EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	CASE NO.
EMPLOYEE –claimant	UD1420/2008, MN1363/2008 WT583/2008

against

EMPLOYER -respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Mac Carthy SC

Members: Mr. E. Handley
Mr. J. Dorney

heard these claims in Carlow on 31 July 2009

Representation:

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Claimant(s) :
Ms. Claire Bruton BL instructed by
Ms. Ann Marie Blake, P.J. Byrne & Co, Solicitors,
Athy Road, Carlow

Respondent(s) :
Ms. Catherine 0'Connor, M. J. O'Connor, Solicitors,
Drinagh, Wexford

The determination of the Tribunal was as follows:-

Grounds of Claim

The claimant's written claim stated that he had worked as a shop manager in the respondent's bookmaking shops since about 29 June 2007 but that he had never received a contract of employment or any written disciplinary procedure. He never received any warning or any other indication that there was any issue about his performance. He objected to not receiving any premium for Sunday work. Eventually, the respondent reluctantly agreed to pay him additional money for Sunday work. Throughout his employment he was paid in cash and never received a

payslip. This made it very difficult for him to establish his exact tax position or even if the respondent was making the correct deductions for his tax and PRSI. He regularly received additional and unrecorded cash payments during his employment.

On 27 June 2008 the claimant was extremely shocked to be advised by the respondent that he was not a team player, that there were complaints about him and that he was "not there for the long term". He had had no previous indication of any difficulty with his work or his relationships with other members of staff. The respondent made it very clear to him that he was to find another job. He sought a reference but the respondent refused to furnish one.

On 18 July 2008 the claimant was asked for an "update" on the previous discussion i.e. the respondent's request to the claimant that he obtain another job. It was subsequently made very clear to him that he was not welcome in the workplace and that he should leave.

The claimant could no longer endure the treatment to which he was being subjected by the respondent and he concluded that he had no choice but to resign from his employment. The written claim sent to the Tribunal stated that the claimant's employment with the respondent had ended on 1 August 2008.

Respondent's Notice of Appearance

The respondent's written defence, signed by the respondent's principal (hereafter referred to as PR), stated that the respondent categorically disputed the claimant's complaints. It confirmed the claimant's start date as 29 June 2007 but stated that PR had presented a contract of employment and job description to the claimant who had "categorically refused to review same and/or sign the presented documents". A "Job Description - Counter Assistant" and "Terms & Conditions of Employment" (both unsigned and undated) and a blank pay advice slip were appended to this written defence.

The defence went on to say that the claimant's contract stated that, for pay purposes only, all days in the betting shop business were the same and that any Sunday premium was included in the claimant's standard rate of pay. It was acknowledged that wages had been paid in cash but it was stated that the claimant had been "at all times fully aware of his PAYE and PRSI deductions as it appeared on his wage advice". The Tribunal was referred to the attached supporting documents.

It was denied that the claimant had ever received additional or unrecorded cash payments "in any way, for any work or duties requested by the company for him to perform". However, PR, as the claimant's aunt, did "recall giving him a sum of money as a personnel (sic) present prior to a holiday he was due to go on". It was stated that this had been PR's "personnel (sic) money" and that it had been taken from PR's purse. She added that she was "aggrieved by his accusation of impropriety in this regard".

The respondent's notice of appearance stated that "the meeting of the 27th of June 2008 was a probationary meeting" with PR's husband (hereafter referred to as HUS) "where a number of issues were discussed". It was stated that these issues had previously been discussed with the claimant on a number of occasions but that there had been "no resolution of same". The notice of appearance concluded as follows:

"The decision was made that (the claimant's) employment would cease within the company and

within his probation period as laid down.

All such information and details of this policy was clearly listed in his terms and conditions of employment and contract which he refused to sign or review.

(The claimant) was never refused a reference of employment only that such a reference would be given on the completion of his employment with the company."

As stated above this notice of appearance had at its foot PR's signature over her typed name and the typed name of the respondent.

The Hearing

At the outset the claim lodged under the Organisation of Working Time Act, 1997, was withdrawn.

The respondent's representative told the Tribunal that PR was married to an uncle of the claimant and the claimant's representative stated that HUS (the abovementioned husband of PR) was a director of the respondent. The Tribunal expressed concern that family divisions could stay in a family for generations (in the event of differences not being resolved between the parties) and requested that this be conveyed to the parties.

The respondent's representative stated that she had only got instructions very recently and that her client had posted its T2 form (notice of appearance) without legal advice and that her instructions were contrary to it. She referred the Tribunal to the T2's statement that the decision had been made that the claimant's employment would cease within his probation period, said that her instructions were different and stated that the respondent was now disputing that a dismissal had taken place.

The Tribunal stated that, if the Tribunal were to ultimately make a finding that there had been a dismissal, it could be difficult for the employer concerned to justify that dismissal if the employer's initial position had been that no dismissal had taken place.

It was claimed in writing that the claimant's average gross weekly pay had been €822.61 after overtime (and other payments had been taken into account).

The respondent's representative acknowledged that payments had been made in cash but said that all payments had been returned for tax purposes. The claimant had got money for travel and had got money as a gift when he went on holiday. Occasionally, bonuses were paid at the time of a major horseracing festival. However, that was put through the books.

The claimant's representative argued that the claimant's P45 had reflected his salary but not his cash payments.

The claimant's representative contended that the claimant was prejudiced by the sentence in the respondent's T2 that "the decision was made that (the claimant's) employment would cease" and that the respondent had to maintain that position at the hearing. The claimant's case was that a decision had been taken to terminate his employment and that he had come to the hearing to meet the respondent case that had been made on the T2 form.

The respondent's representative stated to the Tribunal that the respondent's T2 had been drawn up by someone who was not at the Tribunal hearing.

The Tribunal stated that Employment Appeals Tribunal forms of claim (T1A) and of defence (T2) were not pleadings like court pleadings and that the parties were not strictly bound. For example, the Employment Appeals Tribunal stated on T2 forms that the party completing it would "not be necessarily confined to what is given on this form at the hearing". The Tribunal was not suggesting that a party could not elaborate at the hearing on what had been written on a form. However, the Tribunal also stated that the fact of a party signing a document which had been attached to a T2 created "a fairly heavy onus to establish if she was entitled to resile" from its text. The Tribunal ruled that it would hear a witness on the question of whether there was an entitlement to resile from the words of the notice of appearance (T2 form) in this case.

Respondent's Case

Giving sworn testimony, PR (the abovementioned principal of the respondent) acknowledged that she had received the claimant's T1A form (statement of claim) but said that she had not got legal advice. Stating that she "would not have dealt with" the T1A or T2, she added: "I'm unfamiliar to be honest."

PR told the Tribunal that the person named on the T2 form as the representative acting for the respondent was her husband's son (hereafter referred to as BD) She confirmed that it was her signature on a document attached to the T2 and asked: "Can I read it to see if I've read it before?"

After reading the T2, PR said that she had read it and had signed it in her living room. She added that BD would have typed it up. Asked where BD would have got the information, she replied:

"We probably would have discussed it. He's my husband's son but he does not work in (the respondent). We discussed the running of the business. I discussed (the claimant's) case with (BD). He prepared the document after we discussed it."

PR stated to the Tribunal that her husband (previously and hereafter referred to as HUS) had met the claimant on 27 June 2008 but that the claimant had not been dismissed on that day. Rather, she thought that HUS had wanted to give the claimant "a slap on the wrist". The claimant had got a telling-off but had stayed working for the respondent for a few months thereafter.

PR told the Tribunal that she had not wanted to lose the claimant and that HUS had called the claimant for a meeting "to peg him down a step". PR did say to the claimant "maybe a week later" that his job was safe and that he knew "what (HUS) is like at times".

The claimant was HUS's nephew. The claimant asked for a Friday off to attend an interview for a job that he later told PR that he had not got. PR told him that he had a job with her.

Subsequently, the claimant told PR that he was leaving and that his solicitor had told him that he did not have to give notice. She told him that he might not get the "dole" for ten weeks if he left. She had thought that he had been "getting a bit happier" and that the claimant's employment with the respondent "was all working out". She still did not know why, "out of the blue", he had rung to say that he had spoken to his solicitor and was leaving. She had been very good to him. Two weeks before he left, she had given him extra payments for Saturday work in the hope that he would stay.

PR stated to the Tribunal that HUS had no involvement in the running of the respondent. Asked about HUS's son, BD, she said that he was a general manager of a hotel who was "well used to" employment law and staff issues.

Asked about the sentence in the document attached to the T2 which said that "the decision was made that (the claimant's) employment would cease within the company and within his probation period as laid down", PR said that HUS had gone and talked to the claimant but that she had tried to make it better for the claimant. She remarked that "there's probably no pleasing people", that she had thought that the claimant "was getting on okay", that the claimant had done his work and that they had been on speaking terms (or, as she put it, she had spoken to him and he had talked to her).

PR told the Tribunal that "there was no decision made to end his employment" and that, although she had read and understood the words in the document attached to the T2, she "probably should not have signed it". She added: "That sentence should not have been in it. I just signed it."

Questioned by the Tribunal, PR said that the respondent had seven employees including herself, that she had leases on three shops and that she could get a solicitor when she needed advice. She said that she knew that one is bound when one signs a lease. She told the Tribunal that HUS should not have had discussion with the claimant and that BD had no involvement in the respondent although he had drawn up the document which she had signed before it was attached to the T2 and sent to the Employment Appeals Tribunal.

Speaking of the claimant, PR said: "I had good intentions. He was staying with me. Why would I give an increase if he was not going to stay? I wanted to encourage him to get back to the way things were."

At this juncture in the Tribunal hearing, the claimant's representative pointed out that a Rights Commissioner had dealt with the wages issue regarding Sunday premium prior to 27 June 2008.

To this, PR replied: "Even if it was before the twenty-seventh of June I did it with good intentions."

The claimant's representative declined to cross-examine PR and the respondent's representative declined to call HUS or any other witness although the opportunity to do so was afforded to the respondent by the Tribunal. The Tribunal then afforded both sides the opportunity to discuss the matter between themselves.

When the parties returned without having resolved the matter, the Tribunal stated that, having heard PR, it was not persuaded. PR was running a successful business which regularly got involved in transactions involving large amounts of money and considerable risk. PR had to sign many documents regarding property, insurance and leases. She knew that what she signed bound her. She signed the respondent's notice of appearance. Although it seemed to involve HUS and BD there was a clear intent on behalf of the respondent to dismiss the claimant.

The Tribunal stated that it had not heard HUS but that it had heard that the claimant was led to believe that he had no future with the respondent and the Tribunal was obliged to find that the claimant had been dismissed. There was some confusion in the claimant's own mind. This was nota constructive dismissal but a direct dismissal. It was an old practice of employers to tell an employee that he or she had no future in the job and to look for another job. The Tribunal deemedthis dismissal unfair.

The respondent's representative now protested that full evidence had not been heard. The Tribunal replied that it had heard the representative's client and had made its ruling. The representative said that she felt, with respect to the Tribunal, that the decision was unfair to the respondent. The Tribunal replied that it had given a chance to talk and to call the client. The representative stated that she wanted to apply to adjourn to let the respondent file an amended notice of appearance. The claimant's representative now interjected that she could not consent to this.

The Tribunal now stated that, in fairness to the respondent, it had given PR the chance to give evidence and that the respondent's representative had chosen not to call another witness. The Tribunal ruled that the respondent was not in breach of the Minimum Notice and Terms of Employment Acts, 1973 to 2005, and that it would give the parties until the end of August 2009 to say that they did not need a determination regarding quantum of compensation for unfair dismissal.

Determination:

Having asked questions at the 31 July 2009 hearing about the financial loss incurred by the claimant as a result of his dismissal and not having heard that the matter had been resolved between the parties, the Tribunal, in finding that the claimant was unfairly dismissed within the meaning of the Unfair Dismissals Acts, 1977 to 2007, deems it just and equitable in all the circumstances of this case to award the claimant compensation in the amount of €25,000.00 (twenty-five thousand euro) under the said legislation.

The Tribunal does not find the respondent to be in breach of the Minimum Notice and Terms of Employment Acts, 1973 to 2005. The claim under this legislation is dismissed.

The Tribunal notes that the claim lodged under the Organisation of Working Time Act, 1997, was withdrawn at the hearing.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)