EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	**CASE NO.**
EMPLOYEE	UD942/2010
	MN1817/2011

- *Appellant*

Against

EMPLOYER

- *Respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P. O'Leary B L

Members: Mr J. Reid
Mr G. Whyte

heard this claim at Dublin on 5th September 2011 and 21st November 2011

Representation:

Claimant: Eamonn Green & Co, Solicitors, 19 Clanwilliam Square, Dublin 2

Respondent: Mr David Bell, The HR Department, 126 Ranelagh, Dublin 6
Wendy Doyle, Solicitors, 20 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

Dismissal as a fact was in dispute in this case.

The respondent company operates a guided tour of Dublin. The claimant was employed from 2003 as a driver. At that time there was a separate guide for the tour, however the role of driver and guide amalgamated over time. The claimant described the amalgamated role of driver guide as harder work but more fun. The claimant stated that he and his colleagues were only paid for hours they actually worked- the nature of the work was somewhat seasonal and work would steadily decrease form September through to February. For some of the months in the intervening period there may be may be little or no work for the employees.

It was the claimant's evidence that in early 2009 he attended a meeting with the then manager who informed the claimant that the company had not performed well during 2008 and that it was time to reduce costs. He explained that the company was finding it difficult to pay double pay

o permanent staff for working on Sundays. The claimant told the manager at the time that he did notwant to change his contract but that the company could stop scheduling him for Sunday work. Thiswas the claimant's concession to assist the company as he was paid €400 as double pay for Sundaywork and he normally worked 25 or 30 Sundays per year.

The claimant stated that otherwise his employment was uneventful until the time of 27th February 2010, at which time he was presented with an "inferior" contract of employment and informed that unless he signed the contract, he could no longer work for the company. For various reasons he decided not to sign the contract. A copy of the claimant's original contract and the proposed amended contract were submitted to the Tribunal.

Prior to this the claimant had attended a meeting with his colleagues on the 4th February 2010. The General Manager had informed the employees that the company had not performed well during 2009 and that it was time to cut costs. A new financial consultant (MB) had been employed and had examined the company accounts. He had almost closed the company but in the end it was decided to change how the company was run. The General Manager put forward a proposal that drivers pay would be reduced from €20 per hour to €18 per hour.

The company opened for business on Saturday, 20th February 2010. The claimant attended at the office on the 27th February 2010 to sign some paperwork. However, enclosed with the paperwork was an inferior contract which stated that his date of commencement was in February 2010. The claimant's main reason for not signing it was the company had come close to closing in December 2009. The claimant's fear was that if he signed the new contract stating that his employment commenced in February 2010 and the company subsequently closed, he would have signed away his entitlement to eight years redundancy payment as the new contract stated, "*…and no previous employment counts as part of your continuous period of employment."*

The claimant contacted MB of the company and explained the reasons he could not sign the contract. MB told him that he would not be given further work until he had signed the contract. A meeting was arranged for the following week and the claimant was not to work in the intervening period. The claimant subsequently sent an email stating that he was eager to have the matter sorted out as soon as possible and a meeting was arranged for the following week. Despite the death of his brother-in-law on the following Tuesday, the claimant still attended the meeting with the company on the Wednesday, 3rd March 2010. He described this meeting as a good and positive meeting. The General Manager and MB were present and told the claimant that the company was not performing well financially. The claimant explained that he did not want to take yet another reduction in pay. He outlined in what areas he believed the company failed to collect revenue due to simple office procedures not being implemented.

The claimant also raised the issue of the date of commencement on the new contract of employment and that he wished to work under his existing contract. He was informed that he could not return to work until the matter was discussed at a board meeting the following week. However, on Thursday morning the claimant received a telephone call from the General Manager who wanted to know if the claimant would work on Friday and Saturday and he agreed to pay the claimant as per his existing contact. The claimant explained that it was his brother-in-law's funeral on those two days but stated that he was willing to work other days.

On the following Tuesday, MB of the company telephoned the claimant and stated that the company were prepared to make a concession and reduce the claimant's wages to €19.80 instead of €18 per hour but that he had to sign the new contract. The claimant did not think it was fair and he

told MB that he would be seeking legal advice. The claimant stated that three times he was toldthat he could not work unless he signed the contract. He sought legal advice and his solicitorsubsequently wrote a letter to the company on his behalf. His last day of work was the 20th February 2010. The claimant stated that he was on the roster for 20th February, 27th February and28th February and for the following week but he was told that he could not work that week. He didnot receive a roster after that time. He gave evidence pertaining to loss.

During cross-examination it was put to the claimant that it would be the company's evidence that the date of commencement on the new contract was just a typographical error and that the claimant's previous employment would be honoured. The claimant stated he was not told that atthe time. It was also put to the claimant that he was rostered up to the end of March 2010. Heaccepted that he was rostered up to 14th March but not 30th March 2010. It was put to the claimantthat he had not put a formal complaint in writing to the company. He replied that he had raised theissue in emails.

On the second day of hearing evidence in the above case the Tribunal heard from MR, a financial consultant to the respondent company. He explained to the Tribunal that he met the respondent in the current economic climate when they had hit on hard times. They asked him to review their business and make recommendations on their private business portfolios. In 2009 he joined the company on a 2 day week. When MR analysed the respondent company he felt there was a chance of survival. When he initially got involved the company was burning cash and was unsustainable. They considered closing the business but instead decided to make changes. As a result the company is now profitable and the number of employees has increased.

The changes adopted by the respondent company resulted in 9 people being made redundant. There was also a 10-15% reduction in salaries. The General Manager took a 33% reduction in salary and forewent his pension entitlement. All staff accepted the changes except the claimant.

MR told the Tribunal that the claimant was in receipt of the highest hourly rate of pay among the driver guides. Had the claimant accepted the reduction in his hourly rate he would still be a driver guide. The company have since increased the number of tours and the driver guides now earn more by carrying out more work and they get more tips.

When the changes were being advised to employees, all employees were issued with new contracts. The claimant was concerned about the date of commencement on his new contract as it stated February 2010 even though the claimant's original service with the company started in 2003. MRtold the Tribunal that this was an oversight, the new contracts were to be continuous and thecontracts have since been amended to reflect this.

MR told the Tribunal that the claimant was not dismissed. He did not exhaust the company's grievance procedures and the company believe that he walked off the job.

During cross examination MR explained to the Tribunal that he did not meet with the claimant during the negotiations in relation to the new contracts and his interpretation of the claimant was from file notes and feedback. The claimant's reduction in his hourly rate of pay would have been the lowest, resulting in him still being the highest paid driver guide. MR did not agree that the claimant gave up his Sunday hours voluntarily in 2009 due to company difficulties. It was his understanding that the claimant did not want to work Sundays if the double time rate no longer applied.

The Tribunal heard evidence from the General Manager, FR, of the respondent company, who was involved in the negotiations with staff in relation to the changes proposed by the respondent company.

On 3rd March 2010, the General Manager attended a meeting with the claimant and MB. The purpose of this meeting was to reach agreement with the claimant on his hourly rate of pay and the issues surrounding the double time on Sundays. Throughout the meeting it became apparent that the claimant had no intention of accepting a reduction in pay. However, in relation to working on Sundays, the claimant said that he would work for more than the single rate and less than double time.

Prior to this meeting the claimant had been provided with information on the company's finances, profit and loss account, so that he could see for himself why the company were applying reductions in rates of pay. It was explained to the claimant at the meeting on 3rd March 2010 that all other employees accepted the reduction in the hourly rate. The claimant said he was not concerned about what other staff had agreed to. The claimant was not willing to accept the reduction in his hourly rate of pay. It was agreed at the meeting that they had reached an impasse. The claimant was told that he could sign his contract but dispute the rate of pay and bring a case to a Rights Commissioner in relation to same. The claimant was asked if there was any area that he was willing to negotiate on and he replied that it was his opinion that the company had been mismanaged.

At the end of the meeting it was agreed that MB would contact the claimant after the Board had been informed of the situation. The General Manager and MB were of the opinion that the negotiations with the claimant were still in process at the end of the meeting. FR sent an email to MB sating that the claimant would continue to be rostered for work. It was confirmed to the claimant that he would be rostered on his original terms. In order to reach a compromise with the claimant, the company suggested to the claimant that he might accept a 10% reduction in his hourly rate, in line with the other driver guides.

The General Manager told the Tribunal that the claimant never said that he would bring a grievance through the grievance procedure. On the 9th March 2010 there were telephone conversations taking place between MB and the claimant. That evening MB told the General Manager that the claimant had contacted his solicitor and the company would be receiving a letter from him. The claimant would not be working the next day's scheduled tour. The next contact to the company was from the claimant's solicitor on 14th March 2010. The claimant had been rostered for work until the 30th March but on receipt of the letter from the claimant's solicitor the company took the view that internal negotiations had finished. It was the General Manager's understanding that the claimant had resigned.

During a telephone conversation on 9th March the claimant told MB that he had contacted a solicitor and the company would be receiving a letter from him. The claimant said that he would not be working the next day's scheduled tour.

During cross examination the General Manager explained that the last roster that included the claimant ran until 15th March. The claimant may have been rostered for work until the 30th March and then removed on receipt of the letter from his solicitor.

The General Manager again explained that the date of commencement, 2010, on the claimant's new contract was an oversight and it was dated February because that was the start of the new season.

There was no pressure on the claimant to sign his new contract at the meeting on 3rd March because at this stage negotiations were still taking place in relation to the claimant's terms and conditions in order to have his new contract drawn up. However, at this meeting the claimant was not made aware that the date of commencement was an oversight.

Determination:

The Tribunal having heard the evidence in this case and taking into consideration the circumstances described by the witnesses find that the claimant was constructively dismissed. In coming to its decision the Tribunal also find that the claimant was partly responsible for his dismissal. The Company failed to take any or any adequate or reasonable measures to resolve the situation between them and the Claimant and by unilaterally changing his conditions were responsible for the situation arising that did arise.

Accordingly, the Tribunal, under the Unfair Dismissals Acts, 1977 to 2007, determines that the most appropriate remedy is re-engagement of the claimant but at a rate of €19.80 per hour as of the date of this order under the same conditions that obtain in respect of the other drivers. The claimant's service and employment rights are deemed to be continuous. As a result of the aforesaid the claim under the Minimum Notice and Terms of Employment Acts 1973 to 2005 does not arise.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)