EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF: CASE NO.

Employee UD1250/2005

against the recommendation of the Rights Commissioner **R-033320-UD-05/JH**
in the case of

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. E. Kearney B.L.

Members Mr. T. Gill
Ms. H. Henry

heard this appeal at Galway on 16 October 2007 and 07 January 2008

Representation:

Appellant:
Mr. Jarlath McInerney, McInerney Solicitors,
Cleggan House, 46 Eyre Square, Galway
Respondent:
Mr. John Brennan, Regional Director IBEC,
Ross House, Victoria Place, Galway

This case came before the Tribunal as a result of an appeal by an employee (the appellant) against a recommendation of the Rights Commissioner under the Unfair Dismissals Acts, 1977 to 2001, **R-033320-UD-05/JH**, in the case of an employer (the respondent).

The determination of the Tribunal was as follows: -

The employee began working for the employer, a manufacturer of medical devices, on 1 November 1999. The highest level of quality and adherence to procedures is demanded. At all times relevant to this hearing the employee was working as a product inspector. The employer has a corrective action process which involves five stages: - Counselling, Verbal Warning, Written Warning, Final Written Warning and Dismissal. Counselling has an active life of three months, Verbal Warning six months, Written and Final Written Warnings both twelve months. The employer's brief description of each step is as follows:

- Counselling – first instance of poor performance or minor misbehaviour (not considered to be of a serious nature)
- Verbal Warning – repeated instances of poor performance or minor misbehaviour (not considered to be of a serious nature)
- Written Warning – more serious instances or continued repetition of poor performance or behaviour
- Final Written Warning – continued instances of poor performance or behaviour
- Dismissal – gross misconduct or continued instances of poor performance or misbehaviour

On March 31 2004 the employee received a final written following an incident on 12 February 2004 in which the employer's product labelling procedure was compromised. The employee accepted this final written warning and did not appeal against it. The final written warning makes it clear that there had been no prior quality issues. The Tribunal was not made aware of any other disciplinary issues apart from the one that led to her dismissal.

As a result of the discovery, on 27 January 2005, that of the previous day's production of 231 units, the day's target production level, only eighteen of a batch of nineteen units had been labelled despite records showing that nineteen labels had been prepared. An enquiry was instituted by the employee's acting supervisor (EAS), the quality engineer (QE) and the human resources business partner (HRBP). The claimant met QE during this process and the employer's position is that QE presumed that the employee had been shown the defective product. The employee's position is that she was never shown the defective product. The defective product was not produced before the Tribunal and the employer's position is that it was disposed of prior to the completion of the disciplinary process. Following a meeting with EAS and HRBP on 31 January 2005 the employee was put on paid suspension pending the outcome of the investigation. On 8 February the employee met with her supervisor (ES) and HRBP at which time she was informed that she was to be dismissed. The employee received a letter of dismissal dated 17 February 2005 from ES and HRBP, this letter stated the dismissal was for gross misconduct, dismissal being the next step in procedure following the final written warning for breach of procedure. The employee was denied a minimum notice payment on account of the finding of gross misconduct.

The employee appealed the decision to dismiss her to the vice president operations (VPO) and the human resource manager (HRM). The appeal was heard on 3 March 2005 and the claimant had a union representative with her on the occasion of the appeal, an employee representative had accompanied her during the earlier disciplinary hearings. The appeal hearing confirmed the decision to dismiss the employee but decided to pay the employee her statutory minimum notice entitlement. The letter containing the appeal result was sent to the employee on 21 March 2005. The report in to the incident by QE was dated 14 March 2005.

The employee has not sought to obtain a new job since the dismissal claiming that she had been unable to return to the workforce due to her sense of injustice at the way she had been treated by the employer. She has been on disability since the dismissal. Her GP gave evidence in this regard. The employee was examined by an occupational health specialist on behalf of the employer. This examination, in the period between the two days of the hearing, found that the employee was capable of working from a medical perspective.

Determination

The Tribunal notes that, according to the employer's procedures, a final written warning is for continued instances of poor performance or behaviour. On the evidence before the Tribunal the final written warning was for a first offence, which seems to more appropriately equate to a penalty of written warning for more serious instances or continued repetition of poor performance or behaviour. Nevertheless, as the employee accepted the final written warning and chose not to exercise her right of appeal against that sanction, it is clear that the status of the employee as being on a final written warning with some two months shelf life at the time of the incident on 26 January 2005 is beyond the jurisdiction of this Tribunal. The employee gave uncontroverted evidence that she was never shown the offending article, that is the pouch without the label; the employer's position is that they assumed the employee had seen it. The pouch was disposed of some two to three weeks after the incident. Accordingly it was not available to be seen by VPO or HRM at the appeal process or by this Tribunal. In such circumstances, where the employee did not accept that she was at fault, the Tribunal cannot find that the employee was afforded a fair opportunity to defend her position. The allegations against the employee were never put to her in writing before the disciplinary hearing on 8 February 2005, it is not clear to the Tribunal that the employee was made aware that her employment was under threat before the hearing on that day. For all these reasons it must follow that the dismissal was unfair.

The Tribunal recognises that the medical evidence presented leads it to find that the employee suffered an adjustment disorder as a result of the loss of her job, and the way in which she felt she was treated during the investigation process and in being dismissed. Further, the Tribunal is of the view that the employee's recovery is bound up with her case against the employer being determined.

The Tribunal has to take into account the extent to which financial loss is attributable to an act, omission or conduct by or on behalf of an employer. In this case, the adjustment disorder, which the employee suffered, is completely bound up in the manner, circumstance and fact of her dismissal and the treatment of her during the dismissal process. The Tribunal is satisfied that the conduct of the employer led directly to her not being able to return to the workplace, and therefore led to the losses sustained by the employee. Although the employee was suffering from this adjustment disorder she was able to source work in July 2006, albeit only lasting a number of days. The employee was in receipt of disability during this period.

When the Tribunal is considering compensation, it has a wide discretion in doing so in light of the particular circumstances of the case and takes into account what is just and equitable in the circumstances. The Tribunal is satisfied that the compensation that the Tribunal can award the employee in this case do not comprise losses into the future as the medical evidence tendered was that, her recovery was bound up with getting her case resolved.

In coming to this determination the Tribunal have given careful consideration to the relevant statutory provisions of the Unfair Dismissals Act 1977-1993 as amended, and in particular section 7(2) of the 1977 Act (as substituted by section 6 (b) of the 1993 Act), and section 7(2) as substituted by section 6(b) of the 1993 Act and the current legal position, taking into account Parsons v. Iarnród Éireann [1997] 2 I.R. 523 Johnson v. Unisys Ltd. [2001] UKHL 13, [2003] 1 A.C. 518, Orr v. Zomax Ltd. [2004] IEHC 131 Mayland v Hss trading as Citywest Golf and County Club UD 1438/2004

Therefore, the Tribunal do not consider re instatement an appropriate remedy and in the premise award the sum of €30,000.00 under the Unfair Dismissals Acts, 1977 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)