EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF: CASE NO.

Employee UD888/2007

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. P. McGrath B.L.

Members: Mr. P. Pierson
Ms. P. Ni Sheaghdha

heard this appeal at Mullingar on 12 June and 22 September 2008

Representation:

Claimant:
Mr. Shane Johnston, Nooney & Dowdall, Solicitors,
Mary Street, Mullingar, Co. Westmeath

Respondent:
Ms. Kerry Molyneaux, IBEC, Confederation House,
84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

The claimant, who had been employed since September 1994, worked as window fitter. This involved the claimant travelling to client sites as part of a two or three person team involved in commercial installations, or more occasionally working alone on snagging works. The employment was uneventful, aside from the claimant being counselled about time-keeping matters, until in June 2007 when there was a dispute over whether the claimant had properly booked annual leave for the week commencing 18 June 2007 when the respondent's factory was in operation. The claimant's position was that he had pre-arranged this annual leave with the commercial installation supervisor (CI) in line with the contractual requirement to gain approval one month in advance. On 12 June 2007 the Human Resource Officer (HR) wrote to the claimant to state that his request for annual leave had been received on 11 June 2007 and as this was not in conformance with the agreed policy his failure to report for work on 19 June 2007 could result in disciplinary action. After the claimant spoke to the Managing Director (MD) about this matter CI accepted that the claimant had requested the holiday in adequate time and the letter of 12 June 2007 was expunged from the claimant's

personnel file.

On 12 June 2007 the claimant's wife telephoned CI to inform him that her husband would be unable to attend work the next day as, at a routine hospital appointment, she had become aware of the opportunity for one of their children to undergo a procedure which had been awaited for some time. When the claimant returned to the respondent's premises CI raised this matter with him and sought to get the claimant to attend work the next day due to pressure of work. The claimant was unable to accede to this request as he was unable to arrange a baby-sitter for their other children owing to their regular baby-sitters sitting school exams.

During 13 June 2007 the claimant contacted CI to tell him that, as the child was to remain in hospital overnight and his wife was to remain at the hospital, he would be unable to attend work on 14 June 2007. Whilst CI accepted the claimant's absence from work on 13 June 2007, on the way home from work on 13 June 2007 HR saw the claimant's car parked outside his grandfather's house adjacent to a local bog. This raised suspicions in HR's mind and because of these suspicions HR contacted MD and it was arranged for a private investigator (PI) to conduct surveillance on the claimant on the following day. The claimant returned to work on 15 June 2007 and the surveillance of the previous day was not brought to the attention of the claimant. The claimant took the following week as annual leave and during that week HR received the report from PI.

On 22 June 2007 HR wrote to the claimant to request his attendance at a disciplinary hearing on 27 June 2007. He was told that the reason for the hearing was for engaging in alternative employment while absent from work and for breaking company procedures. He was advised of his right to representation and warned that the matter could result in his dismissal. The claimant, HR and CI, attended the disciplinary hearing on 27 June 2007; the claimant waived his right to representation. HR asked the claimant to confirm what he was doing on both 13 and 14 June 2007 the days when he was away from work when CI had been told that the claimant was to be looking after his children whilst his wife accompanied the child in hospital. When the claimant confirmed that this was the case HR then told the claimant that there was evidence that the claimant had been engaged in alternative work on 14 June 2007. HR then gave the claimant a copy of the PI report which apparently shows the claimant involved in assisting with a low loader and machine on the bog near to the claimant's grandfather's house at a time on 14 June 2007 when the claimant had told the respondent that he was looking after his children.

The respondent's position is that from 9-30am when the surveillance commenced until 11-32am when the claimant left his home there had been no other movements in or out of his home. The claimant's position is that the times on the report are incorrect and that he left home at around midday following the return of his wife and child from hospital. The claimant's position is further that he was not engaged in paid work but was merely helping a friend with the safe movement of his equipment. HR put it to the claimant that, following the return of his wife and child, he should have returned to work for the afternoon; the claimant's position is that by that time on 14 June 2007, as he was working in Dublin it was too late to return to work. At the end of this meeting the claimant was suspended on full pay pending the outcome of the investigation.

On 28 June 2007 HR wrote to the claimant to request his attendance at a disciplinary hearing to be held on 29 June 2207. The claimant, HR and CI, attended the disciplinary hearing on 29 June 2007; the claimant again waived his right to representation. At this meeting the claimant put forward his view that he was entitled to force majeure leave on both 13 and 14 June 2007, a view rejected by HR on behalf of the respondent. HR went on to explain to the claimant that having twice been asked to account for his movements on both 13 and 14 June the claimant had said he was looking

after his children when the respondent had reason to believe that he was engaging in alternative work. As a result of this the claimant was told that as engaging in alternative work whilst absent from his employment constituted gross dismissal the trust between the claimant and the respondent had been seriously breached and his employment was terminated from that day 29 June 2007. The dismissal was confirmed in a letter from HR of the same date. HR and CI took the decision to dismiss and confirmed this decision with MD.

The claimant exercised his option to appeal the decision to dismiss to MD; he had the choice of appeal to the manager of either HR or CI and chose the former. The appeal was heard on 16 July 2007 by MD and the Human Resource manager of the respondent's parent company (HRP), the claimant was accompanied by the same representative as at this tribunal. HRP, who decided the appeal, took the view that the claimant had lied at the earlier disciplinary hearings as to his whereabouts and what he did on both 13 and 14 June 2007. He likened this to being told lies by a sales representative and formed the view that this meant the bond of trust between employer and employee had been irrevocably broken and, in a letter of 18 July 2007, HRP upheld the decision to dismiss the claimant.

Determination:

The Tribunal has carefully considered the two days of evidence adduced for this hearing. The claimant was dismissed because the respondent believed that the claimant had been involved in alternative employment whilst on leave. It is common case that the claimant's child had been brought to hospital to undergo a procedure which had been required for some time. The claimant's family were only notified of the availability of an opportunity for the procedure late in the day. In consequence the respondent was notified of the claimant's need to be with his family to mind the children who were not in hospital. The respondent reluctantly consented to the claimant's absence, even allowing the second day when the claimant rang in to say that his child was staying overnight in hospital. The Tribunal notes that the two lost days were at the cost of the claimant. It was unpaid leave. At some point the respondent became suspicious about the absence. In essence the respondent believed that the claimant was engaged in remunerative employment whilst absent from work. This is one of the offences involving gross misconduct set out on page 48 of the respondent's handbook. It seems certain that the claimant and his grandfather had in times prior worked the bog and presumably this was done for wages or other return. The respondent put a private investigator on the claimant for the morning of the second day's absence from work. At some point of the course of this surveillance the claimant left his home and went out to the bog and helped with the manoeuvring of a low loader in the bog area. The respondent has assumed that this exercise constituted work for which the claimant was paid. The Tribunal finds that the respondent can only dismiss the claimant in this process if it can establish that not only was the claimant engaged in alternative employment but was also remunerated for same. This latter point was simply never addressed or established by the respondent. There was no evidence of the claimant being remunerated for engaging in alternative employment. In addition the Tribunal cannot on a balance of probabilities find that the actions or activity witnessed by the private investigator constituted alternative employment. It is conceivable that the claimant was doing exactly what he said he was doing and assisting a friend at short notice. At the heart of this matter is the reasonableness of the respondent. There is no doubt that the claimant took unpaid leave to be at home with his family to assist in the events surrounding the hospitalisation of a child. There is no doubt that the respondent was on notice of this situation. Is it fair and reasonable for an employer to be allowed to dictate what an employee can and cannot do in the course of his unpaid leave? If the claimant's wife and sister came home from the hospital as he says they did, then is there an onus on the claimant to return to work or refuse to assist a friend? The Tribunal finds that there cannot be such an onus on

the claimant. The respondent cannot be allowed to dictate the claimant's personal circumstances to such an extent. The claimant cannot have been precluded from going out to the bog to assist his friend once his wife and child had safely arrived home.

In addition to the above findings the Tribunal finds that the process to which the claimant was subjected was fundamentally flawed insofar as the appeal was ultimately heard by two parties one of whom had clearly made up his mind at the disciplinary stage and therefore should never have put himself forward as being a suitable party to hear the appeal.

The Tribunal therefore finds the dismissal to have been unfair in all the circumstances in accordance with the Unfair Dismissals Acts, 1977 to 2001. In assessing loss the Tribunal considers that there was no evidence to demonstrate mitigation of loss. The claimant was dismissed in June 2007 and remained unemployed at the time of the second day of the hearing. There does not appear to have been a concerted effort to obtain employment and the absence of a reference cannot fully explain this inertia. It is noted that the claimant was working in security for at least one night a week. Accordingly the Tribunal awards €33,000-00 and has taken into account the length of unblemished service in coming this decision.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)