EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF: CASE NO.

EMPLOYEE – **claimant** UD91/2009

MN82/200 9

Against

EMPLOYER – **respondent**

UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

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

Members: Mr J. Hennessy
Ms. E. Brezina

heard this claim at Kilkenny on 9 July
and 5 November 2009

Representation:

Claimant:
Mr. David Bulbulia B.L. instructed by, on the first day
Mr. Patrick Newell, on the second day Ms. Leona McDonald,
both of Newell Quinn Gillen, Solicitors,
Parade House, South Parade, Waterford

Respondents:
Ms. Angela Grimshaw, Peninsula Business Services (Ireland) Limited,
Unit 3, Ground Floor, Block S, East Point Business Park, Dublin 3

The determination of the Tribunal was as follows: -

The claimant, who has in excess of twenty years experience in the retailing business, was employed from 13 July 2007 as the manager of the respondent’s filling station, convenience store (hereafter the store) and oil distribution business. The claimant had recently been made redundant from hisprevious employment and was recommended to the respondent. In January 2008 an argument arosebetween the managing director (MD) of the respondent and the claimant about the claimant’s lackof supervision of the green diesel pump. This led to the claimant’s walking out in

the heat of the moment. However, the relationship was mended and the claimant returned to work.

Whilst MD's position is that the claimant was given a standard written contract of employment he was unable to produce a copy of it to the Tribunal because it had gone missing from his office. It was further MDs' position that he had orally communicated to the claimant that there was a policy whereby promotional gifts from suppliers were the property of the respondent and not for individual employees. MD, having previously worked in the pharmaceutical business had experience of promotional offers and did not want his business to be involved in promotions. The claimant denied receiving a contract of employment or of being made aware of any policy about promotional incentives. One of the respondent's shop assistants (SA) confirmed that it was a term of her contract of employment that promotional gifts are the property of the respondent. She was unable to find her contract of employment since changing homes. On a number of occasions, on his return from business trips, MD found his office open and he instructed SA to lock it when he was going away. MD had several CCTV cameras in the shop and two outside; he changed the direction of the cameras depending on the suspicious activity. The claimant used to enter his office to view the TV.

The claimant had responsibility for the purchase of stock for the store, including the selection of the suppliers. However, MD did not encourage promotions and because there had been great difficulty in disposing of chocolates purchased under a promotional scheme the previous Christmas he had warned the claimant against partaking in similar promotions. On the morning of 6 November 2008 two supplier representatives visited the convenience store, CR from a confectionery supplier and FR from a meat products supplier. The claimant, despite the warning, had become involved in a promotion, involving the purchase of 160 cases of confectionery. Part of the promotion involved a satellite navigation system (sat nav) being made available to the store. On 6 November 2008 CR brought the balance of the 160 cases and the sat nav to the store. The claimant placed the sat nav in the boot of his car, which was in the car park area of the store.

Part of the arrangement between FR's employer and the respondent involves FR's taking back the unsold out-of-date stock for disposal and issuing a credit note to the respondent for the out-of-date stock. It was the claimant's evidence that on 6 November 2008 he asked FR, for "a bit of breakfast", which FR provided. The claimant placed these nine items of fresh food in the boot ofhis car. There is no suggestion that these items were invoiced to the respondent. The respondent'sposition is that there had been thirteen or fourteen out-of date items left out for collection by FR onthe day (6 November 2008) but the store was only given credit for four returns that day. It was MD's evidence that he had, on several occasions advised the claimant to keep a special book in which to record the out-of-date products but he failed to do so.

Two shop assistants, working in the store on the morning of 6 November 2008, became suspicious about the activity between the claimant and the two representatives. As a result SA telephoned MD to alert him to their suspicions. MD then attended the convenience store and, having contrived to give the impression that he was going to Cork, he then drove off in a commercial vehicle, which he parked in a nearby house from where he observed the convenience store. The claimant was due to finish work at 2.00pm and when MD saw the claimant leaving he confronted him and asked to be shown the contents of the claimant's car boot. It was MD's evidence that the claimant went pale at this request and asked for a chance. This claimant denied both assertions.

The claimant complied with this request and opened the car boot. There is a dispute between the parties as to whether it was possible to see the sat nav in the boot without moving the food items. The claimant's position is that the sat nav was in plain view and he told MD that he intended

givingit to him as a Christmas gift. MD, whilst accepting that this was said, maintains that the food wason top of the sat nav and when the claimant referred to a Christmas gift he (MD), believing it to bethe food items, could not understand how food products delivered on 6 November 2008 were goingto be given as a Christmas gift some seven weeks later. MD removed the food products and the satnav from the claimant's car boot, took the claimant's shop keys and, according to MD, suspendedthe claimant. MD maintained that he was losing the value of these goods that amounted to a retailvalue of €22.97. The claimant's position is that he was dismissed at this point; MD had told himthat he would get what was owed to him and that he was not to return to the store. It was MD'sevidence that his staff had also spoken to him previously about other such occasions. MD's evidence was that it would be much cheaper for him to buy a sat nav than to be burdened with shelfafter shelf of a product, which he could not sell.

MD contacted CR who confirmed that the sat nav was intended for the respondent as part of the promotion. MD spoke to SA that afternoon to confirm her earlier observations and asked her how she would feel if the claimant did not return to work. SA understood that MD was asking how she would feel if he did not return for his later shift that day. At around 6.00pm the claimant telephoned MD seeking to discuss the situation and they agreed to meet at around 10.00pm in a local hotel.

According to MD the claimant admitted, at the meeting, that the sat nav was a mistake but insisted that the food items were his and suggested they go to the supplier's local office where it would be explained to MD that he was not suffering any loss in respect of the foods in the boot of his car.MD felt that the claimant was too well connected in the local office and wanted to go to head officebut the claimant was unwilling to go there. Furthermore, MD did not want the business involved in"any skulduggery". MD confirmed to the claimant that he had checked out the ownership of the satnav with CR. The claimant had earlier unsuccessfully tried several times to contact CR. It wasMD's position that he dismissed the claimant at the conclusion of that meeting because he had losttrust in him. He had been in touch with his partner in the business in the interim and he did not wantthe claimant in the employment. It was the claimant's evidence to the Tribunal that the sat nav wasgiven to him as an incentive to place an order with the supplier. The claimant, in his evidence to theTribunal, recalled a conversation with MD the previous year relating to unsold boxes of chocolatebut added that MD had not instructed him in that conversation not to become involved in promotions but had told him not to buy the specific brand of chocolate. The claimant did notreceive any documentation in relation to the foodstuffs he had been given and did not know how they were accounted for.

It was MD's position that the claimant was paid an exceptionally high wage of €1,000 a week torun a straight business. The claimant could not recall any discussion or negotiations about his wages prior to commencing employment with the respondent.

Determination

Whilst an issue was raised as to the correct identity of the employer the claimant accepted in his evidence that the above-named respondent was his employer and that the said respondent had issued him with his P45.

The Tribunal, whilst noting that no copies of any written contract or policy were opened to it, accepts, on the balance of probability, that the respondent had a policy on promotional incentives and that according to that policy such incentives were the property of the respondent. The Tribunal further finds that the claimant was aware of this policy. The Tribunal bases this latter conclusion on

the clandestine manner in which the claimant took possession of the goods on 6 November. Furthermore, it accepts that the policy was re-iterated to the claimant the year prior to the incident herein, when the respondent had difficulty disposing of surplus chocolates, bought as part of a promotion. In addition, CR, who had been dealing with the claimant about the sat nav, confirmed to the respondent that it was the respondent's property. The Tribunal is satisfied that by the time of the 10.00pm meeting on 6 November in the hotel the respondent had completed a fair investigation into the allegation concerning the sat nav.

On the other hand, it is clear to the Tribunal that by the time of the meeting MD had not conducted a full and fair investigation into the food found in the claimant's car and he erroneously suggested to the claimant that enquiries with the meat products supplier had revealed that no returns were to be credited to the respondent for 6 November 2008. The Tribunal notes that the evidence shows that the respondent received a credit note for four of the 13 items that were in the basket for return on 6 November.

When requesting the claimant to allow him to examine the contents of the boot of the claimant's car MD was conducting an investigation triggered by the legitimate concerns of two other employees. This inevitably left the claimant with questions to answer. It was entirely reasonable at that point for MD to suspend the claimant. The Tribunal rejects the claimant's assertion that he was dismissed at this stage.

Although there is a problem with regard to the investigation into the food found in the claimant's possession, the Tribunal is satisfied that it was reasonable for the respondent to conclude in relation to the sat nav that the claimant's conduct was such as to breach the implied term of trust and confidence placed in him. This breach, particularly by a person in a managerial position in whom a high standard of trust and confidence is reposed, is such as to justify the dismissal.

It follows that the dismissal was not unfair and the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

This being a conduct based dismissal a claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 does not arise

Sealed with the Seal of the

Employment Appeals Tribunal

This ________________________

(Sgd.) ________________________
(CHAIRMAN)