EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	**CASE NO.**
EMPLOYEE - *claimant*	UD582/2009
	RP602/2009
	MN592/2009
	WT252/2009

against

EMPLOYER - *respondent*
EMPLOYER - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 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: Ms. P. McGrath BL
Ms. J Winters
Mr. P Woods

heard these claims in Dublin on 26 November 2009 and 21 May 2010

Representation:

Claimant: Mr. Alistair Rutherdale BL instructed by Ms. Aoife Sheehan, John Sherlock & Company, Solicitors, 9-10 Main Street, Clondalkin, Dublin 22

Respondent: Mr. John Kennedy BL instructed by Doran W O'Toole & Company, Solicitors, Unit 3b, Woodland Office Park, Southern Cross, Bray, Co Wicklow

The determination of the Tribunal was as follows:-

Determination (of Preliminary Issue):

The Tribunal members have carefully considered the evidence adduced. The Tribunal has been asked to deal with a preliminary issue relating to the claimant's jurisdiction. In particular has the claimant got the requisite 52-week service to allow him to bring a claim for unfair dismissal under the Unfair Dismissals Acts, 1977 to 2007?

The claimant makes the case that the years of service with the first named respondent (hereinafter referred to company A) together with the period of service with the second named respondent (hereinafter referred to as company B) should be taken together as one period of service. This

would give the claimant a period of service of three years, which well exceeds the minimum, required in the Unfair Dismissals Acts, 1977 to 2007.

The respondents make the case that there was a break in service between employment with company A and company B and that the claimant was well aware that his employment with company A was terminated on the 16th September 2008 and that his employment with company B was a fresh employment start, which commenced on the 17th September 2008.

The Tribunal recognises that the accrual of service is a significant benefit, which attaches to long-term employment. In light of this, the Tribunal finds that the parties must demonstrate a break in service was intended and understood before such a break can be established.

In looking at the facts herein the Tribunal notes that the claimant went to his employer looking to be redeployed or moved for personal reasons. The employer, quite fairly, accepted the difficulties expressed by the claimant and set about the task of seeing if his abilities could be used elsewhere.

The company director/manager gave evidence of his discussion with the claimant and stated that a solution to the difficulties expressed to him was to place the claimant in another site where a second company (company B), owned and run by the director was operating security services.

The evidence of the employer/director was that the parties intended that the claimant was effectively terminating his employment with company A and taking up new employment with company B.

The difficulty with this assertion is the lack of evidence to demonstrate this intention. The claimant was not at the time given a P45 from company A, the issue of notice was not addressed, no new contract of employment was drawn up, the issue of a probation period was not addressed, the claimant presented no curriculum vitae and had no formal interview process. In full what happened was the claimant presented for a meeting with the security manager of company B set up by the director wherein he was effectively measured up for a uniform and told where to attend and what time.

Importantly the claimant started work on site with company B the day after he had last worked on a company A site. Showing no actual break of service.

The Tribunal finds that the parties have failed to demonstrate an intended break in service mutually understood by the parties. Whilst the employer might suggest this was orally advised to the claimant the Tribunal cannot accept this was this was understood by the claimant in the absence of any written verification especially where English understanding may not have been perfect.

The Tribunal notes that a number of employees who had been working with company A also transferred to company B. In effect company B took on the company A employees as part of the re-structuring process, which occurred in the aftermath of the director of company B taking over company A. Whilst the respondents maintain that the companies were to be seen as separate entities in reality they were run administratively from the same office. The claimant was either seconded from company A to company B or redeployed to company B. Either way there was no break in service and the case for unfair dismissal must proceed.

Determination (of Substantive Case):

The Tribunal has carefully considered the evidence adduced in the course of this hearing. The respondent company summarily dismissed the claimant for the deliberate refusal to carry out the legitimate instruction of management. The onus rests with the respondents to establish to the satisfaction of the Tribunal that the respondent acted reasonably and fairly in all the circumstances.

The claimant accepts that he was using a laptop during the course of his employment as a security guard with the respondent company. The claimant has made the case that the use of a laptop was a regular feature during his years of employment. The claimant indicated that his supervisors knew this to be the case.

The respondent company has made the case that the use of laptops and DVD players etc. was strictly forbidden on "active" sites such as the one at Stewart's Hospital. The clients, it was explained, would not tolerate the use of such sources of entertainment when the security guard was meant to be alert to all aspects of security on the site.

An issue arose at the beginning of October 2008 when the claimant was seen on site with a laptop bag and perhaps with an open and powered-up laptop. It is accepted by the claimant that at least three things occurred as a result of this. Firstly, the managing director of the company sent a warning text message stating that the use of laptops is not allowed. Secondly, a handwritten notice was put up over the claimant's desk warning that security personnel could not use laptops. Thirdly, the claimant's line manager verbally told the claimant that the use of laptops could result in his dismissal.

The claimant has made the case that he did not fully understand the content of these three events and that he did not understand the implications and/or consequences of what might happen to him if he persisted in using the laptop at work.

It seems then that within two to three days of these three warnings the claimant was at his place of work and was seen to have his laptop up and powered-on.

On the face of it, the company may have had grounds for an on-the-spot dismissal for gross misconduct for the claimant's insubordination.

Instead, the managing director did call the claimant and his witness into an office to afford the claimant an opportunity to give a reasonable explanation for what seemed to the managing director to be a wilful disobedience on the part of the claimant.

The claimant was not able to substantiate in any way the explanation given; namely, that he was waiting on an important legal document or letter.

On considering all the evidence, the Tribunal finds that the respondents acted reasonably with respect to their treatment of the claimant. The Tribunal cannot accept that the three warnings given in quick succession were not understood by the claimant and finds that he knew or ought to have known that he was not allowed to use his laptop, for any purpose, in the workplace.

Bringing his laptop into work and opening it up for whatever purpose was an act of flagrant disregard for the instructions he had been given.

The act amounts to a breach of trust so significant that the respondents were not unreasonable in

taking the step of summary dismissal.

The claim under the Unfair Dismissals Acts, 1977 to 2007, fails.

As the Tribunal has found that the respondents' summary dismissal of the claimant was not unreasonable the claim lodged under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, fails.

As the Tribunal has not found that the respondents were in breach of the Organisation of Working Time Act, 1997, the claim lodged under the said legislation is dismissed.

As the Tribunal has not found that the claimant was redundant within the meaning of the Redundancy Payments Acts, 1997, the appeal lodged under the said legislation is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This ________________________

(Sgd.) ________________________
(CHAIRMAN)