

## EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE **-claimant**

UD865/2010  
RP1170/2010  
MN822/2010  
WT363/2010

against

EMPLOYER **-respondent**

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007**  
**REDUNDANCY PAYMENTS ACTS, 1967 TO 2007**  
**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001**  
**ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr R. Maguire

Members: Mr R. Prole  
Mr J. Jordan

heard this claim at Dublin on 25 August  
and 7 November 2011

Representation:

Claimant: Mr Gareth Robinson BL on the first day, Ms Ciara O'Duffy BL on the second day instructed by Mr Niall Bass on the first day, Ms Lorna Duffy on the second day, both of Keans Solicitors, 2 Upper Pembroke Street, Dublin 2

Respondent: Mr Brian Foley BL instructed by Ms Aoife Sweeney, Mason Hayes & Curran Solicitors, Bank House, Barrow Street, Dublin 2

The determination of the Tribunal was as follows:

The claimant worked as a door supervisor at a gentlemen's club (the club) operated by the respondent from some time in 2005. The respondent operates some seven licensed premises including the club with a total of some 190 employees. Initially the claimant was employed by a service provider to the respondent; he became a direct employee of the respondent on 20 November 2007. It is common case that during negotiations at this time when the claimant became a direct employee it was agreed that the claimant would receive a higher rate of pay

than was initially offered and in return the claimant would not seek payment for holidays despite this being in contravention of the Organisation of Working Time Act.

Initially the claimant worked six nights a week at the club. From May 2009 the claimant went on to a three-day week. The respondent's position is that this was on account of a request from the claimant as he had been involved in a motor vehicle accident. It is further the respondent's position that they have not been unduly affected by the economic downturn and no staff members have been put on reduced hours as a result of the downturn. The claimant's position is that he was placed on a three-day week as a result of the downturn. The claimant produced a letter from the manager of another of the respondent's clubs to support his contention. The claimant's tax deduction card indicates that from November 2009 he returned to working four or five days a week.

The security manager (SM) of the respondent gave evidence of having been approached by an unnamed individual who suggested that someone with the same name as the claimant was involved in the planning of a new club which it was felt the managing director (MD) of the respondent might object to. SM's evidence was that it was known what kind of car MD drove and the area where MD lived. The inference was that there would be action taken if MD were to object to the proposed new club. At this stage SM did not know that the claimant was in the respondent's employ.

SM reported this information to MD on or around 6 March 2010 at which time MD was able to confirm that the claimant was one of their employees. In view of his concerns for the security of his family MD determined that the claimant was to be summarily dismissed without the opportunity to respond to the allegations against him. The respondent's position being that even if the claimant were to deny the allegations, which he did, this would make no difference to the decision to dismiss. The claimant's dismissal was effected by the operations director (OD) at the start of the claimant's shift on the evening of 7 March 2010. It is the respondent's position that as well as the security breach OD also told the claimant that he was dismissed because he had been seen selling steroids whilst on duty at the club door. The person who made this allegation against the claimant was not prepared to give evidence to the Tribunal.

The respondent initially agreed to pay the claimant until he found alternative employment. Later the respondent offered to re-instate the claimant to his position. It is the respondent's position that the claimant should have easily found alternative work as a door supervisor, his apparent failure to do so amounting to a failure to mitigate his loss.

The parties made written submissions after the hearing and these were considered by the Tribunal.

### **Determination**

It was accepted by the Respondent that the Claimant was summarily dismissed, the Respondent states that this was done on two bases, namely that he had been involved in indirect threats to the MD of the Respondent and his family in relation to a rival club that was going to be opened in Clondalkin, and secondly, that he had dealt steroids while working in the club. The Tribunal heard contradictory evidence in relation to the timing of this second allegation, and cannot find that this allegation motivated the decision of the Respondent to dismiss the Claimant.

In any event, the Tribunal is not satisfied that the allegation against the Claimant was such that it warranted summary dismissal without giving the Claimant the opportunity to respond to the

allegations and go through a proper disciplinary procedure.

The Tribunal therefore finds that the Claimant was unfairly dismissed.

In relation to the compensation that should be paid to the Claimant, the Tribunal is not satisfied that the Claimant's loss was attributable to the termination of his employment. The Tribunal has considered the Personal Injuries summons dated the 13 September 2010 in the matter of Robert Murphy v. Ronan Gallagher 2010/8521 P. The accident the subject matter of those proceedings took place on 22 December 2008. Both parties made submissions on this Summons. It is clear that the Claimant was claiming that by virtue of a road traffic injury caused by the defendant in those proceedings, the Claimant was unable to return to work. The summons states: "The Plaintiff worked as a doorman and personal trainer prior to the accident and has been unable to return to this work given his injuries. Given the Plaintiff's prognosis in terms of his right shoulder, the Plaintiff will be claiming past and future loss of earnings and loss of opportunity." The Tribunal cannot agree with the submission of the Claimant that this claim is "totally irrelevant."

It is clear that the Claimant was in fact working as a doorman after the date of the accident the subject matter of the personal injury proceedings and indeed worked up until his employment was terminated on 7 March 2010. Therefore, it is clear that the court documents submitted in those proceedings, and in particular the statement referred to above, cannot be relied upon. In those circumstances, the Claimant's evidence before the Tribunal in relation to his efforts at mitigation cannot be accepted as he has shown that he is not a reliable witness.

The Tribunal finds that the Claimant has not proved any loss in relation to the termination and finds that he is entitled to four weeks' pay being a total of €1,920-00 under the Unfair Dismissals Acts, 1977 to 2007.

The claim under the Redundancy Payments Acts was withdrawn at the outset.

The Tribunal awards €960-00, being two weeks' pay, under the Minimum Notice and Terms of Employment Act 1973 to 2005.

The respondent conceded that the claimant was entitled to the sum of €1,739-60 under the Organisation of Working Time Act, 1997 and the Tribunal so awards.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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