

RESERVED DECISION (as to part)

THE INDUSTRIAL TRIBUNALS

BETWEEN

Applicant/Appetition

Respondent

Mr G M C Bertrand

AND

E M I Leisure Ltd

DECISION OF THE INDUSTRIAL TRIBUNAL

HELD AT

London South

ON

30 November 1979

4 January 1980

31 January 1980

CHAIRMAN:

Mr F W I Barnes

MEMBERS.

Miss W Gallner

Mr W A Hutchinson

DECISION

The unanimous/majority decision of the Tribunal is that

- (1) The applicant was unfairly dismissed by the respondents and is entitled, subject to recoupment, to compensation in the sum of £ 650
- (2) The correct style of the respondents is E M I Leisure Ltd.

REASONS

1. Mr Bertrand, is who French by birth, sued his former employer, E M I Leisure Ltd, who are the owners and operators of a large and prestigious hotel called the Royal Horse Guards Hotel in Whitehall Court, SW1. He went there as Assistant Food and Beverage Manager on 2 October 1978, and put in his letter of resignation (Exhibit R4) on 7 September 1979, and was asked to work out his contractual notice, so that in fact his employment ceased on 5 October.
2. As he had resigned, the dismissal he had to put forward was necessarily of the constructive variety.
3. The respondents made an error^{as} to the year of termination in their notice of appearance, and all they wrote by way of resistance was that the applicant had no case for constructive dismissal.
4. At the outset of our hearing, on 30 November 1979, we explained to Mr M S Cox, Personnel Manager representing the respondent, that a case such as the one before us might go into two stages, a stage in which the fact of dismissal would be determined one way or the other, and if it were determined in the applicant's favour, a second stage in which it would be open to the respondent to allege either that the dismissal was justified, and/or that the applicant had contributed to the facts that caused his dismissal.

5. We asked Mr Cox if he would like to be free, in the event of the dismissal denied by the respondents being proved, to contest the second stage, and he said he would, whereupon we said that in that case we would require particulars of the points of criticism of the applicant's conduct, character, or service, in respect of which they would say that the dismissal if proved was justifiable and/or the applicant contributed to it by his own fault, which we thought should be put down in writing so that the applicant could be properly forewarned.
6. We gave Mr Cox an adjournment for the purpose drawing such particulars, and he produced a document we called R1, which so far as we can see was only further particulars of the grounds upon which the constructive dismissal was defended.
7. We informed Mr Cox that unless he could put down on paper grounds of criticism or "countercharges" for the second stage, he would have to stand or fall on the result of the first stage, i.e. whether we found the dismissal proved or not, and after a further adjournment Mr Cox agreed to stand or fall on the decision of dismissal or no dismissal. In fact it turned out that on the evidence we heard on 30 November and 4 January, and 31 January there was very little criticism brought against the applicant, so far as the performance of his duties for the respondents were concerned.
8. We considered it important to have any intended criticism pleaded, both so that the applicant could prepare himself to meet it, and so that if, in the course of his cross-examination, criticism were made, we would be able to determine at once whether it was a matter pleaded, in which the cross-examiner might persist, or a matter going only as to credit, in which the cross-examiner would have to accept the applicant's answer. It was not therefore an empty matter of technicality, but one with a sound basis, in the interests of fairness to the applicant, and facilitating our hearing.
9. The applicant was very ably represented by his wife, Mrs F S Bertrand, who also briefly gave evidence to produce a statement by Mr Raj Salhotra (Exhibit 16), about whom more will be said later. She also called, and we fitted this in on our first day as he was due to go abroad shortly, Mr Andreas Michel Florentiades who had been the applicant's immediate superior as Food and Beverage Manager up till 1 September 1979, when he (Mr Florentiades) was put onto other duties in the hotel; and Miss L Padbury a Personnel Assistant to the respondent.
10. Mr Cox called Mr John Ambrose O'Neill, Hotel Manager of this hotel up till 1 May 1979; Mr Timothy John Weimer, the Food and Beverage Manager from 1 September 1979 onwards, formerly Deputy General Manager at the hotel, and Mr Kurt Kuen, the General Manager who had been Deputy Manager at this hotel in 1972, in another hotel of the chain in Birmingham from 1974, and from May 1979 General Manager of the Royal Horse Guards Hotel. They did not call a Personnel Manager, a Mrs Trenouth, whose name will figure in the evidence which we will summarise hereafter, and who, as we understood it, was still available to them, if they had wanted her, in a Headquarters Personnel Department.
11. In the latter part of July the applicant had fallen slightly foul of Mr Kuen by reprimanding a waitress a Mrs Karim El Said for being slow in taking hot food from the kitchen to rooms in room service, and who had complained

to Mr Kuen. It seems that Mr Kuen did not back up the applicant as against Mrs El Said's complaint, but he was brought before Mr Kuen for criticism, with his Manager, Mr Florentiades, who did seek to support him.

12. From the end of July onwards, worse was to come for the applicant. The Storeman or Head Storeman, Mr Raj Salhotra, had been granted leave of absence from August 6 to 2 September, and it had fallen to the applicant to sign his annual holiday application form (R6). He was proposing - and it was known he was proposing - to go to India, which he had not visited for some years, and this left the stores department deprived of a storeman, and unfortunately the Assistant Storeman was a most unreliable person in relation to both timekeeping and health, which meant that reinforcement was clearly required for the stores over the period of Mr Salhotra's absence.

13. Mr Florentiades thought that he had answered this problem by arranging with an intelligent trainee student, a Miss Alice Kwan to take over the stores for the month, which move was blocked by Mrs Trenouth of Personnel; she was only equivalent in rank to Mr Florentiades, and Mr Kuen - we think unwisely - supported Mrs Trenouth against his Food and Beverage Manager. Supervision of the stores, in which a great deal of valuable equipment, food and liquor was kept, was certainly part of the Food and Beverage Department's responsibilities, but not, it was submitted by Mrs Bertrand, the responsibility of the Food and Beverage Manager or his Assistant to stand in indefinitely doing the work of the storeman.

14. Early in August, two coloured kitchen porters were seen to be in the stores, and Mr Kuen objected to their presence on the grounds of their lack of experience, which he says was also the reason why he had blocked Mr Florentiades' move to put Miss Kwan in the stores for the month of Mr Salhotra's absence.

15. On 8 August there was the "Christmas Menu" meeting, and in the course of it the Restaurant Manager and the Head Chef complained of poor service from the stores, and, in the version of the applicant and Mr Florentiades, which we accept, Mr Kuen made it quite plain to Mr Florentiades in the presence of the applicant that he, the applicant, was required to be in the stores. The applicant protested that it was not his job to run the store, but that of a storeman and a professional storeman, and Mr Florentiades intervened in his support, and eventually, but this does not seem to be remembered by Mr Kuen, he relented and said to Mr Florentiades that he could look for some one else for the job of storeman.

16. After the meeting, Mr Kuen called Mr Bertrand apart in the corridor, and asked him if he thought it was all a joke, which the applicant denied, upon which occasion he again asserted that being the storeman was not his job and that the management should put a storeman in.

17. In the absence of Mr Salhotra on holiday, and of the assistant storeman through illness or irresponsible non-attendance, virtually all the working of the stores in the month of August fell to the applicant. The applicant had been trained in France to be a Manager, this was his first management job, and though it could be described as being on the lowest rung of the ladder of management, it was distinct in our view from the more menial job of the storeman, into which rôle he felt he was being forced during the

month of August.

18. It is true that the applicant had re-organised a good deal of the system in the stores, which the respondents appreciated, but it was not in our view permissible for the respondents to force him to remain in the stores doing such manual work as might come up (subject to some labouring help, when available from other departments), and we are satisfied that he had reason to feel that he was being degraded, and not used in the job in which he had contracted to serve the respondent.

19. He expressed his discontent at times to Mr Florentiades, who on one occasion said that that he had told him the management did not wish to replace him in the stores, but to do the stores job, and Mr Florentiades on one occasion warned Mr Kuen that the applicant was thinking of leaving and asked him to deal with him more gently, and to deal with him if possible through himself (Mr Florentiades), asserting that he was trying to do his best for the hotel.

20. The applicant's worst fears were confirmed by a conversation he had with Mr Kuen on 31 August. The latter very naturally had called Mr Weimer to see him before the latter took over the duties of Food and Beverage Manager in place of Mr Florentiades, and, after him, he interviewed the applicant, who by then was thoroughly upset and discontented with his lot as a de facto storeman, and Mr Kuen addressed him as follows:-

"I am going to make changes in the food and beverage department, Mr Weimer will be in charge from Monday, and I ask you to give him your full co-operation."

To this the applicant replied:

"Do you mean in the stores, or as assistant food and beverage manager?"

To which Mr Kuen replied:

"Wherever you are needed."

And to this the applicant said that if the situation did not change he would have to go.

21. Upon this occasion, as we see it, the applicant was asking for an assurance that under the re-organisation he would be relieved of the duties of being a storeman, and Mr Kuen for the management was very expressively denying him any such assurance.

22. At some time which we cannot exactly determine, towards the end of August or the beginning of September, Mr Salhotra was sending telex messages from India expressing doubts as to his return, for medical reasons.

23. If these were being exchanged and prior to September 1, it is quite extraordinary that Mr Florentiades, the head of the department in which Mr Salhotra was working, was not informed of them by Personnel, in the shape of Mrs Trenouth. After the beginning of September, however, they or the

latter of them were made known to Mr Weimer, but all we needed to decide on this matter is the question whether it was in doubt at the time the applicant decided to resign whether Mr Salhotra would ever return again or not, and this seems to be common ground, it also seems to be common ground that nobody kept the applicant au fait with the meaning of the telex messages.

24. During this month the applicant had been trying to combine some managerial duties with the storekeeping, but it is plain that by September 4, the stores were getting out of hand, as the applicant told us, he went in on that day for a duty at 13.00 hours and found the stores in such indescribable confusion that he had to spend the next 6 or 7 hours merely tidying them up.

25. Following this he decided that he would have to resign, and he handed his letter of 7 September to his then immediate superior, Mr Weimer, who did not make any deep enquiries into the reason why it should be tendered. At an earlier conversation, on 4 September, Mr Weimer agrees he told the applicant that he did not know whether Mr Salhotra was coming back or not, and the applicant again protested that the Assistant Food and Beverage Manager should not work as a storeman, and that it had been an insult of Personnel not to inform his predecessor of Mr Salhotra's various telegrams.

26. On receiving R4, Mr Weimer went to see the applicant in the stores, he (the latter) reiterated that he was unhappy with his position in the stores, and Mr Weimer decided to stall and let the applicant get his complaints "off his chest". He suggested that at that time Mr Salhotra was due to return on 10 September, and the applicant might wait until then, also saying that whatever the case were, whether Mr Salhotra returned or not, they would still have to recruit a storeman. Another conversation at about this time was when Mr Weimer asked the applicant if he had another job to go to, and he said, No, and Mr Weimer commented that his resignation was a bit rash. He did not it seems go any deeper into the causes of the applicant's discontent or remedies that might be found therefore.

27. With the benefit of hindsight, we were told that Mr Salhotra in fact returned on 12 September, but we must clearly judge the matter in the light of the information available to the applicant at the time he decided he had had enough and must resign, without attributing to him the knowledge that he later received on Mr Salhotra's return.

28. One of Mr Cox's less attractive arguments was that since the applicant had signed Mr Salhotra's authority for leave, he was liable to fill his place, or see that his place was filled in his absence. As a matter of logic, this proposition almost refutes itself, and one can imagine a very senior manager authorising an extended leave for a very menial operative, without having himself to takeover the latter's duties if he defaulted as to his return date. In any event, on the facts of this case it seems to be refuted by the fact that the plans of the Food and Beverage Department to supplant Mr Salhotra, at any rate for the considerable clerical duties and the lighter manual duties, with a trainee Miss Kwan, were blocked by Mrs Trenouth and Mr Kuen, and we feel furthermore that on the point of information, the applicant was impeded in making a judgment upon the probabilities of Mr Salhotra's return by the personnel department keeping the exchange of telexes, which we have exhibited in a little bundle at A2, from the food and beverage department, and particularly from the attention of the applicant.

29. On the point of the exact terms of the applicant's engagement, the respondent's evidence was also unsatisfactory. They had put in an alleged job description with their documents, which was a type-written sheet of 2 pages and a bit, without any authentication of any kind upon it, and there was no evidence whatever that this description had been shown to and/or accepted by the applicant. He while studying the files had come upon the job description of the Food and Beverage Manager and his Assistant, but these were very different documents, different in length, and different in the spacing of the paragraphs; and Mrs Bertrand called Miss L Padbury, a Personnel Secretary, who said that latterly she had been retyping forms of job descriptions. There was no evidence that these were ever shown to the employees.

30. Accordingly, we cannot find the applicant bound by any of the alleged duties in R3, although he would have accepted what is set out there up to the last two paragraphs.

31. The penultimate paragraph reads:

"Any other special duties or work outside the normal daily/weekly routine, but within the overall scope of the position."

And the ultimate paragraph reads:

"The above main tasks are subject to amendment and additions according to the individual requirements of the establishment and management."

As to these, the applicant would probably find no difficulty so long as the "overall scope of the position" was interpreted within the scope of managerial duties. As to the latter, he would not have accepted amendment without consultation and consent of the employee.

32. It was accepted on all sides that temporarily managers would stand in at any particularly required task: for instance the applicant himself had on two occasions performed as Head Waiter at breakfast time. This, however, he saw as distinct from being consigned indefinitely to the stores without any assurance of any future date when he would revert to his proper managerial duties. The management could clearly have coped with the August emergency better, if the applicant had been consulted from the start and his co-operation sought on a strictly temporary basis. We consider that the situation with which the applicant was faced on 7 September fell well within the principle announced by Lord Denning MR, in the case of Western Excavating (ECC) Ltd v Sharp (1978) IRLR at page 27, and that this applicant had been subjected to a rather long drawn out threat of demotion in effect from a managerial position to a more menial one as a storeman.

33. We are somewhat surprised that when the emergency first appeared, and according to Mr Kuen there was something of a financial emergency arising when it was noticed in July that the bookings for August were disappointing and less than were normally to be expected, the matter was not frankly discussed between the individuals concerned, and co-operation sought on a purely temporary basis. Miss Kwan was willing to operate the stores for the month of August at

a casual rate of £1 per hour "in the hand", and other arrangements might have been designed, and particularly, the applicant assured that it was not intended to make a permanent storeman of him. The absence of such reassurance on 31 August seemed to us to give him every ground to believe that he was in severe risk of such demotion, so far as his job content was concerned.

34. Accordingly we find a constructive unfair dismissal and consider the question of compensation.

35. The basic award is not difficult to assess, in that the applicant's gross weekly pay amounts to £85.38 per week creating a basic award of £170.76.

36. The compensatory award is a little more complex. His take home-pay at £256.85 per month becomes, in weekly terms, £59.27 per week: having worked out his notice he was paid by the respondent up till October 5, and he secured employment at a masonic catering centre in Clerkenwell near the Farringdon Road to start on December 4. During this interval he had one week's unemployment benefit, so that the recoupment regulations apply.

37. He went to the new job on December 4, and only stuck it out for one day, receiving £18 for his day's work. He complained that transport was more difficult, the last train from Waterloo to Surbiton, to which he and his wife had moved (in fact to the flat vacated by Mr Florentiades when he went abroad), leaving at 2 minutes past midnight, and the hours being longer. On the other hand, the pay was also up by about £1,400, and there was no evidence that he had put any of his personal difficulties to the proprietors of the establishment with a view to seeing what could be done to help him. We are bound to conclude that, by not remaining in that employment for a longer trial than one day, he did not shoulder the onus of reasonably mitigating his damage, equally it did not persuade us that it would be equitable to lay at the door of the present respondents any loss in respect of net earnings later than the day he tried, but did not persist in, this alternative employment.

38. If we were wrong about this, we record that he proposes to go to other employment on February 4 next. We bear in mind, in cutting off this head of compensation at December 4, that he spoke rather optimistically of the new job with the masonic catering centre when he gave evidence before ourselves on November 30, but when he came again on January 4, he told us that he had rejected the job after a day's trial, and only since then had a week's casual work at a restaurant to which he had been recommended by Mr Florentiades from 15-22 December.

39. We accordingly award 8 weeks' purchase of the net take-home pay which is $8 \times £59.27$ or £474.16.

40. We further award a nominal sum for the postponement of his statutory rights, namely £5, making a total award of £649.92 which we level up to £650 in accordance with the usual custom.

41. The particulars in accordance with the recoupment regulations are accordingly as follows:

- a) The total award is in the sum of £650.

- b) The prescribed element is £474.16.
- c) The period over which the prescribed element runs is from 6 October to 3 December 1979.
- d) The excess of the total award (a) over the prescribed element (b) is (to the nearest pound) £176.00.
- e) The applicant may not be entitled to the whole monetary award. Only (d) is payable forthwith; (b) is the amount awarded for loss of earnings during the period under (c) without any allowance for unemployment benefit or supplementary benefit received by the applicant in respect of that period; (b) is not payable until the Department of Employment has served a notice (called a recoupment notice) on the respondent(s) to pay the whole or a part of (b) to the Department (which it may do in order to obtain repayment of unemployment or social security benefit paid to the applicant in respect of that period) or informs the respondent in writing that no such notice will be served. The sum named in the recoupment notice, which will not exceed (b), will be payable to the Department. The balance of (b), or the whole of it if notice is given that no recoupment notice will be served, is then payable to the applicant.
- f) The Recoupment Notice must be served within the period of 21 days after the conclusion of the hearing or 9 days after the decision is sent to the parties, (whichever is the later), or as soon as practicable thereafter, when the decision is given orally at the hearing. When the decision is reserved the notice must be sent within a period of 21 days after the date on which the decision is sent to the parties, or as soon as practicable thereafter.
- g) The applicant will receive a copy of the recoupment notice and should inform that Department of Employment in writing within 21 days if the amount claimed is disputed. The tribunal cannot decide that question and the respondent, after paying the amount under (d) and the balance (if any) under (b), will have no further liability to the applicant, but the sum claimed in a recoupment notice is due from the respondent as a debt to the Department whatever may have been paid to the applicant and

regardless of any dispute between the applicant and the Department...

Francis Garner

Chairman

Reserved Decision (as to reasons)

DECISION SENT TO THE PARTIES ON

..... 17 MAR 1980

AND ENTERED IN THE REGISTER

..... *W Robertson*

FOR SECRETARY OF THE TRIBUNALS

Mr G M C Bertrand v EMI Leisure Ltd

THIS DOCUMENT IS CERTIFIED TO BE A
TRUE COPY OF THE ORIGINAL
IN THE OFFICE OF THE SECRETARY OF THE TRIBUNALS

..... *[Signature]*

SECRETARY OF THE TRIBUNALS