

## EMPLOYMENT APPEALS TRIBUNAL

**CLAIM(S) OF:**  
EMPLOYEE

**CASE NO.**  
UD612/2010

*- claimant*

against

EMPLOYER

*- first named respondent*

EMPLOYER

*- second named respondent*

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. P. O'Leary B.L.

Members: Mr. D. Peakin  
Mr. S. O'Donnell

Dealt with a matter by way of "*For Mention*" in Dublin on 12th October 2010

#### **Representation:**

Claimant: Joe Donnelly, Divisional Organiser, Mandate Trade Union,  
O'Lehane House, 9 Cavendish Row, Dublin 1

Respondent: In person.

#### **The "*For Mention*" determination of the Tribunal was as follows:**

This matter came before the Tribunal as a matter for mention only on October 12<sup>th</sup> 2010. The reason that the matter was put in for mention by the Tribunal was to ascertain whether this case was a legitimate claim.

The Tribunal ascertained from the first named respondent what his objection to the matter was and he claimed that the signature on the form T1A was forged and therefore the claim was fraudulent. The claimant was asked by the Tribunal if he had authorised that a claim be made on his behalf under the Unfair Dismissals Acts, 1977 to 2007 and he replied that he did.

Under S.I. 286 of 1977 a claim is made under section 8 (2) of the Unfair Dismissals Act, 1977 which states:

*"A claim for redress under this Act shall be initiated by giving a notice in writing (containing such particulars (if any) as may be specified in regulations under section 17 of this Act made for the purposes of subsection (8) of this section) to a rights commissioner or the Tribunal, as the case may be, within 6 months of the date of the relevant dismissal and a copy of the notice shall be given to the employer concerned within the same period."*

The notice must contain the following:

*“A notice under subsection (2) of section 8 of the Act to the Tribunal or under subsection (4) of the said section 8 or section 9 (2) of the Act shall specify –*

- (a) the name and address of the person bringing the claim or appeal,*
- (b) the name and address of the employer or the employee, as the case may be, concerned,*
- (c) the date of the commencement of the employment to which the notice relates,*
- (d) the date of the dismissal to which the notice relates, and*
- (e) the amount claimed by the said person to be the weekly remuneration of the said person in respect of the said employment calculates in accordance with regulations under section 17 of the Act.”*

There is no requirement on the claimant to sign the form or indeed on any party to sign the form. The notice supplied by the Employment Appeals Tribunal is not a statutory form, however, the notice does have a place for the signature of the party.

Under Article 37 of the Constitution of Ireland a Tribunal of limited jurisdiction cannot adjudicate on whether any part of the criminal law has been infringed.

Article 37 (1) states:

*“ Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution.”*

It was common case that the Trade Union official who sent in the form on behalf of the claimant signed the claimant’s name on the form. However the Trade Union official sent the form in on the instructions of the claimant.

In the circumstances the Tribunal have established that the claim made by the claimant is a legitimate claim and is therefore a matter that will have to go to a hearing of the Tribunal. The signing of the T1A form by the Trade Union official is a matter for another authority. The subjective element of the claim is for a sitting division of the Tribunal to adjudicate on. The Tribunal therefore orders that this matter should take its place in the list and come before the Tribunal in due course.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.  
UD612/2010

EMPLOYEE - *claimant*

against

EMPLOYER - *respondent*

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. P. O'Leary B L

Members: Mr D. Peakin  
Mr. S. O'Donnell

heard this claim at Dublin on 12th October 2010  
and 1st July 2011  
and 27th October 2011  
and 12th December 2011  
and 15th February 2012

#### **Representation:**

Claimant: Mr. Joe Donnelly, Divisional Organiser, Mandate Trade  
Union, O'Lehane House, 9 Cavendish Row, Dublin 1

Respondent: In Person

#### **The determination of the Tribunal was as follows:**

##### Summary of Evidence:

Dismissal as a fact was in dispute between the parties.

#### **Claimant's Case**

The claimant commenced employment with the respondent in 2003. In 2005 he worked full-time hours during the summer while on holidays from study. The claimant was a student so his hours were part-time and inconsistent but in 2009 they were considerably reduced. On completion of his college course the claimant was constantly looking for full-time employment in his chosen area; security.

In September 2009 a customer told the claimant that he might be able to secure him a position in a security company as a supervisor. As a result the claimant spoke to the respondent about the possibility of leaving. The respondent did not want the claimant to leave his employment. The claimant completed the training for his security licence on the 25<sup>th</sup> September; he continued to work for the respondent but was actively pursuing a security job.

The claimant intended on working both jobs initially to ensure he liked the new security role. The respondent agreed to release the claimant for the one month trial in the security job. The claimant's presumption was that he would continue to work a few hours in the bar; he did not 'completely leave' the respondent's employment.

On the 8<sup>th</sup> of October the claimant had an accident. The claimant was on certified sick leave until the 4<sup>th</sup> of November during which time he completed his trial with the security company. The claimant decided the security job was not suitable so he rang the respondent on the 2<sup>nd</sup> or 3<sup>rd</sup> of November and informed him that the security job had not worked out and that he'd be back at work. The respondent questioned why he was 'quitting the security job.' The claimant arranged to meet with the respondent.

The claimant met with the respondent sometime after the 4<sup>th</sup> of November; the conversation was tense and heated at the end. The respondent requested that the claimant re-apply for his job and sign a new contract with lesser terms & conditions and a lesser rate of pay. The claimant had not left employment and had in fact been submitting sick certs to the respondent while on sick leave (the respondent returned them to the claimant's doctor.)

The claimant contacted his union representative and gave him full authorisation to correspond with the respondent on his behalf. The union wrote to the respondent on the 25<sup>th</sup> of November 2009 reiterating that the claimant had not resigned. A further letter was sent on the 8<sup>th</sup> of December 2009 as there was no response from the respondent. This letter requested the claimant's P45 if he was dismissed or his hours to be re-instated if not. The claimant received his P45 on the 5<sup>th</sup> of January 2010 but it stated that the 6<sup>th</sup> of October 2009 was the claimant's leaving date even though the claimant had worked on the 8<sup>th</sup> of October (split shift on the day his accident occurred). A letter was sent on the 8<sup>th</sup> of January requesting the P45 to be amended to reflect the correct date.

The claimant had the respondent's permission to do the trial with the security company. The agreement was that the claimant would not do any hours for the month.

During cross-examination the claimant confirmed that he did not provide medical certificates to the security company, as it was the respondent that he was working for. It was put to the claimant that a Contracts Manager of the security company would give evidence that the claimant worked for the security company on a full-time basis from the 25<sup>th</sup> September 2009 to the 6<sup>th</sup> November 2009. The claimant stated that the role he had applied for on this occasion was a full-time position but he had discussed completing a trial period with the security company. In addition to that, an employee is required to have a security license to work in the industry. While he had completed the training in or around the 25<sup>th</sup> September 2009 he was unable to carry out work for the security company until he received the temporary license. This arrived towards the end of his sick leave. He accepted that he had worked for the security company but only for a period of three or four days.

It was put to the claimant that he had left the respondent's employment on the 6<sup>th</sup> October 2009 and that his diary and the timesheets confirmed this fact. The claimant refuted this, stating that he had worked for the respondent on the 8<sup>th</sup> October 2009 and that the diary was sometimes completed by other members of staff.

The claimant stated that he was working a split shift on the 8<sup>th</sup> October 2009, the day he suffered the injury. He had worked that morning and was due back in the evening. However, while at sports training in the afternoon he suffered an injury. As a result he was certified unfit for work from the 8<sup>th</sup> October 2009 to the 4<sup>th</sup> November 2009. The claimant stated that he did not work one day with the security company until after he went to hospital. He was a patient at the hospital for almost one week and the medical certificate covered the period from the 9<sup>th</sup> October 2009 to 27<sup>th</sup> October 2009. He worked the trial days with the security company near the end of his sick leave in or around the end of October or beginning of November. He was paid by the security company for the number of

trial days he worked.

The parties agreed that when the claimant telephoned the respondent on the 4<sup>th</sup> November 2009 and said he did not want the position with the security company, the respondent had encouraged him not to give up the job, as the respondent was unsure if he could guarantee hours to the claimant.

It was put to the claimant that the respondent had written a letter dated 17<sup>th</sup> November 2009 to him as the claimant continued to contact him. The letter confirmed that the claimant had resigned his position but had recently applied for part-time work with the respondent. The claimant replied that he had subsequently brought in medical certificates to the respondent to prove that he was not absent on sick leave on a continuing basis. As he had not left his employment, a letter dated 8<sup>th</sup> December 2009 was written on the claimant's behalf as the respondent was not providing him with work. He requested a P45 but did not receive this until January 2010.

During re-examination the claimant stated that it was not set out that he had to submit medical certificates to the respondent. He recalled being given a contract of employment in an envelope but none of the staff accepted it.

In reply to questions from the Tribunal, the claimant stated that during the trial period the respondent had asked him if he would work weekends, he presumed this was because he had a good rapport with customers.

Giving evidence the claimant's father recalled that he was at home on the 8<sup>th</sup> October 2009 when the claimant returned from sports training and was feeling unwell. When the claimant said that he was due back at work that evening his father telephoned the respondent and informed him that he was bringing the claimant to the hospital. The respondent asked to be kept informed which the claimant's father adhered to when he later informed the respondent that the claimant had been admitted to hospital.

During cross-examination the respondent asked for documentary proof to be produced that the telephone calls had been placed.

Giving evidence the claimant's uncle and fellow employee recalled a conversation he overheard between the claimant and the respondent at the beginning of September 2009. The claimant was talking to the respondent about the security company and the circumstances of when he was going to start work when the respondent suggested that the claimant would try working there for a month and continue to work weekends for the respondent.

In early November the respondent asked the witness if he would be prepared to accept a three-day week. The witness said that he would discuss it in January as it was close to Christmas and his hours would only be given to part-time employees. In or around this time he told the respondent that the claimant should be returning to work soon. The respondent had enquired about the claimant's well-being on a few occasions.

It was the respondent's evidence that in mid-September 2009 the claimant had informed him that he had received a job offer. The claimant was to leave the respondent's employment at the end of September for a position with a security company. The respondent wished the claimant all the best in the new employment.

Subsequently, in early November 2009 the respondent received a telephone call from the claimant who complained that he did not like the work with the security company. The respondent suggested

that over time the claimant might be able to advance with the company.

On the occasion of a second telephone call from the claimant, he told the respondent that he was leaving the security company and he enquired if any hours were available with the respondent. The respondent told the claimant that he was crazy to leave the job as the pub trade was deteriorating. He told the claimant that he might have some hours for him in the lead up to Christmas. The claimant telephoned on numerous occasions seeking work so eventually the respondent offered what hours he could to try and help the claimant out. The respondent outlined this offer of work to the claimant in the letter dated 17<sup>th</sup> November 2009.

He gave the letter to the claimant on the 17<sup>th</sup> November 2009 and asked him to agree to its contents but the claimant said something to the effect that he had not left the respondent's employment. This was the first time that the claimant had raised this issue. Two days later the claimant walked in to the bar with medical certificates and subsequently the respondent received correspondence from the union on the claimant's behalf.

Giving evidence on behalf of the respondent the Assistant Manager recalled that in or around mid to late September the claimant had told him that he was leaving the respondent's employment. The claimant was listed for work up to the 6<sup>th</sup> October 2009. The claimant told the Assistant Manager that he had secured a full-time position elsewhere and that he would be unavailable for work from in or around the end of September. He confirmed that the claimant had left his position of his own volition.

The Contracts Manager gave evidence that he works for the security company that the claimant was recruited to in September 2009. He told the Tribunal the claimant officially started with his company on the 25<sup>th</sup> September 2009. The claimant was employed for two pay periods and was officially removed from their employment records on 6<sup>th</sup> November 2009. He did not inform the company that he was in receipt of Social Welfare at that time. The company does not operate a trial period for employees. When the claimant left his employment he did so for personal reasons. He informed the company that he was not comfortable in the position assigned to him as he had been in college with people who worked in the building. The claimant did not provide any medical certificates to the company during his term of employment. The witness confirmed to the Tribunal that all employees are subjected to an induction day on commencement of employment. He could not recall interviewing the claimant as he interviews thousands of people but he probably did interview the claimant for the position. This would have been prior to 25<sup>th</sup> September 2009. He could not recall if the claimant said that he would be interested in a management role in the company. The claimant was initially assigned to a site in Holles St and subsequently to a location in Spencer Dock because he suited the profile for that assignment. Following his assignment to Spencer Dock the witness spoke with the claimant who said that he did not feel comfortable working in the Spencer Dock location. The claimant did not say that he had another job at that time.

## **Determination**

The Tribunal considered all the evidence in this case and determined that the most important aspect of this case was the arrangement alleged to have been arrived at by the parties in respect of the retention of the contract of employment between them. It is clear from the evidence of the employer that there was no assurance given to the claimant of the retention of his position with the employer. The claimant on the other hand believed that if he did not like the new position with the security company that he would be able to return to his employment with the respondent but in the meantime he would continue to work for the latter for a few hours per week while in his new employment until he made up his mind. By reason of the accident that the claimant suffered he became unfit for work however he did work a few days with the security company after the accident while he was unfit to work with the respondent. The claimant did not send in sick certificates to the respondent

while unfit for work. After he sought to regain his position with the respondent he sent in sick certificates to the respondent covering the period of his sickness. The Tribunal determines that the claimant did not have a firm agreement with the respondent regarding his return. The arrangement, if any, was too tenuous to sustain a firm contract of employment between the parties. In the circumstances the claim made by the claimant under the Unfair Dismissals Acts 1977 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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