

## **EMPLOYMENT APPEALS TRIBUNAL**

CLAIM OF:  
EMPLOYEE

CASE NO.  
UD510/2011

against  
EMPLOYER  
under

### **UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr P. Meghen

Members: Mr D. Hegarty  
Mr J. Flavin

heard this claim in Limerick on 20 November 2012 and 20 February 2013

Representation:

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Claimant(s):

Respondent(s):

The determination of the Tribunal was as follows:-

It was alleged that the claimant, a leisure centre manager, had been unfairly dismissed after an employment that began in October 2008 and ended in September 2010. It was disputed that the claimant had breached his contract of employment. It was also contended that the restrictive covenant upon which the employer sought to rely on, was neither binding nor enforceable.

It was also alleged that the employer had conducted an inadequate investigation into the issues which resulted in the decision to terminate the claimant's employment and that the alleged wrongdoing did not constitute gross misconduct. It was alleged that the decision to terminate had not been justified, that fair procedures had not been applied and that the employer had not fulfilled its contractual obligations to the claimant employee whether in respect of fair procedures or otherwise.

Without prejudice to the enforceability of the restrictive covenant, it was alleged that the said covenant was not applied fairly to all employees.

Disputing the unfair dismissal claim, it was contended on behalf of the employer that the claimant had not been unfairly dismissed. The claimant's contract of employment provided that he "should not be engaged or connected with any other business activity during the term of your

employment with (the employer) and associate companies without the prior written consent of (the employer)”.

It was stated that, on 5 August 2010, the claimant had accepted that he had been engaged in another business activity during the course of his employment with the respondent employer. This had not been disclosed to the respondent either before the claimant commenced employment or during the course of the claimant’s employment with the respondent. However, the consent of the respondent had not been sought and, therefore, the claimant had been in clear breach of his contract of employment.

It was contended that the covenant in the claimant’s contract of employment had been clearly explained to him when he had taken up employment with the respondent, that he had acknowledged in writing that he had understood it and that the covenant was, therefore, binding on the claimant.

It was also submitted that a full and thorough investigation had been carried out by the respondent into the issues which resulted in the decision to terminate the claimant’s employment. The investigation established that the claimant was involved in another business activity during the course of his employment with the respondent and this had been accepted by the claimant. The respondent believed that the claimant wrongfully withheld this information and that such withholding of information constituted gross misconduct.

The respondent further contended that the covenant in question had been applied fairly to all employees, that fair procedures had been applied and that the claimant had been afforded every opportunity to make submissions both to the initial disciplinary investigation (carried out first by the respondent’s general manager and HR manager and subsequently by the group financial controller on appeal). The claimant was afforded the opportunity to have representation at all meetings. The respondent believed that fair procedures had been applied and that the decision to terminate the claimant’s employment had been justified in the circumstances.

### **Determination:**

In the course of the claimant’s employment he had no previous disciplinary record and gave evidence that his business did not interfere with his day to day position with the respondent. The Tribunal notes that his other business activity was 60 kilometres away and while his contract included a restrictive covenant he was not advised that if it was breached, it could lead to his dismissal. The Tribunal is therefore satisfied that the dismissal was unfair and that the claimant was unfairly dismissed.

The Tribunal is satisfied therefore that compensation is the appropriate remedy and, pursuant to the provisions of the Unfair Dismissals Acts, 1977 to 2007, awards the sum of €25,333 as being just and equitable in the circumstances.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

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

