EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:	**CASE NO.**
EMPLOYEE	UD400/2009

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

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr D. Herlihy

Members: Mr J. Killian
Mr T. Kelly

heard this appeal at Limerick on 21st April 2010

Representation:

Appellant: Mr Ger Kennedy, SIPTU, Connolly Hall, Churchwell, Tipperary Town, Co. Tipperary

Respondent: Mr. Tim O'Connell, IBEC Confederation House, 84-86 Lower Baggot Street, Dublin 2

This hearing came before the Tribunal by way of an appeal from a former employee against a recommendation of a Rights Commissioner reference number r-060307-ud-08/PB

The determination of the Tribunal was as follows:-

Appellant's Case
The appellant commenced employment as a static security guard with the respondent in 1985. In 2006 the appellant was informed by the area manager that he was being transferred from his current site on the basis of a complaint. The appellant was not made aware of the nature of the complaint and was given no indication of the source of the complaint.

The appellant was asked to move site in less than one week. The appellant acknowledged the respondent's right to move him but on this occasion did not accept the offer of the alternative location because it would have meant pleading guilty to the unspecified complaint and moving to the new location would mean his acceptance of punishment for same.

The appellant insisted he was available for work at all times and he contacted his union representative with a view to resolving the issue. This led to a series of correspondence between the union and the company. The appellant felt that if natural justice were to prevail he would have

been given an opportunity to respond.

The appellant told the Tribunal that further correspondence took place between the company and the union and a referral went to the Labour Relations Commission. This resulted in a conciliation conference but the subsequent proposal from the LRC did not lead to an agreement. At the time of the conference a monetary offer was made to the appellant which he rejected.

The appellant in the form of his representative made an application to have his case heard in a full Labour Court hearing. The conciliation officer decided not to refer the case to the Labour Court and replied to the appellant in a letter dated 24th October 2007. "*Having considered the submissions of the parties the Commission considers that the offer made was reasonable in the circumstances and it is not clear as to what benefit would accrue by referring this case to the Labour Court at this point".* At this stage the appellant was out of work 13 months.

The appellant told the Tribunal that he suffered ill health in May 2007. He was under the care of a doctor and was forwarding his medical certificates to the company. The company advised him to stop sending them the certificates and he duly complied.

When the appellant was denied access to the Labour Court he lodged a constructive dismissal complaint against the company. This led to a Rights Commissioner hearing, which took place on 13th October 2008, at which the company furnished a submission. It was at this stage that the appellant became aware of the specifics of the complaint that resulted in his transfer. However, the complaint remains unsubstantiated because he was not made aware of the source of the complaint.

The appellant told the Tribunal that his complaint to the Rights Commissioner for constructive dismissal was unsuccessful. The appellant is prepared to go back to work for the company.

Cross Examination

During cross examination the appellant did not dispute any moves that had taken place prior to this one and agreed that during the course of his employment with the respondent he had been moved from one site to another several times. However, he could not say for definite if these moves were made at the request of the customer.

The appellant confirmed that in 2000 he brought a case under the Industrial Relations Acts, 1969 and 1990 against the respondent to the Labour Relations Commission against a particular transfer. The subsequent Rights Commissioner's recommendation, dated 17th July 2001, stated that the appellant should accept that the company was entitled to transfer him when it did.

The appellant agreed that during September and October 2006 the respondent attempted to roster him for work and at this stage he requested redundancy. However, a redundancy situation did not exist, which the appellant accepted but he was not prepared to move to a different site based on an unsubstantiated complaint.

The appellant confirmed that he was offered work on an alternative site but the hours of work were to be different than those he currently worked, and these did not suit. The appellant did not revert to the company as requested in the letter of 30th April 2007 because he wanted communication carried out through his representative.

The appellant agreed that at no stage did he commit to writing his query about the customer's

complaint, that resulted in his transfer, and request the nature of it. He felt it should have been set out for him. The appellant told the Tribunal that he was not familiar with the grievance procedure.

Respondent's Case

The Tribunal heard evidence from WG, the Business Support Director, with the respondent. Prior to 2004, WG had responsibility for 200 contracts. WG explained to the Tribunal that contracts with customers typically run for a period of one year. They are awarded based on rates for service and the service provided. The contracts are customer driven.

WG told the Tribunal that if a customer requested the removal of a guard, the company would oblige that request to prevent the customer taking the ultimate sanction and moving their business to another security company. The company would ask the customer the reason for the request before deciding which site to move the guard to. However, the customer may inform the company that the guard "just doesn't fit the bill". WG explained that employees may be moved for rostering reasons and therefore there would not be a reason to give to the employee.

WG made reference to the Rights Commissioner recommendation, dated 17th July 2001, in respect of a case taken by the appellant under the Industrial Relations Acts, 1969 and 1990. This recommendation upheld the company's right to move an employee. The appellant appealed this recommendation to the Labour Court. The Labour Court upheld the recommendation of the Rights Commissioner.

Cross Examination

During cross examination WG explained that if a contract is lost and there is no other site available to move an employee to then a redundancy situation would exist and that employee would no longer be employed by the company. WG confirmed that it was not normal for a redundancy situation to arise. He agreed that under the Transfer of Undertakings legislation an employee could move to a new employer and carry their service.

WG confirmed that when it is necessary to move an employee to another site that employee is entitled to formally request the reason for the move. WG accepted that the company normally operates under the terms of natural justice.

The Tribunal heard evidence from JF, Director of Human Resources with the respondent company since March 2003. JF was advised by the area manager in Limerick that a request had been received from a customer to have the appellant removed from his duties on their site. A decision was made to move the appellant and the appellant refused to accept the new assignment. JF told the Tribunal that he did not receive any correspondence from the claimant or his representative until the conciliation conference in the Labour Relations Commission.

JF refuted that the company offered the appellant €5,000. The company had a position available for the appellant and therefore would not have made such an offer. JF told the Tribunal that a previous request from the appellant for redundancy had been refused because there was work available for the appellant and therefore a redundancy situation did not exist.

JF told the Tribunal that the appellant's contract stated that he was employed as a guard in the Limerick area and therefore the company were entitled to move him within the Limerick area.

The respondent wrote to the appellant and asked him to accept within 10 days. The appellant did not respond to this but did continue to submit medical certificates. The appellant's hours of work and rate of pay on the new site were to remain the same. However, the shift pattern would change from 44/40 to 48/36.

JF wrote to the appellant on 19th February 2008 and asked him to confirm his position. This arose from notification the respondent received about a claim for Unfair Dismissals lodged with the Rights Commissioner Service in respect of the appellant. JF contacted the appellant's representative who informed him that the appellant was not accepting the offer of employment and was pursuing a case for constructive dismissal.

JF told the Tribunal that the appellant had raised no formal grievance with the company and he had moved site on several occasions.

Cross Examination
During cross examination JF agreed that there is a duty of care to employees. The company was requested to move the appellant and did. The appellant was being asked to move to an adjoining site on the same industrial estate. JF said the appellant was not being disadvantaged in any way. JF explained that there is a constant need to move around staff to maintain an experienced balance and meet with customer requirements.

JF told the Tribunal that no specific complaint was raised by the customer in relation to the appellant and therefore there was nothing to investigate. In it's submission to the Rights Commissioner the respondent stated that "*In June 2006 the customer raised a number of issues with respect to the appellant with ***** management including his general attitude to staff and his apparent failure to 'gel' with the team. They requested he be removed from their site."* If a customer requested that a guard be moved the respondent would comply because the customer is entitled to control of the people that come on to their premises. JF explained that it is not unusual in the security industry for a customer's contract to stipulate that they have the right to pick the guards.

JF confirmed that the appellant was provided with a period of paid leave for a couple of days prior to the scheduled move to allow the move to take place. The appellant was being assigned to another important contract and JF explained that the company would not place him on this contract if they did not think he was capable. This paid leave was discontinued because the respondent could not pay indefinitely while the appellant refused to accept a reasonable instruction.

The appellant was informed to stop submitting medical certificates after the respondent received notification of the unfair dismissal claim with the Rights Commissioner.

Determination
Having carefully adduced all of the evidence presented, the Tribunal determines that the company were within their rights as an employer to move the appellant from one location to another in line with the contract held with the relevant client.

The Tribunal upholds the recommendation of the Rights Commissioner reference number r-060307-ud-08/PB. Accordingly, the appellant's claim under the Unfair Dismissals Acts 1977 – 2007 must fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)