EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
Employee

CASE NO.
UD1180/2005
MN890/2005

Against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J Flanagan BL

Members: Mr M Kennedy
Mr G Lamon

heard this claim at Naas on 31st October 2006, Dublin on 9th November & 11th December 2006

Representation:

Claimant(s): Mr Vincent Nolan BL as instructed by;
Niall P O'Neill, Solicitors, 34/35 South Main Street, Naas, Co. Kildare

Respondent(s): Mr Emmet Whelan
Denis McSweeney, Solicitors, 6 Mount Street Crescent, Dublin 2

The determination of the Tribunal was as follows:

Claimant's Case:

The claimant had commenced work with the respondent as a production operative at their factory unit in Naas in November 2000. Within one year of commencement the claimant was promoted to Depot Supervisor. This promotion involved an increase in responsibility and salary. The claimanthad assisted the Depot Manager and the claimant had reported to the Depot Manager, who was theclaimant's line manager in Ireland. All support systems and logistics for the respondent were basedin Milton Keynes in the United Kingdom. The claimant had always worked with the Depot Manager and got on well with him. The claimant had held a supervisory role in respect of otherstaff. The claimant received a bonus in 2004 but not in 2005. The claimant had studied a course inEmployee Relations & Managerial Skills and was conferred in 2004. The claimant felt that he washighly rated by the respondent. There had been no disciplinary action against the claimant until theincident the subject of his dismissal. The respondent's work performance appraisal dated 7 th December 2004 detailed that the claimant

had a work ethic of the highest standards.

At some date around 19th January 2005 the Customer Service Representative for the respondent (hereinafter referred to as the CSR) moved from Head Office in Milton Keyes to Naas for the purpose of increasing customer service in the Naas unit. The CSR was described as a "trouble-shooter." The claimant had not met the CSR previously. On Saturday, 22nd January 2005,there was a night out at a local public house for one of the senior drivers of the respondent who wasabout to get married. The claimant arrived after the CSR. A number of the claimant's other colleagues were in the public house and everyone mingled well. The drivers in the company have atradition of buying short measures of alcohol for each other. The CSR was excluded and the claimant formed the belief that the CSR was miffed by this exclusion.

During the night the claimant discussed the senior driver with the CSR. The CSR was very impressed with the senior driver. The claimant did not talk to the CSR for very long, as he did not really want to talk to CSR about work. Some of the claimant's colleagues joked with CSR he was "wired" after coming over from Head Office. The claimant left the pub at 2am after several drinks.

The following Monday was the claimant's day off. The claimant attended work on 25th January 2005. Everything appeared normal until the afternoon when the claimant was summoned upstairs by the Head of Human Resources and the Depot Manager. The claimant did not know what the meeting was about. The CSR had made a complaint that the claimant had been threatening and abusive on 22nd January 2005. The claimant denied the allegation. There was no witness in attendance with the claimant. The claimant was suspended with pay pending an investigation. The Depot Manager brought the claimant home.

The claimant received a letter from the Head of Human Resources dated 27th January 2005. Two allegations were put to the claimant in this letter. The first allegation was that the claimant had been threatening and aggressive towards the CSR on 22nd January 2005 and had breached the trust of the respondent. The second allegation was that the claimant had made inflammatory remarks about the Depot Manager and was undermining the authority of the Depot Manager. This second allegation had not been put to the claimant at the meeting on 25th January 2005.

On 8th February 2005 the claimant met with the Human Resources Officer and he brought a witness with him to this investigatory meeting. The same allegations were put to the claimant and the claimant denied them. The Human Resources Officer suggested the claimant submit a written statement. He emailed her a statement as he felt if he did not she would make a decision based on what the Human Resources Officer had in front of her. The claimant took notes of this meeting. The claimant received copies of statements made by other individuals a number of days later. As far as the claimant knew no bar staff, doormen or other patrons of the public house were interviewed by the respondent.

The claimant told the Tribunal he did not make any of the comments as alleged in the statement of the CSR. It was the belief of the claimant that the CSR orchestrated his statement in order to discredit the claimant. The claimant was next in line for the position of Depot Manager and the claimant believed that the CSR wanted the position for himself. The claimant noted that the statement by the CSR did not state the amount of alcohol he had consumed on the night of 22nd January 2005. The claimant denied talking about the Depot Manager. The allegations in the statement did not come from the claimant. The claimant denied threatening children; it was something he would not do under any circumstances. The CSR was not questioned but gave a statement. None of the other witnesses had heard what the CSR had alleged was said. The

claimantcomplained strongly about the second allegation, in the view of the claimant it was an "add on" andhad not been put to the claimant in the meeting of 25th January 2005. The claimant was notprovided with any opportunity to question the witnesses. One witness statement stated that they hadbought the claimant a drink at 3am. This was incorrect as the claimant was home by 2.25am. Theclaimant stated that he had nothing to hide, and he requested that the doormen and bar staff beinterviewed but that this was not done.

The claimant was suspended for just less than six weeks. The claimant received a letter dated 22nd February 2005 inviting him to a disciplinary hearing on 28th February 2005. It was alleged in this letter for the first time that the claimant had breached the personal harassment policy of the respondent. The respondent had previously alleged a breach of trust. At the disciplinary meeting the respondent did not seem to care what the claimant said and the claimant formed the impression that the respondent really did not listen to the claimant. The CSR was not present at the hearing.

The respondent communicated its decision to demote the claimant by letter dated 2nd March 2005. The claimant was to commence work as a Production/Warehouse Operative on 5th March 2005 and further the claimant was issued with a final written warning which would remain in effect for twelve months. The claimant did not receive an investigatory report as provided under the Harassment Policy. The claimant returned to work on 5th March 2005 but the claimant exercised his right to appeal the decision. The role of Acting Depot Manager was given to the CSR in March 2005.

The claimant set forth his grounds of appeal in a letter dated 8th March 2005. The appeal was heard on 21st March 2005. The Head of Foods Service (hereinafter called the HFS) chaired the appeal meeting. The HFS confirmed that he had received a copy of the claimant's grounds of appeal. The claimant took notes at the appeal meeting and these notes were provided to the Tribunal. Point five of the respondent's disciplinary appeal procedure states that "If you are appealing on the groundsthat you have not committed the offence then your appeal may take the form of a complete re-hearing and reappraisal of all matters so that the person who conducts the appeal can make an independent decision before deciding to grant or refuse the appeal." The original disciplinary decision of the respondent was upheld at this appeal.

The claimant returned to work on 5th March 2005 as a Production/Warehouse Operative but he was working under duress. If anyone made an allegation against the claimant he could be summarily dismissed. The claimant was not happy with the response of the HFS. The claimant had disputed the allegations made against him from day one. The claimant worked under protest and to the best of his ability.

In June 2005 a meeting was held. The Head of Human Resources announced that the CSR was taking up the position of Acting Depot Manager. The claimant felt under pressure because if the CSR made another allegation against him then the claimant felt that he could be summarily dismissed. This put pressure on the claimant. It was not pleasant for him to work in that atmosphere. The claimant started looking for alternative employment as his accuser was now to take the position of Acting Depot Manager.

The CSR told people that he was starting as Acting Depot Manager with a clean sheet. During the claimant's six weeks suspension the CSR made disparaging remarks about his predecessor the Depot Manager. The claimant stated being demoted was as bad as being sacked. The CSR would bethe claimant's boss as Productive/Warehouse Operative. The claimant sought a second appeal. Therespondent wrote a letter dated 28th June 2005 stating that the respondent would

only consider asecond appeal three months after the original appeal decision if the claimant had new evidencerelevant to the original disciplinary hearing which had not previously been available to theclaimant. The claimant sent his letter of resignation dated 18th July 2005.

The claimant gave evidence of loss.

On the second day of the hearing the claimant was cross-examined.

The claimant confirmed that he had a conversation with the CSR on his arrival at the depot but the claimant denied making derogatory remarks about the Depot Manager. The claimant also denied threatening the CSR on the night in question.

The second witness for the claimant was at the date of the hearing an employee of the respondent and acts as Shop Steward. The second witness was not present at the public house on the night in question. The second witness became aware of the allegations when they were discussed in the canteen. During the claimant's suspension the CSR told the staff present in the canteen that the claimant would be back but in a lesser role. This statement was made in general while they were having lunch. The second witness also gave evidence as to the current value of the share option scheme.

Respondents Evidence

The first witness for the respondent was the CSR. The role of the CSR was to look after the customer, that is the franchisee, and to ensure that customer service is maintained throughout the United Kingdom and Ireland.

The CSR considered being sent to the Naas branch to cover annual leave to be an opportunity to gain experience and to see how the branch performed. The CSR formed the opinion that the Naas branch was poorly run and that there was a lack of management through the entire structure of the branch. The CSR arrived on 18th January 2005 and the incident with the claimant occurred on 22nd January 2005.

During the first week the CSR spoke with the claimant and other managers in order to obtain information, stating that he genuinely wanted to know how to move the business forward. The initial thoughts of the CSR about the claimant were that the claimant was a very capable worker but that there was no management style. The CSR felt that the claimant took the criticism personally. The claimant was very derogatory when speaking about the Depot Manager who was on holidays and stated that the Depot Manager was seen as the "poison chalice" and that everyone wanted rid of him. The CSR was not happy with the responses of the claimant, but the CSR was there to oversee the facility, the CSR was aware that changes had to be made and he needed to create teams in each area. The CSR believed that the claimant was an important part of the team and he felt that with the support of the claimant his job would have been easier.

The CSR stated that he saw the function on the 22nd January 2005 as a fantastic opportunity to meet the staff socially. The CSR arrived sometime between 8pm and 8.30pm. Initially there were a few people at the bar, the CSR exchanged pleasantries with the claimant and in a sense stood next tohim but did not have a one-to-one conversation with the claimant at that time. The one-to-one conversation was held later in the evening. By that stage the CSR had 4 to 5 pints, one or so shots,and a glass of champagne which he did not finish. The conversation drifted onto work

and he usedit as an opportunity to try get a feel of how the claimant felt about the depot, the staff and his manager. The claimant was not very complimentary about his manager and brought up an issue over a case of beer. The CSR told the claimant that he was there to help and that he was not to beseen as the Big Brother type. The claimant's demeanour changed during the course of the eveningand the claimant made statements such as "I'm a dangerous man" and "Don't **** with me." TheCSR was somewhat taken aback by these statements and so he asked the claimant to repeat himself,the claimant answered by stating that he could have the CSR sorted and the claimant mentioned thatthe CSR had nice children.

At that point the CSR became angry. One of the drivers then approached where the CSR and the claimant were sitting, the CSR asked the driver to leave so that he could clarify what the claimant had said. The CSR also felt that if he had been drunk he would have sobered up at that stage. The CSR became concerned about his safety so he left the public house. That night the CSR telephoned his wife and his direct line manager. He did not reach his line manager but left a message to say that he had been threatened by a work colleague and that he wanted his line manager to ring him back. The CSR received a call from his line manager the next day and was told that if he wished to pursue the matter further the CSR should contact Human Resources. They did not get into the details at that stage but the CSR said that it was serious enough for him to be concerned.

The CSR worked on 23rd January 2005 and again on 24th January 2005. The claimant returned to work on 25th January 2005. In the meantime the CSR had spoken to Human Resources. The Human Resources person arranged to fly over on 25th January 2005 and at that stage the CSR started to put his recollection of the events into writing. The Human Resources person took over the typing of this statement from the CSR. The CSR dictated the rest of the statement to Human Resources person. This statement by the CSR was opened to the Tribunal. When the claimant returned to work on the 25th January 2005 the CSR made a point of meeting the claimant in the hope that the claimant would take the opportunity to apologise for the incident but the claimant did not do so.

Following on from this incident the claimant was demoted and the CSR became the Acting Depot Manager. The CSR stated that the role did not suit him as his family was in the United Kingdom and that that was where the CSR wanted to be based, but because of the shortage the CSR agreed to work in the depot for a short period of time and arrived back to Naas in June 2005 for a period of six months during which time he won the staff over and recruited a new assistant manager.

Upon cross-examination the CSR stated that even without alcohol his recollection of 22nd January 2005 would be the same. The CSR accepted that there was nothing in his statement about the amount of alcohol which he had consumed. The CSR confirmed that he had spoken to the investigating officer and the officer who conducted the disciplinary hearing, and that he was asked about the amount of alcohol which he had consumed. The CSR recalled being excluded from a round of drinks on the night in question, but denied that he was seriously upset over it.

In reference to the other witness statements the CSR accepted that of all those statements no one else had witnessed the conversation the subject of the disciplinary hearing. The CSR was aware that the claimant had denied making the threats as alleged, but the CSR denied that he had made up those allegations. It was specifically put to the CSR that these events as alleged did not occur.

In response to a question from the Tribunal the CSR confirmed that he did not contact the police despite feeling threatened.

The Head of Human Resources for the respondent gave evidence and stated that on Sunday 23rd

January 2005 she received a phone call from the CSR who told her that he had been threatened whilst out the previous evening. The Head of Human Resources arrived at the depot the following Tuesday and advised the CSR to document the allegation. The CSR commenced typing his statement but she took over as he was slow in typing and she had to catch a flight the same day. The statement was then faxed to the respondent's Employment Law Contact.

She met the claimant on the same day, following the advice received from the Employment Law Contact she advised him that he was suspended. The suspension and allegations were set out in a letter dated 27th January 2005. The letter also outlined the investigatory process. She could not recall why gross misconduct was not mentioned in the letter. Her next involvement was after the appeal in March 2005 when following correspondence from the claimant she wrote on the 8th April 2005 and informed his representative that the formal disciplinary procedures were exhausted and the matter was finalised. However, she stated all along that if the claimant was to produce new evidence they may have afforded him the right to have a re-hearing. The Human Resources manager referred back to the letter of April 8th 2005 and stated that it was a standard letter and the line regarding the procedures was an error. She next wrote on 22nd June 2005 following a further request for a second appeal, refusing it on the basis of time lapse. The claimant was informed that in accordance with the disciplinary procedures he had 5 days to appeal the decision.

The claimants letter of resignation was passed to her, however she did not realise that the claimant had an issue with the CSR returning to the depot. With reference to the staff handbook and clause I(1) the Human Resources witness stated that the respondent used dismissal as a last resort and that demotion was the most suitable alternative.

Allowing the claimant to cross-examine witnesses during the disciplinary process was not an option as it was not normal respondent procedures. The Human Resources manager then explained the share option scheme.

When cross-examined the witness stated that on arrival at the depot on 25th January 2005 she advised the CSR to document the events, and again confirmed that she typed it as the CSR dictated the events to her. She passed the investigation over to someone else to conduct the investigation and could not say why the claimant did not receive a copy of his statement until a later date. It was also accepted that the CSR had threatened the claimant; however, that threat was not investigated. The claimant was not allowed cross-examine the CSR on his complaint as it was a sensitive issue and they did not want both parties in the room, however, the respondent had no problem with the CSR returning to the depot where the claimant worked. It was put to the witness that the procedures very flawed.

When questioned by the Tribunal the Human Resources officer could not say why she did not get the CSR to sign his statement. She was aware of the demotion discussion and accepted that the judgement to demote was based on the balance of probabilities.

The Human Resources officer of the respondent gave evidence and stated that her first involvement was through correspondence she issued dated 22nd February 2005 requesting the claimant attendance at a disciplinary hearing on the 28th February 2005. She enclosed copies of statements received and a copy of the gross misconduct and disciplinary process handbook.

The meeting on 28th February 2005 lasted over two hours, she was not happy with the responses given by the claimant and stated that his demeanour showed him to be extremely uncooperative. During the investigation the claimant did ask for the bar staff and the doormen of the public house

to be questioned, however the Human Resources officer stated that with agreement they decided that they would not be able to add anything to the investigation.

The decision to demote was based on the statement received, the disciplinary hearing held with the claimant and his failure to cooperate. It was based on reasonable belief.

When cross-examined it was put to the Human Resources officer that the claimant did cooperate through the disciplinary hearing as the notes of same hearing would indicate. It was also put that he could not answer questions put as he maintained throughout his denial of making the threat.

Determination

The claim being one of constructive dismissal, it fell to the claimant to prove the fact of dismissal and the claimant proceeded first.

It is a statutory entitlement of the parties to make opening statements, and both parties availed of the opportunity to outline in summary form the cases they intended to make. As is frequently the practice of the Tribunal, the Tribunal sought to confirm the details of the T1A and T2, including the basis for the calculation of loss, insofar as such matters could be agreed between the parties and prior to the hearing of evidence.

For the claimant it was alleged that arising out of a night out in a public house, the claimant was unfairly demoted, and after exhausting all procedures to remedy the situation, the claimant was entitled to resign his employment in circumstances that amounted to constructive dismissal. The respondent denied the claimant's contention.

The disciplinary process dealt with two allegations which had been made against the claimant. The first was that the claimant was threatening and aggressive against the CSR and the second was that the claimant was undermining the authority of the Depot Manager by making inflammatory remarks about him, both occurring on Saturday, 22nd March 2005.

The Tribunal received into evidence extensive documentation from each party as agreed between them both.

The claimant gave his evidence in chief and at the close of same it appeared to the Tribunal that it was his case that the disciplinary meeting on foot of which the claimant was demoted occurred very substantially as set forth in the minutes of the disciplinary hearing as furnished by the respondent. Of particular note was the disclosure in the minutes that the only persons present were the decision maker herself, a note taker, the claimant himself and a witness for the claimant. In response to questions from the Tribunal it was accepted by both sides that no other persons were present. Specifically it was admitted for the respondent and agreed by the claimant that the individual who made the allegations the subject of the disciplinary hearing, referred to as the CSR, was not present.

The Tribunal has carefully considered the minutes of the disciplinary hearing and is satisfied that the evidence of the claimant was exclusively of an exculpatory nature. The Tribunal is also satisfied that the person described as the claimants witness was there for the purpose of accompanying the claimant at the disciplinary hearing, that he had not been present at the incidents complained of and could not and did not give any evidence *per se* that threw any light on the incidents themselves.

On the basis of the uncontroverted account of the disciplinary hearing the Tribunal is satisfied that the dismissal was unfair procedurally and that the decision to demote the claimant was one which no reasonable employer could have reached. The only evidence given at the hearing was given by the claimant and was exclusively exculpatory in nature and yet the decision maker came to a conclusion contrary to the entirety of the evidence. No evidence was given by any other person and notably the CSR, who according to the respondent was the only witness to any misbehaviour alleged against the claimant, was not present. The decision maker heard no evidence supporting the allegations against the claimant at the hearing and yet came to a conclusion that was wholly unsupported by any evidence. A disciplinary decision that is unsupported by the evidence is a decision which no reasonable employer could reach. Indeed this decision maker reached a disciplinary decision which was actually perverse to the evidence and *a fortiori* one which no reasonable employer could reach.

Notwithstanding the fact that the respondent accepted that matters occurred as described above very early on in the course of the hearing and despite having had the apparent unfairness of such an approach pointed out to the respondent, the respondent insisted that the dismissal was not unfair and requested that the case be given a further two full days for hearing. The Tribunal requested that the respondent outline how such a dismissal could be procedurally fair. The respondent claimed that the fairness of dismissal was a matter of evidence and for submissions at the end of the case. The respondent persisted in its wilful refusal to outline to the Tribunal an arguable case that dealt with the difficulties that had come to light from perusal of the documents placed in evidence by the respondent itself. Ultimately the Tribunal granted the respondent its request that a further two days hearing be granted; and this despite the failure of the respondent to obey the direction of the Tribunal that it at least attempt to outline a *prima facie* case. Having heard the case to the end the Tribunal is still no wiser as to how such a procedure could be justified and notes that at the end of the hearing and despite being offered the opportunity to make closing submissions, the respondent made no discernible attempt to deal with the apparent unfairness of its procedures. The Tribunal is conscious that it can only in very limited circumstances grant an order for costs. The Tribunal was aware that the claimant had engaged the services of a solicitor and counsel, an expense that the claimant was justified in incurring given the gravity of the allegations, the complexity of the issuesand the potential level of compensation. Where an employee engages legal representation for whichexpense the Tribunal has no power whatsoever to award costs, the Tribunal must be mindful ofallowing the case to run on more than is absolutely necessary. This division chose to allow the respondent a further two whole days as requested, essentially trusting the respondent that an arguable case would emerge. No such case emerged and regrettably the claimant must have beenput to substantial additional expense. There is a lack of equality in how the Tribunal is empoweredto deal with parties as to costs, where an employee makes a frivolous or vexatious claim the Tribunal may award certain costs against the claimant, but where an employer wilfully and unnecessarily complicates and/or extends a case the Tribunal has no power to award any costs against employers no matter how they may behave. It further appears that the Tribunal has no power to reach a final determination merely upon the wilful refusal of a party to comply with a direction of the Tribunal in respect of a procedural matter. The Tribunal must be alert to the possibility that an unscrupulous respondent is deliberately increasing the costs of a case, safe in theknowledge that no order for costs can be made against it and thereby using its greater financial resources abusively as a tactic against a less well resourced claimant. The Tribunal became concerned, in the course of this case that precisely these abusive tactics were being used against theclaimant and being orchestrated by a third party. That third party was described by the respondentas the respondent's "Employment Law Contact" and it is widely known as a firm that manages certain human resources issues on an outsourcing basis and it insures connected employment law claims that may arise. The Tribunal

wishes to make it clear that it makes no criticism whatsoever ofthe solicitor acting for the respondent, the Tribunal being satisfied that the solicitor for the respondent was at all times acting to the very highest standards on the instructions of the respondent's insurer.

Additionally the Tribunal finds that the decision maker relied upon written statements made by a number of individuals which were taken down in writing by an investigator and without hearing that evidence from those individuals herself. The failure to hear the evidence upon which her decision was allegedly based represents a fundamental abrogation of her role in the carrying on of a disciplinary hearing and in and of itself makes this dismissal procedurally unfair.

The Tribunal is satisfied that the decision maker in reaching her decision relied upon the statement given to her by the CSR in advance of the disciplinary hearing and which had been reduced to writing in substantial part by her own efforts. The Tribunal finds that the decision maker in reaching her decision to demote the claimant based her decision upon evidence given to her by the accuser of the claimant in advance of the hearing, not in the presence of the claimant and not repeated in evidence before the disciplinary hearing, as clear and egregious example of prejudice by a decision maker as one might be unfortunate to encounter.

The Tribunal finds the second witness for the claimant to be a credible witness and accepts his evidence that during the claimant's suspension the CSR told the staff present in the canteen that the claimant would be back but in a lesser role. The Tribunal is satisfied that the conclusion to the disciplinary process was known in advance of the hearing and that the respondent had made up its mind to demote the claimant and that nothing said at the hearing would alter the conclusion already reached. The Tribunal is satisfied on the balance of the evidence that the matter had been prejudged and that the disciplinary hearing was little more than a poorly orchestrated sham for the purpose of covering the decision in the mere pretence of procedural fairness.

The key allegation against the claimant was that he made certain menacing remarks which the CSR found threatening. Having carefully considered all pertinent matters, the Tribunal finds that the CSR was not a credible witness. It is notable that no third party corroborated the essence of the complaint made by the CSR, that is to say, none other than the CSR heard these remarks being made. Other persons present at the occasion were asked if they had heard the claimant make negative remarks against the CSR and all other persons asked denied hearing any such remarks being made. No person other than the CSR reported any atmosphere of animosity between the claimant and the CSR. The decision maker failed to have proper regard to the failure of corroboration by those present.

The Tribunal was expected to believe that the CSR was genuinely concerned for his own personal safety and this despite the oral evidence of the CSR himself that after the remarks were made the CSR was left on his own and that when a third party approached him the CSR then requested the third party to go away so that the CSR could meet with the claimant alone to confront the claimant further. The Tribunal is not satisfied that any such remark was made and specifically finds that there was a failure to critically examine the account of events as given by the CSR in his statement.

The Tribunal notes that the respondent considered it inappropriate to have the CSR present at the disciplinary hearing due to the threats he had received. The Tribunal does not find it at all credible that the safety of the CSR could not be maintained at the disciplinary hearing and regards the contention itself as evidence of bias as it was the essential matter for the disciplinary hearing to ascertain whether or not threats had been made, instead the respondent took as its initial assumption that which it purported to conclude. It is notable that the respondent chose to demote the claimant

and appoint the CSR to a position such that the claimant was to report directly to the CSR and as such they were expected to work in close proximity with each other thereafter; a state of affairs established by the respondent which is indicative of the true state of mind of the respondent, that is to say, the respondent had no genuine belief that the claimant was any kind of threat to the CSR.

The CSR in his own statement to the respondent admitted making a threat to the claimant on the night in question. This admission was never followed up by any investigation into the behaviour of the CSR, nor was the CSR subjected to any disciplinary sanction for making remarks of a threatening nature against a subordinate.

The claimant alleged that the CSR had a motive for the making of the complaint; that both the claimant and the CSR were in the running for a certain position within the respondent firm, and that as a result of the complaint made by the CSR the claimant was put out of contention. The Tribunal notes that the CSR ultimately obtained the position. Although the CSR gave evidence to the Tribunal of his alleged reluctance to take on the position, and his protestations that he did so on a temporary basis only, it is notable that in his statement of complaint the CSR states:
"I went on to explain what it might be like under different management and asked if he would be able to accept someone else coming in. I confirmed that it would not be me."
As it turned out, it was him. On the other hand, no attempt was made by the respondent or the CSR to support the complaint against the claimant by suggesting any possible motive which the claimant might have for making the threatening remarks attributed to him.

The second allegation was that the claimant was undermining the authority of the Depot Manager by making certain remarks about him. The Tribunal heard ample evidence to satisfy itself that the respondent itself was not entirely happy with the performance of the Depot Manager and that it was the CSR himself who initiated conversations about the way in which the depot was being run. The Tribunal finds that the claimant made certain criticisms of the Depot Manager which were in response to matters put to him by the CSR. In the opening paragraph of the statement of complaint the CSR stated that he had been seconded to the Naas depot because of customer complaints and that it was his role to observe and implement practices to ensure a more efficient way of working, and specifically, *"spending time with [the Depot Manager] to identify areas for improvement."* The claimant was the subject of a patently unfair complaint by the CSR, in which the CSR mischaracterised the cooperation of the claimant with the CSR's own role to observe. No evidencewas tendered by the respondent to show that the criticisms made by the claimant were unreasonableor untrue.

In the course of the disciplinary hearing the claimant was found by the respondent to have failed to cooperate with the disciplinary process. This failure to cooperate was treated by the respondent as a third disciplinary breach, and a finding was made against the claimant on this count, despite it not being one of the complaints the subject of that disciplinary hearing. In any event, the Tribunal finds that the failure to cooperate amounted to little more than a refusal by the claimant to admit the matters alleged against him.

The Tribunal finds that the claimant exhausted all remedies available internal to the respondent and that having done so was entitled to resign and the Tribunal deems the resignation to be a constructive dismissal.

The Tribunal finds that the claimant was unfairly dismissed by way of a constructive dismissal; both substantively and procedurally.

The Tribunal, having carefully considered all the available remedies, and after having had regard to the expressed preferences of both parties for compensation as a remedy and bearing in mind the understandable collapse in trust of the claimant in the respondent, considers reinstatement and reengagement to be unsuitable remedies. Where an employee has been replaced the Tribunal is understandably loath to reinstate or reengage that employee in circumstances where compliance with such a determination might oblige the employer to dismiss the replacement from his or her position.

The Tribunal heard submissions relating to the treatment of share options for the purposes of calculating an award of compensation. The Tribunal considers the most salient aspect of this scheme to be the requirement that the employee, once granted the option to purchase a certain number of shares at a stated price, must remain in the employment of the employer for a further period of ten years before exercising the option to purchase the shares. The Tribunal considered what might probably have occurred had the dispute between the parties never arisen. This grant of share options appears to constitute an inducement by the employer to retain staff and the Tribunal is not persuaded on the balance of probabilities that the claimant would not have moved on to better prospects in the meantime.

The Tribunal is satisfied that the claimant took reasonable steps to mitigate loss and notes that the claimant dealt with his constructive dismissal in an orderly fashion, that he sought alternative employment and only after having obtained a new employment did the claimant give his notice to the respondent such that the claimant was at all times in employment. The Tribunal accepts that the claimant's further employment opportunities were blighted by demotion he suffered and further accepts that the employment he obtained was at a reasonable level of remuneration in the light of all the circumstances.

In calculating the level of the award of compensation the Tribunal has disregarded the share options entirely, and for the reasons given above. The Tribunal finds that the base figure for the calculation of loss ought to be the level of remuneration granted to the claimant prior to his demotion. The Tribunal is satisfied that the argument advanced on behalf of the respondent that the loss ought to be calculated on the basis of the reduced level of remuneration granted to the claimant after his unfair demotion is an unmeritorious argument which could only serve to encourage an employer to force an employee out of his employment by unfairly reducing the employee's remuneration, safe in the belief that any award of compensation against the employer could thereby be artificially minimised.

The Tribunal finds that there is an ongoing loss to the claimant arising from the difference between the higher level of remuneration received by him from the respondent and the lower level of remuneration now obtained in his new employment and that this ongoing loss is likely to continue at similar levels for the rest of the claimant's working life, which the Tribunal for the purposes of this calculation estimates to be a period of fifteen years. As the total future accumulated losses substantially exceed the statutory maximum award which is capped at two years gross remuneration the Tribunal awards compensation in the sum of €83521.20

The claim under the Minimum Notice and Terms of Employment Acts 1973 to 2001 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)