

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIM(S) OF:  
Employee

CASE NO.  
UD402/2008  
MN360/2008

Against

Employer

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001  
UNFAIR DISMISSALS ACTS, 1977 TO 2001**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr D. Cagney BL

Members: Mr P. Pierce  
Ms M. Maher

heard this claim at Dublin on 23rd July 2008

Representation:

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Claimant(s) : Ms. Karen O'Brien B.L instructed by Ms. Ann Nowlan, Burns Nowlan, Solicitors,  
31 Main Street, Newbridge, Co. Kildare

Respondent(s) : In Person

**Respondents Case:**

The first witness gave evidence that he is a director of the respondent company and that the claimant commenced employment with the company as a cellar man in July 2006 and worked day time only. The company went into examinership in June 2007 when it experienced financial difficulties and the claimant was informed at that stage that he could not be retained in employment as a full-time cellar man. He was informed that his duties would change to include bar work duties, which would involve night work and the claimant accepted this position. The claimant proceeded to work on day duties and night duties from June 2007 onwards.

At a meeting held in early December 2007 all employees were informed by a director of the company that they would be required to work on the night of the 26th December 2007 and the night of the 31<sup>st</sup> December 2007. Rosters were posted up for the Christmas period on the 20<sup>th</sup> December 2007 and the claimant was rostered to work both nights. The claimant approached the witness on the 24<sup>th</sup> December 2007 informing him that he could not work on the night of the 26<sup>th</sup> December 2007 and the night of the 31<sup>st</sup> December 2007. The witness explained to the claimant that the company was short staffed and he would have to work on those nights, but agreed to allow him to

leave early if it was not busy. The claimant then told the witness that if he had to work on those nights he was going to leave. He placed his keys on the table, handed his key fobs to the witness and left the building. The witness gave evidence that 'under no circumstances was the claimant dismissed' and that they were operating on a skeleton staff.

Under cross-examination the witness gave evidence that the claimant was made fully aware that he was required to work on the night of the 26<sup>th</sup> December 2007 and that he had worked nights on previous weeks leading up to the Christmas period.

In reply to questions the witness confirmed that he was not in attendance at the meeting in early December when employees were notified that they would be required to work on the nights of the 26<sup>th</sup> December 2007 and 31<sup>st</sup> December 2007.

The second witness gave evidence that he is employed as a senior bar manager and had a good working relationship with the claimant. He was working with the claimant on the 24<sup>th</sup> December 2007 when the claimant informed him that he could not work on the night of the 26<sup>th</sup> December 2007. The claimant was about to meet a director of the company to explain his position and informed the witness that if the meeting did not go the way he wanted, 'it was a pleasure working with him'. The witness understood this to mean that the claimant would not be working there any longer if the meeting did not go to his satisfaction. When the claimant returned from the meeting he left items on the bar counter and left the building without saying anything to the witness.

Under cross-examination the witness confirmed that he attended the meeting in early December 2007. Two directors were present at the meeting and it was explained to employees that no time off could be taken over the Christmas period and a note to that effect was placed in his payslip. He could not recall if the claimant attended that meeting.

### **Claimants Case:**

The claimant gave direct evidence that he was initially employed as a cellar man and his working week was Monday to Friday from 8am until 5pm. When the company went into examinership he agreed to work some shifts in the bar at night to help his employers. This arrangement finished around August 2007 when he was told that he did not have to work night shifts any longer. On the Thursday before the Christmas period in 2007 he had heard from a work colleague that he was rostered to work on the night of the 26<sup>th</sup> December 2007. He did not see the roster until Christmas Eve when he noticed that he was rostered to work on the night of the 26<sup>th</sup> December 2007. He explained to a director of the company that he could not work on this night as he had family commitments. The director replied to him 'if you cannot work you know where we all stand'. The director asked him for his keys and the claimant went downstairs and left the premises as he understood this to mean that he did not have a job if he did not work on the night of the 26<sup>th</sup> December 2007. He confirmed that the director had told him he could leave early if it was not a busy night.

The witness gave further evidence that he was not present at a meeting in early December 2007. He only heard of this meeting on the day of the hearing. He never received a note in his payslip concerning holiday arrangements over the Christmas period.

Under cross-examination the witness confirmed that he had not requested to be off work on the 26<sup>th</sup> December 2007 or the 31<sup>st</sup> December 2007. He confirmed that the arrangement whereby he was not required to work nights only lasted for one month and he agreed to return to some night work

duties.

In reply to questions he confirmed that he carried out night work duties up until shortly after Halloween 2007. He was not sure if he worked any nights in December 2007 and agreed that he did not approach his employer seeking to be off duty on the night of the 26<sup>th</sup> December 2007. He confirmed that he had 15 years experience in the bar trade and would know the busy periods in the trade. He confirmed that he did not contact his employers after he left his employment.

**Determination:**

The Tribunal having carefully considered the evidence is satisfied by a majority decision that a dismissal occurred. The Tribunal is also of the view that the claimant made a major contribution to his dismissal. Based on his own evidence he is a very experienced member of the bar trade and had made himself available for night work. He was informally aware that he may be required to work on the night of the 26<sup>th</sup> December 2007. Based on his experience he was fully aware of the particular demands of the Christmas period and made a domestic arrangement prior to enquiring if he was required to work on the night of 26<sup>th</sup> December 2007.

The work arrangements that the employer had in place over the Christmas period were ambiguous and not made expressly clear. The position regarding the claimant is further complicated by the fact that he was originally employed as a cellar man on a weekday basis only.

The Tribunal awards the claimant €860 for his successful claim under the Unfair Dismissal Acts, 1977 to 2001. The Tribunal also finds that the claimant is entitled to one weeks pay under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 and awards him € 640 under the said Act.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

