EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF: **CASE NO.**
EMPLOYEE UD128/2008

against the recommendation of the Rights Commissioner in the case of:

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. D. Hegarty
Mr. K. O'Connor

heard this appeal at Tralee on 15th October 2008
and 16th January 2009

Representation:

appellant (s): Mr. Patrick Cullinane B.L. instructed by Patrick Enright, Solicitor, St. Anthony's, Tralee Road, Castleisland, Co Kerry

Respondent(s): Mr. John Barry, Management Support Services (Ireland) Limited, The Courtyard, Hill Street, Dublin 1

This case came before the Tribunal by way of an appeal by the employee (*hereinafter referred to as the appellant*) against the recommendation of the rights commissioner: R-053624-UD-07 Federal JOC dated 14 January 2008.

The determination of the Tribunal was as follows:

This is a appeal for constructive dismissal.

Summary of the Evidence

The respondent provides security personnel at various sites. The appellant commenced employment with the respondent in March 2005 and at the time of the incident herein had been working on the hospital site for around seven months. His duties as a security guard include patrolling the hospital car park and placing stickers on illegally parked cars. Up to this time the appellant had an unblemished record with the respondent.

On the morning of Wednesday 17 January 2007 a sticker was placed on Mrs D's car because it was parked in a space reserved for disabled drivers without displaying the requisite permit. Mr D, the driver's husband and owner of the car, is a director of another company, which also engages the services of the respondent on its premises. Mr. D lodged a complaint with the hospital (the respondent's client) on behalf of his wife alleging that a security guard had used foul and abusive language to his wife. The complaint was communicated to the respondent's CEO in head office and an investigation was put in train. The respondent's human resource manager (HRM) denied that the referral of this incident to the highest level, the respondent's CEO, was unusual

On Thursday, 18 January, the respondent's senior supervisor on site (RSS) (who is now its Operations Manager) interviewed the five security guards including the appellant who had been on duty at the hospital on 18 January and each of them denied involvement in the altercation. It was the appellant's evidence that that he pointed out to RSS that he did not fit the description, provided by complainant, of a grey-haired security guard of stocky build and furthermore he (the appellant) wore spectacles. The appellant was the smallest of the five security guards on duty on the site on 18 January. The appellant assured RSS that he was not involved in the altercation. It was his evidence that he does not use such language. It was RSS's evidence that the security guard involved in the incident was described as dark (haired) with bits of grey and of medium to stocky build. Before this, the site supervisor had also questioned the five security guards on duty at the relevant time and all also denied having had an altercation with Mrs D.

Mr D came to the hospital to view the CCTV footage and confirmed that the car involved was his and that the driver was his wife. RSS and the client examined the CCTV footage on Friday and saw the appellant on duty in the area and standing by the reception door. RSS then spoke to the appellant in the presence of his shop steward. The appellant told him that it could possibly have been he that put the sticker on Mrs D's car but he denied any involvement in an altercation or confrontation. The appellant confirmed to RSS that he had seen two women trying to remove a sticker but he had not gone to them as there was no point in doing so if a sticker had already been put on the car. The CCTV footage did not show the altercation. The appellant suggested to RSS to bring in the two women. RSS told him that he was not accusing him of the altercation. The appellant was on holidays the following week and was due back to work for the night shift on Monday 29 January 2007.

On the afternoon of Monday 29 January 2007 RSS telephoned the appellant instructing him not to resume his duties in the hospital and assigned him instead to the college site on Wednesday and Thursday and the bus station on Friday night. The appellant felt he was being accused. RSS explained to him that he was being transferred from the hospital pending the completion of the investigation into the incident but assured him that it was a thing of nothing and that it would not take long. It was the respondent's evidence that the appellant had been moved from the hospital site because, after viewing the CCTV footage, he had been the only one on duty at the hospital entrance, although it did not show him doing anything wrong. It was the appellant's evidence that his colleagues on the college site taunted him (about the incident). The appellant's next scheduled shift, was to be in Killarney the following weekend. However, on Monday 5 February, the appellant submitted a sick certificate stating that he was unfit for work due to stress. Around a week later he submitted another medical certificate for a further two weeks. The appellant was expecting that the investigation would be concluded within two weeks - the week of his holidays and the week following his return. He accepted that RSS had not indicated that he would make contact with him while he was on holidays.

Because he felt that nothing was being done, the appellant telephoned his trade union and a senior official advised him to get a "without prejudice" letter from RSS stateing why he had been moved from the hospital. RSS told him there was no need for a letter. It was the appellant's evidence that RSS confirmed to him that that it was he who had moved him from the hospital. Up until then he had led him to believe otherwise. The appellant found this very hurtful. No one else had beenmoved from the hospital site. The appellant felt that he was being made a scapegoat and the wholesituation was getting to him. He was being blamed for something that he had not done. Beingaccused of verbally abusing a woman weighed heavily on him. The respondent was doing nothingabout it and the trade union was not processing the matter so he contacted a solicitor to clear hisname. When his trade union officials discovered that a legal representative was involved in thematter, they would have nothing further to do with his case.

On 7 February 2007 the appellant's solicitor wrote to the respondent denying that the appellant was involved in the incident, informing the respondent that the appellant was extremely upset and distressed by recent events and called on the respondent to redress the situation within ten days or legal proceedings would be instituted. The respondent did not reply to the letter and this made the appellant feel that he was being blamed.

The appellant returned to his legal representative who again wrote to the respondent on 27 March. The situation had being playing on the appellant's mind, there were arguments at home and the appellant "knew" that the respondent was going to ignore the matter completely. The appellant got sick of the waiting and because he could not handle it anymore he wrote to the respondent and resigned. It was a very difficult letter to write. He did not inform his solicitor that he was tendering a letter of resignation. His resignation letter was undated and the appellant could not remember exactly when he had sent it. The respondent's evidence was that it was received in the respondent's Cork office on 23 March 2007 and forwarded to the respondent's CEO at head office reaching her on 3 April 2007. HRM was not aware of the letter of resignation at the time she received the solicitor's letter of 27 March. She did not reply to either of these letters because the respondent had an exclusive agreement with the trade union. She saw the appellant's resignation letter on 3 April but saw no point in replying to it.

In late March RSS spoke had a telephone conversation with the appellant about the forthcoming examination for security guards and offered to help him if he had any difficulty with the paperwork. The appellant denied RSS's contention that, during that conversation, he had asked the appellant about his return to work. The appellant had not expressed his frustration at the lack of progress to RSS during their conversation. The appellant did not attend the course.

It was the respondent's case that the appellant's absence on sick leave stymied the investigation. However, the appellant contended that his stress did not confine him to bed and he would have made himself available for a meeting but he had never been asked to one. HRM maintained that the appellant had failed to comply with the grievance procedure which stipulates that an employee should in the first instance raise his grievance with his on-site supervisor and failing a satisfactory outcome at this level, he should have referred it to the next level and ultimately the trade union official would raise the issue with HRM. It was the appellant's case that he spoke to RSS because he was his boss. HRM had not replied to the appellant's solicitor's letter of 7 February because: the respondent had an exclusive agreement with the trade union, the appellant was out sick and she did not want to communicate with a third party. She confirmed that she had not written to the trade union to inform them about the involvement of a third party.

The appellant was moved from the hospital site, at the client's request, because he was the security guard on duty in the area where the incident occurred. He was the only security guard "in the frame" unless another guard had relieved him for his break at the time; security guards rotate during break time. No officer would be in the area at the time unless on break. The appellant confirmed that there was one security guard on the hospital site who fitted the description given by the complainant but he could not say if this person was involved in the incident.

According to RSS the respondent had no previous problems with the appellant and it would have been out of character for him to use the alleged foul language. There was no footage of the appellant talking to the woman who had parked illegally. The appellant was right to place the sticker on the car. While the move from the hospital to another site meant a reduction in pay through the loss of overtime, it was not the loss of money but the damage to his good name that caused the appellant concern.

The appellant felt relief following his resignation and sought alternative employment in bars and hotels. It was an industry where he had previously worked. The hours he works per week vary but he works two to three days per week at €10.00 per hour. The appellant could not go back to security work as he had not completed the PSA security training and exams.

Determination:

The respondent received a complaint from a woman that a security guard had verbally abused her. The original complainant had unlawfully parked in a space reserved for disabled drivers. The respondent received this complaint at three removes from the incident. The appellant became the focus of the investigation because he was the security guard on duty in the relevant area at the time of the alleged altercation. He remained the only focus of the investigation despite his repeated denials of involvement in the altercation, the fact that he did not fit the description provided by the complainant, his senior supervisor's acknowledgement that such language would be out of character for the appellant and the possibility that another security guard could have been in the area. The appellant suggested that the original complainant be invited to participate in the investigation. No evidence was adduced to suggest that anyone from the respondent ever spoke directly to her. Nor did the Tribunal have the opportunity of hearing any evidence from her.

The Tribunal is aware of the difficulties presented to the respondent when the hospital's head of security requested that the appellant be transferred from the site. However no steps were taken by the respondent during the week of the appellant's return to work to progress the investigation. The appellant had already been questioned twice about the incident and on each occasion he had denied involvement in the alleged altercation in the car park. There was no evidence before the Tribunal that the respondent had taken any other steps during the following seven weeks, up to the time of the appellant's resignation, to confirm or refute the appellant's stated position on the issue.

The Tribunal considered the respondent's contention that the appellant failed to adhere to both the grievance procedure and respondent's exclusive agreement with the trade union. However, when the appellant approached his senior supervisor it was not drawn to his attention that he was not strictly adhering to the respondent's grievance procedure. He approached his solicitor because he felt he was getting nowhere. Similarly, the respondent did not remind him of the exclusive agreement. Having considered all the evidence surrounding these issues the Tribunal is satisfied that the appellant was not unreasonable in adopting this course of action. Crucial to the Tribunal's finding on these issues is its acceptance that the allegation that he had verbally abused a female

seriously affected the appellant and played on his mind. The medical certificates he submitted to the respondent certified that he was suffering from stress. In the circumstances of this case and in particular where the respondent was relying on a complaint received at a number of removes from the alleged incident the Tribunal is satisfied that the respondent ought to have communicated with the appellant, in particular it was unreasonable for the respondent to maintain silence and not make some response to his solicitor's letter of 7 February. This failure on the part of the respondent convinced the appellant that he was being blamed for the incident and this further added to his stress. The Tribunal is satisfied that it was reasonable for the appellant to feel that he had been made a scapegoat.

In all the circumstances of the case the Tribunal unanimously finds that it was reasonable for the appellant to terminate his contract of employment with the respondent. Accordingly, the appeal under the Unfair Dismissals Acts, 1977 to 2007, succeeds and the recommendation of the rights commissioner is overturned. The Tribunal awards the appellant the sum of €10,000 under the Acts.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)