EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.

Employee UD206/2007

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K.T. O'Mahony B.L.

Members: Mr.T.Gill
Mr. J. LeCumbre

heard this appeal at Athlone on 26 March
and 16 July 2008

Representation:

Claimant:
Ms. Elaine Hanniffy B.L. instructed by, on the first day
Mr. Declan O'Flaherty, on the second day Mr. John Keogh,
both of Tormey & Company, Solicitors,
Castle Street, Athlone, Co. Westmeath

Respondent:
Mr. Ross Cooper, Dundon Callanan Solicitors,
17 The Crescent, O'Connell Street, Limerick

The determination of the Tribunal was as follows:

This being a claim of constructive dismissal it fell to the claimant to make his case.

The claimant was employed as one of ten pest control technicians in the respondent's Athlone branch from September 2004. Each technician was responsible for a specific geographical area but the area could be changed from time to time. Each technician was allocated a portfolio of work-cards and, in general, each customer site was serviced every six to eight weeks. He had previously been employed for thirty years as a telecommunications technician and latterly as a bar

manager. The manager of the area stepped down and for most of 2005 he had no manager. Towards the end of 2005 the service supervisor also stepped down. As a result of these changes the claimant felt that he had lost two sources of invaluable advice. A new branch manager (the Manager) was appointed on 4 January 2006. On 10 January 2006 the claimant wrote to the Manager to canvas the idea of setting up an informal alliance of technicians and got a negative response. On 16 January 2006, following the promotion of a technician to the position of supervisor (TS) the Manager met the claimant and, following this meeting, issued a memorandum to the claimant entitled "Verbal refusal to take instruction from TS", in which she asked the claimant to withdraw his refusal to accept instructions from TS. The claimant replied to the Manager on 17 January 2006 that he would now accept instructions from TS under protest as he had now been informed that TS was his supervisor. He pointed out that it was normal for staff to be advised of such appointments in writing, something that had not happened in this case.

On 16 February 2006 the claimant wrote a long letter to the Area Managing Director of the respondent in the UK, setting out his concerns on several issues including portfolio development. In his reply on 22 February 2006 the Area Managing Director told the claimant to raise the issues with the Manager and, if he got no satisfaction from her, to go to the Divisional Manager. The Manager then wrote to the claimant on 10 March 2006 addressing the points raised in his letter of 16 February 2006 and stating that she would have preferred if he had addressed the issues to her rather that entering extensive correspondence which is time consuming and not a very productive way to resolve issues to their mutual satisfaction. The claimant replied on 7 June 2006 and reminded the Manager that he had raised the issues with her in his letter of 10 January 2006 and that she had summarily dismissed them. Most of the issues raised by the claimant in his letter to the Area Managing Director, apart from the issue on portfolio development, were resolved by June 2006 and did not form part of the claimant's case for constructive dismissal.

There were a number of changes to the claimant's portfolio in early 2006. Technicians are allocated a certain number of work cards to attend to. A major client might have up to three cards for any one site; on the other hand in many cases these multiple sites had an unrealistically low allocation of time for their completion. The claimant's portfolio had increased from 213 work cards at the beginning of 2006 to 292 by June 2006 as well as having to do a number of one-off calls to other portfolios that had fallen behind their service schedules. This increase along with the change to his territory involved driving longer distances and resulted in a fall in his level of achievement. Pest control is a health and safety issue and if anything goes wrong the technician gets the blame. The claimant was in a situation not of his own making and he felt very frustrated. He spoke to the Manager a number of times but there was no attempt to reduce his workload. He had raised this issue in his letter to AMD on 16 February 2006.

He expressed his concerns in a letter dated 21 August 2006 to the Manager, and in the first paragraph stated;

"I am corresponding to you to voice my concern over the difficulty and stress that has developed in my work because of the revised portfolio I have been allocated. In 2005, I achieved almost 100% performance in state of service at the end of the year. In the current year, if immediate changes do not take place, I will be lucky to achieve 70%. I cannot continue to accept this situation as it does the customer a major disservice, will damage the Company's reputation and puts me in a very invidious position in terms of reputation and my personal health and welfare."

In this letter he also provided a detailed analysis of his workload showing that the actual treatment time was over thirteen hours longer that the defined overall treatment time as allocated by the

company. Furthermore, it showed that the total workload per cycle was 345 hours per cycle rather than the 234 hours allocated and that because of the changes to his portfolio his workload had increased to the point where he was no longer able to achieve 100% service performance. He complained of being subject to an excessive workload and informed the Manager that he would no longer facilitate the respondent through early starts, short lunches and late finishes. From January to June 2006 the claimant's call cards increased from 213 to 292 and the value of his portfolio increased from €139k to €176k. In his letter the claimant stated;

"It is further an irrefutable fact that in the past the most common method of rogue employers in effecting "constructive dismissal" has been the burdening of targeted staff with an impossible workload." He concluded his letter by stating, "If my portfolio and workload are not amended in a fair, transparent and equitable manner by the end of August, I reserve the right of recourse to the Agencies vested with statutory responsibility in these areas".

By letter of 23 August 2006 the Manager acknowledged receipt of his letter and informed him that given the very detailed nature of his letter it would take some time to deal with it and so it would not be possible to reply by the end of August. When the claimant was on 213 call cards his service performance was at 100%, when the claimant was on 292 call cards his service performance was at 71%, a level deemed acceptable by the Manager and up to the average of the other technicians. However, the claimant was never apprised of this latter point.

On 25 August 2006 the Manager wrote informing the claimant that because he felt stressed by his job that she was in the course of arranging for him to be seen by the company doctor. On 28 August 2006 the Manager admonished the claimant for executing paperwork at the office without prior approval. The respondent's position was that this was a new departure for the claimant. The claimant's position was that this had been his normal practice throughout the employment and furthermore he had been at the office for the purpose of demonstrating and discussing certain aspects of modification to his company van.

The claimant was out sick from 29 August 2006 until 11 September 2006; this was his first illness since he joined the respondent. On the morning of 29 August 2006 the claimant telephoned the Service Controller at 10.27am to inform the respondent of his illness. On 30 August 2006 the Manager issued the claimant with a formal written warning for his failure and refusal to inform either TS or herself directly rather than the Service Controller of his absence. On the same day the Manager sent him a second letter on the subject of "Unapproved visits to the office", admonishing him for visiting the office in his supervisor's absence without prior arrangement with her or TS and in particular because of "the current unacceptable situation with the state of service arrears in your area and throughout the branch". The claimant attended for a medical examination by a company appointed doctor on 27 October 2006. The doctor's report included the opinion that the claimant appeared to be very stressed and was advised to avail of stress management. The claimant requested a copy of the doctor's report. It was not forwarded to him during the remainder of his employment. The claimant submitted his resignation to the Manager on 31 October 2006 citing persistent failure to address a number of major concerns and issues and that he felt his position was untenable.

Determination:

The claimant was a conscientious and competent employee and the uncontroverted evidence was that his service performance was excellent. Over the first half of 2006 the claimant's portfolio was substantially increased and this impacted on the level of service available to the customers and on

the claimant's working hours. Despite his complaints about this no positive steps were taken by management to deal with it. On 21 August 2006 the claimant wrote to the Manager again complaining about the excessive workload. In that letter of complaint the claimant referred to constructive dismissal. Given the history of complaints this should have been a signal to the respondent that there was a problem that had to be addressed. By letter dated 25 August 2006 the Manager indicated to the claimant that she was in the course of arranging a medical appointment for him because he was stressed by his work. Yet, five days later, on 30 August, the manager sent two letters to the claimant, one containing a formal written warning and the other admonishing him for "unapproved visits to the office". Not only are these letters insensitive at this time but also they belie any sense of concern for the claimant and put in question the motive behind sending him for a medical examination. Furthermore, the Tribunal finds that the warning was not justified.

Following the medical examination, which confirmed that the claimant was suffering from stress, no attempt was made to assist the claimant obtain or avail of stress management or to ascertain if the claimant was making his own arrangements in this regard. The claimant was not given a copy of the doctor's report. There was no response from the respondent. The Manager told the Tribunal that the situation was being monitored there was no indication of when, or if, any action was going to be taken. The claimant never received a substantive response to his complaint of 21 August 2006. The Tribunal is satisfied that by virtue of his extensive correspondence with management the respondent can have been in no doubt that the claimant had a grievance of which they had been made full aware.

For all these reasons the Tribunal is satisfied that the claimant was justified in resigning and claiming constructive dismissal. In assessing the award the Tribunal has been mindful of the difficulty the claimant might find in seeking further employment and also the fact that he has been obtaining additional skills to assist in that regard, in all the circumstances the Tribunal assesses the award under the Unfair Dismissals Acts, 1977 to 2001 at €25,000-00

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)