

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:  
EMPLOYEE - *claimant*

CASE NO.

UD1087/2009  
MN1101/2009

against  
EMPLOYER. - *respondent*

under

### MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005 UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Dr. A. Courell B.L.

Members: Mr T. Gill  
Mr M. McGarry

heard this claim at Sligo on 19th April 2010

Representation:

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Claimant(s) : Ms. Caroline McLoughlin, Callan Tansey Solicitors,  
Law Chambers, 3 Wine St, Sligo

Respondent(s) : Mr. Bob Walsh, McGovern Walsh & Co, Solicitors,  
Pearse Plaza, Pearse Road, Sligo

### Respondent's Case

The first witness (hereafter known as JC) gave evidence that he works as a manager with the respondent company. He also works as a bar person in the company's licensed premises and has responsibility for staffing and rosters. On the night of 21 February 2009 he was working along with four employees one of whom was the claimant. Shortly after midnight he noticed two customers waiting to be served. He approached the customers and they informed him that they did not require service. His colleague hereafter known as (JW) also approached the customers and they also told him that they did not require service. It appeared as though the customers were waiting to be served by the claimant.

The claimant then served the two customers in question two drinks. The witness then checked the till receipt and discovered that only one drink had been recorded. Approximately 15 minutes later

the claimant served the customers two more drinks and again only recorded one drink on the till receipt. The witness then asked the claimant to accompany him to the kitchen area whereupon he produced the till receipts and asked the claimant for an explanation. The claimant initially denied what had happened but then admitted that she had served two drinks free of charge. She did not appear to believe that it was a serious issue and explained that she, herself, would pay for the two drinks at the end of her shift. The claimant then returned to work and offered the witness €5 payment at the end of her shift for the unpaid drinks. The witness declined the offer of payment.

The witness attempted to contact the co-owners of the business in relation to the incident but they were uncontactable for a number of days. He eventually informed co-owner hereafter known as (FH) on 25 February 2009. The witness along with (FH) met with the claimant also on 25 February 2009 and requested that she return to the premises on 27 February 2009 as they needed to discuss the matter further with the other co-owner, hereafter known as (ES).

The witness gave further evidence that the only people with the authority to serve drinks free of charge are the co-owners and himself. It is explained to each employee that no drinks can be served free of charge without prior approval from himself or the co-owners. He did not accept the claimant's explanation that she would pay for the drinks at the end of her shift.

The next witness (JW) gave evidence that he has worked as a bar man for the respondent for the past 10 years. On the night of 21 February 2009 he asked two customers if they required service and they replied that they were ok. He later noticed the claimant serving two alcoholic drinks to the customers. He then checked the till receipt and discovered that only one drink had been recorded. He had been asked by (JC) to observe the two customers as (JC) had been suspicious of them. (JC) then went to the kitchen area along with the claimant and he had no further interaction with the claimant. He confirmed that he has never been given permission to serve drinks free of charge and account for payment at a later stage.

The next witness (ES) gave evidence that he is the co-owner of the business. He has co-owned the business for the past 16 years. The company operates a zero tolerance to the serving of drinks without payment as it is a cash business. It is an act of gross misconduct to serve drinks or food free of charge without necessary authorisation. He was not present on the night of 21 February 2009. He, along with (FH) and (JC) dismissed the claimant on the basis of evidence communicated to him concerning the incidents of the night of 21 February 2009. That decision was taken on 25 February 2009 as the actions of the claimant amounted to gross misconduct.

### **Claimant's Case**

The claimant gave direct evidence that she commenced working for the respondent in June 2004. Initially she worked in the kitchen area but from 2008 onwards she worked as a waitress. She was never provided with a contract of employment. In May 2008 she commenced a computer course which resulted in her working on a part time basis. She commenced a second course in October 2008 but continued working on a part time basis and had no difficulty in obtaining her part time hours.

In early January 2009 she started to experience some difficulty in obtaining her part time hours and she spoke with (FH) about the situation. She explained that other employees with less service were being provided with hours of work. When she did not receive a satisfactory explanation she contacted her local citizens advice centre and was advised that she should send a letter to her employer stating that she was available for work. She did as she was advised.

On the night of 21 February 2009 two of her friends entered the bar area. One of her friends was very upset as her mobile phone had been stolen. She served her friends two drinks each on two different occasions. She only charged them for one drink on each occasion as it was her intention to pay for the other two drinks herself at the end of her shift. When (JC) approached her about this she explained the position to him. (JC) told her that it was unacceptable to serve drinks free of charge without prior authorisation and she would have to pay for the drinks. He did not say that he would have to speak with the co-owners about the matter.

At the end of her shift she offered to pay €5 for the drinks but (JC) declined to accept the payment stating that she could pay for them during the week. She understood that the cost of the drinks amounted to more than €5 but she only had that amount on her person at that time as her personal belongings were away from the bar area in a hallway. She worked her shift the following day and returned to the premises on 25 February 2009. She gave (JC) €9.60 and he said the matter was now sorted. She then checked the roster and discovered that her name was not included on it. (JC) then told her that (FH) was reducing hours and she should speak with (FH) about her hours. No other meeting occurred that day.

She returned to the premises on 27 February 2009 and spoke with (FH) about her hours. She enquired about the possibility of obtaining hours of work as a cleaner. (FH) replied “you must be joking, you are not working here anymore, ask your manager why”. She realized at that stage that her employment was terminated but nobody told her that she was dismissed. She never spoke with (ES) at any stage of the process and she never received any written communication stating that she was dismissed. She confirmed that she had witnessed bar staff serving free drinks to customers during the time she worked for the respondent.

### **Determination**

There was a conflict of evidence between the parties as to whether, or not, the claimant had acted in a way which constituted gross misconduct. On balance, the Tribunal accepts the evidence of the respondent and, in particular the evidence given by the first witness (JC). In the circumstances, the respondent has established that this was a case of gross misconduct and that the summary dismissal of the claimant was fair. Furthermore, while the Tribunal accepts the respondent’s evidence that the procedures followed leading up to the dismissal were fair, the Tribunal comments that the system by which the decision to dismiss was communicated could be improved upon. The claim under the Unfair Dismissals Acts 1977 to 2007 fails.

This being a conduct based dismissal the claim under the Minimum Notice and Terms of Employment Acts 1973 to 2005 also fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

