

## EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

Employee

UD1303/2005

MN970/2005

WT449/2005

against

Employer

under

### **MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001 UNFAIR DISMISSALS ACTS, 1977 TO 2001 ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. M. Petty

Members: Mr. T. Gill  
Dr. A. Clune

heard this claim at Galway on 1 March,  
3 and 30 July 2007

Representation:  
\_\_\_\_\_

Claimant:

Mr. Shane MacSweeney, MacSweeney & Co. Solicitors,  
First Floor, 1 Merchant's Gate, Merchant's Road, Galway

Respondent:

Ms. Fiona Forde B.L. instructed by, on the first day, Mr. Gordon McCann,  
and on the subsequent days, Ms. Christine Galbraith,  
Kennedy Fitzgerald Solicitors, The Waterfront, Bridge St. Galway

The determination of the Tribunal was as follows: -

The claimant, who at all relevant times had a full-time job with a different employer in a totally different field of employment, was employed by the respondent as a part-time disc jockey from July 2000. This was a one-night a week arrangement whereby the claimant initially worked Friday nights, then Sunday nights before commencing Saturday nights some time in early 2002. The employment was uneventful until September 2003 when the claimant was replaced as Saturday night DJ for four weeks. At the end of this four-week period the claimant worked the next Saturday night but was then working Sunday nights until Christmas 2003. After Christmas 2003 there was no Sunday night work for the claimant as the premises was no longer opening Sunday nights.

The claimant felt that he had been unfairly dismissed and took a claim for unfair dismissal before the Rights Commissioner service. By the time the matter was heard by the Rights Commissioner the claimant was again working for the respondent and the Rights Commissioner found that there had been no dismissal as the claimant had effectively been reinstated following a period of lay-off. The Rights Commissioner did find that the respondent needed to address the fact that there were no written terms and conditions for the claimant's employment. The claimant appealed the Rights Commissioner's recommendation to the EAT. The Tribunal upheld the Rights Commissioner's recommendation. Whilst the respondent used various disc jockeys, the claimant was the only one to have employee status rather than being self-employed. The claimant's position was that, following the Rights Commissioner's recommendation, his position was under threat from the respondent. It was known that the premises were to be re-developed.

The claimant wrote three letters to the respondent complaining about his employment situation, one on 21 November 2003 pre-dated his complaint to the Rights Commissioner. A written contract of employment was issued to the claimant in December 2004. On 2 January 2005 he wrote to question the taxation status of his employment. On 17 February 2005 the respondent issued protective notice to its employees in regard to the impending closure of the nightclub. On 19 June 2005 the claimant wrote to the respondent demanding to know when the nightclub was to cease trading. In the event the nightclub closed at the beginning of May 2006.

It was the respondent's position that, following his unsuccessful complaint to the Rights Commissioner, the claimant became more and more difficult to deal with in the workplace. An employees' handbook and disciplinary procedure was issued in July 2005. The claimant received his copy on 22 July 2005. The claimant received a written job reprimand on 7 August 2005 from the managing director (MD) and the club manager (CM). This reprimand related to three items. Firstly not answering or returning telephone calls from consultants called in by MD to assist in the running of the nightclub, including a music selection policy. Secondly CM's unhappiness with the claimant's performance. This unhappiness related to the "dry ice" generated smoke levels in the club and the claimant's unwillingness to alter those levels when requested to by CM or security staff. Thirdly, the claimant's unwillingness to meet the consultants in the nightclub when he was at work. The claimant disputed these allegations against him. His position was that he might have missed one telephone call from the consultant, he denied there were any problems in his controlling the smoke levels. At the conclusion of this meeting the claimant refused to shake hands with MD, he then took evasive action when MD attempted to pat him on the back. The claimant's position was that it was an emotionally charged atmosphere and he felt threatened by MD.

During a club security meeting on Monday 8 August 2005 further complaints were made about the claimant's control of smoke levels, his use of strobe lighting for dangerously long periods, his unwillingness to respond to requests from customers and his reluctance to tone down the music in response to incidents on the dance floor. On Thursday 11 August 2005 CM telephoned the claimant to ask him to come in early on Sunday night 14 August 2005 to discuss these complaints. The claimant was not at the meeting on 8 August 2005. The claimant gave a letter, in response to the complaints in the job reprimand, to MD at the meeting with MD and CM on Sunday 14 August 2005. The claimant was issued with a formal verbal warning at this meeting. This was the last occasion that the claimant worked for the respondent. The verbal warning dealt with two issues, smoke levels and the claimant's reluctance to respond to requests from staff members to control the smoke and the issues raised at the security meeting in addition to smoke levels. The claimant was required to change his attitude towards MD, CM and all staff with a review of progress on Wednesday 17 August 2005. A letter of complaint, dated 19 August 2005, from a customer who

was not a witness before the Tribunal, about the claimant was put to the claimant in a letter from MD on 23 August 2005. The claimant received this letter on 26 August, the day on which he was asked to meet MD to discuss the complaint. He did not meet MD on that day to discuss the complaint but replied in a letter of 31 August 2005 in which he questioned the complaint. He further sought clarification of his employment status as to whether he was suspended or not. The claimant was dismissed in a letter dated 8 September 2005 from MD.

### **Determination**

The Tribunal is satisfied that the dismissal was effected without the claimant being afforded fair procedures. It must follow that the dismissal was unfair. The Tribunal is not satisfied that the claimant sought to mitigate his loss until letters were written to prospective employers on 25 March 2006. The business closed at the beginning of May 2006. In those circumstances the loss in this case is restricted to a five-week period. Having regard to the contribution of the claimant to the dismissal the Tribunal awards €500-00 under the Unfair Dismissals Acts, 1977 to 2001. It being accepted that the claimant received all of his statutory entitlements, the claims under both the Minimum Notice and Terms of Employment Acts, 1973 to 2001 and the Organisation of WorkingTime Act, 1997 must fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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