the matter to the duty manager (DM) who did not take any action on the matter. Later that evening BM was talking "gibberish" to him and the claimant felt this was because "he was rattled". As the claimant was leaving work at the end of his shift he raised the matter with BM. It was BM's evidence that the claimant asked him about the vodka and cranberry juice. It was the claimant's evidence that he asked only about the cranberry juice and that BM replied, "It was not vodka". There had been a previous incident involving the claimant and BM in October 2006 when the claimant had purported to issue a verbal warning to BM because he had not prepared the bar area for lunchtime. Investigations by the human resource manager (HR) established that the lack of preparation was due to events outside BM's control and the warning was not recorded on BM's personnel file. The claimant was dissatisfied with BM from the beginning of his employment and believed that his general performance, attitude and appearance were grounds for dismissal.

On Saturday 23 June 2007 the claimant again spoke to DM about the drink incident and as a result of this conversation the claimant sent an email to HR, who was not at work until Monday 25 June 2007. In the email the claimant raised his concerns about the events of 22 June 2007. HR noted from the email that the claimant had neither dealt with the incident at the time it occurred nor attempted to get any sample of the contents from the glass. The claimant, who was not rostered on duty again until Tuesday 26 June 2007, telephoned HR on Monday morning (25 June 2007) and during this conversation HR told the claimant that she believed his case against BM was weak. The claimant told HR that he did not want BM working in his department, that he wanted him gone, that he could not be trusted and that if BM did not leave it would make their positions "a joke". On Tuesday 26 June 2007 the claimant met HR at around 6.15pm and both reiterated their views on the matter. The claimant suggested to her that if BM was spoken to he might consider his position and leave the employment. The respondent's position is that the claimant indicated his intention to take the claimant aside and tell him to get another job and if he decided to dig his heels in that he (the claimant) would make it difficult for him to get another job or a decent job in the country and that it would be his word against BM's. HR told the claimant that this was a decision for the respondent and not for him. HR undertook during their conversation to write to BM inviting him to a meeting to explain why he had been drinking in the bar and had undertaken to do so on the claimant's assurances that staff are not allowed to drink non-alcoholic beverages in the bar. Later GM informed her that the staff are allowed to have such drinks and that the claimant had confirmed this to him. Accordingly, HR did not issue a letter to BM. The claimant also spoke to GM later that evening and both sides again expressed their opposing views on how to deal with the matter. GM explained to the claimant that procedures have to be followed and instructed him not to pursue his intended course of action.

On Wednesday 27 June 2007 at around 6.00pm HR told the claimant that a decision had been taken not to pursue the claimant's allegation against BM. The claimant was unhappy and frustrated about this decision. Shortly after the claimant asked BM to follow him to the spirit store, which is in a secluded area far from the bar. It was the claimant's case that when they reached the store the claimant told BM to take a seat, closed the door and leaned against it. The claimant then proceeded

to tell BM in an intimidating manner to “find a new f... job”, that if he dug his heels in he would f..... get rid of him anyway; that if he left he would say nothing but that if he stayed he would make sure that “he would not get a decent job in this f.... country again”. As the claimant made these comments he had moved closer to BM and was standing over him; BM was shaking and did not open his mouth. Further, it was the respondent’s case that the alleged comments made by the claimant to BM in the spirit store were in almost the exact terms which he had used when discussing the matter with both HR and GM. The claimant’s position is that he took BM to the spirit store in order to ask BM to tidy it. When there it was BM who had raised the incident of 22 June when he told him (the claimant) that he could not accuse him of drinking. It was the claimant’s evidence to the Tribunal that a joke was being made of his position and he wanted to get the claimant out of the equation.

Following this incident BM went to the assistant manager to complain about it but he was shaking and talking fairly loudly so the assistant manager could not understand everything he said. He telephoned his mother who told him to calm down. On her advice he asked the claimant to put his comments in writing but he laughed at BM, denied having said anything and told BM that it was his word against his own. BM then made a note of the incident. BM left and reported the incident to the Gardai. BM, who had live-in facilities in the hotel, was afraid to stay there after this incident.

On Thursday 28 June BM informed HR about the incident in the spirit store and they had a number of discussions about it throughout the day. HR outlined the various options open to BM for dealing with the matter and he ultimately decided to have it formally investigated and dealt with by the respondent. On 28/29 June BM submitted a four-page formal complaint to the respondent outlining the events that occurred between 22 June and 27 June. This document also contained complaints about a number of incidents that had allegedly occurred prior to this time but the claimant subsequently dropped the latter complaints. On 4 July the claimant submitted a complaint to GM about HR’s treatment of him since BM lodged the complaint against him and alleged a potentiality of bias on her part.

As both HR and GM had a prior involvement as regards the complaints made by BM against the claimant the respondent engaged an independent human resource consultancy to conduct an investigation into BM’s complaint. The claimant was “sent home” on pay pending the completion of the investigation. The investigators met BM and other witnesses on 13 and 14 July 2007. They furnished copies of the complaint and witness statements gathered during the investigation, as well as other relevant documentation, to the claimant about four days prior to his interview, which took place on 18 July 2007. At his interview the claimant had an opportunity to put forward his version of the incidents in issue and to respond to the witness statements including BM’s statement and the allegations made against him. Having made amendments, at the claimant’s request, to their note of his statement the claimant signed his statement on 10 August 2007. Later in August the claimant indicated to the investigators that he was not satisfied with his responses and they allowed him time to make further responses. It was the evidence of one of the investigators that BM had broken down during his interview with them on 13 July and that this was an unusual occurrence. He gave further evidence that at his investigation meeting the claimant told them that he had three choices: (i) to say nothing, (ii) tell them what they needed to hear, or (iii) to tell the truth. The claimant had sought to call character witnesses to give evidence on his behalf to the investigators. The investigators did not interview these witnesses, as they had not been present at the time of the incidents under investigation.

The investigators’ report, including their findings of fact and conclusions, was presented to the respondent on 20 September 2007. The investigators found that the claimant’s behaviour

towards BM in the spirit store on 27 June did not constitute bullying as there was no repeated inappropriate behaviour. On the other hand, they found that it did amount to harassment as defined in the respondent's policy, which defines harassment as *"any act or conduct that is unwelcome or unacceptable and could be regarded as offensive, humiliating or intimidating with a potential negative impact on the work environment"*. Furthermore, they found that the claimant had also failed to follow the respondent's policy for dealing with disciplinary matters and had failed to follow the instructions of both HR and GM on how to deal with the matter. A copy of the report was sent to the claimant by registered post in late September 2007.

On 25 September 2007 the Operations Controller wrote to the claimant to inform him that, based on the findings of the investigators' report, the respondent was invoking the disciplinary procedure against him and invited him to attend a disciplinary hearing. In the letter he was also informed that at the hearing he would have the opportunity to respond to the outcome of the investigation and to present any mitigating circumstances. He was also informed that the outcome of the hearing could result in disciplinary action up to and including dismissal.

The disciplinary hearing ultimately took place on 4 October 2007. It was conducted by the Operations Controller and Mr G was also in attendance on behalf of the respondent. The claimant, although advised in the letter of 25 September that he could bring along a colleague, was unaccompanied at the hearing. At the commencement of the hearing the claimant was again reminded that he could have a colleague with him but he was happy to proceed without one. He was again informed that this was his opportunity to reply to the investigation findings, to comment on the investigation process and put forward any mitigating circumstances. The claimant questioned some of the report's findings on the events of 22 June 2007. He was concerned that the investigators had interviewed HR and GM even though he had been told those two would take no part in the investigation. He complained of having received no training in the procedure to be used when faced with a situation such as he had to deal with on 22 June 2007. He further complained of the length of time he had been suspended following the decision to set the investigation in process, the resultant damage to his reputation and the fact that BM had initially made other allegations against him although these were withdrawn at the start of the investigation. The meeting was adjourned to allow the respondent get clarification on the issues raised by the claimant. The meeting reconvened on 8 October 2007. The claimant did not plead any mitigating circumstances at the disciplinary hearing.

The respondent summarily dismissed the claimant for harassing BM in breach of its Bullying and Harassment Policy and Procedures which behaviour as defined amounted to gross misconduct under clause 17 of the respondent's "Grievance and Disciplinary Procedures". The claimant's failure to follow HR's and GM's instruction not to proceed (with disciplinary action) against BM also constituted gross misconduct under the latter and a further ground for dismissing the claimant. The claimant was dismissed on 8 October 2007. The claimant exercised his right to appeal to the Group Director. The appeal was heard on 17 and 21 October 2007. The appeal was denied and the dismissal stood.

Determination:

The Tribunal finds that the respondent had reasonable grounds for not acting on the claimant's complaint about the drink incident. This finding is based on the facts that the claimant had not seen the barman pour the vodka, he had not confronted the barman about it at the time and he neither got

nor attempted to get a sample of the contents of the glass.

The claimant was dismissed for his behaviour towards the barman in the spirit store on 27 June 2007. There were no witnesses to the incident. The respondent, having received conflicting reports on what had occurred from the two employees involved, engaged external investigator to hold an investigation into the matter under its Bullying and Harassment Policy and Procedures. The Tribunal is satisfied that the investigation was comprehensive, thorough and fair. The Tribunal dismisses the claimant's complaint that the investigators had interviewed and taken statements from the Personnel Manager (HR) and the General Manager (GM). Failure to interview these members of management would have rendered the investigation incomplete.

Having considered the totality of the evidence both from the investigation and adduced during the hearing, the Tribunal finds that it was reasonable for the respondent to accept the barman's account of what occurred in the spirit store on 27 June 2007. The Tribunal is satisfied that the claimant's behaviour towards the claimant on the said occasion constituted harassment under the respondent's Bullying and Harassment Policy and Procedures and gross misconduct under its Grievance and Disciplinary Procedures. Furthermore, the claimant's failure to desist from dealing with the barman in the manner as indicated by him to both the General Manager and the Personnel Manager and in outright defiance of their reasonable and lawful instruction to him constituted a further instance of gross misconduct under the said Grievance and Disciplinary Procedures. The Tribunal is satisfied that there were substantial grounds justifying the respondent's decision to summarily dismiss the claimant. Accordingly, the dismissal was fair and the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)