EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF: **CASE NO. UD968/07**

Employee

against the recommendation of the Rights Commissioner in the case of:

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan
Members: Mr. F. Moloney
Mr. S. O'Donnell

heard this appeal at Dublin on 11th February 2008.

Representation:

Appellant : Mr. Tom O'Dwyer, Assistant Branch Organiser, Dublin Services Branch, SIPTU, Liberty Hall, Dublin 1

Respondent : Mr. John Barry, Management Support Services, (Ireland) Ltd., The Courtyard, Hill Street, Dublin 1

The case came to the Tribunal by way of an appeal against the Rights Commissioner's recommendation in the case of Employee –v- Employer reference (r-048327-ud-06/JT)

The determination of the Tribunal was as follows:

Appellant's Case:

The appellant commenced employment on 15th May 2000 as a Junior Bar Assistant. Two years later he was promoted to Senior Bar Assistant. He worked 30-40 hours per week. His rate of pay was €8.00 per hour. In the absence of the Bar Manager on sick leave from November 2005 to May 2006 and another employee who was let go, the appellant was in charge of the Bar.

After the appellant's return from holidays in July 2006 he telephoned the Bar Manager about his rostered hours for the following week. He was not rostered to work that week but was told to phone again towards the end of the week. When he telephoned again he was told he was rostered towork on the following Thursday. Other staff with less service were rostered before him. His hourswere greatly reduced then. When he told the Bar Manager he was seeing another employee in thecompany he felt the Bar Manager's attitude changed towards him and asked him to keep his relationship discreet.

When the appellant approached the Bar Manager about his reduced hours he was told to fight his own battles and not to undermine his (the Bar Manager's) authority. He felt the Bar Manager blackened his name. When he enquired why his name was taken off the roster in October 2006 he was told "you just were". When the appellant asked when would he be back on the roster he was told to phone again. He spoke to the Chief Executive Office (CEO) in his office about this matter and the CEO said, "if you start this, get out of my office".

For financial reasons the appellant felt he had to resign. Other staff were rostered to work more hours than he was.

The appellant had not received a pay increase in three years. He believed that two employees working with him were paid at a higher rate of pay. Since his resignation the appellant has been working on a casual basis. He is still actively seeking permanent employment.

Under cross-examination, the appellant said his hours varied. In winter time his hours were reduced. Upon his return from holidays in July 2006 he immediately telephoned the office enquiring about his rostered hours for the following week. Before departing on holidays he told the Bar Manager when he would be back from holidays. He said that a casual part-time staff member worked more hours than he did.

In September 2006 the appellant instructed his union representative to act on his behalf. His union representative wrote to the respondent about his reduced hours. The respondent invited the appellant to a meeting to discuss matters but advised that they did not recognise union representation. The appellant declined the invitation, as he did not wish to attend on his own.

The appellant said he had not been given any warnings during his employment with the respondent but the CEO had spoken to him about his personal appearance on occasion. The last day the appellant worked was 12 November 2006. He left messages for the Bar Manager about not being rostered but was unable to contact him. He spoke to another staff member who told him he wasn't rostered to work.

Respondent's Case:

The Chief Executive Office (CEO) gave evidence on behalf of the respondent. He commenced work with the respondent on 23rd July 2006. The Bar Manager reported to him. He had spoken to the appellant about his general appearance. The appellant did not have a good demeanour. Theappellant never acknowledged the CEO's presence. He wrote to the appellant on one occasion when he saw him wearing runners in the Bar while working. The CEO had no involvement in barrosters. The staffing of the Bar was appropriate to the level of business. During the refurbishmentworks which commenced in October 2006 working hours were reduced. The CEO stated that hedid not shorten the appellant's working hours. He denied he told the

appellant to get out of his office when the appellant spoke to him in his office in October 2006.

The CEO stated if a staff member had a grievance, the rule was that the employee should speak to management. It is open to the employee to bring a family member along if they so wish. It is the respondent's policy not to recognise union representation. When the CEO extended an invitation to meet with the appellant following a letter from the appellant's union representative, the appellant did not reply.

The CEO believed the appellant was employed as a casual bar person and that he was still a student. The appellant was not always available for work and the respondent was flexible in respect of his working hours. The appellant was not a permanent full time employee and never applied for such post.

Under cross-examination the CEO said he had no input into the day-to-day running of the Bar. The Bar Manager looked after this. He said he spoke to the appellant about the wearing of runners while on duty.

The CEO told the Tribunal that the appellant had not received a contract of employment. The Bar Manager had told him that the appellant was a student. The appellant's availability to work was always an issue. He accepted in his letter of 18th October 2006 to the appellant's union representative that the appellant should have been invited to bring someone with him when he extended an invitation to meet him.

Determination:

The appellant resigned his position with the respondent because he was not being rostered for sufficient hours and because he was taken off the roster altogether in October 2006. When he enquired as to why he was taken off the register he was told "you just were". He had difficulty discussing this with his manager and although he did meet the chief executive officer this did not resolve the problem. The appellant gave evidence that when he tried to discuss this with the chief executive he was told "if you start this get out of my office". This was disputed by the Chief Executive. Irrespective of whether this was said or not the appellant, a young man, should have been able to discuss the difficulties he was having with management. The appellant did not have a contract of employment. There was no grievance procedure. The respondent refused to discuss the matter with the union because it did not recognise the union. In this situation the appellant was not told that he could have somebody accompany him to the meeting with the chief executive officer. Having tried, but failed, to resolve this matter with the bar manager and with the chief executive officer the appellant resigned and claims that he was constructively dismissed.

A constructive dismissal will occur in a situation where an employee terminates his Contract of Employment where, because of the employer's conduct, the employee was entitled to terminate his Contract without notice or where it was reasonable for him to do so. It has been well established that a question of constructive dismissal must be considered under two headings – entitlement and reasonableness. The employee must act reasonably in terminating the Contract of Employment. Resignation must not be the first option taken by the employee and all other options including following the grievance procedure, must be exhausted first. An employee must pursue his grievance through the procedures laid down before taking the drastic step of resigning. As stated above the appellant did not have a contract of employment nor was there any grievance procedure for him to follow. Where there is no grievance procedure to follow the employee (appellant) must act reasonably. This Tribunal determines that the appellant did act reasonably. He tried to resolve the

issue with his manager and when this did not work he tried to resolve it with the chief executive officer. The Tribunal therefore upsets the decision of the Rights Commissioner. The Tribunal further determines that compensation is the most appropriate remedy under the Unfair Dismissals Act 1977 to 2001, and awards the appellant €3,000.00.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)