EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.

EMPLOYEE UD1390/2009

Against

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K.T. O'Mahony B.L.

Members: Mr. D. Hegarty
Mr. J. Flavin

heard this claim at Cork on 29th June 2010 and 30th November 2010 and 1st December 2010

Representation:

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Claimant:
Edward O'Mahony & Co, Solicitors, 22 Tuckey Street, Cork

Respondent:
McNulty Boylan & Partners, Solicitors, 26/28 South Terrace, Cork

The determination of the Tribunal was as follows:-

Preliminary Issue

The respondent contended that the Tribunal did not have jurisdiction to hear the claim under the Unfair Dismissals Acts as the claimant did not have the one-year's continuous service as required by s. 2(1) of the Acts. It was agreed that the employment ended on 14 May 2009 but there was a dispute as to the date the employment commenced.

The Evidence

The respondent's bar was losing money and in early 2008 its owner (OB) invited the claimant, who had previously worked for him in another bar, to work in the bar. The respondent's position was that as the claimant was running his own bar at the time he agreed to work for him on a casual/consultancy basis two days per week and this continued from 12 February 2008 to 26 May

2008. The claimant was looking at the business and examining why it was not a success. The claimant's job was to promote the bar, control staff and stock and get sales up. The lease was being terminated in his own bar and the claimant, in or around 26 May 2008, began to work full-time for the respondent and from then he was paid by the respondent and put on the company books. There was no agreement as to how long the consultancy arrangement was to last and the arrangement was not reduced to writing. OB, who had a large business portfolio, personally paid the claimant until he commenced as an employee with the respondent on 26 May 2008, from which time he was paid by the respondent.

The claimant's position was that the respondent wanted him to develop the business and the only way that he could do so was by working in the bar. Before this there had been a big turnover of staff in the bar; it is important for customers to have someone to associate with and that the bar has an identity and continuity. The claimant commenced working in bar for the respondent on 12 February 2008 but because he was running his own bar at the time he was only available to work 4 days a week, averaging 40 hours per week and he was paid €500 net per week in cash and was to receive a bonus if takings exceeded a certain threshold. His duties included serving the customers, stocking the bar, cleaning the toilets and other usual duties of a barman/bar manager. Business in the claimant's own bar was dropping and when his lease was terminated early by mutual agreement because of his financial agreement, he changed to working five days per week in the respondent's bar in late May 2008 and his pay was increased to €700 per week. When he started in February 2008 there had been no prior notification to the staff, he just took control as manager.

Determination on Preliminary Issue.

The Tribunal is satisfied that the claimant was carrying out the duties of a bar manager, which included duties of a barman, from the time he commenced working in the respondent's bar on 12 February 2008. Accordingly, he has the requisite one-year's continuous service entitling him to maintain a claim under the Unfair Dismissals Acts.

<u>Respondent's Case</u>

The respondent's bar had been losing money in its first two years. The person who had been running the bar prior to the claimant had no experience and left. The claimant, whom OB regarded as a very good barman with many years experience in the trade, was hired by OB to improve and develop the business. There was a good relationship between the parties and the respondent gave some financial help to the claimant.

The claimant's wages were paid in cash, which were left in an envelope with his name on it in the safe every Monday for collection by him. According to the claimant he was paid €700.00 per week when he was working full-time and there was also a bonus incentive scheme in place. The respondent's position was that he was paid €400.00 per week, which together with a pay slip were placed in an envelope and left in the bar safe for collection by the claimant every Monday. Copies of pay slips from 1 June 2008 to 1 May 2009 were submitted to the Tribunal. OB's position was that the claimant had never queried the P45 and P60 furnished to him. The claimant was adamant that he had received only one pay slip during his employment with the respondent and that was because he required one for family proceedings in another forum.

Stocktakes were carried out every four weeks by an external stocktaker, from a company dealing with approximately 40 bars and hotels. The employment went well at the start and for the first six

months that the claimant worked there he turned the business around and the turnover increased. Then the stocktakes began to show some serious discrepancies in draught beer. Documentation, submitted to the Tribunal, shows:

11/09/08 to 9/10/08	deficit of 107 pints	
10/10/08 to 6/11/08	deficit of 660 pints	(7.5 kegs)
7/11/08 to 7/12/08	deficit of 185 pints	
8/12/08 to 6/1/09	surplus of 58 pints	
7/1/09 to 3/2/09	deficit of 98 pints	
4/2/09 to 3/3/09	deficit of 334 pints	
4/3/09 to 6/4/09	deficit of 118 pints	
7/4/09 to 6/5/09	deficit of 469 pints	
7/5 /09 to 13/5/09	deficit of 409 pints	

OB met the stock taker and the claimant after each stocktake. He found the deficit of 660 pints in early November alarming. He felt something was seriously wrong and that a discrepancy of this magnitude could only be due to theft. While wastage can occur where a barrel is "high", this is documented and allowances are made by the brewery. OB did not issue any warning to the claimant on finding this discrepancy but told him he "had to get to the bottom of it". OB felt that money was not being clocked through the till or the stock was not being delivered. It is the manager's job to check deliveries. On 8/9 December 2008 following another stocktake showing a discrepancy OB issued a verbal warning to the claimant. OB's position was that it was the responsibility of the claimant as manager to ensure that shortages do not occur and that on each occasion that there was a loss he made it clear that the level of shortage was not acceptable. On 6 March 2009 OB wrote to the claimant stating inter alia:

"Over the last 5 stocktakes we have had only 1 in surplus. As manager you are responsible for stock and cash at the premises. I have issued verbal warnings to you in the meetings with the stock taker that have taken place after each stock take.

I am now giving formal written notice that any future substantial stock losses will result in the termination of your employment with this pub."

Immediately subsequent to this written warning there were two further bad results from the stock-taker (see above) and on 8 May 2009 OB again wrote to the claimant stating:

"The performance is entirely unacceptable, and shows a complete degeneration in your management of the pub over an extended period.

Please note there will be no further verbal or written warnings. The next stock take that shows substantial losses will result in immediate dismissal."

Following this, OB was very concerned and did a count himself at the weekend. He then called in the stock-taker and discovered that from 6 to 13 May there was a loss of 409 pints. Losses for those 6/7 days amounted to €2,281.00. The problem was at crisis point.

OB called to the bar on 14 May 2009 and met with the claimant. OB told the claimant that his performance was unacceptable and that he was being let go. This meeting took place in a snug at the back of the bar. OB denied the claimant's assertion that a customer in the bar could overheartheir conversation. It was the responsibility of the claimant, as bar manager, to ensure

that losses did not occur and he failed to so do.

The claimant had spoken to OB of his concerns about some members of staff but when these were let go the problem continued. OB denied having received any free kegs of beer from either the brewery or the claimant. OB was not alleging that the claimant was involved in any wrongdoing but it was his responsibility to ensure such losses did not occur. The claimant's management of the bar had fallen apart.

In her evidence to the Tribunal OB's wife confirmed that OB had dictated the two letters of warning and that she had typed them, put them in an envelope and on each occasion stapled the letter to the claimant's pay packet, which she placed in the bar safe. Staff are paid in cash and the programme she uses produces pay slips. She was adamant that the claimant was paid €400 per week and she was not aware of any extra pay being given to him by her husband (OB). When he wanted a payslip for a court case she reprinted an old pay slip for him.

The stocktakes were carried out by ST from an independent company. ST confirmed his reports to the Tribunal. He maintained that well-run bars should show a surplus in draught beer. Before he finalised his reports he would contact the claimant about them. These were the worst losses he had ever come across in the course of his work but the claimant could not understand it or give any explanation. ST believed that the problem was due to theft. When some members of staff were let go the problem continued. It was the manager's job to check the deliveries.

Claimant's Case

The claimant was a trained and experienced bar manager. He had raised concerns about wastage and had complained to a brewery about the high wastage in a particular beer. The brewery had given four free kegs to compensate for this. He also bought three kegs of beer with his own money and put these in the bar. The claimant agreed that the larger discrepancies could only be attributed to dishonesty and accepted that as manager he was responsible for discovering the source of the problem. The claimant further accepted that he had been told that his job was in jeopardy. However, he did not accept the veracity of the final stocktake.

The claimant outlined the steps he had taken to eradicate the loss or dishonesty: he spoke to staff and cautioned them about the waste, he ensured that receipts were issued with each sale, watched for 'no sales' on the tills and asked the owner or assistant manager was present to take in the kegs on delivery. Deliveries are made between 7.00am and 8.00am and were put away by the time he arrived at work. The breweries did not accede to the claimant's request to make their deliveries at a later time. For a while OB or the assistant manager came in early to take in the deliveries. The claimant had discussions with OB as to whom he thought might be acting dishonestly. He discussed the problem with the assistant manager who worked opposite shifts to him and told him to "keep an eye out". While there was CCTV on every till anyone wishing to avoid detection could do so. The assistant manager was the only other full-time member of staff.

The claimant accepted that he had received two verbal warnings after unacceptable stocktakes and that these warnings made it clear to him that his job was in jeopardy. However, he denied ever having received a written warning. The stock-taker treated him fairly. However, he did feel that as manager he should have been involved in the stocktakes. The respondent had no grievance or disciplinary policies in place.

On 14 May 2009 OB and his son came to the bar. OB's son took charge of the bar so that the

claimant and OB could have a meeting at the other end of the bar. When OB told him that he was dismissing him the claimant pleaded for his job. The claimant maintained that a member of the public, who was in the bar at the time, overheard, their conversation.

Determination

The respondent's business was suffering ongoing unsustainable losses. It was common case that the scale of the losses could only be due to theft or dishonesty of some sort. The respondent specifically stated that he was not alleging that the claimant was involved in any wrongdoing. The claimant agreed with the respondent's position that it was his responsibility, as bar manager, to ensure that losses did not occur. Yet, he failed to identify the source of the leakage or to take adequate steps to resolve the problem. The stocktaking was carried out by an independent company. The Tribunal is satisfied that the claimant received the two written warnings as well as the two verbal warnings and in any event the claimant's evidence was that he knew that his job was in jeopardy. The Tribunal, accepting the final stocktake report, is satisfied that the dismissal was fair. Accordingly, the claim under the Unfair Dismissals Acts 1977 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)