EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:	**CASE NO.**
EMPLOYEE - appellant	UD1514/2009

against

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms S. McNally

Members: Mr D. Hegarty
Ms. P. Doyle

heard this claim at Cork on 28th July and 18th, 19th October 2010

Representation:

Claimant: Mr Kieran Hughes BL instructed by
Fiona Foley & Company, Solicitors, Barracks Square, Ballincollig, Co Cork

Respondent: Mr Conor Power BL instructed by
McCann Fitzgerald, Solicitors, Riverside One, Sir John Rogerson's Quay, Dublin 2

The determination of the Tribunal was as follows:

Preliminary Issue

The legal representative for the respondent submitted that the Employment Appeals Tribunal did not have the jurisdiction to hear this case. He explained that the claimant had lodged his claim with The Industrial Tribunal in Northern Ireland, before he lodged it with the Employment Appeals Tribunal. The claimant lodged his claim with the Industrial Tribunal on the 12 April 2009, while his application to this Tribunal was submitted on the 10 July 2009. Therefore the Industrial Tribunal seized jurisdiction of the case under "Brussels 1 regulations". He referred to Article 27 of "Brussels 1 regulations", *"Where proceedings involving the same cause of action and between the same parties are brought in the courts of different member states, any court other that the court first seized shall of its own motion stay proceedings until such time as the jurisdiction of the first court seized is established" 2." Where the jurisdiction of the first court seized is established, any court other than the court first seized shall decline jurisdiction in favour of that court".*

The claimant's representative maintained that this application had been lodged without prejudice to Northern Ireland and was subsequently withdrawn. The claimant had lodged it in Northern Ireland as the time limit there is three months and at this point he was unsure as to how he was going to proceed with his claim. The Industrial Tribunal accepted that the application was lodged without prejudice. By withdrawing the case from the Industrial Tribunal the claimant had unsealed this Tribunal.

The Tribunal deliberated after both sides had argued their position. The Tribunal noted that the claimant had lodged his application to the Industrial Tribunal without prejudice and had withdrawnit and decided to proceed with his claim in the Employment Appeals Tribunal. The claimant lodged this application to protect his interests, and the Industrial Tribunal was aware of the claimant's application to this Tribunal and had raised no objection to this. The Tribunal claimedjurisdiction of this case and proceeded to hear the substantive issue pursuant to Article 31 of theBrussels 1 Regulations (Council Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters) which states " *Application may bemade to the courts of a member state for such for such provisional, including protective measuresas may be available under the law of that state, even if, under this regulation, the courts of anotherMember State have jurisdiction as to the substance of the matter."*

Respondent's Case

While the respondent has no legal or business premises in the Republic of Ireland it nevertheless employed a regional sales manger and a team of up to five sales staff to promote, market and sell its products in that jurisdiction up to January 2009. That manager and his staff all lost their jobs by that date and their roles and functions are now conducted on behalf of the respondent by a distribution centre and agency. The role of those former employees, which included the claimant, was to persuade personnel in the medical professions to purchase and then prescribe the respondent's products to patients. Up to 2007/08 this operation was commercially successful. When that situation adversely changed then the respondent reacted in such a way that it eventually resulted in the disbandment of that entire team. The respondent was part of a larger group of companies and that group's disciplinary policy and procedure was submitted to the Tribunal as applicable in this case.

Part of the general principles of that policy read as follows:

Management can choose to deal with minor instances of misconduct and initial unsatisfactory levels of performance informally. If a problem continues or management judges it to be sufficiently serious this procedure will apply.

The Company will not dismiss any employee for a first offence, unless the offence amounts to gross misconduct in which case the employee will be dismissed without notice or pay in lieu.

The company will not take any formal disciplinary action under the procedure without:

- Having carried out a prompt investigation. The company will inform the employee whether any meeting he or she is asked to attend is investigatory or disciplinary.

- Giving or sending the employee a letter setting out the complaint made against him or her and possible outcomes of the disciplinary meeting.

- Providing the employee with relevant evidence before the meeting and giving the employee sufficient time to review this.

- Giving the employee, together with any permitted companion a reasonable opportunity to consider his or her response to that information before the disciplinary meeting is held.

The respondent listed up to twenty-five separate offences that it considered gross misconduct. These included but were not limited to the use of a mobile phone while driving a company vehicle without the proper use of a hands free device. More relevant to this case were the following:

Fraud or any other offence committed against the Company, which would be a breach of the law

Falsification of records/clock cards/documentation/expenses/overtime etc

Inaccurate or fraudulent recording of financial transactions.

For several years up to his cessation of employment the claimant held the position of regional sales manager for the Republic of Ireland. In holding that position he had the use of a car provided by the company. Apart from a daily allowance for subsistence the claimant also submitted receipts for fuel and other items incurred in the course of his business on his expense reports. While road tolls applications were allowed no receipts were required to support those reported expenses. The claimant also used the vehicle for personal use for which he was responsible for the costs incurred.

In the absence of premises the claimant's residence was also considered his office. From time to time he personally and physically reported to the respondent's office some four hundred kilometres distance from his residence. For a number of years up to 2007 he seldom undertook door-to-door sales but attended to supervisory and administrative tasks. However, that situation changed and the claimant found himself back in the front line of selling by that year. The claimant neither had a written job specification list and his conditions of work were described by the senior vice president of sales and marketing as fluid and flexible

That senior vice president of sales and marketing outlined to the Tribunal the background and circumstances that led to the claimant's dismissal for gross misconduct. In denying that wrong or ill-judged products were supplied to the claimant and his team in 2007/08 the witness accepted that sales and income generated from their products had performed "not well" and by early 2008 were "flat". In considering and analysising that changed situation the respondent decided, among other things, to take a closer look at the activities of the claimant. The poor sales performance was the "trigger" for an investigation. Up to then the witness who had known the claimant in excess of twenty years never had reason to question his commitment and loyalty to the company.

The company wanted to satisfy itself that the claimant was conducting and performing his business duties in their best interests. It was concerned that its falling sales could be connected to falling levels of activity and commitment by this employee among others. In that context a tracking device was place on his company car in the spring of 2008 to record its movements. The dates were 25 March and 10 April 2008. The claimant was not informed of that development.

The witness was concerned with what the tracking device recorded especially in the light of, and in

contrast to, what the claimant submitted in his expense reports for those dates. That tracking device showed that the car remained in the greater Cork City area on those days while the signed expense reports stated the claimant had travelled to Limerick and Kilkenny on those occasions. There were clear inconsistencies and discrepancies that needed further attention. The respondent engaged the services of a risk management company for surveillance on the claimant. The respondent highlighted two particular days, 9 May, and 9 June 2008, as demonstrating further conflict between what the surveillance observed and what the claimant stated in his expense reports.

The expense report stated that the claimant travelled from Tipperary to Cork on 8 May while the surveillance team reported that the car did not move that day apart from a minor local outing. The surveillance team also recorded that the car and claimant remained either at or close to his residence on 9 June 2008. The claimant's submitted expense form for that day stated he was in Kilkenny that day.

At no time prior to or during this tracking and surveillance was the claimant notified of those operations. In addition his submitted expense reports were accepted and approved for payment. The respondent contended that to have not done so would have compromised their ongoing investigation, alerted not only the claimant but also others to those covert activities and would have likely led to changes in their behaviour so as to dilute a case against them.

The respondent, in the person of its acting human resource manager, wrote initially to the claimant on 13 November 2008 inviting him to a disciplinary hearing. That letter contained a brief summary of evidence linked to the four dates mentioned above and indicated he would have to explain that situation. The claimant was also informed that the witness would conduct this meeting and its purpose was to discuss allegations of breach of contract and fraud and that there was evidence to suggest that certain diary details he submitted were inaccurate. The period in question was between March and June 2008. That letter also contained this sentence: *This is considered by the company as gross misconduct and may result in your summary dismissal.*

By the time of that hearing on 21 January 2009 all the sales team operating in the Republic of Ireland had either been dismissed or resigned. The witness, the acting human resource manager, the claimant and a former colleague attended that hearing. The meeting was adjourned a couple of times for breaks and consideration, the final adjournment being at 17.50. Some fifteen minutes later the witness returned and informed the claimant, with regret, that he was being summarily dismissed. The reason for that decision as stated on an official form was for fraudulent claims of expenses.

During the course of this disciplinary hearing the claimant was provided with one page of the risk management report based on their surveillance operations. He said that he was also handed maps linked to those movements. He in turn had his diary entries for the days in question together with copies of emails he worked on for some of those days. Other documentation referred to at that meeting included further detailed diary lists, which included people and places.

The witness accepted that the total monetary fraud that the claimant committed against the respondent amounted to €10.80. However, he did not accept the claimant's explanation that he erred in the recording of his expense reports. The senior vice president of sales and marketing "stood over" the respondent's conduct and findings in this case.

A formal letter of dismissal issued the next day written by the acting human resource manager confirming that decision. That letter informed that claimant that the disciplinary hearing had been

arranged to discuss allegations of fraud and breach of contract against him. The claimant exercised his right to appeal that decision.

The group's human resource manager initial involvement in this case occurred in late January 2009 when he read and wrote notes on an appeal letter from the claimant. Together with another senior colleague this witness presided at an appeal hearing on 19 February. This duo or panel concluded, following full consideration of the case, to uphold the original decision to dismiss the claimant. That full consideration involved addressing several points raised by the claimant during this process. In writing to the claimant to confirm the outcome of their deliberations the witness described as satisfactory the way evidence was given to the claimant prior to and during the disciplinary meeting. That letter explained that the time gap between the initial investigation and the disciplinary hearing as a logistical issue.

In acknowledging there was no human resource policy on surveillance the witness indicated that the unusual circumstances of this case merited this particular method. He rejected the claimant's assertion that normal management procedures were not utilised in this case but confirmed that the claimant did not participate in the investigation process. He said that that the allegations were based on the claimant's behaviour and not on his performance. The witness justified the respondent's refusal to allow the claimant bring a solicitor to that disciplinary meeting. The company acted in accordance with its own guidelines in that respect.

This manager told the Tribunal that this case went deeper than toll expenses as the claimant benefited in both time and money from his deception. However, had the claimant been working on the days in question then there had been no time fraud. Trust and confidence in him as an employee had now gone and his behaviour in question amounted to gross misconduct. The claimant did not offer or submit contrary convincing evidence to show that the tracking and surveillance records were somehow inaccurate or wrong. His diary entries were unreliable and clearly did not reflect reality. In commenting on the line in a letter to the claimant that this is considered by the company as gross misconduct and might result in your summary dismissal- the witness viewed it as a possibility as distinct from a conclusion.

The acting human resource manager defended his refusal to allow a solicitor to attend the claimant's disciplinary meeting on the grounds on the grounds of statutory provisions. However, he was unable to identify such a statue and then referred to a code of practice not applicable in this jurisdiction to support that decision. The disciplinary hearing took place in the Dublin region. According to the respondent's procedure an employee had the right to be accompanied by a fellow worker or trade union official. The witness agreed that the respondent had gone outside its own procedures in allowing a person other than that described to accompany the claimant at his disciplinary and appeal hearing.

Claimant's Case

The claimant commenced employment with this respondent in the summer of 1985. He was subsequently appointed to the position of regional manager for the Republic of Ireland. While in that role he supervised up to five staff who were undertaking direct selling and marketing to customers and potential clients. The main function of that team was to reach certain sales targets and "to drive" the respondent's products in the market place. Both the claimant and his team were

judged on their previous performances, which up to 2007/08 were regarded as successful.

That situation negatively changed around that time as the respondent's licence for the selling of certain goods expired and was replaced by a tablet shaped as distinct from a liquid based product. The claimant explained to the Tribunal that his experience and outside research showed Irish customers preferred the liquid type of medicine. While he had "heated" discussions with management about that issue this tablet type product was launched on to the local market. Indeed the respondent had invested heavily in that product and since it lacked a "unique selling point" it was no surprise to the witness that it did not sell as well as earlier products or as the respondent had anticipated. That scenario, not unsurprisingly, resulted in lower sales for the staff involved and higher concern on projected targets and profit for the respondent. It also eventually led to the cessation of employment both for the claimant and his sales team.

The witness indicated he was casual in filling in his expense reports. He had been filling in those forms since his commencement with the company. That casualness included filling in those forms retrospectively and as it turned out not very accurately. He had to submit fuel, accommodation and some entertainment receipts on those reports. However, the expense reports listed above were signed and submitted by him no more than three weeks from their actual dates. He accepted both to the Tribunal and the respondent that the information contained in those reports regarding tolls, locations, dates and places were false. The witness maintained that this wrong information was submitted in error. In addition he admitted that the diary entries for those days were also wrong and commented that he was "not whiter than white" regarding his reports and diary entries.

The respondent never accused the claimant of fraudulent behaviour as regarding taking payments for time he was not working on their behalf. Apart from the toll payments he did not financially gain from his expense report submissions.

From the initial placing of the tracking device on his company car up to receiving a letter from the respondent in November 2009 the claimant was unaware that he was under investigation by the company regarding his performance or behaviour. No mention was made of such allegations when he met management earlier than month nor was he subjected to an annual appraisal also due around that time. He was so upset at the allegations against him that his health deteriorated to such an extent that he lost weight and was declared unfit for work for several subsequent weeks. The claimant understood by the contents of that letter that he was to be dismissed when the disciplinary meeting convened. The witness saw the respondent as his "family" which he had given his life to.

While the claimant was aware of the allegations being put to him prior to the disciplinary meeting he nevertheless felt disadvantaged going into that meeting as he had not been furnished with a complete set of documents used by the company in the case against him. Besides, he had concluded by then that the "die was cast" as by that stage all his colleagues' employment with the respondent had been terminated. He only received sight of a single page of a report together with maps at that meeting. Nevertheless, the witness accepted that the company's case had a basis to it.

The witness reflected that in hindsight he did not present his case to the respondent as well as he could during the disciplinary and appeal process. He also voiced his opinion that he should have given more attention and respect to the filling in and submission of his diary and his expense reports. He also viewed the respondent's operation against him as unfair and based on stealth as a means of getting rid of him.

Determination

The Tribunal having considered the evidence presented by the parties, legal submissions and documentation furnished, find that the procedures used by the respondent rendered the dismissal unfair under the Unfair Dismissal Acts, 1977 to 2007 in that:

1. Surveillance equipment was used without the knowledge of the claimant.
2. The letter sent by the respondent to the claimant on the 13th of November 2008 did not sufficiently set out the allegations made against the claimant.
3. The respondent failed to provide the totality of the incriminating evidence collected in advance of the Disciplinary Meeting held on the 21st of January 2009 to give the claimant a sufficient and reasonable opportunity to consider the contents of the evidence in accordance with the General Principles of the Company's Disciplinary Policy and Procedure which states " *The company will not take any formal disciplinary action under this procedure without: …… providing the employee with the relevant evidence before the meeting and giving the employee sufficient time to review this"*
4. Insufficient time was taken by the disciplinary panel in reaching their decision to dismiss the plaintiff, the decision having been notified verbally to the claimant, 15 minutes after the conclusion of the Disciplinary Meeting.

However the Tribunal is satisfied that the claimant made a significant contribution leading to his own dismissal.

The Tribunal awards the sum of €30,000.00 as compensation to the claimant under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)