

## EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE – **claimant**

UD2179/2009

MN2021/2009

WT916/2009

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. P. Hurley

Members: Mr. P. Pierson  
Ms. H. Henry

heard this claim at Athlone on 15 December 2010  
and 1 March 2011

Representation:

\_\_\_\_\_

Claimant: Mr. Tony McLynn, T & N McLynn, Solicitors,  
7 Pearse Court, Pearse Street, Athlone, Co Westmeath  
on the first day  
Mr. Martin Fallon, 23 Whitebeam Avenue,  
Athlone, Co Westmeath  
on the second day

Respondent: Mr. Ronnie Lawless, IBEC West Regional Office,  
Ross House, Victoria Place, Galway

The determination of the Tribunal was as follows:

The claimant was employed from 7 June 2008 by the respondent, which supplies security guards to third party clients. On the night shift of Saturday 29 August 2009 the claimant was employed as a static security guard on a motorway project some fifty miles long. The claimant's location was close to an area where mobile plant was stored when not in use at night.

The claimant's supervisor had a problem in establishing contact with the claimant who did not answer his mobile phone. The claimant's position is that this was because the battery in his phone had gone flat. The supervisor asked a van patrol guard (VP) to investigate and the respondent's position is that at around 4-00am on 30 August 2009 VP found the claimant to be asleep in the reclined passenger seat of his car with a blanket or quilt and a pillow. VP was unable to wake the claimant and informed the supervisor of this. A nearby guard was asked to get the claimant to phone the supervisor when he was awake.

The supervisor went to the claimant's location at around 6-00am by which time the claimant, who had not contacted the supervisor prior to his arrival, was awake. The claimant denied having been asleep and accused VP who arrived shortly after the supervisor of lying when suggesting that he had been asleep. It is common case that the supervisor told the claimant to finish his shift, the claimant's position was that the supervisor told him that it was his last day working for the respondent and that he was finished. This was the last time that the claimant worked for the respondent.

The operations director (OD) received a report from the supervisor and a letter from the claimant about the incident in the early hours of 30 August. The respondent's position is that OD decided not to roster the claimant for any further shifts until he had met the claimant to discuss the matter. This was conveyed to the claimant in a phone conversation around 3 September 2009. No meeting was arranged and the claimant attended unannounced at OD's office on Friday 11 September 2009. The claimant complained of being unfairly treated and denied being asleep as alleged. OD decided that the claimant's behaviour amounted to gross misconduct and decided not to roster him from that point on. No correspondence issued to the claimant about this matter and he received his P45 on request some eleven months later.

### **Determination**

The Tribunal is satisfied that the supervisor dismissed the claimant some time after 6-00am on the morning of Sunday 30 August 2009. It follows that this was a dismissal without any, or fair procedure and as such is automatically unfair. Nevertheless when considering the remedy in a case such as this the Tribunal has to be mindful of the contribution of the claimant to the situation in which he found himself. The Tribunal accepts VP's evidence of what he found at around 4-00am and in those circumstances it is quite possible that properly applied procedures may have resulted in a charge of gross misconduct being sustained against the claimant. For all these reasons the Tribunal measures the award under the Unfair Dismissals Acts, 1977 to 2007 at €1,500-00. The Tribunal further awards €360-00, being one week's pay, under the Minimum Notice and Terms of Employment Acts, 1973 to 2005. The claim under the Organisation of Working Time Act, 1997 was withdrawn during the hearing.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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