

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIM OF:

CASE NO.

EMPLOYEE – *claimant*

UD1090/2010  
MN1057/2010

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: Ms. K.T O'Mahony BL.

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

heard this claim in Cork on 21<sup>st</sup> September 2011

Representation:

\_\_\_\_\_

Claimant: Barry Sheehan, Solicitor, 26 Marlboro Street, Cork

Respondent: Mr. Eoin Clifford instructed by Mr John Murphy, J.J Murphy & Co, Solicitors,  
Courthouse Chambers, Washington Street, 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, 1977 to 2007 as the claimant, who commenced employment on 5 June 2009 did not have one year's continuous employment at the time of his dismissal on 28 May 2010 as required by section 2(1)(f) of the 1977 Act.

The case on behalf of the claimant was that he was dismissed on 10 June 2010 and thus had one

year's continuous employment at the time of his dismissal.

### **Summary of the Evidence**

The claimant commenced employment with the respondent in one of its bars in the city on 5 June 2009. As "a thank you" to his staff the owner of the respondent business (MD) arranged an outing for them to Schull on 27 May 2010. A bus was hired for the outing. A number of stops were made at pubs on the journey to Schull and the group had dinner and more drinks in Schull.

The following morning the respondent was informed that an incident, initiated by the claimant, had occurred between him and another member of staff, in the early hours of the morning of 28 May. The respondent considered the matter to be very serious and if true that it would constitute gross misconduct on the part of the claimant. MD contacted the head of security and they interviewed the other member of staff involved in the incident, who was crying and very upset. Some other employees were also interviewed. There had been no witnesses to the incident. According to MD when they confronted the claimant later that morning and put the allegation to him he shrugged, gave them a smart answer and denied the allegation. MD concluded that the claimant initiated the incident, that it constituted gross misconduct and made a judgement call there and then, on the side of the street, to dismiss the claimant. He told the claimant that his job was gone. His final words to the claimant were: "You are fired."

While the claimant admitted that an incident had occurred between himself and the other employee his version of the incident differed materially from the respondent's version. When the respondent and the head of security met him on 28 May he was told that he was "in big trouble" and "had better leave the country". It was indicated to him that he should return to the city by public transport. When he asked them what had he done they did not listen to him. He believed that he had been suspended on the morning of 28 May. He made his own way back to the city that day. Following several unsuccessful attempts to speak to members of management on the phone over the following days, he had to ultimately request his P45. The claimant believes that his employment was terminated on 10 June 2010.

### **Determination on the Preliminary Issue**

The effect of section 2(1)(a) of the Unfair Dismissals Acts, 1977 to 2007 is that, statutory exceptions apart, an employee must have one year's service in the employment to bring a claim under the Unfair Dismissals Acts. The claimant does not come within the statutory exceptions.

It was common case that the claimant commenced employment on 5 June 2009. It is well established that a year's service is completed on the day before the anniversary of the commencement of the employment. Thus, the claimant would have a year's service on 4 June 2010. There was a dispute as to the date on which the employment was terminated. Having considered the evidence the Tribunal accepts that the claimant was dismissed on 28 May 2010.

The relevant provision of section 1 of the Unfair Dismissals Act 1977 defines "date of dismissal" as the date on which the notice, to which an employee is entitled, would have expired had the notice had been given. Since the claimant had over 13 weeks' but less than 2 years' service he was entitled, under section 4 (2) (a) of the Minimum Notice and

Terms of Employment Acts, 1973 to 2005 to one week's notice of the termination of his employment. However under section 8 of the same Act there is no entitlement to notice where the dismissal is for misconduct. Having considered the extent and circumstances of the investigation carried out at the side of the street the Tribunal is not satisfied that the respondent fairly or reasonably established that the claimant was guilty of misconduct. Thus, the claimant is entitled to one week's notice. Having considered subs (h) of section 18 of the Interpretation Act 2005 the Tribunal finds that, including the day the notice was given, the date of dismissal was 3 June 2010. Accordingly, on adding on the one week's notice, the claimant is one day short of having one year's service on the statutory date of his dismissal. Accordingly, the Tribunal does not have jurisdiction to hear the claim under the Unfair Dismissals Act 1977 to 2007.

For the reasons stated in the previous paragraph and loss having been established, the Tribunal awards the claimant the sum of €480.00, being one week's gross pay in lieu of notice, under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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