[EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF: CASE NO.

EMPLOYEE UD569/2009

- employee /appellant

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

EMPLOYEE -v-
EMPLOYER

- employer/respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mrs. M. Quinlan

Members: Mr E. Handley
Ms M. Maher

heard this appeal at Dublin on 29th March 2010

Representation:

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Appellant :
Mr. Richard Grogan, Richard Grogan & Associates,
Solicitors, 16/17 College Green, Dublin 2

Respondent :
McKevitt & Co, Solicitors, 23 Mespil Road, Dublin 4

The determination of the Tribunal was as follows:-

This came before the Tribunal by way of an appeal by the employee/appellant against the recommendation of a Rights Commissioner Ref: r-065691-ud-08/JT dated 16th February 2009

Appellant's case:

The appellant in his evidence told the Tribunal that he commenced working with the respondent as a discharge crew operator / supervisor on 1st March 2006. He had previously worked with another company doing similar work from 2001. The appellant transferred to the respondent in early 2006 when the previous company lost the contract.

His contract of employment was opened to the Tribunal. In 2007 he was unhappy with his work in the Topaz terminal. His hours were now being varied at very short notice and he was losing hours to a new employee with less service than the appellant**.** He contacted the Managing Director, hereinafter referred to as (MD) in August but did not get a satisfactory response. In November 2007 he brought up the matter again. He lived very close to the port and was getting very short notice. He was taken off hours in Topaz by text message and was not given other work.

On Friday 3rd August 2007 he went to the MD, and asked why he was taken off a pre-arranged shift and the response he got was that he, the MD could do whatever he wanted. Other employees were also complaining about no notice for shipping duties and they confronted the MD. The MD said they did not have to work if they did not want to. The appellant felt that he and his colleagues could then be left sitting in the house with no work as a kind of punishment. The appellant's hours were 10pm to 6am. In August he was asked to come in at 8pm and he said he could not make it. The MD then rang and said not to bother coming in.

On 1st October 2007 his brother who lives abroad was home and he asked the appellant to go down the country with him. On that day at 10am, the appellant received a text message from Operations Manager, hereinafter referred to as (OM) asking him if he would work a shift that evening. The appellant said no but that he would work a shift the next day. He then received a phone call/text from OM saying he was badly stuck and would he work a shift at midnight, that night. There were also missed calls on his phone. He told OM he was unavailable and having spoken with his brother he would not be able to get back until Tuesday. The appellant rang OM and told him he would be back at in or around 9/10pm that night and he asked that the MD ring him. When the appellant spoke with the MD he was told he would not pay him. The appellant had not received clearance to stand in for this work. The appellant had driven back from Kerry and got in by 4am on 2nd October. On 25th October 2007 he attended a course in the same building as the MD's office. The appellant had received a text message from OM on 8th November telling him that he could no longer do his normal Sunday shift, 08.00 to 20.00 hours in the Topaz terminal. At a meeting on 9th November the appellant was told he was no longer suitable.

On 13th December 2007 the appellant booked a trip to the US. He had taken one weeks holidays in the Summer of 2007. On the 15th December he told OM that he would be unavailable during the Christmas period. On 17th December he was asked by OM to confirm his holidays and he then received a telephone call from the MD refusing his request to take holidays. The appellant was told that two other employees had requested time off before him. The appellant then received a letter dated 17th December from the respondent stating that the short notice of his holiday was unacceptable and that if he continued with that course of action he would not be offered work on his return. He was asked to ring by 19th December at the latest to resolve the matter. The appellant believed that he had given adequate notice in accordance with his Terms and Conditions of Employment. On 18th December the appellant tried to postpone his holiday but was unable to do so as he could not change the outbound flight. He told OM and the MD that he had tried without success to change his holidays. From the letter dated 17th December 2007, the appellant took it that he had been dismissed. From the time the appellant returned from holidays on 2nd/3rd February he was not rostered to work any hours.

The appellant then requested his P.45 and by letter dated 26th March 2008 from the respondent, a P.60 for the year 2007 was attached and it stated that a P.45 would not issue for 2008 as the appellant had not worked in this year. In his letter dated 7th May 2008 the appellant notified the respondent of his intention to pursue a claim for unfair dismissal. In response by letter dated 9th

May 2008 the respondent asked the appellant to make contact and arrange a time to meet with the intention of resolving matters. The appellant was also invited to attend a COP Supervisory training course on 20th, 22nd or 23rd of May. In his letter of 15th May the appellant responded by stating he was unhappy with the way he was treated in his employment since the summer of the previous year and made reference to the respondent's reaction if he proceeded with his planned holiday in December 2007. The respondent's reply dated 19th May 2008 stated the company terms in relationto the taking of holidays and that reasonable notice was required prior to the taking of same. Thisletter also stated that the appellant was still considered to be an employee of the company and againinvited him to make contact to arrange a time to meet to put his concerns at rest. There was afurther letter from the respondent dated 20th May 2008, a reminder in relation to the COPSupervisory training course, as the appellant had not turned up for the course.

In cross-examination witness stated that he did not threaten to resign when the respondent told the appellant it was not possible to take his holiday at short notice in December 2007. He did not respond to the text message from OM on 3rd January 2008 as it did not mean anything.

Respondent's case:

The appellant's employment with the respondent has moved under the Transfer of Undertakings (Protection of Employees) Regulations, 2003 to SGS Ireland Limited, a competitor from 1st April2009.

The Tribunal heard evidence from the Operations Manager (OM) who has worked with the respondent for eight years. Part of his job was the rostering of staff. Every ship was restricted bytides and space plus urgency. There was a different crew for different terminals, which meant therecould be two/three shifts in at the same time. There was a four-man crew on each shift. There could be a few days notice and then there could be three ships in at the same time from different companies. Witness worked with the appellant at the Topaz terminal. There was a requirement by Dublin Port to have one supervisor and three others present. Christmas time is much busier than atother times of the year and ships come in on Christmas day. Topaz outsource their "graveyard" shift. In relation to annual leave the employees would let witness know a few weeks in advance. Prior to Christmas a memo is sent to all employees checking which dates they would not be available to work during the holiday period. On 1st December 2007 this memo was issued with thepayslips and two out of five reverted to say they were not available to work during the Christmasperiod. On 17th December 2007 the appellant contacted witness stating he was taking holidays atthis time and witness said it would be impossible for him to cover for the period between 23rd December to 2nd January with three men. He asked the appellant if he could change his holiday asother staff had booked ahead of him but the appellant did not care. It takes two to three years totrain as a supervisor and he wanted the appellant to work during the Christmas period. He phonedand sent a text message to the appellant but he did not receive a response. The appellant wasworking for the respondent but he did not want to work.

In cross-examination witness stated that it was the practice to give notice prior to taking holidays however the contract of employment did not specifically state the length of notice required. While he sent a text message to the appellant on 3rd January 2008 he did not send any text message after that date.

In answer to questions from Tribunal members witness stated that there were about thirty employees at the time of appellant's employment in the company including nine supervisors.

The Tribunal also heard evidence from the secretary who has worked with the company for nine years. She was also in charge of payroll and she sometimes covered the rosters. The pre-booked holidays were recorded in a diary and she kept track of holidays taken. The employees usually told her in advance. She sends out the form on the first payday in December so that employees could get back and confirm when they were not available during the Christmas period. It was custom and practice to assume that an employee was available if his form had not been returned. The appellant had not been dismissed before or after Christmas or at all. She received the email from the appellant seeking his P45 and she showed it to the managing director. The P.45 was not due as he had not been dismissed.

The Managing Director (MD) in his evidence told the Tribunal that if the respondent was unable to cover a shift they would be liable for de-merged costs, which could amount to €30,000 per day. The company would not be able to sustain such costs, which could result in the closing of the terminal in addition to possibly loosing the contract. The appellant complained he was not made supervisor for shipping. The appellant would have to undertake training and it took the respondent nine months before the terminals would accept him as supervisor. Persons have to be suitable and it related to efficiency. The matter was out of the respondent's hands. When Topaz moved in they wanted increased experience and knowledge at weekends when their personnel were not available. Around October/November 2007 there seemed to be difficulties as the appellant was declining to do shipping work and would be available to do the terminal work.

Witness was told by OM that the appellant was taking holidays during the Christmas period at a time when two other employees were also not available and the roster had already been drawn up. Witness appealed with him to cancel his holidays. There had been many a discussion regarding Christmas and the cover for the period. They had no idea when the appellant was coming back from the holiday. The shipping supervisor was vital and needed three years experience at the job in addition to training. His taking the holidays at short notice caused difficulty for the respondent. The letter of 17th December 2007 was intended to show the appellant why witness did not want him to take the holidays. He was trying to get him to work over the Christmas period. The appellant's booking the holiday and then telling the respondent showed no sense of responsibility towards the company. The third paragraph of this letter was a threat but it was never followed up and because the appellant was a shipping supervisor it hurt witness more than the appellant. The company has been in operation since 1993 and since that time only two employees had been dismissed. With these two employees witness went through disciplinary procedures prior to dismissal but there was no reason to take such action against the appellant. They did not hear from the appellant after Christmas and he did not respond to a text message from OM. When the appellant lodged the claim for unfair dismissal witness responded with letter dated 9th May 2008 stating that he had not been dismissed and he offered him a place on a supervisors training course for later that month. There was a great need in the company for supervisors at this time and discharge crews have to get the card signed off. It was mandatory to do the training every year. When a Transfer of Undertakings took place the respondent considered the appellant to be still employed by the respondent.

In cross-examination witness stated that in his letter dated 17th December 2007 he asked the appellant to ring him but he made no effort to contact the company. He did not think of writing to the appellant in January, as his brother who works for the respondent did not know where the appellant was and he did not respond to a text message on 3rd January from OM.

Determination:

There was a history of conflict between the appellant and respondent following a change in rostering, which deeply dissatisfied the appellant. This dissatisfaction led to the appellant turning down work in the shipping discharge area and making himself available for terminal security work only.

His selectivity with regard to the type of work, which he was prepared to do led to the meeting of 9th November, at which the appellant said he was told he was "no longer suitable." The appellant subsequently booked a holiday to the USA at Christmas, the busiest time of the year in the industry, without following the procedures the respondent said were standard for arranging leave for holidays. This action led to the letter of 17th December, which waseffectively a letter of dismissal, and was taken as such by the appellant.

The evidence of the respondent was that the appellant was a valuable and experienced worker, which the company did not want to lose. Indeed the letter of 17th December makes it quite clear that the company hoped to resolve the issue before the appellant went on holidays. Equally, it is clear that the dismissal might have been avoided if the matter had been adequately addressed after the appellant's return from his Christmas holiday abroad.

A training course for supervisors was to take place on the 20th, 22nd and 23rd of May 2008 and the appellant was requested, by letter dated the 9th May to contact the company urgently so as to be included on the course. The appellant did not contact the company to take up the course offer. Having heard the evidence from both parties the Tribunal is unanimously of the view that there was a dismissal in this case and such dismissal was unfair.

The Tribunal is of the view however that any loss attributable to the dismissal, ceased as of the date of the course and that the actions of the appellant contributed significantly to his dismissal.

Accordingly the Tribunal upsets the Rights Commissioners decision and awards the appellant the sum of €6,000 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)