EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	**CASE NO.**
EMPLOYEE	UD1072/2008
- *claimant*	TE130/2009

against

EMPLOYER - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
TERMS OF EMPLOYMENT INFORMATION ACT 1994 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr D. Hayes BL

Members: Mr. M. Flood
Ms M. Maher

heard this claim at Dublin on 7th January 2009
and 8th May 2009
and 21st December 2009

Representation:

Claimant: Mr. Brendan Archbold, 12 Alden Drive, Sutton, Dublin 13

Respondent: Ms. Kiwana Ennis BL instructed by Ms. Aisling Butler, William Fry, Solicitors, Fitzwilton House, Wilton Place, Dublin 2 on first and second day of hearing
No appearance by or on behalf of the respondent on the 21st December 2009

The Terms of Employment Information Act 1994 to 2001 case came before the Tribunal by way of an employee appealing against the Decision of the Rights Commissioner ref: (r-069476-te-08/JT)

The determination of the Tribunal was as follows:

This claim was heard over three days. On the afternoon of the second day the Tribunal was told that the claim was settled and liberty was sought to re-enter the claim should the need arise. Such liberty was given. An application was subsequently made to re-enter the matter, within the time allowed by the Tribunal and it was relisted for hearing on 21st and 22nd December 2009. There was no appearance by or on behalf of the respondent on the 21st December. The Tribunal was due to sit at 10.30am to hear the matter but delayed in case the respondent and its representatives were delayed. By 11am there was still no appearance. The solicitor that had been acting for the respondent was contacted and she told the Division's Secretary that her firm no longer representedthe respondent in this matter. The Secretary then attempted to contact the respondent

but, for a fulltwenty minutes, its telephone was constantly engaged. The Tribunal was satisfied that the noticesof hearing had been delivered to the respondent and had been signed for. When the Tribunal sat at11.30am there was still no appearance by or on behalf of the respondent. The claimant's representative told the Tribunal that subsequent to the receipt of the notice of hearing he had spokento one of the respondent's directors about the impending hearing.

The Tribunal was satisfied that the respondent was properly on notice of the hearing and was aware that it was due to be held on 21st December. For whatever reason the respondent decided not to attend. The Tribunal acceded to the claimant's application to proceed with the hearing. The respondent was neither denied an opportunity to attend nor an opportunity to make its case.

The claimant commenced employment in June 2006. He did not receive a contract of employment until January 2007. It was claimed in evidence that the claimant also received written contract when his employment began but that a copy of this first contract could not be located. The Tribunal does not accept this.

The claimant was employed as a health and safety manager. The respondent is a building contractor engaged in the building of social and affordable housing for local authorities together with some civil engineering work. Obviously, health and safety matters are of much importance in the construction sector and are to be taken seriously.

The respondent was working to achieve a certification known as a "Safe-T-Cert". This certification is provided by the Construction Industry Federation and is a stepping-stone to ISO certification. It has an importance in tendering for contracts. The company was subject to a number of health and safety audits. The certification was granted in mid-April 2008. It seems that this was largely due to the efforts of the claimant. It is noted in the minutes of a meeting, held on 17th April 2008, that:

> *"Firstly, all congratulated [the claimant] in achieving the Safe-T-Cert for the company."*

Present at meeting, along with the claimant, were two directors, ER and SR, the site manager, FW, and the company manager, OS.

Prior to 2008 there appears to have been few, if any, concerns of substance relating to the claimant's performance of his duties.

The claimant was notified on 16th April 2008 by FW that he was to attend a meeting on 17th April. He was told that the meeting was to be about forthcoming civils projects. As it turned out themeeting was almost wholly devoted to the claimant's perceived shortcomings. The minutes noteforty-three items. Forty-one relate to problems with the claimant's performance. There is a verysmall number of tangential references to forthcoming civils projects but only in the context of theclaimant's ability to deal with them. The minutes conclude with the note:

> *"[OS] said that this is a formal meeting and will be documented."*

It seems that this was to be taken as a written warning. It is, of course, no such thing. It was indicated that SR, ER, FW and OS would sit down with the claimant on 23rd May 2008 to discuss his work progress.

It is clear to the Tribunal that the claimant was ambushed at this meeting. He was brought to what

was effectively a disciplinary meeting on an entirely different pretext. He was not advised of the concerns that were to be raised. He was not afforded the opportunity to be represented. The respondent then gave, what it considered to be, a written warning.

The follow-up meeting took place on 4th June 2008. It was attended by the claimant, FW and OS. The directors, SR and ER did not attend. It is noted in the minutes that:

> *"The meeting with [the claimant] was to discuss his work progress from the last formal documented meeting on the 17th April 2008. Directors, [ER] and [SR] gave [FW] and [OS] authorisation to deal with the review and to take to the table their concerns as discussed with [FW] at an earlier meeting the previous week"*

Again, a large number of issues were raised and the respondent's view was that, in essence, no improvement had been made by the claimant. It was noted in the minutes that:

> *"FW made it very clear that the next time we sit down to review [the claimant's] work progress we need to see a 100% improvement. FW will not be repeating the same issues again to [the claimant]. This is [the claimant's] second official written warning, any more issues will result in him [the claimant] being dismissed from his position with the company."*

The claimant was not offered representation at this meeting either. Nor had he been warned that it was disciplinary in nature.

The next meeting took place on 2nd July 2008 and was attended by the claimant, FW and OS. At this meeting the claimant was offered the opportunity to have someone attend on his behalf as a witness. The claimant disputed that what had transpired at the first meeting constituted a first written warning. The minutes grudgingly note that:

> *"FW and OS disagreed with this but will on this occasion accept what [the claimant] is saying. The minutes of the meeting stated that it was a second and final written warning will now be put back to a first written warning."* (sic)

Again the meeting dealt with a large number of issues relating to the claimant's performance. At the end of the meeting FW again purported to give a final written warning. The claimant was given until 10th July 2008 to resolve all issues.

At the meeting on 10th July 2008, FW and OS went through their concerns with the files relating to twenty-three different sub-contractors. It was noted that FW and OS were not satisfied that the claimant had dealt with all of their concerns during the allotted eight days. They indicated that they would report their findings to ER and SR who would review the findings before coming to a decision. It was indicated that dismissal was a likely outcome.

The claimant received a letter, dated 15th July 2008, informing him that he was to attend a disciplinary hearing at 4pm on 17th July. That meeting was conducted by ER. He commenced by giving his opinion that the lives of workers were being put at serious risk and that the claimant had been given sufficient time to address all issues. The minutes then note the following:

> *"[ER] stated that before he made his decision had [the claimant] anything to say."*

The hearing lasted for fifteen minutes. ER then took fifteen minutes to consider his decision. On his return he announced that he was dismissing the claimant. This decision was confirmed in writing by letter dated 18th July 2008.

The claimant appealed this decision. The appeal was heard on 25th July 2008 by SR, notwithstanding his earlier involvement in the process. The claimant was represented at this meeting. At the conclusion of the meeting he was told that SR would be in touch. On 29th July, SR wrote to the claimant and raised a new issue that the Claimant had been working as a health and safety consultant to a number of the respondent's sub-contractors. The Tribunal accepts the claimant's evidence that he was assisting these sub-contractors at the request of his employer. The result of the appeal was that the claimant's dismissal was confirmed.

The Tribunal is satisfied that the respondent, before April 2008, had no concerns about the claimant's performance. Shortly after the respondent had secured an important certification, largely due to the claimant's efforts, concerns came fast and furious. Even if the respondent had significant concerns, it deluged the claimant with them and gave him very little time or guidance so as to enable him to correct his ways. Only eight days elapsed between the time that the respondent spelt out in any detail their concerns and the claimant being reported for disciplinary action. Within a further fortnight he was dismissed. When an employer has concerns about an employee's performance it ought to give the employee a reasonable opportunity to improve. To do this he must point out to the employee his short-comings and advise him how best he might improve. Neither was done in this case.

The respondent adopted a noticeably lax style in its disciplinary process. In the first instance, the claimant was invited to a routine meeting at which he suddenly found himself at a disciplinary meeting. It was not until July that the claimant was formally invited to a disciplinary meeting, notwithstanding that at three previous meetings the respondent purported to discipline him. It should be noted that a written warning is just that, a warning given in writing. It is not sufficient that it be vaguely referred to at a meeting and then recorded in a minute. A written warning is a formal step in a disciplinary process and ought to be treated as such.

The Tribunal is satisfied that the claimant's dismissal was both substantively and procedurally unfair. We are satisfied that compensation is the appropriate remedy. In respect of the claim pursuant to the Unfair Dismissals Acts, 1977 to 2007, the Tribunal awards compensation in the amount of €66,500 as being just and equitable in all the circumstances. In addition the Tribunal sets aside the Decision of the Rights Commissioner and awards the claimant €500.00 under the Terms of Employment Information Act 1994 to 2001

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)