EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF: CASE NO.

EMPLOYEE **- claimant** UD646/2010
MN596/2010
WT273/2010

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: Ms. K.T. O'Mahony BL

Members: Mr. D. Hegarty
Mr. D. McEvoy

heard these claims at Cork on 11 May
and 1 September 2011

Representation:

Claimant:
Mr. John Boylan, McNulty Boylan & Partners Solicitors,
Clarkes Bridge House, Hanover Street, Cork
Respondent:
Mr. Colmán O'Donnchadha BL instructed by, on the first day,
Mr. Martin Harvey and on the second day Mr. Harvey
and Ms. Aine McCarthy both of Martin A. Harvey & Co. Solicitors,
Parliament House, 9/10 Georges Quay, Cork

The determination of the Tribunal was as follows:

The claimant was employed as a catering instructor in the respondent's training centre from 1996. The respondent, which is funded by both FAS and the VEC, provides five streams of training in catering, health & recreation, computing, construction and woodwork for young people who are often socially disadvantaged. There is also general training in art and English.

The claimant, whose skill as an instructor was highly regarded by the respondent at all times, was employed on a full-time 35 hour week basis until 2004 when, following a period of extended sick leave, it was agreed that she could work reduced hours on three days a week, by leaving two hours early at 2-45pm, thereby meaning she was working some 29 hours a week. As a result of this

arrangement it became necessary for the respondent to make alternative arrangements for the supervision of the catering trainees on those days when the claimant finished at 2-45pm. This arrangement involved two staff members involved in numeracy and literacy training but who were not qualified as catering instructors.

In 2007 the claimant sought to undertake a course of study towards a diploma in the study of the provision of services to those with special needs. As part of this course of study the claimant wanted some time off work. The claimant wanted to take three months off work to complete the first part of the course; her position is that the centre manager (CM) advised her that there was a better chance of her request being successful if she were to seek a twelve-month career break. In the event the respondent's board approved the claimant's request for a twelve-month career break was successful and the break ran from 2 January 2008 until 5 January 2009. The claimant completed the first two parts of the course during the break. It is common case that there was agreement that the claimant could continue on 29 hours a week after the career break.

In the years before the claimant's career break negotiations had begun towards an agreement at a national level involving the operation of 43 training centres, including the respondent. Among the aspects covered in the agreement are modernisation, flexibility, industrial relations stability and co-operation with continuous improvement of service provision. The payment of monies arising from benchmarking arose from the implementation of this agreement. The performance verification committee of the respondent comprising CM, secretary of the board (SB) and a staff representative signed the agreement in early May 2008 and the FAS community services manager countersigned it on 22 May 2008.

This agreement committed the respondent to provide up to 32.5 hours of contact time per week for trainees. It was also decided to start up again after the summer break by bringing back the trainees in mid-August 2009 some two weeks earlier than previously. As far as the management of the respondent were concerned it was no longer acceptable for the catering instructor to leave at 2-45pm when the trainees were to be on the premises until 4-00 or 4-30pm compared to their previously leaving shortly after 3-00pm.

On 10 December 2008 CM met the claimant in order to discuss her return to work after the career break. It was at this meeting that CM explained the changes, which had been implemented during her absence, to the claimant. The claimant was unhappy about the changes, in particular not being able to finish work at 2-45pm. It is the respondent's position that the claimant opined that she could work no more than two full days because of the need to pick up her children from school. The claimant's position is CM her to choose between her family and her job.

On 15 December 2008 the claimant gave CM a list with three options for her working hours. These were

1. To finish at 4-45pm on Monday and Tuesday, 3-45pm on Wednesday and Thursday with Friday off for a total of 29 hours
2. To finish at 3-45pm Monday to Thursday and work as before to 1-00pm Friday for a total of 31 hours
3. To finish at 4-45pm Monday to Thursday with alternate Wednesday or Thursday off finish at 1-00pm Friday for a total of 26.25 hours.

While it is common case that option one was the claimant's preference, it is the respondent's position that the claimant told CM she would have no problem with option 3. then met members of

the board and it was decided that option three would be the best solution. On 16 December 2008 CM wrote to the claimant confirming this decision and on the following day sent the claimant a revised contract reflecting the changed working hours.

On 5 January 2009 the claimant returned to the centre and refused to work the proposed new hours unless she was allowed to take unpaid leave in August. This had been agreed by the respondent, following requests submitted to the board, in the preceding few years when trainees did not return to the centre in mid-August. The claimant worked the same hours as she had prior to the career break. It is the respondent's position that the claimant told CM she would take the summer off "one way or another".

At a meeting held on 12 January 2009 and attended by the chairman of the respondent (CR), SB, CM, the claimant and a friend of the claimant. During this meeting the claimant said she had felt bullied by CM over the proposed alterations to her working arrangements. This allegation was withdrawn later in the meeting when the claimant said that she had been under pressure. The claimant refused to compromise over her working hours and no agreement was reached. The claimant met SB some time in March 2009. It is the claimant's position that SB told her she could go back to 29 hours and have August off if CM had no problem.

On 29 April 2009 the claimant met CM to discuss annual leave. During this meeting CM agreed to the claimant taking one week's unpaid leave in July as well as some annual leave. It was again pointed out to the claimant that trainees were returning to the centre on 14 August 2009 and it would be very difficult to accommodate her request to take the last two weeks in August as unpaid leave. CM wrote to the claimant on 8 May 2009 to confirm the events of the 29 April meeting.

On 15 May 2009 the claimant wrote to CM asserting, inter alia, that unpaid leave in August had become part of her terms and conditions of employment. On 2 June 2009 CM wrote to the claimant seeking her agreement to take the leave as agreed on 8 May and in particular to return to work on 17 August 2009 and further seeking her agreement to working the revised hours as set out in option three. The claimant was asked to respond in writing that she was agreeable to proceed on that basis or the overall position of her employment would be reviewed. On 4 June 2009 the claimant went out on sick leave with stress. The claimant attended a doctor nominated by the respondent on 9 July 2009 and in his report the doctor suggested that the stress was more an industrial relations than a medical matter and not severe enough to warrant continued absence from work.

Also on 4 June 2009 the claimant's then solicitor wrote to CM complaining about her treatment and suggesting that the matter might be referred to a Rights Commissioner. The respondent's solicitor replied on 10 June 2009. A complaint under the Terms of Employment (Information) Act, 1994 to 2001 was lodged with the Labour Relations Commission on or around 21 August 2009.

On 28 September 2009 CM wrote to the claimant enclosing a copy of the doctor's report of 9 July and invited her to an investigative meeting on 6 October 2009 to discuss the claimant's failure to return to work. The claimant replied on 30 September 2009 that she was not in a position to attend the meeting, as she was certified sick.

On 3 December 2009 CM wrote to the claimant to confirm that in accordance with the agreed sick pay scheme the claimant would go on to half pay from the December payroll. The claimant replied in a letter received on 10 December 2009 together with a medical certificate for the period 10 December 2009 to 7 January 2010 that she would return to work on 7 January 2010. On 14 December CR wrote to the claimant expressing delight at her impending return to work and

enclosed a copy of the revised contract of employment option three. On 22 December 2009 the claimant's solicitor wrote to CR suggesting that the claimant had been pressured and bullied from 15 December 2008 to change her hours on return from the career break. He sought for her to be allowed to return to work on her previous hours and that no discussion or negotiations take place directly between the claimant and the respondent as the matter was now before the Rights Commissioner. This approach was rejected in a letter from the respondent's solicitor on 6 January 2010 not received by the claimant's solicitor until 8 January 2010.

When the claimant returned to work on 7 January 2010 CR asked if the claimant was prepared to work the hours of option three. When the claimant declined saying the hours did not suit her she was suspended with pay pending a disciplinary hearing for refusal to work agreed contractual hours. After one postponement the disciplinary hearing was held on 27 January 2010, it was conducted by two members of the board who had no contact with the claimant during this process and attended by CR, CM and the respondent's solicitor. The claimant declined to attend the disciplinary hearing. The recommendation of the disciplinary panel was to dismiss the claimant for gross misconduct and the board of the respondent ratified this. A letter of dismissal was sent to the claimant on 4 February 2010 confirming her immediate dismissal for refusal to work hours which she had agreed as this amounted to gross misconduct. The notice of hearing of the complaint before the Rights Commissioner issued on or around 21 January 2010 with the hearing scheduled for 12 February 2010.

Determination

There is no doubt but that whilst the claimant was on her career break significant changes occurred within the respondent and its operations. One of these changes was that trainees remained in the centre later than had been the case prior to the career break. The claimant accepted in her evidence that it was reasonable for the respondent to expect her to be in attendance at all times that the trainees were. There is no suggestion that the claimant was unaware of the changes implemented as a result of the May 2008 agreement. Towards the end of the career break and following the meeting of 15 December 2008 CM wrote to the claimant on the following two days setting out the agreement CM understood to have been reached and then issuing a revised contract. The claimant never wrote to the respondent to express dissatisfaction with either of the letters. The first time CM knew there was a problem was on the claimant's return to work on 5 January 2009 when the claimant linked her refusal to work the revised hours to her demand for two weeks' unpaid leave in August. The Tribunal notes that the claimant herself produced the three options for her working hours on return from career break, it is hard to reconcile this with a later refusal to work one of those options. The claimant made an allegation of bullying against CM at the meeting on 12 January 2009, this allegation was withdrawn at the same meeting and not raised again with the respondent until this hearing. While it is unfortunate that the dismissal was effected when the parties were very close to attending a hearing before a Rights Commissioner it must be noted that the claimant should have worked to the new arrangements under protest before that hearing. For all these reasons the Tribunal is satisfied that the dismissal was not unfair and the claim under the Unfair Dismissals Acts, 1977 to 2007 must fail.

This being a dismissal for gross misconduct a claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 does not arise.

No evidence having been adduced in this regard the claim under the Organisation of Working Time Act, 1997 fails for want of prosecution.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)