EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
Employee

CASE NO.
UD783/2006

against
Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Mac Carthy S.C.

Members: Mr. J. Hennessy
Mr. S. O'Donnell

heard this claim at Carlow on 8th May 2007 and 17th July 2007

Representation:

Claimant(s) : Mr. John Fitzgerald, J.J. Fitzgerald & Co., Solicitors,
Friar Street, Thurles, Co. Tipperary

Respondent(s) : Mr Cathal McGreal B.L. instructed by Maguire & McErlean, Solicitors,
78 Drumcondra Road Upper, Dublin 9

The determination of the Tribunal was as follows:-

At the outset, the respondent's representative confirmed to the Tribunal the there was a typographical error in the claimant's letter of dismissal of the 8th March 2006. The words "suspension pay" should be replaced with the words "cessation pay".

The claimant's loss had been agreed between the parties before the hearing commenced.

Preliminary Issue:

The respondent made submissions to the Tribunal regarding a potential pleading that may be pursued in the future in a different forum related to an incident that occurred while the claimant was in the employment of the respondent. The respondent's position was that there was an overlap in the circumstances of employment leading up to the dismissal of the claimant that may lead to compromising the evidence in the other case. The respondent requested that the Tribunal not proceed with the hearing of the case under the Unfair Dismissals Acts, 1977 to 2001.

The claimant replied to this request by confirming that currently no such pleadings existed and as a result, the Tribunal had jurisdiction to hear this case in its entirety. The circumstances surrounding the dismissal were the only ones in contention in this forum and the case could be confined to these. The incident alluded to by the respondent was only by way of background and the claimant was

willing to stand or fall on the evidence adduced on the dismissal alone.

The Tribunal determined that the parties had agreed to confine the evidence to that surrounding the dismissal alone and would not enter into evidence regarding historical occurrences. However, the Tribunal stipulated that, although no such pleadings had been entered to date, should the evidence stray into the area specified, they would adjourn the case before them until other matters were determined. Both parties considered the matter carefully and acquiesced to this position. The case proceeded on the basis that the respondent dismissed the claimant for gross misconduct based on the company disciplinary procedures for a breach of contract. The issues of the claimant's conduct would not be adduced.

Respondent's Case:

The first witness was a Regional Manager and Sports Buyer (SB) for the chain of outlets throughout the whole country. He issued the letter of dismissal dated the 8th March 2006 to the claimant, citing dismissal for breach of contract and gross misconduct. SB told the Tribunal that there was a meeting held in head office in February and the claimant failed to attend. The decision was made to dismiss him as he failed to carry out an instruction to move within the store where he worked. Another Regional Manager (RM) and a friend of the claimant's along with SB and the claimant attended a meeting on the 6th March. The meeting was held to deal with the fact that the claimant had been requested to move area in the store by the store manager (both verbally and in writing) and had refused. He was suspended as a result. He had been requested to attend a meeting prior to this date and had failed to attend. He offered the excuse that he believed the meeting to beat a later date. SB did not accept this reason. The claimant had a sullen demeanour at the meeting and his breach of contract was sufficient to dismiss him. The mobility clause in the claimant's contract (Para. 1 (d)) was pointed out to him and he made no response. SB informed him that it was standard operating procedure in the company to move staff between departments in a store to increase their expertise. The claimant said that he had offered to go temporarily but would not go permanently. There was no discussion of any other matters at this meeting. The claimant did not make an appeal on the decision to dismiss him.

Under cross-examination, SB told the Tribunal that he dealt with that particular store on a weekly basis and would visit it up to six times a week. The respondent company had fifty stores and thirteen of them had sports departments. The store that the claimant worked in was the second highest performer in the country. The rank of sports department manager and assistant store manager was the same. SB had the authority to hire and fire in the company. SB and RM discussed the situation after the meeting on the 6th March and it was then that they made the decision to dismiss.

The second witness was a Regional Manager that worked in the human resources area of the company (RM). She attended the meeting with the claimant, SB and an independent person on the 6th March 2006. She took a note of the meeting and opened this to the Tribunal. She was there to assess the facts in the case and listen to the explanation given. The claimant said that he did not understand why he was moved. RM did not believe him. She said that it was not up to the claimant to decide what the company policy was and the decision was based on the business and operational needs of the business at the time. He was told that his behaviour and attitude were unacceptable as a manager in the company. Paragraph 1 (d) of his contract was read to him and he was informed that this was the section that he had breached. Under cross-examination, RM said that she had not met the claimant prior to the meeting on the 6th March. The move out of the sports department was not a demotion for the claimant.

A third witness, the Human Resources Manager, gave evidence to say that the position of sports department manager was the same rank as assistant manager. The claimant could have objected to the move by bringing it through the grievance procedure. He did not raise it this way. He had no doubt that the claimant acted inappropriately and in breach of his contract.

A fourth witness gave evidence to say that he had been moved around three stores and he had been promoted from sports department manager to assistant store manager. This was normal procedure within the chain of stores. Human Resources would have contacted him to discuss the moves before they happened.

Claimant's Case:

The claimant gave evidence. He had been manager of a sports store for five years before commencing employment with the respondent. When he received the letter regarding his move to the general part of the store he did not understand what it meant. He had often helped out in the store when people were absent. He did not know whether it was a promotion or a demotion. The decision was not explained clearly and he had nobody to go to find out. He said he would have been willing to move had the reasons been explained to him fully. The only explanation he got was that it was for operational reasons. When he was suspended he was waiting for a letter to confirm a date for his disciplinary meeting. The letter he received stated that he had failed to attend a meeting that had been prearranged. He had been unaware of this arrangement. He did not appeal the decision to dismiss him as he did not think the outcome would be any different. The impression he formed was that it was a "one way street" in favour of the respondent. He had appealed a previous incident and the outcome did not change so he felt his hands were tied. The claimant established loss for the Tribunal.

Under cross-examination, the claimant said that he had originally applied for a position as a stores manager with the respondent company. He was appointed as a footwear supervisor in the sports department. When he was asked to move, he wanted clarity regarding his new duties and none was forthcoming. When he received the letter on the 21st February telling him to move, he took no action as he presumed no action would be taken on it. He would expect staff under his management to carry out his instructions. If they had a problem, he would look into the matter further and ask them for reasons why. He felt he was not treated that way.

Determination:

The respondent claimed that the claimant was dismissed on substantial grounds. The respondent relied on the employment contract and in particular Paragraph 1(d) which states:

> *"The employee's job title is Sports Department Manager however you are required to be completely flexible and may be required to work in any area of the store, or in any area associated with the store, in addition you may on occasions be required to carry out other duties as assigned to you by the company."*

This document was drafted by the respondent company and under the contra proferentem rule, is not ambiguous. The "Sports Department Manager" position provided for flexibility, helping out when required and is not so wide. However, flexibility did not include another position altogether. The position was equivalent to the position of Assistant Manager in the store.

Irrespective of a change in remuneration regarding promotion or demotion, the letter of appointment of 24th January 2006 seems to be an offer of another contract. This was a unilateral attempt to change the contract already held by the claimant. The claimant was not bound to accept it and was entitled to accept or not. If the claimant resigned on foot of this, then the onus of proof would be on the claimant to sustain a claim for constructive dismissal.

In this case, the onus is on the respondent to show that the claimant was in breach of his contract. The letter of dismissal is unfortunate with the choice of words "gross misconduct". The words are not appropriate as the party at fault and who broke the contract is the respondent. The respondent showed themselves to be quite inflexible themselves. The Tribunal determines that the dismissal of the claimant is unfair.

However, the Tribunal were not impressed by the claimant's evidence. He could have done more and understood better. He failed to appeal the decision to dismiss and the Tribunal are dissatisfied with his answers as to why he failed to do so. The Tribunal find that he made a substantial contribution to his dismissal.

Accordingly, the Tribunal determines that compensation is the appropriate redress, being just and equitable, having regard to all of the circumstances regarding the dismissal. Therefore, The Tribunal awards the claimant the amount of €4,000.00 under the Unfair Dismissals Acts, 1977 to2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)