

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIMS OF:

CASE NO. MN378/2006  
WT188/2006

UD581/2006

Employee

against

Employer

under

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

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. P. Quinn

Members: Mr G. Phelan  
Mr. T. Kennelly

heard this claim at Limerick on 10th October 2007

Representation:  
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Claimant :

Mr. Gerard J. Meehan, Gerard J. Meehan & Co., Solicitors,  
49 Catherine Street, Limerick

Respondent :

Mr. Cathal Minihane, Dermot G. O'Donovan & Partners,  
Solicitors, Fifth Floor, Riverpoint, Lower Mallow Street,  
Limerick

The determination of the Tribunal was as follows:-

The fact of dismissal was in dispute in this case.

The Claimant had been employed as a part time barperson in the Respondent's premises since in or about the month of July 1998 until the 20<sup>th</sup> February 2006. At different times over the years, as part of her duties, she had been entrusted with varying degrees of responsibility concerning the operation of the bar in the Respondent's premises. For example at one stage, she had possession of the keys and her functions included locking up the premises after functions and paying other employees their wages.

The Claimant gave evidence that in the years leading up to the end of 2005, she would have worked on at least two nights every week and sometimes on three occasions a week, in the event of a function taking place on the premises. The Claimant was not provided with a written contract of employment by the Respondent.

As regards the allocation of hours of work at the Respondent's premises, a weekly rostering system was in operation, whereby employees learned in advance, at the beginning of the week, of the dates and times of the shifts assigned to them for the forthcoming week.

The Claimant gave evidence that on week nights she would generally commence work at 8pm and leave the premises in or about 2am, or sometimes later at weekends. On the Sundays that the Claimant would have worked, she gave evidence of having worked from 12 noon to 8pm.

The Claimant contended that on average she would have earned approximately €112 per week, when allowance was made for the number of functions for which she would have worked over the course of a year. The Claimant gave evidence that she was paid a fixed sum of €50 a shift, regardless of the number of hours worked, that she was paid sometimes by cash and sometimes by cheque, but that she never received a payslip from the Respondent in respect of her earnings.

On cross-examination, although it was suggested to the Claimant that in the period of six months leading up to the 20<sup>th</sup> February 2006, she had only worked on average one 5½ hour shift per week and had earned in total over that period the sum of €1,150, corresponding to €50 per shift, no documentary evidence whatsoever, in the nature of work rosters, books of account, payslips or cheque book stubs, was adduced before the Tribunal by the Respondent.

The evidence of the Claimant disclosed that, from the end of the year 2005 onwards, after the Respondent's Bar Manager at the time had expressed a grievance to her, concerning her inability or failure to attend for work on St. Stephen's Night, a pattern had emerged whereby the Claimant was not being rostered for work by him.

Specifically, the Claimant alleged that in the period after January 1<sup>st</sup> 2006 up to the 20<sup>th</sup> February 2006, notwithstanding numerous entreaties having been made by both herself and by her father on her behalf, of both the Bar Manager and the Club Chairman, the only occasion on which she was rostered for work during this time by the Respondent's Bar Manager was for the 14<sup>th</sup> January 2006. This which was not disputed by the Respondent. Furthermore, the evidence also disclosed that after the 20<sup>th</sup> February 2006, there was a rostering for work in the Respondent's bar of a person or persons who had not acted in that capacity for a number of years

previously.

Ultimately, on the 20<sup>th</sup> February 2006 the Claimant confronted the Respondent's Bar Manager about the situation. The Claimant gave evidence that when she asked him to provide her with work, the Bar Manager told her that over the Christmas, she had let him down and there was no more work available for her with the Respondent.

The Claimant gave evidence that she understood this to mean that she was dismissed and requested to be furnished with her "*P45, a written reference and her holiday pay*," to which the Bar Manager advised her to "*talk to the Accountant and sort it out*".

The Respondent's Bar Manager at all material times, did not testify before the Tribunal. The Chairman of the Respondent, gave evidence before the Tribunal, to the effect that responsibility for the management of the affairs of the Respondent's bar, was essentially devolved upon, or delegated to, the Bar Manager, who had the support of the Respondent.

The uncontested evidence of the Claimant disclosed that, on the 21<sup>st</sup> February 2006, she had telephoned the Club Chairman, who made it known to her in the course of that conversation, that while he knew she required her "*P45, a written reference and her holiday pay*", he would have a word with the Bar Manager about the matter. Apparently, the Bar Manager was going on vacation at or about that time and it was subsequently communicated to the Claimant by the Chairman, that on the Bar Manager's return from vacation, the parties would "*sit down and talk about the situation*".

The Bar Manager returned from vacation in or about the 15<sup>th</sup> March 2006. By this time, the Chairman had been made aware by the Claimant, that there was contemplation by her of the making of a claim for unfair dismissal, her mother having apparently contacted a "*company in Dublin*" in that regard.

The evidence of the Claimant was that on the 15<sup>th</sup> March 2006, the Bar Manager telephoned her and offered her work in the Respondent's premises on the 17<sup>th</sup> March. This offer was on the basis that "*she forget about everything that had happened, bury the hatchet*" and forego any claim for holiday pay, unfair dismissal and notice entitlements.

Having taken legal advice on the matter from her Solicitor, Mr. Meehan, the Claimant subsequently advised the Respondent that she was not prepared to return to work on those terms.

### **Determination**

In so far as the Respondent denied that the Claimant was dismissed from her employment and the fact of dismissal was in dispute, the Tribunal unanimously determines that, on the uncontroverted evidence of the Claimant, as to what transpired between herself and the Bar Manager on the 20<sup>th</sup> February 2006, there was a clear and unequivocal termination by the Respondent of the Claimant's contract of employment as of that date.

By virtue of the provisions of s.6(1) of the Unfair Dismissals Act 1977, as amended, "

*the dismissal of the Claimant is deemed for the purposes of that Act to be an unfair dismissal, unless having regard to all the circumstances, there were substantial grounds justifying the dismissal.”*

Furthermore, by virtue of the provisions of s.6(6) of the said Act, *in determining for the purposes of [that] Act, whether the dismissal of an employee was an unfair dismissal or not, it shall be for the employer to show that the dismissal resulted wholly or mainly from one or more of the matters specified in s.6(4) of [the Act], or that there were other substantial grounds justifying the dismissal”*

The Tribunal unanimously determines that on the evidence adduced before it, the aforementioned statutory presumption was not displaced by the Respondent, who failed to show that the dismissal of the Claimant “*resulted wholly or mainly from one or more of the matters specified in s.6(4) of [the Act], or that there were other substantial grounds justifying the dismissal”*

Accordingly and by reason of the foregoing, the Tribunal unanimously determines that the Claimant is entitled to succeed in her claim for unfair dismissal as against the Respondent.

### **Redress**

The Claimant is currently enrolled in the Garda Training College in Templemore, Co. Tipperary since November 2006 and in all of the circumstances now pertaining, the Tribunal determines that the appropriate form of redress for her is compensation.

The Claimant has made a claim for compensation for unfair dismissal in the amount of €3,712.50 for the period from the 20<sup>th</sup> February 2006 to the 9<sup>th</sup> October 2006.

In determining how much compensation is to be awarded, the Tribunal takes into account the evidence of the Claimant that subsequent to the 20<sup>th</sup> February 2006, she made no application whatsoever for an alternative part-time employment of a similar nature. Accordingly the Tribunal unanimously determines that the Claimant failed to mitigate her financial losses, such as they were.

It was urged upon the Tribunal by Mr. Minihane, the Solicitor for the Respondent, that as an offer of re-engagement was made to the Claimant by the Respondent, on or about the 14<sup>th</sup> March 2006, her claim for compensation for unfair dismissal ought to be confined to the period from the 20<sup>th</sup> February 2006 to that date. In this regard, the Tribunal unanimously determines that having regard to the terms of the said offer and the conditions upon such was made to her by the Respondent, it would be neither just, nor equitable to penalise the Claimant for not having availed of same.

By way of purported explanation for her failure to seek an alternative part-time employment, the Claimant gave evidence that she continued to await a reference from the Respondent, which despite having been promised to her by the Chairman, was all to no avail. The evidence of the Chairman was that had any prospective employer contacted him about the Claimant, he would have been happy to provide a reference for her.

The Tribunal does not accept that the Claimant was justified in adopting the stance

which she did, by not making a single application for an alternative form of part-time employment in the period subsequent to the expiry of her statutory notice period entitlement in March 2006. The Tribunal does not accept that merely because the Claimant was not in a possession of a written reference from the Respondent, she would either of necessity, or even in all likelihood, have been precluded from obtaining alternative part-time employment of a similar nature, had she chosen to seek out same.

The Tribunal believes that on the balance of probabilities, the Claimant ought reasonably to have been in a position to have secured alternative part-time employment of a similar nature, within a relatively short period after the expiry of her statutory notice period entitlement in March 2006.

As regards a calculation of the extent of the Claimant's financial loss, the Tribunal is constrained by the absence of financial and other records. However on the balance of probabilities, the Tribunal is disposed to believe that the Claimant would on average have worked 2 shifts per week and accordingly, the Claimant is awarded the sum of €800 by way of compensation for her unfair dismissal.

Having regard to the length of time for which the Claimant was employed by the Respondent, the Tribunal unanimously determines that the Claimant had a statutory notice entitlement to four weeks pay and accordingly, the Claimant is awarded the further sum of €400, in respect of her claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001.

In respect of the claim pursuant to the Organisation of Working Time Act 1997, it was not disputed that the Claimant had not received such holiday pay as was her entitlement. The Claimant claimed a holiday pay entitlement in the amount of €479.80. Whilst there was some dispute concerning the number of weekly hours worked and weekly pay received by the Claimant, in the absence of the production of financial and other records by the Respondent, the Tribunal is disposed to accept the substance of the Claimant's evidence and accordingly awards her a sum of €415 in respect of her claim under the Organisation of Working Time Act 1997.

In summary, the Tribunal awards the Claimant the total sum of €1,615 in respect of her claims under the Minimum Notice and Terms of Employment Acts, 1973 to 2001, the Unfair Dismissals Acts 1977 to 2001 and the Organisation of Working Time Act 1997.

Sealed with the Seal of the  
Employment Appeals Tribunal

This

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(Sgd.)

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(CHAIRMAN)