EMPLOYMENT APPEALS TRIBUNAL

Claims Of:	Case No.
Employee	UD462/2007
	MN324/2007
	WT138/2007

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. MacCarthy S C

Members: Mr. W. Power
Ms. P. Ni Sheaghdha

heard this claim at Dublin on 1st October 2007 and 5th December 2007 and 6th December 2007

Representation:

Claimant: Mr. Edmond J. Dillon, Micheál Glynn & Co., Solicitors,
98 O'Connell Street, Limerick

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

The determination of the Tribunal was as follows:

The claim for Minimum Notice was withdrawn at the outset of the Hearing.

Giving evidence the claimant told the Tribunal he has 25 years experience in the service industry but not in the security industry. His first security position was with the respondent when he commenced employment as Operations Manager with the company in September 2005. The claimant was responsible for the Assistant Operations Manager, nine supervisors and approximately 850 staff and clients.

When the claimant commenced employment he received an induction over the course of three weeks. This induction did not include on-call procedures. In or around six weeks into his employment the General Manager asked the claimant to become part of the on-call rota. The claimant asked him to explain what this meant. The General Manager explained that every six or eight weeks the claimant would be the on-call

manager. He had to be available 24 hours a day when he was the on-call manager. There was no extra pay for this and he was on-call every third week. On average he received approximately ten telephone calls per week. The claimant provided examples of some of the issues he dealt with as on-call manager. Mr. D a witness for the respondent stated that the on-call role was the same regardless of whether the role was performed on the day shift or the night shift.

The claimant was getting married on the 18 November 2006. The claimant applied in August 2006 to the General Manager (GM) for four weeks holidays in November 2006. He discussed the leave with GM prior to making his application for the leave. The claimant did not receive a response to his application. He sent an email to GM on the 18 October 2006 about his application and on a later date he spoke to GM about it again. The claimant told him that he was willing to work up to the 17 November 2006 although this was a later date than he had originally applied for. GM told the claimant that he could not approve four weeks. The claimant amended his holiday plans to three weeks. Mr. D of the respondent told the Tribunal that the claimant had applied for six weeks holidays and Mr. D granted this leave.

In October 2006 the respondent advertised the position of Assistant Operations Manager for Dublin. The advertisement stated that the position was Operations Manager. Mr. D a witness for the respondent said the job was advertised as this to ensure a better calibre of candidate applied. The claimant's position as Operations Manager was not in jeopardy.

The claimant was shocked and stunned when he saw the advertisement for an Operations Manager in Dublin. He discussed it with the General Manager (GM) who told him not to worry. The claimant told GM that he was unhappy as the holiday he originally applied was not approved and his job was advertised. Clients thought he was leaving the company as they had seen his position advertised.

The claimant was the on-call manager for the 7 November 2006. The supervisor on duty on the 7 November 2006 gave evidence to the Tribunal. He received a telephone call regarding an unscheduled opening at the new site. The monitoring room had received a signal that the alarm was deactivated. When the supervisor arrived at the site the rear gates were locked and padlocked. The supervisor unlocked the back door to the building and found that the alarm was deactivated. The supervisor knew that the alarm had been set as he had put set it himself earlier. The supervisor was not very familiar with the site as it was a new contract. The supervisor picked up an access card from reception and went to turn on the lifts but they were already switched on. The supervisor went to the second floor and walked down the corridor. He had to use a torch, as the lights were not on. He met the security guard who told him that he had a few drinks and was unable to get home as he lived in the country. The supervisor knew the security guard was not due to work until 6am, four hours later. The security guard seemed fine but the supervisor could smell alcohol from him. The supervisor phoned two other supervisors and consulted with them. They advised him to phone the on-call manager.

The claimant in evidence stated that he had received a telephone call at 2am from the call centre and he was asked to contact the supervisor. The supervisor told the claimant that one of the two security guards trained on the site had been sleeping in

the building and there was a smell of alcohol from him. The claimant was aware that only two employees were trained on the site, as it was a new site. It was a complex site with many procedures to be followed.

The claimant asked the supervisor about the condition of the security guard. The supervisor said the security guard was not falling around but he did smell of alcohol. Both of them attempted to contact the other security guard trained for the site but could not get in contact with him.

The claimant asked the supervisor if he thought the security guard would be able to work at 6am. The supervisor said he thought he would. The claimant told the supervisor to leave the security guard there, reset the alarm and return at 5.30am to make sure the security guard was ready to do his shift. The supervisor told the Tribunal that when he returned to the site at 5.30am the security guard was ready for work. He did not smell of alcohol and was in reasonable order and wearing his uniform. The supervisor told him that the claimant would speak with him about the matter later that morning. The supervisor was not asked for a written report of the incident until January 2007.

The claimant intended to meet with the facility management company the following day to explain the unscheduled alarm. On his way to the meeting the claimant received a telephone call and was asked to meet with the General Manager. The claimant explained to the General Manager on the telephone that his thinking on the matter was to avoid a furious client. The General Manager told the claimant that he would take his comments on board. When the claimant arrived at the office he had to tell the General Manager the situation again and he told him that he was going to meet with the person from the facility management company. The claimant left the office but received another telephone call to return to the office. When the claimant returned to the office he was told he was suspended. A letter dated the 7 November 2006 followed to confirm that the claimant was suspended pending an investigation and he was asked to attend a disciplinary hearing on the 8 November 2006. The claimant's solicitor sent a fax (dated 8 November 2006) to the company requesting a different date for the meeting. His solicitor also requested copies of various company documentation and all notes and statements relevant to the investigation.

The disciplinary hearing was rearranged for the 10 November 2006 and again for the 13 November 2006 but the claimant's solicitor wrote stating that the proposed meeting could not proceed as he was still waiting for copies of some documents and clarification of some matters from the company. The disciplinary hearing was rearranged for the 15 November 2006. The claimant's solicitor again wrote to the company outlining a number of matters to be addressed before the disciplinary hearing took place. The GM wrote to the claimant's solicitor on the 16 November 2006 stating that the hearing would be taking place on the 17 November 2006 and the letter stated that if the claimant failed to attend the disciplinary hearing would proceed in his absence. The meeting did not take place.

GM wrote a letter dated 17 November 2006 to the claimant stating that he was dismissed and would be paid a month's salary in lieu of notice. The claimant appealed the decision to dismiss him and received an appeal date of the 10 January 2007. The appeal hearing did not take place on this date and further correspondence

ensued between the parties. The appeal hearing was rearranged for the 31 January 2007. The claimant's solicitor wrote letter a dated 30 January 2007 informing the respondent that neither he nor the claimant would be in attendance on the 31 January 2007. The appeal was not finalised.

The claimant established his loss.

Mr. D of the respondent stated that it was his understanding that GM made numerous attempts to hold a disciplinary meeting with the claimant but his attempts were frustrated. Mr. D was to conduct the appeal but his invitations to the claimant to attend a meeting were declined.

A second witness for the respondent gave evidence to the Tribunal. She confirmed that she liaised with the claimant's representative concerning a date for an appeal hearing.

Determination:

The respondent took the view that the claimant's error of judgment amounted to such a serious lapse as to justify a dismissal.

We are not unanimous as to whether or not there was an error of judgement at all but we are unanimous that such an error (if it be one) was not a "substantial ground" justifying the dismissal within the meaning of Section 6 of the Act of 1977.

In making this finding we have regard to the nature of the security industry and its need for special diligence. But we also have regard to the fact the claimant received a phone call at 2am at home and made a judgement call which may or may not have been wrong. Even if his decision was wrong it did not amount to a "substantial ground."

We are also of the view that the claimant contributed to the dismissal by his failure to engage fully in the investigation. Had he done so he could have explained his decision and there might have been a different outcome. His failure to engage fully in the appeal followed the same pattern. We have regard to this contribution in assessing compensation.

His loss was as follows:

A) He was unemployed for approximately four months of which one month was paid in lieu of notice and his loss of salary was €12,000. He found new employment with a reduction in salary of €3,000 per annum lower than his position with the respondent. We allow €5,000 loss under this heading for past and future loss up to two years since the dismissal.

B) The claimant enjoyed a car allowance of €10,000 per annum from the respondent and he does not have such an allowance in his new job. The car allowance was to drive on the company's business but would also have been a personal benefit included and we would allow one half of that as personal benefit. Over two years this amounts to €10,000.

The claimant's gross loss is €27,000 less €7,000 for his contribution in failing to engage. The Tribunal award the claimant €20,000 compensation under the above Acts.

The claim for holiday pay under the Organisation of Working Time Act, 1997 was resolved.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)