EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:		**CASE NO.**
Employee	- claimant	UD583/2008
against		
Employer	- respondent	

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. Mc Grath BL

Members: Mr M. Murphy
Mr G. Lamon

heard this claim at Dublin on 21st October 2008 and 16th January 2009

Representation:

Claimant : Mr Jim Waters, Waters And Associates, Solicitors,
Unit 1A, Hyde Court, Shaw Street, Dublin 2

Respondent : Mr Padraic Hogan B L instructed by
A & L Goodbody, Solicitors, I.F.S.C., North Wall Quay, Dublin 1

The determination of the Tribunal was as follows:

Claimant's Case
Counsel for the claimant outlined the case; the claimant was employed as a visual merchandiser with the respondent. On the 21 September 2007 the claimant was asked to attend a meeting in the UK at which three issues were raised in relation to her conduct, a disciplinary meeting followed and the claimant was dismissed for gross misconduct and dishonesty. The claimant appealed this decision and an appeal date was set for the 27 November 2007, the claimant could not attend, as she was sick. The claimant was eventually reinstated but felt she could not return to work for the respondent.

The claimant gave evidence that she commenced employment directly after leaving school with the respondent in 1998. She was a model employee and was fast tracked through the ranks of the company and became a senior visual merchandiser in 2006. She had previously a disciplinary incident in which she received a warning for, she described this as minor, it related to claiming expenses at the stores when they were due to go to head office. She enjoyed working for the company and the line of work she was involved in. She was contracted to do thirty-nine hours per week but normally worked above and beyond these hours.

On the 20 September 2007 she got a call from LM's secretary informing her of a flight itinerary for

her to travel to the UK the following day. She was not informed as to why she was required to travel to head office. She arrived at head office where her line manager met her and brought her up to a meeting room where she was told that she was there for an investigation meeting. There were a number of allegations brought against her and they were seeking explanations.

Notes of the investigation meeting of 21 September 2007 taken by a visual communications assistant, signed by the claimant were produced at the hearing. Present at this meeting were the claimant, the visual merchandising manager and a visual communications assistant. At this meeting a number of issues were raised with the claimant. The first related to a text the claimant had sent to a work colleague on the 8 May 2007.

"Hey pet so sorry for this ive still got a headache going to give it another hour. If anyone asks tell them im time owing to take. I did not phone L, screw it. Let me know if anyone looking for me. I'll buzz you later".

The claimant explained that she was very ill that day and capable of going to work. She admitted she should have phoned L in line with the respondent's policy. However she said she contacted the person most directly affected by her absence by text. She apologised for her actions at the meeting.

The second issue raised with her related to her leaving work early on the 3 September 2007. It was put to her that she has left work at 1.00pm. The claimant explained that she was ill on this day in question, however she had gone to work because of commitments that day. As the day progressed she felt worse, she worked through her breaks and left early at about 2.00pm. She was contracted to do a 39-hour week but normally did more than this and never claimed extra.

The third issue was in relation to another text she had sent to a colleague in July 2007 in which she said she felt a bit weird and went on to say she thought she needed today also. She did attend work that day; she explained her start time was flexible once you got your job done. She went on to say that over the years she was flexible even working through the night for the respondent and also volunteering for Sunday work.

At the end of this investigation meeting a letter was issued to the claimant inviting her to attend a disciplinary meeting on the 25 September 2007, which also outlined her entitlement to bring a representative. She explained that she did not bring anyone with her, as she did not realise that her actions would equate to gross misconduct. She had been in shock the day of the investigation meeting and had found it hard to absorb what was being said to her that day.

Present at the disciplinary meeting was the visual implementation manager, visual communications assistant and the claimant. They went through the issues with her again and the meeting was adjourned while they made their decision. She was told she was being dismissed for gross misconduct, in reply she had told them that her actions had not warranted her being dismissed because of her ten years of employment with them.

A letter issued to her on the 26 September 2008 that was read into evidence. The decision to dismiss the claimant was based on her alleged dishonesty. She was very upset that the respondent had dismissed her for a minor breach of procedure and never "in her wildest dream" did she expect this. Such a sanction profoundly shocked her considering her service and loyalty to the respondent over the years. She felt that the appropriate sanction would have been a written warning.
The claimant appealed the company's decision by letter of the 10 October 2007 outlining her reasons for appeal; this was read in to evidence. In this letter she raised the issue that she was not

informed of the investigation meeting beforehand. One of the alleged incidents related to an event five months previously and yet she had to answer this immediately. The company produced no evidence of any sort apart from the texts. Also she had twice admonished the employee who had furnished these texts in the recent past. She went on to outline the "flawed findings of investigation" in relation to the three incidents. She explained why she felt her dismissal was an over reaction by the company.

The respondent acknowledged receipt of the claimant's appeal by letter on the 24 October 2007. The claimant went on to say it took the respondent six days to dismiss her, but fourteen days to acknowledge her appeal letter. The company then sent a letter dated 30 October 2007 informing the claimant that her appeal would take place on the 27 November 2007. A letter from the claimant's doctor was then read into evidence. The claimant did not attend the appeal meeting of the 27 November as her doctor told her it was not in her best interests to attend at that time because of her symptoms which related to the stress caused by her dismissal.

She felt the delay in the respondent setting up her appeal had contributed to her symptoms. She had heard from a few employees that there were a number of stories going about in relation to her dismissal, e.g. that she had inappropriate material on a blackberry, she was fired for gross misconduct, she had misrepresented a holiday that she was on etc. The delay completely diminished her character and she felt that her work colleagues would have no respect for her as a result of this; her name had been blackened after ten years of hard work. Gross misconduct to her meant stealing from the company.

The appeal meeting took place on the 14 December and was carried out by the visual communications controller; the claimant was accompanied by her father. All of the issues were gone through at this meeting. As a result of this appeal meeting the respondent sent a letter to the claimant on the 19 December 2007 overturning the original outcome, and reducing the dismissal to a final written warning. This letter confirmed that the claimant would be reinstated and would receive payment for her contracted hours since 25 September 2007. It instructed the claimant to make contact with a work colleague to enable her return to work on the 7 January 2008.

On receipt of this letter she felt that the respondent had realised that they were wrong in dismissing her, but she did not agree with the final written warning. She went on to say that her good reputation had been damaged within the small industry that she worked in. She had visited her doctor regularly over this period and had to take tablets for depression, which she had never suffered from previously.

She did not return to work on the 7 January 2007 as she was certified unfit to work until the 6 March 2008. At this stage she felt that she had been so badly treated that she could not go back to work for the respondent. The respondent's T2 stated that every effort was made to ensure the claimant's return to work. She felt that no effort was made apart from the initial response to her appeal, at no stage had anyone in the company called to see how she was while absent because of work related stress.

Under cross-examination she confirmed that she was partnered to work with the colleague who had supplied the respondent with the texts, they worked together. Counsel for the respondent told her that a complaint had been made by this colleague and that the claimant had put her in a difficult position, the claimant confirmed that she could not dispute this. It was put to her that she gave no additional explanations of her actions at the disciplinary meeting; her response to this was that she admitted that she was unprepared and did not think she would be dismissed. She had told them that

how things had been falsified, but could not word what she wanted to say.

The hours she worked over her thirty-nine hour week would depend on their workload at the end of each week she would contact the visual implementation manager and inform him of her hours worked.

The chair intervened at this stage to enquire if there was a statement of complaint from her partner who had produced these texts, this individual had rang LB who had taken a note of conversation, the individual felt she was being put under pressure by the claimant. The date of these allegations was the 30 August 2007 the original notes exist. The chair also enquired if this had resulted in a grievance procedure. Counsel for the respondent said the process went from investigation to disciplinary.

At the time when the claimant posted her appeal letter there was a postal strike in the UK. She felt that the company should have offered her an earlier appeal date than the 27 November 2007. When attending the appeal meeting she had two priorities, one was to have the gross misconduct label removed and secondly to get re-instated. She was happy to be reinstated, however, she did not feel she could return to work, how could she explain her situation to her colleagues, she had spoken with a senior manager on the day she was to return to work to tell she was certified sick. She did not communicate to the respondent that she was never going to return to work.

She received a letter from the company on receipt of her medical cert and phone call asking that before she returned to work that she make contact with them to arrange a back to work interview. On the 6 March through her solicitor she informed the respondent that she was claiming constructive dismissal. She gave evidence of loss to the Tribunal.

Respondent's Case

The visual merchandising manager and one of the claimant's line managers met the claimant on 21 September 2007 to conduct an investigation meeting. That meeting stemmed from a complaint from one of the claimant's colleagues about her behaviour and absence record. While it was company policy not to notify their staff of the nature of such meetings the witness accepted that the claimant was not prepared for this meeting and was therefore taken off guard at its contents. During the course of that meeting the witness stated that the claimant had been dishonest and had implicated another employee in that dishonesty. She added that this was a serious offence and because of that it amounted to "gross misconduct". On foot of that investigatory meeting the witness duly invited the claimant to a disciplinary hearing some days later and again at the company's head office in London. Three allegations were levied against the claimant in relation to incidents on 8 May, 3 July, and 3 September 2007.

The witness briefed a colleague about this case and asked him to conduct a disciplinary process against the claimant. As part of that briefing she had indicated to him her views on the claimant's case. That colleague was an employee who had less status and authority than the witness. She commented that this employee had a "free hand" to deal with this case.

The witness could understand the claimant's subsequent concern about returning to work with the respondent following her appeal against the respondent's decision to dismiss and then reinstatement her.

That colleague, who was also a line manger of the claimant, confirmed he was a subordinate to the previous witness within the respondent's hierarchy and that he received both a briefing and a copy

of the investigation notes prior to the disciplinary hearing on 25 September. However, and in that context the witness maintained that the previous witness had not expressed her view on this matter despite her recommendation that disciplinary action was needed. He later stated that he knew that the previous witness's viewed the claimant's behaviour as gross misconduct.

The witness accepted that the claimant who he described as a good worker and a valued member of staff was genuinely sick on 8 May. He did not question the claimant about 3 July but described late as reporting for work after 9.30am. Among the claimant's terms and conditions of employment is that a flexible approach to her working hours would be necessary. The witness did not ask the claimant for her hours worked on 3 September and therefore had no way of knowing those hours. This was the first time he conducted a disciplinary hearing. During the course of that brief meeting he twice gave the claimant the opportunity to state her case. However there was "no interplay" from her and felt the duration of the meeting was sufficient to determine the case. The witness concluded that the claimant effectively admitted her wrongdoing in relation to those three allegations.

That being the case this line manager satisfied himself that the claimant acted contrary to company procedures, was dishonest with the respondent, and inappropriately involved another colleague in her behaviour. Due to that lack of disloyalty and breech of trust the witness informed the claimant of his decision to terminate her employment with immediate effect. Subsequent to that dismissal the witness read a submitted letter from the claimant addressing and explaining her case. Its contents had no effect on his decision to dismiss.

In accepting his decision was correct then and now, the witness nevertheless said that the respondent's subsequent reversal of that sanction to a final written warning and the re-instatement of the claimant's employment was not wrong. The witness regarded himself as competent to carry out a disciplinary process and felt he was impartial in doing so in this case. He was, however, involved in the process concerning the claimant prior to the disciplinary hearing. He did not put the complainant's case to the claimant and therefore the claimant was unable to address those complaints. The witness felt the claimant could have returned to work following the re-instatement decision. Restructuring was being planned at that time which would have meant he would be no longer the claimant's line manger. However the claimant was not made aware of that.

The claimant was formally dismissed for "alleged dishonesty" by letter dated 26 September 2007. She appealed that decision to the human resource department by letter dated 10 October. That letter was received by the respondent on 22 October and an appeal hearing was set down for 27 November. By the end of October the claimant was expressing her concern that her appeal was not being heard "within a reasonable period of time". The respondent replied that she had missed the deadline for an appeal. This was contested by the claimant who later had to cancel the appeal hearing date due to illness and on the advice of her doctor. A revised date for the appeal was agreed for 14 December. The head of visual communications who described herself as the "port of call" for staff heard this appeal. She added that no-one else in the respondent was suitable to hear this appeal.

It was the respondent's policy to deal quickly with appeal cases. However, due to a close family bereavement and a postal dispute in the Respondent's area the witness was not in a position to hear this appeal until 27 November. While this was inconvenient for the claimant the witness did not accept that this delay had a profound effect on her. The claimant was accompanied and represented by her father at this hearing on 14 December. The witness was satisfied that the claimant and her representative were given the opportunity to present their case. In addition to that hearing the witness also took into consideration the claimant's letter of appeal submitted in October. Having

reviewed this case the witness concluded that the dismissal sanction "did not fit the crime". She replaced it with the sanction of a final written warning. That final warning was based on the witness's belief that the claimant broke company procedure once in not phoning in sick. She said this was a very serious offence.

The claimant was due to be reinstated on 7 January 2008 but earlier that month she submitted a medical certificate stating that due to work related stress she was unfit for work up to 7 February. In response the witness extended the claimant's sick pay up to that date as a gesture of goodwill and notified her of a return to work interview. It was the respondent's intention to outline the company's restructuring plans to her at that interview. It was not given that opportunity as on 10 March the respondent received a letter from the claimant's legal representatives. That letter effectively contained the claimant's resignation. Up to then there had been no indication from the claimant had she was having difficulty in returning to work. The witness felt it was reasonable to expect the claimant to return to work despite the ongoing attitude of the person who dismissed her. Besides, that person was to be transferred from the market where the claimant was due to operate. The witness could nevertheless understand how the claimant could not work with him had she returned.

Determination

The Tribunal members have carefully considered the evidence adduced during the course of this two-day hearing. The employee brings a claim against a former employer (the respondent) for constructive dismissal. The onus therefore rests with the employee at the outset that she had, on balance, acted reasonably.

The employee faced a disciplinary procedure arising out of a failure on three occasions to notify her former employer of the fact that she was personally ill and was either leaving early, arriving late or not turning up at all. Reasonable explanations were proffered in respect of one occasion of leaving early and for another occasion arriving late and it seems that if the workplace allowed for flexitime then so long as the employee clocks up her expected eight hour day the management cannot realistically discipline her in respect of which eight hours were being worked.

The last complaint made was that of not turning up for work for a full day and failing to make the fact known to the line manager instead of notifying a co-employee placing her in a difficult position. Ultimately the case, which the employee had to answer, was one of failing to follow the proper procedure for calling in sick and for placing a co-worker in an unacceptable position. The employee accepted that she had acted incorrectly on that occasion.

The investigation and disciplinary process was engaged in over the course of some five days. The Tribunal will not overly dwell on any flaws in this process but noted that it was clear from the evidence that the member dealing with the disciplinary hearing did not have a full grasp of the employee's case and appeared to "rubber stamp" the investigating manager's view of finding a "gross misconduct".

In accordance with her rights the employee went on to appeal the decision to dismiss her from her employment. An unfortunate series of events followed this notice of appeal and there was an unacceptable delay in having the appeal heard and the Tribunal notes that in a staff of over six thousand it is preposterous to suggest that only one person could deal with an appeal especially when that person was out an extended compassionate leave.

The Tribunal does therefore accept that given a three-month time lapse between the investigation

and disciplinary process and the outcome of the appeal the employee's smooth and speedy return to the workplace was seriously undermined. In addition the Tribunal cannot accept that this fact would not have been known to the employer. Of course, this matter would have been known in the workplace.

What is important to the Tribunal is that the parties engaging in the process follows through on the process right to the end.

It is implicit in the employee's decision to appeal the initial decision of the dismissal that the employee sought to reverse that decision and re-enter the workplace. Indeed the fact that the employee wanted re-instatement was confirmed in the course of the appeal hearing on 14 December 2007. By about 20 December the employee was informed (albeit by way of a not overly conciliatory letter) that her appeal had been successful and that she could return to work two to three weeks later (with full remuneration being back dated to the time of dismissal).

The employee remained out of work on an extended certified sick leave up to March 2008 and it seems in the course of this period of time that the employee realised that she could not return to a place of employment where her employer should know that her reputation was in tatters, two of her line managers had determined that she was untrustworthy and dishonest and where her loyal service of ten years had been dismissed as without value. In these circumstances, the Tribunal finds validity in her decision not to return to work and accepts the employee's conclusion that she was constructively dismissed.

That said, the Tribunal cannot ignore the fact that the employee did not engage in the formal invitation to return to work post appeal. We can never know what the reinstatement process would have involved. In her evidence, the heads of merchandising suggested that restructuring would have allowed a painless reinstatement, thought that view was not communicated to the employee.

In assessing losses the Tribunal must take into account that the employee did not fully explore the option of returning to work nor the circumstances which might pertain in respect of her return to the workplace.

The Tribunal awards the sum of €28,500.00 compensation for loss of earnings to date and into the future.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)