EMPLOYMENT APPEALS TRIBUNAL

Claim Of:	Case No.
Employee	UD819/2006

against
Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Mahon B.L.
Members: Mr. M. Kennedy
Ms. E. Brezina

heard this claim at Dublin on 20th March 2007 and 27th June 2007

Representation:

Claimant: XXXX

Respondent: Mr. Donnough Shaffrey, Solicitor, 1 Aspen Court, Cornelscourt Village, Dublin 18

The determination of the Tribunal is as follows:

The Tribunal heard dismissal was in dispute between the parties.

Preliminary Point #1:

At the outset the representative for the respondent raised the issue of the Tribunal's jurisdiction to hear the case as the claimant was statute barred under the Unfair Dismissals Acts, 1977 to 2001, from bringing a claim, as he was over the age of 66. A copy of the claimant's contract was not available on the first day of hearing. However, when asked the respondent's representative confirmed that the contract did not address the issue of the retirement age of employees.

Determination on Preliminary Point #1:

The Tribunal finds that the Unfair Dismissals Acts, 1977 to 2001, Section 2(1)(b) as amended by Section 4(c) of the Equality Act 2004 provides that *"an employee who is dismissed and who, on or before the date of his dismissal, had reached the normal retiring age for employees of the same employer in similar employment or who on that date had not attained the age of 16 years."* Asthere was no evidence adduced of a normal retiring age it must follow that the Tribunal hasjurisdiction to hear the case.

Preliminary Point #2:

A postponement was granted for this case on the 23 January 2007 for a hearing date on the 5 February 2007. The representative for the claimant raised the issue of a letter he sent to the Tribunal dated 6 February 2007 in which he stated, that neither the respondent nor a representative on their behalf notified the claimant of the postponement and he had attended for the hearing on the 5 February 2007.

The representative for the respondent stated that the respondent had sent a letter to the claimant notifying him of the postponement. He undertook to forward a copy of this letter to the Tribunal on or before the 9 July 2007.

Determination on Preliminary Point #2:

The Tribunal note that it did not receive any correspondence from either the respondent or a representative on their behalf either on or before the 9 July 2007 or subsequent to this date. The Tribunal is of the opinion that the respondent acted frivolously and/or vexatiously in failing to notify the claimant of the adjournment granted on the 23 January 2007 and makes an order, under 19 of S.I. 24 of 1968, that the respondent pays to the claimant Mr. William O'Brien Snr. the sum of €95.73 in respect of costs. The claim for costs in respect of the claimant's representative Mr William O'Brien Jnr. is not allowed.

Claimant's Case:

The claimant commenced employment with the respondent as a static security officer in July 1997. His first location was Cloverhill and he was based there for five or six months. During the course of his employment the claimant was promoted to the position of patrol driver and supervisor. The claimant's location was changed twice. He had been based in Citywest for nine years in July 2006.

The claimant was on annual leave week commencing the 17 July 2006. He was due to return to work on Saturday, 22 July 2006. On Tuesday, the 18 July 2006 he received a telephone call from the Operations Director (hereafter referred to as OD) who requested a meeting with the claimant. The claimant tentatively agreed to a meeting on Friday, 21 July 2006. However, the meeting did not take place as the claimant telephoned OD mid-morning on the 21 July 2006. He told OD he could not attend the meeting as he was still on holidays in Cork. The claimant asked OD what it was about. OD told the claimant he was moving location to Cherry Orchard in Ballyfermot as Citywest "wanted the claimant out". The claimant presumed OD meant Citywest management wanted him removed. The claimant was told he was to report for training to Cherry Orchard on Monday, 24 July 2006.

Subsequent to this telephone conversation the claimant telephoned Citywest's General Manager whom the claimant knew quite well. His call was unanswered and he left a voicemail. Twenty minutes later OD telephoned the claimant. He told the claimant he had no right to telephone the respondent's client and that it was he (OD) who did not want the claimant at Citywest.

As the claimant had expected to return to Citywest after his holidays on Saturday, 22 July 2006 he told OD he was not happy with the situation. He stated his reasons; his hours of work would be longer, as well as his travelling times. The claimant told OD he would consider the

change of location over the weekend. On Monday, 24 July 2006 the claimant telephoned OD and told him that the proposed changes were unacceptable.

The work in Cherry Orchard also entailed work in Ballymount and a number of building lock-ups in the evening, including at least one in Chapelizod. It would be necessary to travel between these locations and would involve longer working hours. The claimant would commence work at 4.45pm and finish at 8am the following morning. The claimant estimated he would be travelling an extra 40 minutes approximately each way. He would have to leave his house in Newbridge at 3pm for work in Cherry Orchard and would not return home until 9am the following morning. The claimant explained to OD these were the reasons the job in Cherry Orchard was unacceptable. The claimant did not attend at Cherry Orchard on the 24 July 2006.

The claimant received a letter dated 1 August 2006 from the Operations Director. The letter stated, *"As you are aware you were rostered to return to work on Monday 24th July for briefings on duties in the Cherry Orchard location. Unfortunately you did not appear and did not advise us that you would not be appearing for duty on this date. We were left without cover for this shift and had to make alternative arrangements at the last minute to ensure that our customers were not without service."* The claimant did not understand this as his first few days at Cherry Orchard were supposed to be allocated to training.

The letter also stated: "*As your employer you can appreciate that we are entitled to know when you intend to return for duty. We still consider you an employee of this company until you have advised us to the contrary. We would ask that you contact us in writing indicating your date of return at the earliest opportunity."* The claimant stated he had never agreed to work in Cherry Orchard. The claimant did not receive a P-45 from the company.

During cross-examination the claimant accepted that terms of employment are part of an employment contract but stated a contract had to fair and reasonable. A contract of employment dated the 6 October 2002 was opened to the Tribunal. It stated the claimant's position was Risk Management Officer. The claimant accepted he had signed the contract and that it included at point nine of the contract: *"The Directors reserve the right to instruct the employee to attend at various locations for work as required."* The claimant accepted he had changed location throughout the course of his employment.

It was put to the claimant that he had previously worked at a location in Cloverhill, which is near to Cherry Orchard. The claimant accepted this but stated he was not residing in Newbridge then. It was put to the claimant that the hours of work he stated he would have to work in Cherry Orchard were incorrect. The claimant replied that he had seen a copy of the roster for Cherry Orchard that showed the hours of work as 4.50pm until 8am. It was put to the claimant that such a roster was not specific to the claimant and that his hours of work may have differed from this.

The claimant accepted other employees have moved location but he thought that after nine years in Citywest he should have been given an explanation for the change of location. The claimant telephoned Citywest's General Manager as he felt he was entitled to be informed about the reason. The claimant objected to being contacted by the respondent when he was on holidays and being asked to attend a meeting during his holidays.

It was put to the claimant that it was OD who contacted him on the 21 July 2006, as he did not

show for the meeting. The claimant denied this stating he had telephoned OD on the morning of the 21 July 2006.

It was put to the claimant that OD feared the claimant would persistently contact the General Manager of Citywest and that was the reason he did not want the claimant at Citywest. The claimant accepted Citywest is an important client of the company. He telephoned Citywest's General Manager because he did not get an explanation from the respondent.

The claimant was also cross-examined in relation to an incident that occurred in relation to computers that were in a skip at Citywest. The claimant did not believe that this was connected to the company changing his location from Citywest to Cherry Orchard as the incident with the computers happened two months previously.

The claimant was asked if he would accept the job in Cherry Orchard if the hours of work were the same as Citywest. The claimant replied that it still meant longer travelling times and criss-crossing between locations in traffic. The staff in the location at Citywest had an arrangement that OD was aware of. The staff of the morning shift started earlier than their official start time, in order to allow the night shift to finish earlier and vice versa. The claimant stated this arrangement would not work in Cherry Orchard.

Answering questions from the Tribunal the claimant confirmed there was no indication before his holidays, that he would be moving location from Citywest. He was very annoyed that he did not receive an explanation from the respondent. OD did not make any offer to the claimant, he just told him he was moving.

Giving evidence the General Manager of Citywest told the Tribunal he did not request that the claimant be moved from Citywest and he would not have a problem if the claimant returned to work there. The General Manager stated that security guards at Citywest are not required to lock-up buildings.

During cross-examination he confirmed he had brought a number of inefficiencies and complaints to the attention of the Operations Director and the Managing Director. He accepted how they dealt with such complaints was a matter for them.

Respondent's Case:

Giving evidence the Operations Director confirmed that he telephoned the claimant on the 18 July 2006 about moving location to Cherry Orchard. The claimant selected the time and the date for the meeting on Friday, 21 July 2006. When the claimant did not attend for the meeting he telephoned the claimant. OD wanted to meet the claimant to explain the move. Under the Private Security Authority Licensing Programme (hereafter referred to as PSA) the respondent must ensure each employee holds a license and is trained on each location.

OD stated that there was a mistake in his letter of the 1 August 2006. The claimant was to receive training on the location in Cherry Orchard. There was another employee covering the shift and the claimant had not left the respondent without cover as stated in the letter. The respondent hired a consultant to assist them with meeting PSA requirements. The decision to change the location of staff came about as result of this. The claimant did not discuss the problems he had with the move with OD. If the claimant had attended the meeting he would have been given notice of the change of location. It was OD's intention

to provide the new arrangements to the claimant at the meeting on the 21 July 2007. OD was prepared to listen to the claimant but he was not afforded the opportunity to do so. The only thing the claimant said to him was that he was unhappy with the change to Cherry Orchard. The claimant's contract states at point nine: "*The Directors reserve the right to instruct the employee to attend at various locations for work as required."*

During cross-examination OD stated he did not recall receiving a telephone call from the claimant on Friday, 21 July 2006. He did recall telephoning the claimant after the claimant had tried contacting the General Manager of Citywest.

Giving evidence the Managing Director (hereafter referred to as MD) told the Tribunal the core of the respondent's work is in Cherry Orchard Industrial Estate as well as three other contracts including Citywest. When the company was set up in 1985 it was initially unnecessary for the respondent's staff to move location. However, as the years progressed the respondent moved staff for training purposes. When MD was completing employment contracts in 2002 he included the term at point nine that "*The Directors reserve the right to instruct the employee to attend at various locations for work as required."*

In 2006 the PSA requirements came into force and MD worked hard to implement the requirements. A management consultant was hired. Prior to the licensing the company had to obtain an SGS certificate. This involved a critical analysis of the respondent's systems and how it would deal with certain situations. The respondent cannot employ an unlicensed person. All employees must be cross-trained. Prior to the PSA requirements staff changed location for operational reasons such as the loss of a contract etcetera. Nine of the respondent's employees have changed location. One of the employees was unhappy and complained to the respondent about the change of location but he was aware it was in his contract and that the respondent had the right to change his location. The respondent's business is based on the flexibility and availability of the staff. MD stated that the claimant would have had a company vehicle to travel from Citywest to Cherry Orchard. MD is willing to have the claimant return to work with the respondent. The claimant's name was submitted to the PSA on the 27 March 2007 within a list of staff to be trained to FETAC level by April 2008. All employees had to apply for the course by the 1 April 2007 otherwise it would be illegal for them to work in the security industry. The course would not have caused extra expense to the claimant and it would not take place outside his working hours. MD believes if the claimant had raised his issues with OD he would have listened, as he is a compassionate person.

During cross-examination it was put to MD that the issue of the PSA requirements did not arise on the first day of the hearing. MD could not recall this. It was put to him that neither he nor anyone else from the respondent contacted the claimant subsequent to the 24 July 2006 despite the fact that the claimant had nine years service with the company. He replied it was common knowledge that the claimant was not going to attend for work as he had stated to OD that he was not pleased with the change to Cherry Orchard. MD stated he could not be selective and leave the claimant at Citywest, as that would be discrimination. Other employees had been moved after eight or nine years in one location. MD's decision to move staff was based on PSA requirements in relation to the company's work force.

Answering questions from the Tribunal MD stated that he could not say whether or not the claimant would ever be located at Citywest again if he had taken the position in Cherry Orchard. He confirmed that the respondent did not have contact with the claimant when they

listed him for the PSA course in March 2007. MD made the decision to cross-train staff two years ago. This was communicated to all staff and notices were put on the notice board.

Determination:

The members of the Tribunal very carefully and thoroughly considered the detailed evidence adduced, the statements put forward and the documents submitted during the two-day hearing.

The abrupt notice by telephone to the claimant during his annual holiday of a significant change in his working arrangement to take immediate effect on his return from leave was to say the least in the opinion of the members of the Tribunal inappropriate in its timing and nature. It was hasty and did not at that time seem to allow for clarification or consultation.

It seems to the Tribunal that while on annual leave away from home the claimant was confronted with a final and irrevocable decision taken by management without any notice or consultation. In view of the significant personal and domestic consequences for the claimant the circumstances and reasons, which gave rise to this decision, should have been heralded in advance and clearly explained.

While the respondent apparently acted within contractual parameters, the claimant was not afforded the benefit of fair and reasonable procedure in line with good human resource practice. A formal procedure to facilitate the claimant in raising the issue of his dissatisfaction with the proposed changes to his working arrangements was not available. In implementing change for operational reasons it is expected that a reasonable employer have regard to the duty of care owed to an acknowledged hard working, experienced and long-serving loyal member of staff.

The Tribunal observed a lack of attention by the respondent to the important matter of communications, for example, reluctance to dialogue and engage, failure to complete the T2 form on time (submitted by facsimile on the 26 June 2007) and failure to notify the claimant of an adjournment granted on the 23 January 2007.

The Tribunal having considered all of the circumstances finds that a constructive dismissal did occur. Therefore, having regard to claimant contribution and clarification presented by the respondent during the hearing, it is the unanimous determination of the Tribunal that the claimant be re-engaged with effect from Monday, 3 September 2007. Continuity of service to be preserved, subject to statutory requirements. The claim under the Unfair Dismissals Acts, 1977 to 2001, succeeds.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)