EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	CASE NO.
EMPLOYEE	UD1029/2011
	MN1151/2011
	WT424/2011

against

EMPLOYER

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms J. McGovern BL

Members: Mr. T.P. Flood
Mr. P. Woods

heard this case in Dublin on 18 October 2012

Representation:

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Claimant(s):
Mr. David Miskell, Mandate Trade Union,
O'Lehane House, 9 Cavendish Row, Dublin 1

Respondent(s):
Mr. Brian O'Sullivan, IBEC, Confederation House,
84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

Claimant's Case

Claims were brought under unfair dismissal, minimum notice and working time legislation in respect of an employment from January 2002 to 20 April 2011. It was contended that

he claimant (a nightclub security man) had been suspended without pay due to allegations that were never outlined to him. He was left out suspended for a couple of months with no pay or contact. During this time the respondent refused to respond to the claimant's representatives, to provide any evidence or to outline the allegation for which the claimant was suspended. The claimant met the respondent in February (2011) but the respondent still refused to outline why he had been suspended.
The claim under the Organisation of Working Time Act, 1997, was ultimately withdrawn before the Tribunal.

Respondent's Case

The respondent's position was that the claimant's former employment with it had been fairly terminated within the meaning of Section 6 (4) of the Unfair Dismissals Act, 1977, (by reason of gross misconduct as a result of aggressive and threatening behaviour towards a member of management and refusal to follow a direct management instruction) such that the claimant had no claim against the respondent under the Unfair Dismissals Acts, 1977 to 2007.
It was contended that there had been a full and thorough investigation and disciplinary process in accordance with the respondent's procedure prior to the claimant's dismissal.
Regarding the claim under the Minimum Notice and Terms of Employment Acts, 1997, the respondent stated that the claimant had been dismissed by reason of gross misconduct and, as such, had no entitlement to notice as per Section 8 of the Minimum Notice and Terms of Employment Acts, 1973 to 2005.
Regarding the claim under the Organisation of Working Time Act, 1997, the respondent stated that the claimant had received his accrued entitlements.

The Hearing

Opening Statement for Respondent

It was stated on behalf of the respondent that there had been an incident on 17 December 2010 between the claimant and PR (nightclub manager). It was alleged that the claimant had assaulted PR. Statements were taken and the claimant was dismissed for gross misconduct.

Opening Statement for Claimant

It was stated that the claimant was denying PR's version of events, that MC (the respondent's general manager) had carried out the investigation and that the claimant's representative wanted to flag that he had sought statements but had not seen them prior to his arrival for the Tribunal hearing.

Oral Testimony

Giving sworn testimony, PR gave evidence that he was the respondent's nightclub manager and stated that he had been seven years with the respondent. He worked with the claimant at weekends when the nightclub was open.
Asked about 17 December 2010, PR replied that he had previously had security men using mobile phones on duty but that, on the night in question, he had given them a memorandum asking them to sign for mobile phones. The claimant did not want to sign the memo but said that he wanted a representative to see it. The claimant got aggressive. It got heated. The

claimant went to get a radio from behind PR. The claimant pushed against PR grabbing PR's pen and breaking it. PR's shirt was ripped also. Security came running in. PR told the claimant to wait at reception. The claimant wanted it in writing. The claimant was very irate and kicked over boxes.
PR asked security to go with him for the claimant's suspension letter. The claimant sat in the bar office with his feet up. PR's hand was shaking. The claimant said that PR was scared. PR asked the claimant to leave and then asked GX (another employee of the respondent) to tell the claimant to leave. After PR asked NX (also an employee of the respondent) to get the police. The claimant then got into his car and drove away. PR gave a statement to MC (manager of the respondent hotel). A copy of this undated statement was furnished to the Tribunal.

In cross-examination it was put to PR that everything had stopped when security had come. PR confirmed that nothing else had happened. The Tribunal was then referred to a statement by GX. PR said that he had been pushed up against the wall but that he had not been punched. The claimant had pushed up to the wall and had knocked over some medical boxes. It was put to PR that the claimant had only gone to get a radio and that PR had had an agenda to end the claimant's employment. PR denied having had such an agenda.

The Tribunal was referred to a copy of a redundancy (RP50) form for the claimant and it was put to PR that the respondent had wanted the claimant out. PR denied this. PR was of the opinion that it had not been necessary for the claimant to carry a two-way radio at all times. PR did not disagree when it was put to him that the claimant had had ten or eleven years' service and had always had a radio. PR said that it had been decided that radios (which were really expensive) would be signed for. He said that the claimant and another employee (BRX) had previously failed to return a radio and that he had asked the claimant to do his duties without a radio.

When it was put to PR that the claimant and BRX were the only security men not to have a radio PR replied that they had not needed one because they were "out front with other security".
The Tribunal was referred to a copy of a handwritten letter dated 4 August 2010 from the claimant to the respondent stating that he did not accept the content of warning letters he had received and that he did not agree with the withdrawal of radios as it put his safety at risk in the workplace. In the letter the claimant also alleged that he had not been paid for some ten shifts worked. The claimant requested that the respondent investigate the issues raised and reminded the respondent of letters issued to it by the claimant's trade union. Regarding this letter, PR said that he had spoken to the claimant who had got a radio a short time later.

The Tribunal was referred to a copy of a typed letter dated 10 August 2010 from the claimant to the respondent in which the claimant had raised issues and had appealed the warning letters he had received. PR said that he could not recall being asked about this.
The Tribunal was next referred to a letter dated 4 September 2010 from the claimant directly to PR and the respondent's management regarding the claimant's warnings, pay issues and exclusion from fire safety training. Asked why a reasonable employer would not respond, PR replied that he could not recall getting it and that all employees went to fire safety training meetings.

The Tribunal was referred to a letter dated 21 June 2010 from the claimant's trade union to the respondent regarding the pay and conditions of the claimant. The letter also served notice on the respondent that the trade union would make a claim against the respondent for unpaid wages. PR said that he could not recall this.

Asked why the police had not been called on 17 December 2010 after the boxes had been knocked over, PR replied that he had just wanted the claimant off the premises. The claimant had been unwilling to leave without a letter and had been sitting in an office without authorisation but had left at the mention of the police.

It was put to PR that the claimant would say that he had asked for time to read documentation and that PR had refused. PR denied this.

The Tribunal was now referred to a 17 December 2010 witness summons served on the claimant on behalf of the abovementioned BRX in respect of a court case involving the respondent.

PR told the Tribunal that he had the authority to give warnings and investigate employee conduct.

The respondent's representative referred the Tribunal to a copy of the 17 December 2010 memo from PR to all members of the respondent's security team regarding mobile phones and prohibiting their use by all staff members during working hours and requesting that all security stall sign to indicate their understanding of the memo.

Giving sworn testimony, MC (the abovementioned manager of the respondent) said that she had been in her post since October 2010 and that she had heard about the Friday 17 December 2010 incident on the following Monday whereupon she had asked for a written statement. The claimant was suspended at this time. She reviewed PR's statement and saw CCTV footage. She sent a letter to the claimant's trade union representative.

The Tribunal was furnished with a copy of a letter dated 2 February 2011 from MC to the claimant inviting the claimant to a meeting at which he could be represented so that the claimant could present his version of the events (of 17 December 2010) that had resulted in his suspension.

MC told the Tribunal that the claimant attended the meeting and that minutes were taken. The claimant's representative interjected that he did not recall getting them but MC insisted that they had been sent.

A meeting fixed for 16 March 2011 was delayed. MC reviewed CCTV footage and all else related to the incident. She determined that dismissal of the claimant was justified.
The Tribunal was now referred to a letter of dismissal for gross misconduct dated 6 April 2011 from MC to the claimant.

MC told the Tribunal that there were no minutes of a second meeting attended by the claimant and the claimant's representative and that the incident had been in a room where there were no cameras therefore it would not have appeared on the aforementioned CCTV footage.

In cross-examination it was put to MC that letters to the claimant dated 2 February 2011 and 9 March 2011 were not also sent to the claimant's representative. MC replied that minutes of meetings had been sent to the claimant's representative and that MC had met people shortly after the incident. MC did not deny taking statements before meeting the claimant and said that she had not felt obliged to give statements to the claimant or the claimant's representative. A

meeting was held to hear the claimant's version of events.

The Tribunal was referred to a letter dated 15 March 2011 from the claimant's representative to MC requesting information as to the allegation against the claimant, relevant statements and all other material information. MC replied that she had been working part-time and that her father had been terminally ill. She accepted that the claimant had not known that there was an account (of the incident) that was inimical to him.

The Tribunal was referred to a letter dated 14 April 2011 from the claimant's representative to MC stating that the claimant's trade union continued to await information relating to the incident as well as an agreed shift payment due to the claimant.

A letter dated 6 April 2011 issued from MC to the claimant telling him that the respondent had decided that he was guilty of gross misconduct. MC stated that it contained her reasoning behind the claimant's dismissal, that she had not been sure how specific she had to be in a dismissal letter and that she had felt that she had put in enough to dismiss the claimant. The claimant's representative stated that he had responded to this letter. MC acknowledged that there had been no appeal. She did not deny that the claimant should have had a right of appeal. She stated that the decision to dismiss the claimant had been based on the 17 December 2010 incident. She did not deny that the claimant had been on four months' unpaid suspension.

The Tribunal was now referred to the respondent's written procedures and, in particular, its references to gross misconduct.

Questioned by the Tribunal, MC stated that the claimant's record prior to the 17December 2010 incident had not been part of her decision (to dismiss the claimant).

GX (an abovementioned employee of the respondent) attended the hearing to prove his written statement concerning 17 December 2010. The statement said that GX saw the claimant aggressively hold PR against a wall and kick nearby objects. GX saw the claimant try to punch PR and snap a pen from PR's hand and rip PR's shirt whereupon PR was shaking and in fear of the claimant. PR gave the claimant a letter of suspension whereupon the claimant continually refused to leave before eventually leaving.

Under cross-examination GX stated that he had given the statement two or three days after the incident and that he still worked for the respondent. GX added that it had been a serious situation and that he had never seen a staff member behave in that manner.

Giving sworn testimony, MOD (another employee of the respondent) confirmed a written statement that he had given about the 17 December 2010 incident. The statement said that MOD saw the claimant very aggressively push past PR towards the radios leaving PR visibly shaken and that the claimant violently grabbed a pen from PR's hand shouting at PR in a very threatening manner and kicking over a box of medical supplies on the way out such that PR was afraid for his safety.

Under cross-examination MOD said that it was a week or ten days after the incident when he gave his statement. He gave it to MC. He was still working for the respondent.

Giving sworn testimony, NB (another employee of the respondent) confirmed a written statement that he had given. The statement said that the claimant had initially refused to leave

NB's office when asked to do so but had left before the police were called.

Under cross-examination NB said that he had given his statement in early January 2011and that he still worked for the respondent. When it was put to him that the claimant had been told to wait in NB's office NB said that the claimant had not told him that.

Giving sworn testimony, the claimant said that he had worked for the respondent for about ten years and that it had been "grand" until new management (i.e. PR) came in with new staff. The claimant thought that there was a "clear plan to get all the old staff out". There were only two of the original staff left when the claimant was dismissed after a period of suspension. PR had taken over in 2006-7.

When asked about redundancies, the claimant said that that the security staff had been was whittled down on foot of redundancies and contract security was brought in. The Tribunal was next referred to a copy of a redundancy (RP50) form dated 7 January 2010 in respect of the claimant. The claimant said that the respondent wanted to use "all new staff" but that he had not wanted to avail of a redundancy scheme. People were replaced but they wanted to hold on to their jobs. They were always told that redundancy was there for them. There had previously been about sixty staff. An issue arose over whether or not the claimant was entitled to have a two way radio during the course of his job. There was a suggestion that someone had stolen a radio therefore there were not enough apparatus for all members of staff. The claimant did not feel safe without a two way radio. In the past the claimant states that even when he was given a radio no-one would respond once the contract security were brought in.On the 17 December 2010 PR had wanted the claimant to sign a document concerning the use of mobile phones during work hours. Given the history of written warnings, the claimant would not sign without someone else there or without taking away the document.

. Giving evidence about the incident on the 17 December 2010 the claimant alleged that it had been PR who had grabbed a pen out of the claimant's hand. The claimant told the Tribunal that he felt very sorry for GX and that GX's statement was untrue. The claimant asserted that there was no-one else in the room except him and PR when the incident happened. Security arrived afterwards. Referred to the statement of MOD, the claimant said that there had been no pushing or ripping of shirts, that there had been no reason for him to push PR and that there was "maybe standing room for three people" in that room. The claimant was asked to go to an office. As soon as PR said that his pen was broken, the claimant was suspended. The claimant went to an office to wait. He had wanted to know for what alleged gross misconduct he was being suspended. He left the premises after reading the suspension letter that PR had written for him on that night of 17 December 2010.
By way of attempts to mitigate his loss, the claimant claimed to have applied for many jobs. The claim under the Organisation of Working Time Act, 1997, was withdrawn.

In cross-examination it was put to the claimant that it was damning that three statements had been given. In reply he did not allege that the statements had been totally untrue but said that there had been no assault. He acknowledged that there had been a heated argument but said that there had been no ripping of shirts.

Closing Statements

The respondent's representative submitted that, even if appeal procedures were found to be

deficient, procedural shortcomings such as a failure to provide a claimant's representative with copies of adverse statements should not be fatal to the respondent's case. It was contended that, even if the Tribunal was to find that there had been a procedurally unfair dismissal, it was open to the Tribunal that the claimant had been one hundred per cent responsible for all financial loss incurred as a result of his dismissal. It was stated that (rather than warnings previously received) the dismissal was solely justified by the 17 December 2010 incident.

The claimant's representative submitted that there had been a sustained campaign by the respondent to get the claimant's employment terminated and that the claimant had never received a statement of what was alleged against him. It was argued that, if the matter was so simple, four months (after the 17 December 2010 incident) was not a reasonable time for the respondent to take to make the dismissal decision.

Determination:

The Tribunal heard and considered extensive oral testimony as well as receiving typed statements.

It is common case that there was an incident but there was a conflict of evidence in relation to it.

It is clear from the evidence that only the claimant and the nightclub manager (PR) were present for the incident. The other witnesses only gave evidence of the aftermath. PR suspended the claimant without pay on the spot subject to an investigation for gross misconduct. The matter was then handed on to the respondent's manager (MC) who collected statements.

There were four half-page statements and two brief meetings with the claimant but the investigation still took four months. The claimant remained suspended without pay and without any formalising of the reason for that. The claimant was not privy to any of the statements used by the respondent. No explanation was given to the claimant as to the contents of the statements.

The claimant's representative wrote to the respondent on a number of occasions requesting explanations and statements of the allegations made against the claimant but no response was issued on behalf of the respondent. MC ultimately dismissed the claimant by letter dated 6 April 2011. No appeal was offered in this letter and it does not seem that the directors or any human resources representative for the respondent had any input into this decision. MC, as manager of the hotel, conducted this investigation and made the decision to dismiss.

In the particular circumstances of this case the Tribunal finds that the procedures were substantially lacking; enough so to uphold the claim of unfair dismissal.

The Tribunal accepts that there was an incident between PR and the claimant but the Tribunal does not accept that was of such a serious nature as to warrant dismissal for gross misconduct.

Allowing the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, the Tribunal (in the absence of specific financial documentation assessing the claimant's average gross weekly pay at €340.00 per week) awards the claimant the sum of €1,360.00 (this amount being equivalent to four weeks' gross pay at €340.00 per week) under the

aid legislation.

In addition, allowing the claim under the Unfair Dismissals Acts, 1977 to 2007, the Tribunal, finding compensation to be the appropriate redress in all the circumstances of this case, deems it just and equitable, in view of the claimant's contribution and attempts to mitigate his loss in other employment, to award the sum of €5,500.00 (five-and-a-half thousand euro) to the claimant as compensation under the said Unfair Dismissals Acts, 1977 to 2007.

The Tribunal notes that the claim under the Organisation of Working Time Act, 1997, was withdrawn.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)