EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	**CASE NO.**
EMPLOYEE	UD1293/2010
- *Claimant*	MN1247/2010
	WT531/2010

Against

EMPLOYER
- *Respondent*

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997
UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr M. O'Connell B.L.

Members: Mr R. Murphy
Mr J. Maher

heard this claim at Dublin on 10th November 2011
and 25th January 2012

Representation:

Claimant: Mr. Padraig Lyons B.L., Healy O'Connor, Solicitors, 77 Sir John Rogerson's Quay, Dublin 2

Respondent: Ms. Rosemary Mallon B.L., Whitney Moore, Solicitors, Wilton Park House, Wilton Place, Dublin 2

The determination of the Tribunal was as follows:-

Preliminary Issue
In this case, the parties agreed that the claimant's accrued employment rights had transferred to the respondent by way of a Transfer of Undertakings. Although a non-national, he was lawfully employed as a catering assistant by the Respondent on the 15th of March 2008 under a limited student/work permission which expired on November 24th 2009. The claimant was dismissed from his employment on the 5th of February 2010.

A preliminary issue was raised as to whether the Tribunal had jurisdiction to hear a claim for unfair dismissal given that when the employment was terminated, the claimant did not have a work permit and therefore, was not permitted to work lawfully for the respondent – or for that

matter, any other employer in the State.

In the first instance, the Tribunal notes that there was a dispute between the parties as to when or whether the claimant actually requested the assistance of the respondent. For the purposes of this determination, the Tribunal is prepared to assume that such a request was made of the respondent for its support in relation to the renewal of permission to work. However, there was no sworn evidence given in relation to this point.

Notwithstanding, it was argued on behalf of the claimant that the respondent had an obligation to assist in the application for a work permit and that the respondent's failure to do so, constituted a breach of the terms of employment which rendered the dismissal unfair.

This argument relies on the assumption that the respondent was under an obligation to apply for a work permit or at the very least, to assist in the application for a work permit. This obligation, it was implied, had its roots in statute, in the employment contract or both.

The relevant statue at all material times was the Employment Permits acts 2006, Section 4(1) of which states:

"An application for the grant of an employment permit in respect of the employment in the State of a particular foreign national may be made… by:

(a) The person proposing to employ the foreign national, or
(b) …the foreign national"

Sub-section 3 goes on to state:

"A foreign national may not make an application under this section in respect of his or he employment in the State unless an offer of employment in the State has been made in writing to him or her within such period preceding the application as may be prescribed."

The Tribunal holds that these provisions merely permit the employer – and in this case, the respondent – to make an application or to provide an offer of employment. But they do not amount to a statutory obligation on the employer. The provisions envisage an application being made by a non-national with the voluntary cooperation of an employer. In short, the principal onus in Section 4(3) is on the non-national applicant but he or she requires the assistance of an employer. Crucially however, if the assistance is withheld, the applicant is faced with a difficulty which is insurmountable.

The second issue which needed to be addressed was whether the cooperation of the respondent was a term of employment – even an implied term of employment – in this case. In support of the assertion that it was, the claimant cited the case of *Nataliya Golovan v Portulin ShellfishLimited* UD/428/2006.

The facts of that case related to employment which was terminated on the 23rd of June, 2005 which predated the enactment of the Employment Permits Act 2006. In its determination, the Tribunal correctly stated that the onus in 2005 was on employers to rectify situations in which their workers' permits had expired. The onus shifted the following year and so, the Tribunal does not believe the claimant could rely on the facts.

Similarly, the Tribunal feels the case of *Olga Dubyna v Hourican Hygiene Services Limited*

UD781/2006 offers no refuge to the claimant in this case because it also dealt with the scenario which existed back in 2003. Not only was there at that time a legal obligation on the employer to renew the employee's work permit in *Dubyna* but it is clear from the evidence that she was given an explicit undertaking by her employer regarding the renewal of a work permit.

In the instant case, there was neither a statutory obligation nor a contractual duty on the respondent to apply for a work permit for the claimant. If the respondent was to have had an implied role in this process, it arose from the statutory obligation which ceased in 2006 when the Employment Permits Act came into force. For this reason, the Tribunal does not think the claimant can argue plausibly that it was a term of his contract of employment – even an implied one.

Accordingly, the Tribunal determines that there was no valid contract of employment beyond the 24th of November 2009 and the respondent's decision to terminate the claimant's employment cannot be held to be unfair and therefore the claim under the Unfair Dismissals Acts 1977 to 2007 must fail.

The employment of the claimant beyond the 24th of November 2009 arguably gave rise to an illegality. However, the Tribunal does not require to address this issue.

Neither does the Tribunal test the respondent's assertions regarding the unlikelihood of a successful application for a permit by or on behalf of the claimant given that he would not have been eligible. This was a matter for the sole consideration of the Work Regulations division of the then Department of Enterprise, Trade and Employment.

Based on the submissions received from both parties and the dates contained therein, the Tribunal finds that the claimant did not receive notice of termination or payment in lieu of same. He is entitled to such a payment and the Tribunal makes a determination in the sum of €866.00 in respect of two weeks wages under the Minimum Notice and Terms of Employment Acts, 1973 to 2005. There was no evidence presented to the Tribunal in respect of the claim under the Organisation of Working Time Act, 1997. Accordingly the claim under the Organisation of Working Time Act, 1997 is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)