EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	CASE NO.
Employee	UD515/2007
	MN370/2007
	WT160/2007

against

Employer

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. M. O'Connell BL

Members: Mr. J. Horan
Mr. S. O'Donnell

heard this case in Dublin on 17 September 2007 and 17 April 2008

Representation:

_____

Claimant(s):
Mr. John Connellan, Carley & Company, Solicitors, 10 Anglesea Street, Dublin 2

Respondent(s):
No legal representation still on record for the respondent in this case

The determination of the Tribunal was as follows:-

In the claim form lodged with the Tribunal it was stated that the claimant's security industry employment with the respondent commenced on 20 September 2002 and ended on 7 May 2007. It was alleged that:

the claimant had never received annual leave or "cash-in leau" (sic) for the years that he had worked;

the claimant had been accused of sleeping at work for which he had been deprived of wages which were still owed;

money had been deducted from the claimant's wages for training that he had never attended;

the claimant had been forced to use his car as an on-site shelter for three months;

the claimant had sometimes spent the whole night in the cold with no shelter;

the claimant was not usually paid for his full hours worked e.g. after working eighty-eight hours he "would be paid only 39hrs & would struggle very hard to get the remaing" (sic);

the company deducted tax every week but "the revenue dept" sent the claimant a bill for over six thousand euro which the company did not submit to "revenue dept";

the claimant "always lived in constant fear of being sacked as I was always threatened with dismissal at every opportunity" and "right now I feel bullied, insulted & abused as words like <<you little piece of shit>> were constantly used on me" so that, as a result, the claimant had lost a great deal of his self-esteem, confidence and personal pride;

the claimant was only being paid €9.02 per hour rather than €9.57 per hour "as per security regulations" and this incorrect rate was also paid for public holidays (Xmas, Easter, bank holidays etc.) but if one refused to work on public holidays because of the incorrect rates one would be threatened with dismissal and so the claimant would "just work in disgruntlement & very unhappy";

neither were Sundays paid at correct rates according to security regulations nor were there night allowances;

payslips were given "mainly for just few hours worked (in most cases for 39 hours)";

the claimant would work "around 88 hrs/week but never was it considered as overtime";

the overall effect on the claimant was that "right now I feel used, abused, useless and abandoned".

In a notice of appearance sent on behalf of the respondent it was submitted that the claimant had not been unfairly dismissed and it was denied that the respondent had been in breach of the Minimum Notice and Terms of Employment Acts, 1973 to 2001, or of the Organisation of Working Time Act, 1997.

In an opening statement made on behalf of the claimant at the Tribunal hearing on 17 September 2007 the Tribunal was told that the claimant was from Zimbabwe but was resident in Ireland on a student visa which allowed him to work up to twenty hours per week during term and forty hours per week out of term. The claimant worked for the respondent as a security guard. The night of 7 May 2007 was the end. The claimant was on a residential development site. There was a show apartment burglary on the site. The claimant did not detect it. Gardai were called and the respondent was called. The respondent alleged that it had no alternative but to dismiss the claimant with immediate effect. The respondent's grievance was that the claimant did not properly discharge his duties on the night and, when asked on the night, had said that all was okay. The claimant was dismissed by letter dated 8 May 2007.

By letter dated 14 May 2007 the claimant wrote to the respondent seeking outstanding wages accrued for sixty hours worked in his final week and claiming for damage to his car when he was at work. Having failed to get comfort after his letter, the claimant was given advice to make a claim to the Tribunal.

In an opening statement made on behalf of the respondent it was submitted that the claimant had been fairly dismissed. A number of times the claimant had been given verbal warnings after being caught sleeping on his job as a security guard. It was no surprise that the claimant had been sleeping because he was also doing another job and studying.

Regarding the night that led to the claimant's dismissal, the Tribunal was told that the claimant had to walk around a particular site every thirty minutes and report to base that all was okay. However, the claimant failed to report to base. Early in the morning the claimant said that there had been a break-in. According to the claimant the break-in happened between 5.30 a.m. and 6.00 a.m.. Gardai said that two plasma screen televisions had been taken. The respondent questioned the claimant who said that he had been in his hut for six hours and accepted that the burglary had taken place at a previous time. Trust and confidence in the claimant was broken. The claimant accepted his dismissal. This was a stand-alone incident of gross misconduct.

Regarding the claimant's letter dated 14 May 2007, the Tribunal was told that the respondent did try to compensate the claimant for the damage to his car but that the claimant could not show that he owned the car. It was submitted that this was not a claim that the claimant felt was an unfair dismissal but rather that the claimant was angry about his job loss and not getting compensation. It was submitted that the claimant was telling lies.

Case for Respondent

Giving sworn testimony, the respondent's managing director (hereafter referred to as MD) said that the respondent provided security for residential construction and industrial sites and had over eighty employees (including some in Manchester and London). The claimant worked for the respondent from 2002 when he worked part-time doing twenty hours per week and had worked up to thirty-nine hours per week in 2005.

The claimant worked for the respondent on different sites around Dublin city. He had to walk the site, clock in at various points and make a call to the respondent's Kimmage base. They had to ring in every thirty minutes. MD found the claimant asleep on a site around 2004 and some of the respondent's drivers also found the claimant asleep. The respondent had digital cameras. The claimant was caught asleep around ten times.

MD said that the claimant was paid €9.03 per hour.

MD told the Tribunal that in May 2007 the claimant was looking after a large construction site in Dublin where he had to walk the site including the show apartments, check that all was in order and convey this information to base every half-hour. At 6.00 a.m. MD got back from London. Night staff were on duty. At 6.00 a.m. the claimant was on the phone to him saying that he had heard a noise whereupon he walked out and found that windows to the show apartments had been broken. A garda station was informed. MD subsequently formed the view that what the claimant was saying

was untrue and that he should have noticed at midnight that the windows were broken. The claimant had been making the calls every half-hour saying that all was fine. The gardai were there at midnight. At 6.00 a.m. the claimant had said that he had heard glass breaking.

MD spoke to the claimant on the premises. Another respondent employee had arrived on the scene when the gardai were there. The claimant admitted making a false report and that he had not done the required patrol.

Asked at the Tribunal hearing if there had been a reason why the claimant might not walk around, MD said: that it had been the claimant's job to walk around; that the claimant had been told what the respondent expected; that MD knew there was no future for the claimant in this job; that the business was based on trust: and that there was no longer any trust in the claimant.

Asked if he had considered merely giving a warning, MD replied: "It's down to trust. I need to be one hundred per cent sure. He admitted his guilt immediately. He had no other response. We sent another guard in after five minutes."

Regarding the 14 May 2007 letter from the claimant which sought to claim for damage to the claimant's car, MD said that he had got a late April phonecall from the claimant to say that the claimant had encountered a youth outside the claimant's site security cabin at 7.00 a.m.. MD added that this had been a site with a perimeter of nearly a mile of razor wire and a number of exits and said that the claimant had told him that this youth, having asked to use the claimant's mobile phone, had produced a knife whereupon the claimant had pulled the cabin closed. However, the youth then went at the window, got the keys of the claimant's car and proceeded to ram the gates of the site with the claimant's car. The claimant was on the phone to MD when this took place.

MD told the Tribunal that he believed the claimant at the time but that the youth in question had still not been caught although the gardai had been there in four minutes. MD told the Tribunal: "I'm in business fifteen years. Not much surprises me."

After the incident the claimant, who had opted to take a few days off, was asked to bring the car to the garage which the respondent used. The respondent was prepared to pay for the damage and contacted an insurance company which asked for information on the claimant's own insurance. The claimant never supplied the information and the respondent heard no more.

Regarding the claim in the claimant's 14 May 2007 letter that he was owed wages for sixty hours worked in his final week of employment, MD told the Tribunal that the claimant was sent a letter to come in on a set date whereupon he got full payment for his sixty hours and signed for it. This was the week after the two plasma screen televisions had been taken. The claimant did not raise the issue of damage to his car when he collected his money.

When it was put to MD that the claimant had alleged that he had got no annual leave MD said that the claimant had got his annual four weeks. When asked if he had records to confirm this, MD replied that his book-keeper was in attendance and could give evidence about this.

Regarding the question of whether the claimant had really worked seventy hours per week rather than thirty-nine, MD told the Tribunal:

"Time-and-a-half plus shift allowance would be payable then. We try to keep all employees to thirty-nine hours. We have a large staff but only pay overtime when we have to. He would get an eighty-nine euro shift allowance for Saturdays, Sundays or bank holidays and time-and-a-half for overtime. It would be on his cheque. He would sign for a shift allowance. We had a major fraud incident. We adopted a policy where employees have to sign for a cheque."

It was now put to MD that the claimant was alleging non-payment of overtime and hours worked. MD replied that the claimant had said that he was a solicitor and accountant in Zimbabwe but had made no complaint to the respondent. MD said: "Why did he stay if conditions were so bad?"

MD concluded his direct testimony to the Tribunal saying: "I felt his dismissal was fair. I'm entrusted by clients to protect their property. Our insurance is €2.5 million per year. I need to ensure that everything is being done."

In cross-examination MD was asked what the claimant's payslips said when overtime was done. He replied: "He would not be taxed on shift allowance. That would be tax-free. I'm saying he did not work more than thirty-nine hours."

It was put to MD that the claimant would say that he had routinely worked more than seventy hours and MD was asked if he (MD) was really saying that the claimant only ever worked thirty-nine hours. MD replied: No. He may have done more. I'm not there all the time. He may have done up to fifty hours occasionally."

Commenting on a payslip that had a reference to seventy-eight hours, MD said that this would refer to two weeks' holidays. It was put to MD that the claimant had worked Christmases and that the claimant and other witnesses would say that it was the respondent's practice to ensure that foreign staff always worked well in excess of thirty-nine hours. MD replied: "He would have opted to take his holidays around that time. I travelled from the U.K. to be here. I don't have the file here today."

It was put to MD that the respondent had not paid tax for the claimant on a large sum of money in the last year. MD replied: "I got a tax clearance cert."

MD was now asked why someone would opt out of a shift allowance and was asked what had been non-taxable. He replied: "He (the claimant) was working elsewhere. He did not ask for it. He would have known about it."

Asked if the respondent had a training manual, MD said that there was a mission statement and that all employees would have seen it and signed it but that he did not have it with him at the Tribunal hearing.

It was put to MD that the claimant would say that there had been no clocking system. MD replied: "I've been told the clocking system was not working on the claimant's site. I've heard of tampering. The supervisor told me. He's not here today."

It was put to MD that the claimant had never worked on the site where MD had allegedly found him sleeping three years earlier. MD replied that the claimant had indeed worked on that site and that MD had found him sleeping.

It was put to MD that the claimant would say that he had routinely worked nights and days. MD

replied that, on occasion, the claimant might have done fifty or sixty-two hours.

At this point in the cross-examination the hearing was adjourned to resume on 7 December 2007.

On 6 November 2007 the claimant's representatives sought and were granted a subpoena for MD to bring to the 7 December 2007 hearing all his mobile phone records between 17 September 2007 and 6 November 2007.

On 30 November 2007 the firm of solicitors that had acted for the respondent on 17 September 2007 wrote to the Tribunal that it was no longer representing the respondent.

At the resumed hearing on 7 December 2007 the claimant's representative and the respondent's counsel (now instructed by a replacement firm of solicitors) told the Tribunal that the case had been compromised (i.e. settled) and all claims were withdrawn for the settlement to be implemented with eight weeks' liberty to re-enter.

On 21 January 2008 the claimant's firm of solicitors re-entered the case.

By letter dated 11 March 2008 the abovementioned replacement firm of solicitors wrote to the Tribunal that it was no longer acting on behalf of the respondent and that it wished to come off record in this regard.

The case was listed for hearing on 17 April 2008 before the same Tribunal division that had presided over the previous hearing on 17 September. On 17 April 2008 the claimant attended with the solicitor who had represented him throughout but there was no attendance by or on behalf of the respondent.

Case for Claimant

Giving sworn testimony at the 17 April 2008 hearing, the claimant stated that he had worked for the respondent from September 2002 to May 2007. He stated that he had worked seventy-eight hours per week notwithstanding that his payslips said thirty-nine hours, that he had never been paid overtime and that he had never got holidays. He denied that he had opted to work his holidays although he did say that he had worked Easter and Christmas holidays for which he "was only paid a flat rate".

Asked about a shift allowance of eighty-nine euro which was untaxable, the claimant said that he had never got it and that the respondent had failed to account for that.

It was put to the claimant that MD had said that he had slept on the job in Rathmines. He replied that he had never worked in Rathmines but that he had worked in Ranelagh and in Rathgar.

Asked about the events of 6 and 7 May 2007 at a Rialto site, the claimant said that he had arrived at 8.00 p.m. on 6 May. There were showhouses and a construction site. The security guard that he relieved told him that they were no longer watching the showhouses because there was an alarm there. Therefore, there was no access to the showhouses. The respondent had told him to get information from the person there. He kept watching the building site.

In the morning of 7 May the claimant heard a sound and went to inspect. He saw a door smashed and an alarm disabled. He saw that new televisions were gone. He rang the police and explained

that he had heard a banging sound. Soon after ringing the police he rang the respondent. It was around 5.00 a.m..

The Tribunal put it to the claimant that MD had said that the break-in had been at around midnight and he (the claimant) was asked why there had been a five-hour delay. He replied:

"I'd been told to just watch the building site. The sound I heard was a banging sound. The building site was about five hundred yards from the showrooms. We had included the showrooms on previous nights. That night I was told not to include the showrooms. We got a briefing from the person there every time."

It was put to the claimant that MD had been very clear that it had been the claimant's responsibility to supervise the whole site. The claimant replied:

"When I told him I was alerting him to something I was not meant to watch."

It was put to the claimant that MD had said that the claimant had been found sleeping on the job. The claimant replied:

"He claimed that his dad came during the night. The site had a big wooden door and a small hole. He claimed his dad put a searchlight through the small hole. There was no shelter there. I was parked far from the gate. They said I should have seen the light. They said I'd been sleeping."

It was put to the claimant that MD had said that he had warned the claimant many times. The claimant said:

"I would not have been five years with him if he was not happy. He never gave me a warning. I went to sites where there was no shelter. I had a car. He didn't warn me. The only time was when I was delayed in traffic and I was meant to pick up his dad. I did not call him in time to say I was stuck in traffic. I said I was doing him a favour to collect his father but he called me a bastard. There was no shelter on most sites. I used my car as shelter. A guy on site left a van on site."

The claimant was now asked about the incident on 27 April 2007 when his car was allegedly damaged. He replied that it had been before alarms had been put in the showrooms on that site, that he had been working a shift from 8.00 p.m. to 5.00 a.m. and that, when he checked, there was a "guy" who had either jumped the wall or come through the small door. This "guy" said he was there to see somebody whereupon the claimant said that he would call the site manager. The "guy", who looked drunk, then asked the claimant for his phone and said that he would stab the claimant if the claimant did not give the phone to him. The claimant ran away leaving his carkeys in the security hut. The claimant closed the door on him in the security hut whereupon the intruder started to break windows in the hut and the claimant ran away again. The intruder hit the gates with the claimant's car. When the police arrived he had gone but the police subsequently caught him.

The claimant confirmed to the Tribunal that his car had sustained damage to the tune of about five thousand euro. He added that MD had told him to bring his car to MD's friend's garage, that "the guy there said to come back later", that MD had told him to wait and that he had waited until 7 May 2007 when his employment ended. He would normally get calls to ask him to go to sites but not this time. He received a letter of dismissal on 14 May. He subsequently wrote to the respondent but got no reply whereupon he sought legal advice.

Regarding 7 May 2007 the claimant told the Tribunal that, after he called the respondent to report that there had been a break-in, he was asked had he not been called every twenty minutes in accordance with normal procedure and the respondent's driver subsequently tried to prove to MD that he had been calling the claimant.

The Tribunal asked the claimant why he had kept working for the respondent for so long if he had felt that he was not being paid all that was due to him. The claimant replied: "When you get out you see there's a lot of abuse." Pressed on this, the claimant said: "I did not know where to go." The claimant said that he was "a partly-qualified accountant" from Zimbabwe and, on being asked why he had worked for about five years for half what he was due, replied that he was allowed to work twenty hours per week during academic terms and forty hours per week outside term. He added that it was "very difficult to get a job as a student". On being asked if there were no better employers in the security industry, he replied that he would always be threatened that, if he "messed with" the respondent, he would not get a job anywhere. He added: "The first days I worked for him he just put cash in an envelope and said that he had taken tax."

Asked if MD had explained how much had been taken in tax, the claimant replied: "No. I had a shortfall in tax. I don't think he was submitting to Revenue. He said, because I had a shortfall, he would take twenty-five euro every week. I owe the Revenue Commissioners six thousand euro. I went to the Revenue Commissioners towards the end of last year. They have not contacted me."

The claimant then gave details of his earnings in other employment after his employment with the respondent.

In closing submissions, the claimant's representative said that the claimant had only been entitled to work twenty hours per week, that the claimant had worked more hours than this out of economic necessity and that the claimant's representative was not sure how the Tribunal could reconcile that. The representative added that the claimant had taken no leave at all in the last year-and-a-half of his employment with the respondent.

Determination:

Having considered the evidence given by both the respondent and the claimant the Tribunal determines that the respondent's procedures were deficient and that, in all the circumstances, the claimant was unfairly dismissed. The Tribunal deems it just and equitable to award the claimant the sum of €4,000.00 as compensation under the Unfair Dismissals Acts, 1977 to 2001.

In addition, the Tribunal awards the claimant the sum of €352.18 (this amount being equivalent to two weeks' gross pay at €176.09 for a twenty-hour week) under the Minimum Notice and Terms of Employment Acts, 1973 to 2001.

Also, the Tribunal awards the claimant the sum of €1056.54 (this amount being equivalent to six weeks' gross pay at €176.09 for a twenty-hour week) under the Organisation of Working Time Act, 1997.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)