EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF: CASE NO.

EMPLOYEE–**Claimant** UD2462/2009
MN2302/2009
WT1055/2009

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. C. Corcoran B.L.

Members: Mr. M. Noone
Mr. N. Dowling

heard these claims at Dublin on 16 November 2010

Representation:

Claimants:
Mr. Hugh Byrne B.L. instructed by Ms. Elizabeth Howard,
Howard Synnott Solicitors, Ballyowen Castle,
Ballyowen Shopping Centre, Lucan, Co. Dublin

Respondent:
Mr. Darach MacNamara B.L. instructed by
Mr. Barry O'Donoghue, Ferrys Solicitors,
Inn Chambers, 15 Upper Ormond Quay,
Dublin 7

The determination of the Tribunal was as follows:

The claimant worked in the public house from January 2006 as a barman well before the respondent took over on 31 October 2008. By the time the respondent took over the claimant was assistant bar manager. A new bar manager (BM), who had worked with the claimant in a previous employment, was appointed on 21 February 2009. BM was the claimant's supervisor.

From January 2009 the respondent had become concerned about the level of variance in the form of

lost potential revenue (LPR) being highlighted in two-weekly stocktaking reports carried out by an independent contractor. As a result of this the respondent set the management team of BM and the respondent the task of monitoring usage of stock and reducing LPR. The respondent's position is that the claimant was present at five or six meetings also attended by the respondent, his personal assistant and BM where the seriousness of this issue was brought home to both BM and the claimant. The claimant accepts being at one such meeting in March 2009.

It is accepted that at the March meeting the respondent told both the claimant and BM that if they couldn't do their jobs properly in regard to controlling LPR then he, the respondent, might as well not employ them and do their jobs himself. The respondent further asserts that there were various disciplinary issues in regard to the claimant's timekeeping, adherence to uniform policy and the condition he was in when arriving for work. No written record was opened to the Tribunal of any instances where the claimant was formally sanctioned in regard to any of these issues.

On 4 July 2009 the claimant was injured at work during a disturbance whereby a patron was being ejected from the premises. The claimant was absent from work because of his injuries for some eight weeks after this injury. It is the respondent's position that while the claimant was away there was a significant improvement in the LPR position. The respondent made it clear that this was not to be seen as a comment on the claimant's honesty but against his competence.

On Tuesday 13 October 2009 the claimant did not charge for a lunch served to two ladies in the respondent's carvery as a result of a complaint about their meal. The respondent's position is that the complaint was about cold coffee; the claimant's position is that the complaint was about cold food. The respondent's position is that the claimant exceeded his authority in not charging for the lunches. On foot of this incident the respondent issued the claimant with a verbal warning. The respondent's position is that the claimant was given a copy of this warning on 13 October whereas the claimant's position is that he was not aware that the respondent had any issue about his actions on 13 October until 17 October 2009 by which time other issues had arisen.

The first stocktake after the claimant's return to work was on 16 October 2009 and this showed a deterioration in LPR. BM did not work that day and the claimant, due in at work at 12.00 noon, did not come to work until almost 4.00pm. The claimant's position is that he mistakenly thought he was due to start work at 4.00pm as had been the case a week previously. The respondent's position is that the claimant was unshaven with a crumpled shirt and stank of alcohol telling the respondent that he had "slept it out".

Shortly after his arrival at work the claimant was called in by the respondent and then sent home with instructions to come to meet the respondent at noon the following day to discuss matters. In the event the noon meeting on 17 October 2009 was put back to around 2-00pm. At this meeting the claimant was given a written warning in relation to a serious deficit in stock take of the previous day, a further written warning for being four hours late for work and not being properly dressed on 16 October and then a letter of dismissal with immediate effect for three verbal and two written warnings. The respondent told the Tribunal that the claimant was dismissed without notice for gross misconduct. The claimant asserts that the catalyst for his dismissal was the receipt by the respondent of a letter from the claimant's solicitor, dated 15 October 2009, stating the claimant's intention to launch a personal injury claim against the respondent arising from the injuries sustained on 4 July 2009. The respondent's position is that this letter was not received until Monday 19 October 2009.

Determination:

The respondent asserted that he dismissed the claimant for gross misconduct yet the dismissal letter states that he was dismissed following three verbal and two written warnings. On the face of it this amounts to a dismissal following the application of a procedure, as outlined in the contract of employment, of escalating sanctions through the disciplinary process. Putting the question of previous verbal warnings to one side the Tribunal is not satisfied that there was any proper investigation into the lunches not charged for. It is equally clear that there was no proper investigation into the reasons, if any, for the poor LPR result at the 16 October stock take. Neither is the Tribunal satisfied that any proper enquiry was conducted into the circumstances of the claimant's late arrival on 16 October. Rather it seems to the Tribunal that the respondent took the view that he would send the claimant home on 16 October and prepare the ground to dismiss him the following day. The Tribunal is satisfied that the question of LPR was a serious matter for the respondent. That being the case it is not clear to the Tribunal why BM was not subject to any discipline in this regard. For all these reasons the Tribunal finds that the claimant was unfairly dismissed. When considering the award to make in this case the Tribunal finds that the claimant contributed to his dismissal, the evidence of the Head Chef about the claimant's timekeeping and condition on arrival at work being key in this regard. Having carefully considered all the factors involved the Tribunal measures the award under the Unfair Dismissals Acts, 1977 to 2007 at €10,000-00.

The Tribunal further awards €1,400-00, being two weeks' pay, under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

The evidence having shown that the claimant received his entitlements in this regard, the claim under the Organisation of Working Time Act, 1997 must fail.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)