EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
Employee

CASE NO.
UD708/2006
MN469/2006
WT232/2006

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001
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: Ms. K.T. O'Mahony BL

Members: Mr. M. Forde
Mr. D. McEvoy

heard this case in Clonmel on 6 February 2007

Representation:

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Claimant(s) :
Mr. Kieran W. Cleary, Cleary & Cleary, Solicitors,
Law Chambers, Market Street, Clonmel, Co. Tipperary

Respondent(s) :
Ms. Lucy Walsh BL instructed by
McCann Fitzgerald, Solicitors,
2 Harbourmaster Place, I.F.S.C., Dublin 1

The determination of the Tribunal was as follows:-

Preliminary Issue

The claimant commenced employment with the respondent on 24 May 1999 and was dismissed on 17 August 2005. T1A claim form claiming unfair dismissal was lodged with the Tribunal on 29 June 2006, which was not within the prescribed six-month statutory time limit for initiating the claim. The respondent had no knowledge of the claim until 6 July 2006, which was some ten months after the dismissal, when it received a copy of form T1A from the Tribunal. The respondent argued that the claim was statute-barred. The claimant sought to rely on a letter dated 27 September 2005, received by the Tribunal on 28 September 2005, which was within the six-month statutory time limit, indicating the intention to bring an unfair dismissal claim and seeking the appropriate form(s) for completion. In the alternative, the claimant asked the Tribunal to exercise its discretion under section 8 of the Unfair Dismissals Act as amended (the "exceptional circumstances" provision) to extend the time for lodging the claim. On this front it was argued on behalf of the claimant that the fact that she was involved in a number of High Court actions against the respondent prevented the lodging of the claim in time. The respondent contended that the claimant could not rely on the letter of 27 September 2005 as it did not comply with the requirements set out in para. 3 of the Unfair Dismissals (Claims and Appeals) Regulations 1977 (Statutory Instrument No. 286 of 1977) in that it did not specify the correct date of commencement of the claimant's employment with the respondent and did not specify the claimant's weekly remuneration in respect of the said employment.

Determination of Preliminary Issue:

The Tribunal finds that the claimant's representative's letter of 27 September 2005 was sufficient to initiate the claim for unfair dismissal notwithstanding the absence of the amount of the claimant's weekly remuneration and the error as to the date of the claimant's commencement with the respondent. Under the Unfair Dismissals Acts, 1977 to 2001, the Tribunal finds that the 27 September letter constitutes a claim under the said legislation. In reaching its decision, the Tribunalconsidered the Unfair Dismissals (Claims and Appeals) Regulations 1977 (Statutory Instrument No.286 of 1977) and took cognisance of the comments of Walsh J in the *Halal Meat Packers(Ballyhaunis) Ltd v Employment Appeals Tribunal and Eamonn Neary {1990} ELR 49,* (S.C.) eventhough in that case the matter under consideration by the Supreme Court was the exercise of adiscretion or the lack of it under para 5 of the same regulations.

Para. 3 of the Unfair Dismissals (Claims and Appeals) Regulations 1977 (Statutory Instrument No. 286 of 1977) sets out the details to be included in a notice initiating an unfair dismissal claim: the name and address of both the claimant and employer, the dates of commencement of employment and of dismissal and the weekly remuneration in the said employment. Para 5 of the same regulations, which was under consideration by the Supreme Court in the *Halal* case, as originally enshrined in legislation provided that a person who did not enter an appearance to a claim was not entitled to take part in or be represented at the hearing of the claim. The harsh consequences of the failure to enter an appearance was later modified to an extent by the provisions of para 15 of theMaternity Protection (Disputes and Appeals), 1981 (SI No.357 of 1981) Regulations which conferred a discretion on the Tribunal in cases where no appearance had been entered. There is nosuch consequence provided for where there is a failure to strictly abide by the requirements of para.3 of the regulations. The Tribunal finds that the omission of the amount of the claimant's weeklyremuneration and the error as to the date of the claimant's commencement with the respondent donot operate to defeat the letter of 27 September received by the

Tribunal on 29 September constituting the initiation of the claim for unfair dismissal. Furthermore these are matters well within the knowledge of the respondent. To find otherwise would indicate a "rigidity" and an adherence to "undue technicalities" which this Tribunal was intended to eschew. Accordingly, the Tribunal has jurisdiction to hear this claim under the Unfair Dismissals Acts 1977 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

EMPLOYMENT APPEALS TRIBUNAL

Claim Of:	Case No.
Victoria O'Halleron, 5 Carrigeen, Clonmel, Co. Tipperary	UD708/2006
	MN469/2006
	WT232/2006

against

Guidant Luxembourg S.A.R.L., Cashel Road, Clonmel, Co. Tipperary

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001
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: Ms. K.T. O'Mahony B.L.

Members: Mr. M. Forde
Mr. D. McEvoy

heard this case in Clonmel on 6 February and in Cashel on 18 July 2007

Representation:

Claimant: Ms. E.J. Walsh B.L. instructed by Ms. Sineád Cleary, Cleary & Cleary, Solicitors, Law Chambers, Market Street, Clonmel, Co. Tipperary

Respondent: Ms. Lucy Walsh B.L. instructed by Mr. Terence McCann, McCann Fitzgerald, Solicitors, 2 Harbourmaster Place, I.F.S.C., Dublin 1

The determination of the Tribunal was as follows:

Preliminary Issue:

On the first day of hearing the respondent's representative raised a preliminary issue as to whether the claim for unfair dismissal was lodged in time with the Tribunal and accordingly whether the Tribunal had jurisdiction to hear the case under the Unfair Dismissal Acts, 1977 to 2001. At the request of the claimant's representative the Tribunal's determination dated 13 April 2007 was issued to both parties.

Respondent's Case:

Giving evidence the Managing Supervisor (hereafter referred to as MS) told the Tribunal he became the claimant's supervisor on the 11 July 2005. Prior to this he had occasionally supervised the claimant when he was covering for another supervisor. However, his contact with the claimant was very limited prior to 11 July 2005.

The respondent manufactures medical devices for the global market. The claimant who had commenced employment with the respondent in May 1999, worked as a production operator in the cardiac management division where pacemakers are manufactured. These are life saving devices and cleanliness is paramount; contamination of the device can lead to infection. The manufacturing process is governed by strict procedures. The respondent's General Manufacturing Area Instruction document (hereafter referred to as GMAI 100286) sets out the requirements for employees working in a Control Environment Area (hereafter referred to as CEA) in order to ensure the integrity of the manufacturing process. Familiarisation with these procedures is part of each employee's induction. The procedures are very clear. The procedures stipulate inter alia that: the employee should wear a hat to cover all their hair and facial hair must also be covered; a gown must be worn and should be closed from the top to the bottom and only the last two buttons on the gown are allowed to be open; boot coverings must be worn; safety glasses should be worn; on entering the clean room the employee must clean her hands thoroughly, using a minimum of two squirts of antibacterial wash with deionised water and must wash their hands for a minimum of twenty seconds; food is not allowed in the gowning room because the act of chewing can release particles that could contaminate the product An employee cannot enter the clean room unless they have been certified to do so. This certification is completed during induction.

On the 12 July 2005 MS observed that the claimant was not wearing the issued glasses, while working in the test area. He was only a short distance away from her and had observed her for "a good thirty seconds". He approached the claimant and told her she needed to wear the safety glasses. She told him she had removed the glasses to clean them. Employees are allowed to remove their glasses to clean them quickly. However, this was not what he had observed the claimant do; she had been holding them while talking to someone. While MS had to occasionally speak to employees about not wearing their glasses it would never be to the same offender; the claimant had been spoken to about not wearing her glasses on two previous occasions.
MS did not take any action at this stage other than note the incident.

On the 13 July 2005 the Lead Operator reported to MS that he had seen the claimant chewing at her workstation in the CEA. MS then discreetly observed her and saw that she was chewing. When MS challenged the claimant she told him she was chewing the inside of her mouth. This was not what he had observed: he had seen the claimant's lips move up and down from a distance of approximately fifteen feet. When he told her he could smell mint from her breath she replied that she had eaten a
mint during her break. MS informed the claimant she was non-compliant with GMAI 100286.

The fact that, in his first week as her supervisor, the claimant had twice been non-compliant gave him cause for concern. On the day prior to commencing in his role as supervisor in the section he had met his predecessor who had gone through his notes and made him aware of any significant incidents. Therefore, MS was aware that the claimant had been issued with a written warning for non-compliance in relation to cleanliness and clothing. He was not aware of the contents of the

warning.
MS discussed the problems he had with the Operations Manager who was his supervisor. MS decided that they should proceed to disciplinary probation, which is the next level of the disciplinary process.

MS met with the Senior Human Resources Representative (hereafter referred to as HR) who had the records of the claimant's two previous supervisors. A disciplinary meeting was held on the 20 July 2005. The claimant was given twenty-four hours notice of the meeting, told who would be present (MS and HR), that the subject of the meeting related to her recent non-compliance (chewing and not wearing safety glasses) and that she could bring a witness if she wished.

The disciplinary meeting was held on the 20 July 2005. The claimant did not bring a witness to the disciplinary meeting and at the start of the meeting she was again offered the opportunity to have one present but she wanted to proceed. MS went through her recent non-compliances and those her previous supervisor had relayed to him. MS enquired if the claimant wanted to add anything, call any witnesses, or if she wanted to offer an explanation as to why it had happened. MS told the claimant that he was considering disciplinary probation and that this was the last stage of the disciplinary process prior to termination. The claimant did not say much. She did say it was unfair and that she should not be going further in the disciplinary process. The claimant did not provide any explanation or refer to any mitigating circumstances for her non-compliance. The claimant did not ask them to speak with anyone.

MS reflected on the limited feedback from the claimant. He believed it was appropriate to proceed to disciplinary probation. He asked HR for the disciplinary Probation Notice/Letter and went through each item on it, word for word, with the claimant. The Probation Notice outlined the issues giving rise to a verbal warning in November 2004, a written warning in April 2005 and counselling on 5 July 2005 as well as the recent incidents. She had received a written warning on the 14 April 2005 because of concerns spanning a period from November 2004 to April 2005 while she had two different supervisors and it related to not wearing her safety glasses when testing the product, not covering her jewellery, having her clothing trailing the ground, failing to detect a unit that had been badly filled and a number of parking violations on site. The counselling on 5 July 2005 concerned her absence on 4 July 2005 and a late explanation for that absence. The claimant was given an opportunity to respond. The Probation Notice also stated: *Effective 20 July 2005 you are being placed on disciplinary probation. As you have received Improvement Required in your July 2005 performance review you will shortly be commencing a 24 week performance improvement plan (P.I.P). This PIP will address both your performance issues over the review period as well as the most recent issues, which are being addressed in this letter.* The Probation Notice further stated: *It is important to note*
that while on the PIP you will be evaluated on the results you achieve as well as the process by which you achieve them. We will review your progress on each if the items contained in the PIP on a weekly basis in order to provide you with adequate feedback. Under the heading *Consequences* the Probation Notice stated: *Improvements in your performance must occur immediately and be sustained. If at any time during the specified period, the stated goals are not being met, further disciplinary action, up to and including termination of employment, may be required.* Whilst the claimant was informed of her right to appeal the decision to place her on disciplinary probation, she did not appeal it.

On the 11 August 2005 MS observed that the claimant was not following the correct procedure when putting on her boot coverings. The correct procedure is to sit on the bench in the gowning room and put on the boot covering with your foot hanging over the dirty side of the gowning room.

This ensures that any dirt particles would fall onto the dirty side of the room and contamination of the clean side of the room is avoided. MS observed the claimant putting the boot coverings on over the clean side of the room. The claimant was aware of the correct procedure for putting on the boot coverings from her induction course and quarterly training. MS could not challenge the claimant at that time as he was still gowning up. MS then observed the claimant going to wash her hands and observed her using only one squirt of antibacterial soap and washing her hands for only 4-5 seconds.

Later in that shift, MS spoke to the claimant and outlined the correct procedures for washing her hands and putting on boot coverings. The claimant said she always washed her hands but she did not refer to the boot covering procedure. He told the claimant he needed to consider what action to take. MS reviewed the latest problems with the Operations Manager and they concluded that the disciplinary process should progress. Termination of the employment contract would be the next step. MS discussed the decision with HR who thought the decision was appropriate.

A further disciplinary meeting was held on the 16 August 2005. The claimant was given notice of the meeting on 15 August and informed that she could have someone with her. MS, HR and the claimant were present at the meeting. MS outlined concerns dating from 2002 onwards. The claimant did not make any real response other than saying that she felt MS and HR were being unfair. MS asked if she wished to speak to someone but she did not. MS told the claimant that termination of her employment was being considered but the matter would be reflected on. MS discussed the situation with HR and reached the decision to terminate the claimant's employment. MS did not feel confident, having the claimant on the team, that the clean room and consequently patients were being protected. MS felt that the claimant had had ample opportunity over the years to improve but she had continued to have problems. The claimant did not raise any issue about a health difficulty or make any reference to a claim for bullying during the disciplinary meetings. The decision was taken to dismiss the claimant. She was dismissed by letter dated 17 August 2005. The claimant was given four weeks pay in lieu of notice and any holiday money due to her.

In cross-examination MS said that while he was aware that the claimant had some health problem he did not know the nature of the problem. An employee's privacy is protected. The claimant had been encouraged, as part of feedback to her, to re-read
the procedures. At no time did the claimant say she did not understand the procedures. The claimant was not offered relocation to another position.

MS did not agree that the claimant should have been allowed to complete the twenty-four weeks of the Performance Improvement Plan (PIP) before dismissal was considered. The claimant had further compliance problems for which she could not provide reasons and so she was dismissed. The Probation Notice referred to "immediate improvement". He agreed that PIP addresses attendance, quality performance, productivity and compliance but it (PIP) is related to the annual performance reviews, which have nothing to do with disciplinary issues. He had one meeting with the claimant in relation to the PIP.

MS and HR had considered issuing a Probation Notice before the meeting. At the meeting they reviewed their concerns with the claimant but she could not put forward any reason for her non-compliance so the Probation Notice was issued. The claimant was dismissed for her history of non-compliance and because of the consequences her repeated failures could have for patients and the respondent's business. At the meetings held on 20 July and 16 August 2005 the claimant was given an opportunity to present her case but she never mentioned her health problems, personal injury claims or made any allegations of bullying and harassment. MS was unaware that she had

instigated three personal injury claims against the respondent. MS did not accept that the letter of dismissal dated 17 August 2005 did not contain the reasons for dismissal because it stated "you had further GMAI 100286 compliance issues". MS replied that he had made it clear to the claimant, that she needed to make improvements.

MS did not accept that from the time he became the claimant's supervisor he wanted her out. He denied that she was singled out for petty disciplinary issues as a result of having instigated a person injury claim in 2004; he did not know the claimant had instigated personal injury claims.

The respondent's Human Resource Representative (HR) told the Tribunal that he was not present when the warning of the 21 February 2003 was given but the letter outlining the reasons for the warning was on the claimant's file. He signed the warning letter of the 14 April 2005 and he was present at the meeting when that warning was given. He (HR) attends disciplinary meetings to ensure that correct procedures are followed, that the meetings are fair and balanced and to suggest a break if the employees get upset; he considers himself to be neutral at these meetings. MS chaired the disciplinary meetings.

HR was present at the disciplinary meetings held on 20 July 2005 and 16 August and confirmed MS's evidence on those meetings. At the time of the 20 July 2005, HR was aware "in broad terms" that the claimant was receiving support with a health difficulty but he did not know the nature of that difficulty; this issue was not raised at either of the meetings and are a private matter between the claimant and the health professional(s). He was aware that the claimant had instigated three personal injury claims against the company but no reference had been made to these at either of the disciplinary meetings. The decision, on 20 July 2005, to place the claimant on disciplinary probation was not made prior to the meeting as the claimant may have raised issues that MS would take into account. If the claimant had raised a defence
the Probation Notice would not have been produced. HR recalled the claimant saying at the meeting she had been chewing her mouth and cleaning her glasses and that it was unfair to place her on disciplinary probation for these. At the 16 August meeting the claimant did not raise anything in her defence. HR did not agree that MS picked on the claimant; she was failing to comply and he had to deal with the problem. The respondent also has a separate grievance procedure in place but the claimant did not use it to make any complaint about being picked on. He did not accept that the claimant did not know about the grievance procedure. Employees receive training on it; he could not recall whether she had got a copy of it but it was referred to in the Employee's Manual.

The claimant said to them that the decision to dismiss her was too harsh and unfair. There was nothing presented to MS by the claimant that caused MS to reconsider the decision. The letter of dismissal was sent to the claimant at her house by courier. The claimant did not appeal the decision to dismiss her. She had not appealed any of the warnings either. The claimant had a number of supervisors and as they are moved around they have to detail complaints.

The catalyst for cutting short the PIP was the claimant's non-compliance. Such failures cannot be trivialised, as there is a possibility that the medical devices could become contaminated with very serious consequences for patients. While the claimant had not received written notice of the meetings she had received prior notice of them. The outcome of the disciplinary meetings was not a foregone conclusion; if the claimant offered any explanation the Probation Notice would not have been issued to her. She had not told them at the meetings that a number of employees had refused to accompany her to the meetings. The claimant was not dismissed for a single non-compliance but for her repeated failures in that area over a number of years. HR agreed that while a PIP meeting

had taken place on 8 August 2005 the relevant documentation on the review had not been completed.

Answering questions from the Tribunal HR confirmed that while the Probation Notice was typed prior to the meeting of 20 July 2005, issuing it to the claimant was only one possible course of action; if the claimant had provided any relevant information at the meeting the Probation Notice would not have been issued to her.

Claimant's Case:

Giving evidence the claimant told the Tribunal that she commenced employment with the respondent in May 1999. Initially the claimant worked as a factory operative but her position changed in November 2004 to a more difficult job where she was on her feet constantly. The claimant was successfully trained to the new job in CBT 001, which was in a controlled room. She got on very well with the workers and in 2004; she got a five-year appraisal award.

The claimant felt "victimised and treated like dirt" by MS. She agreed that the two previous supervisors also had problems with her. At the disciplinary meetings she was shocked and could not speak up for herself so she remained quiet. She did not appeal the decisions because appeals were not overturned. All of a sudden she was being
picked on about parking her car, not wearing her glasses, having her tracksuit trailing on the ground, chewing and washing her hands. She violated the car parking rules because works were going on in the car park. On 11 August 2005 she had washed her hands for longer than 4-5 seconds. She did not put on the boot coverings over the clean side of the floor. She has a habit of chewing her mouth and this is what she was doing on the 13 July 2005 when MS observed her. She was not wearing her glasses when MS observed her on 12 July 2005 because she was cleaning them; she might have been between the machines when she was cleaning them. She was definitely being picked on. She should have been allowed her to complete the PIP.

The claimant asked four people to attend the disciplinary meetings with her but none of them wanted to become involved; they wanted promotion in the company. She
agreed that she had not disclosed their refusals at her disciplinary meetings. She was not told she could have a lawyer present.

During cross-examination the claimant agreed that procedures are very important. She said that she had not breached the procedures on purpose. She reiterated that she was cleaning her glasses and chewing her mouth during the instances of the 12 and 13 July 2005. She was unaware of the issue about the boot coverings until the disciplinary meeting of the 16 August 2005. Many employees are spoken to about breaches in procedures. She had received training on the GMAI procedures

Mr. M, a former employee and process operative with the respondent, who had been a first aid officer for six years, told the Tribunal that he was employed by the respondent at the time the claimant worked there. He had observed a change in how the claimant was treated: she was "pulled up" for having her tracksuit trailing on the ground, for chewing and for wearing make-up while others were not spoken to about such breaches.

Determination:

Complying with the requirements for working in a Controlled Environment Area is of paramount importance in the manufacturing process. The claimant failed on a number of occasions to comply with these requirements. These failures could have serious consequences. Whether the non-compliance is deliberate or not is irrelevant because of the seriousness of the consequences that could ensue. The Tribunal does not accept that the claimant's personal injury claims, the three of which were issued between late 2002 and November 2003, influenced the decision maker's mind. Accordingly, the Tribunal finds that the respondent had reasonable grounds to dismiss the claimant.

The respondent followed its disciplinary procedures. MS informed the claimant that she was entitled to have a co-worker with her at the meetings and they were not informed by her at the disciplinary meetings that a number of her co-workers had refused to attend with her. She was given an opportunity to respond to the complaints made against her. From the Probation Notice issued to the claimant on 20 July 2005 it was clear to her that improvements in her performance must occur immediately and be sustained and that if at any time during the life of the Probation Notice goals were not met, further disciplinary action, up to and including dismissal could be taken. The procedures followed in dismissing the claimant were fair. Accordingly, the claim under the Unfair Dismissal Acts, 1977 to 2001, fails.

The claims under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 and under the Organisation of Working Time Act, 1997 were withdrawn.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)