EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF: CASE NO.

EMPLOYEE - **Claimant** UD2113/2010
MN2074/2010

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 J. McGovern BL

Members: Mr N. Ormond
Ms M. Finnerty

heard these claims at Dublin on 8 March 2012

Representation:

Claimant:
Mr Thomas Halligan, Gaffney Halligan & Co. Solicitors,
Artane Roundabout, Malahide Road, Artane, Dublin 5
Respondents:
Mr Peter O'Shaughnessy, IBEC, Douglas Road, Cork

The determination of the Tribunal was as follows:

Dismissal being in dispute it fell to the claimant to prove the fact of dismissal

The claimant was employed as a sales assistant in the respondent's retail store from December 2006. By 2010 the claimant was working four days a week on Wednesdays, Fridays, Saturdays and Sundays as one of ten sales assistants in the store. On or around 20 July 2010 the claimant submitted a holiday request form to the store manager (SM) for nine days annual leave to be taken during the first two weeks of September.

The respondent's position is that on 21 July 2010 SM told the claimant that her request could not be granted because of the planned re-opening of the upper sales floor of the store in September 2010 for which exact dates had not yet been finalised and that this non-approval of the leave was confirmed on 4 August 2010. The claimant's position is that she got no response to her leave request from SM until, following the booking of her travel on 14 August 2010, she heard from a

colleague of problems about taking leave in September and that SM, when challenged about this, told the claimant that she had forgotten about her request but that it was not approved.

After discussions between SM and the operations officer (OO) in head office OO wrote to the claimant on 16 August 2010. In this letter OO pointed out that not only had the claimant insufficient leave accrued for the leave requested but that everyone in the store knew of the re-opening of the upper sales floor and that expecting to take nine days leave during this time was insane as all hands were needed on deck.

A paragraph of the letter states "SM has not approved your holiday form claimant, therefore if you insist on your holidays you are openly and completely working against the Company. This form of behaviour is what's called an act of gross misconduct. With this knowledge in mind, and you still insist on taking your holidays, then you are in effect walking out on your position. The decision is yours."

The claimant was then reminded of the extensive unpaid leave she had been granted earlier in the year and the letter concluded that there was no more to say.

On 24 August 2010 the claimant replied to OO restating her position that SM had made no initial objection to her leave request and that she had booked her travel before being told of the rejection of the leave request. She acknowledged that she had insufficient leave to cover the period requested but pointed out she had arranged with colleagues to cover for the period in excess of her entitlement but pointed out that the holiday would not be cancelled as she was not in a position to change the arrangements.

The claimant worked normally until Sunday 29 August 2010 the last day she worked at the store. It is common case that when the claimant said she would be taking her holidays and SM told the claimant that she expected her at work on the following Wednesday as she was on the roster. The claimant then asked SM "Are you firing me?" and that SM said "No!"

The respondent's position is that later on 29 August 2010 the claimant requested her P45 and returned her key to the store to SM but said she would return her store swipe and car park key fob on receipt of the P45. The claimant denies requesting her P45 but asserts that SM requested and was given her store key on 29 August 2010.

After close of business on 29 August SM sent an email to OO in the following terms

"Claimant handed back the keys to the store today. I have rostered her on for her normal days next week but she advised that she would be taking her holidays although we have not authorized her leave. She said she would return her swipe and fob on receipt of her P45."

On 8 September 2010 OO wrote to the claimant in the following terms

"As you are now in receipt of your P45 could you please return your locker key and car parking fob to us without delay as per your agreement. Regarding the fob, please note that it cannot go through the postal system and will have to be handed into the store for my attention."

The claimant's position is that this letter, which she received on return home from holiday, amounts to a letter of dismissal.

Determination:

This is a case where the Tribunal have come to a majority decision. The majority are satisfied the claimant was informed of the non-approval of her holiday request by SM on 21 July 2010 and that this was confirmed on 4 August 2010. Despite this the claimant booked her travel on 14 August2010. The majority are satisfied that OO's letter to the claimant of 16 August 2010 was in responseto the respondent becoming aware of the claimant having booked her travel despite being told thatthe leave was unapproved. It is common case that on 29 August 2010 SM told the claimant that shewas not firing her. The majority accept that after getting this response from SM the claimant, laterthat day, requested her P45. Accordingly, the majority are satisfied that the claimant resigned fromher employment on 29 August 2010 and was not dismissed. By the afore mentioned majority theTribunal finds that as there was no dismissal the claim under the Unfair Dismissals Acts, 1977 to2007 must fail.

There having been no dismissal the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 also fails.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)