EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	CASE NO.
EMPLOYEE	UD2252/2009
against	
EMPLOYER	
under	

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey BL

Members: Mr. T.P. Flood
Mr. J. Flannery

heard this claim in Dublin on 20 January 2011 and 17 June 2011

Representation:

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Claimant(s):
Ms. Kiwana Ennis BL instructed by
Martina Larkin, O'Brien Ronayne, Solicitors,
5a Main Road, Tallaght, Dublin 24

Respondent(s):
Mr. John Barry, Management Support Services (Ireland)
Limited, The Courtyard, Hill Street, Dublin 1

The determination of the Tribunal was as follows:-

The claimant, a plumber, alleged that he had been unfairly dismissed on 19 May 2009 after he had been hitherto employed by the respondent since March 2008. The respondent contested the allegation.

In an opening statement at the Tribunal hearing the respondent's managing director (hereafter referred to as MD) said that the respondent was in the water-cooler business and that the claimant had joined as a sanitiser but, in a subsequent change of duties, was asked to do water filters. The claimant had a review in October 2008. There were no issues with him then. In May 2009 the respondent's operations manager (hereafter referred to as OP) visited a site and found the claimant's sanitisation to have been bad.

Giving sworn testimony, OP said that he did random site visits. He went to the Dublin 15 site of a client (TG) and found that the coolers were not to the desired standard. He phoned the claimant and asked to meet him. The claimant was not wearing safety boots as required for all sites. OP took the

claimant to different coolers. The claimant got a verbal warning. OP had felt that the exteriors of the coolers had not been cleaned correctly.

There were other issues subsequently. OP phoned a supervisor at a client site and asked for comments. The client was unhappy with the cleanliness of the coolers. This was May 2009. OP got other complaints regarding coolers at a major hotel (SHL). He asked to meet the claimant and gave him a written warning, due to customer complaints, on 12 May 2009. The customer was unhappy with the level of sanitisation.

OP explained to the Tribunal that all exterior cooler-parts had to be clean. The respondent was told that its customer care representative was not to be sent again. The claimant requested a grievance meeting and requested MW as a witness for this meeting. The respondent had given the claimant the use of a vehicle (for personal as well as work use) but had had to revoke this. The claimant felt that he had been put under pressure. The revocation concerning the vehicle was done at the 12 May 2009 meeting. OP told the Tribunal that taking back the claimant's vehicle was just a change in the respondent's policy. The vehicle was now to be returned at the end of each day.

The claimant was the only qualified plumber in the respondent. Sometimes on would not know what equipment was needed. The claimant would be able to purchase equipment but would sometimes have to wait four weeks for all to be settled. The respondent understood the claimant's position and said that it would address the issue.

OP asked MW to leave the grievance meeting because he felt that having MW present at the claimant's dismissal was unfair. There had been a meeting on 15 May 2009 regarding a major client (BOI).

OP told the claimant that his lack of action regarding coolers had resulted in the respondent being at risk of losing the BOI contract with the consequence of jobs with the respondent being in jeopardy. The claimant was, therefore, dismissed. This ended OP's involvement.

OP told the Tribunal that SHL had been discussed with the claimant and that the claimant had been shown how to work on the coolers. He had asked the claimant for an explanation but none was given. Neither had the claimant reported client unhappiness. The respondent had built a reputation for doing its work well. It took about fifteen minutes to sanitise a cooler. All cleaning agents etc. were provided. OP stated to the Tribunal: "To the letter of the law I can say we did not dot every "i" and cross every "t". However, he said that the claimant's work had gone from bad to worse. Complaints were received from big customers and the claimant could not continue. The claimant got a verbal warning, a written warning and dismissal. OP felt that the claimant was putting the respondent in jeopardy. The claimant was replaced by a new recruit. The respondent had to do spotchecks on everything. Work had to be done to the required level. As well as having procedure for a verbal warning and a written warning the respondent did reviews with employees. It was not just that an employee was meant to keep going until he got into trouble. The claimant did not succeed in reversing his dismissal by an appeal.

Giving sworn testimony, MD (the respondent's abovementioned managing director and founder) said that he had been involved in recruiting the claimant who was a plumber. In 2003/2004 the respondent had started to expand into the mainsfed market and felt that it needed a plumber's level of expertise. MD and CRL (agent for BOI) wanted to implement a migration from bottle-top coolers to mainsfed coolers. BOI was such a big customer that it would be unprofitable for the

respondent to extend nationwide without BOI's custom.

The respondent hired people like the claimant to send to BOI. The claimant, a qualified plumber, was fully trained in sanitisation. The respondent did not have any sales representatives. The face of the respondent was the sanitiser.

MD had a review with the claimant who had the ability to do the job. The claimant also trained others with whom there was no issue. MD was aware of the December 2008 warning to the claimant (for not sanitising coolers to the required standard and for not wearing safety boots).

The respondent suffered the loss of about one fifth of its business. The Tribunal was referred to a 20 February 2009 e-mail request by a customer for the servicing of all six of its water coolers. The Tribunal was then referred to a 27 March 2009 e-mail with a similar request from the same customer. MD stated to the Tribunal that it was not normal to get a new request for sanitising within this period of time. There would then be a deficit to the respondent (in terms of overall costs and other work that could have been done).

The Tribunal was next referred to a 1 May 2009 request for service and cleaning of water dispensers alleging that they were in a very unsanitary state and requiring service "asap". MD stated that he had been very concerned about this. Visits to customers became unusually frequent (rather than twice per year which would be normal). As well as being aware of the claimant's December 2008 verbal warning MD was aware of a 12 May 2009 written warning from OP for not sanitising customer coolers to the necessary standard. This was stated to have been a repeated offence. It was also noted that the claimant had presented for work unshaven on 11 May 2009 which was a violation of his employment contract.

Referring to a meeting with CRL and BOI, MD said that its purpose was to discuss the respondent's attitude to an unacceptable level of service. MD was reminded that he had said that the respondent would be a one-stop solution and was told that the claimant was not allowed in any more from 15 May 2009. MD explained to the Tribunal that, if BOI was not happy, CRL (BOI's agent) "got it in the neck" and came back to the respondent for action. The respondent prepared an action plan. OP went out himself and did all the sanitisation. MD was made aware of the problem at SHL (the abovementioned hotel).

The respondent was losing customers and suffering a loss of business. It was very difficult to get new customers. OP said that his trust in the claimant was gone. The respondent did not know what other business would be lost.

The Tribunal was now referred to a grievance raised by the claimant:

In accordance with my Company Employee Handbook Chapter 6, Stage 1, and my work contract, I have asked for this meeting to air my grievance as I feel I am being unfairly treated by my Manager.

My Grievance is as follows:

> A. I have been issued two stages of disciplinary procedures. A first verbal warning was issued to me on 8/12/08 over the phone and confirmation placed in my folder. I was not requested to attend a disciplinary meeting. I was never advised of my right to appeal. This is clearly a breach

of company guidelines as per the Company Employee Handbook (Chapter 7).

B. On or around the 8th May at a meeting I was informed I was to receive a written warning and maybe suspension. Days later, I was given an apology about this. Some days later I was handed a letter and told it was a written warning and again I was not asked to attend any disciplinary meeting prior to this or advised of my right to appeal. The retraction of the use of a company vehicle seems to be imposed on me as a punishment. Again, no reason was given to me for this action. My concerns over losing this privilege of taking home my van are that my working day will be shorter as I often start from home to travel to the country and will make my targets harder to achieve.

C. I have been asked on occasion to use my own money to purchase materials for the company to carry out my job and have to wait for up to 4 weeks to be reimbursed. I would request that, if I am to use my own money to purchase materials, that a proper system of reimbursement be put in place.

I ask that these disciplinary procedures be removed from my record, use of the company vehicle reinstated and proper training given to me so that I have a better understanding the standards you require as this action is the only feedback I have received in 14 months with the company.

MD stated to the Tribunal that the claimant's grievance had been addressed to OP. The claimant was the only employee who had a van. Vehicles were parked up nightly but the respondent had given the claimant more flexibility to take a vehicle home. Nobody else had a van to take home. The removal of this right would have happened anyway; the economy was "dire". Referred to the fact that the claimant had received a written warning before dismissal, MD said that "the decision would have been made anyway".

The Tribunal was next referred to an undated letter from the claimant to MD stating that the claimant, after fourteen months' employment with the respondent, had been dismissed at the end of a recent grievance meeting with his manager and wished to appeal the decision.

However, the Tribunal was referred to a letter dated 28 May 2009 from MD to the claimant confirming the claimant's dismissal. The letter stated that the claimant had requested a hearing with OP, that the meeting took place on 19 May 2009 and that, during the hearing, OP brought to the claimant's attention several additional complaints which the respondent had received, since the 12 May warning letter, in relation to the claimant's poor work performance. One complaint, in particular, had necessitated the attendance of both OP and MD where the customer expressed grave concerns about the poor sanitation service levels carried out by the claimant in a number of their office locations.

The letter stated that, in relation to the claimant's letter received on 25 May 2009 appealing his dismissal, the claimant had not stated the grounds for an appeal to be heard as was required in accordance with the employee handbook.

The letter concluded by stating that the claimant's dismissal was due to his failure to improve his standard of work after receiving the appropriate warnings and the fact that his continually poor work performance had resulted in the respondent being placed in a precarious position with its

customers.

MD told the Tribunal that he had not wanted the respondent to dismiss someone and look for someone else. The claimant had alleged inadequate training but he was a qualified plumber who had held down the job with the respondent for many months. The claimant had given no explanation or excuses as to why coolers had not been clean. He just referred to procedures. The claimant had trained people himself but did not give MD reason to change the dismissal decision. The decision was upheld on the basis of what OP had told MD and the complaints that the respondent had got. The situation was unacceptable.

MD accepted that the respondent had not followed procedures but contended that the respondent had been left with no option. The respondent had wanted to expand the market for its business but it was down about thirty per cent since 2008/9 The company's workforce had been twenty-two or twenty-three and was now seventeen. All had taken a ten per cent salary cut in 2010. It was now necessary to do more travel to customers because there were less customers.

RS (who had been some three years with the respondent) gave testimony to the Tribunal. He distributed water and sanitised coolers. He visited BOI premises in Kilkenny. He went there to clean because it was dirty. It looked like it had been three or four months since the last cleaning. He could not believe that sanitisation had been done four weeks earlier. He saw no evidence that tea or coffee had made the coolers dirty.

MW (who had worked with the respondent for about eighteen months) gave testimony to the Tribunal. He had delivered water and cleaned coolers. He had been with the claimant on 19 May 2009 but was only in the meeting for less than five minutes. A few days earlier, the claimant had asked him to come to a meeting. The claimant was going to give OP a list of things about which the claimant was not happy.

MW told the Tribunal that when he had sanitised coolers he would find "all sorts" including build-up of tea and coffee.

Giving sworn testimony, the claimant said that he started with the respondent in March 2008. He was a sanitiser/plumber who delivered water. The training he received was that OP (the abovementioned operations manager) brought him to a warehouse and showed him water-coolers. All of his training was on that day. Later, someone was to show him mainsfed work but that person was not sure about it himself.

In December 2008 the claimant got a verbal warning. OP phoned saying that he was not happy with cleaning done and that the claimant had not been wearing safety boots. The next day, a written copy was put on the claimant's folder.

Employees were given a scrubbing pad. OP said that he could see that the claimant had made an effort but that it was not good enough.

The next issue concerned client premises in Kilkenny. The claimant got a call to see OP who said

that he had got a complaint about Kilkenny. OP told the claimant that he would probably get a written warning. The claimant went to check all the coolers again. He also got an on-site manager to check. They saw people putting tea and coffee in the water-cooler trays. The client (BOI) said that they would send an e-mail around about this.

The claimant told the Tribunal that sometimes a customer would come around and sign off on his work. Asked about late March, early April and May of 2009, the claimant said that tea and coffee were causing the issue.

The claimant phoned CK in the respondent's office to explain his position and to ask that OP be told. OP said that CK had told him what had happened, that he (OP) was sorry and that the claimant would not be getting a written warning. That was the Kilkenny issue.

The claimant had to leave in the van he used with the respondent. OP said that he did not have time to discuss the claimant's written warning.

The Tribunal was now referred to the claimant's abovementioned grievance. This was 19 May 2009. The claimant asked for MW to come in with him. The claimant gave MW and OP a copy of his grievance. OP did say that he would make sure that any expense-money due to employees would be reimbursed more quickly. Training was not discussed. OP said that he wanted to have a private meeting with the claimant. OP said that he was letting the claimant go. The claimant was in shock but said that OP should not have asked MW to leave. OP asked the claimant to leave in all property he had from the respondent. The claimant got up and left.

Regarding labels that the claimant had been alleged to have failed to put on coolers, the claimant told the Tribunal that he had been told that there was a spelling error on the labels and that he was not to put them on. The respondent had no confidence in his work. Customers complained that it took so long to fix a cooler.

The Tribunal was next referred to the claimant's grievance, appeal against dismissal and MD's letter to the claimant dated 28 May 2009 confirming the claimant's dismissal.

The claimant told the Tribunal that he had asked for a colleague (the abovementioned MW) in respect of meeting the respondent in May 2009 but the respondent said that another staff member (the abovementioned CK) would sit in. MD and OP were sitting opposite the claimant but the claimant asked that OP not be there because OP had dismissed him. MD agreed and asked the claimant for his appeal grounds. The claimant made reference to tea and coffee being put into water-cooler trays. At this point in the Tribunal hearing the respondent's representative said that this had not been put to MD (something which the claimant's representative accepted) but did not request that MD be recalled to deal with the tea-and-coffee point.

Resuming his direct evidence to the Tribunal, the claimant said that MD had said that he would respond to the claimant in writing.

Asked to give his opinion as to whether he had been guilty of gross negligence, the claimant replied that he disagreed, that he would see his calls through and that it had all started from the Kilkenny issue. Asked if there had been performance issues, he replied that this had been only after his grievance.

The claimant stated that he looked for jobs straight away after his employment with the respondent. He was "on the dole" for three months. A friend's girlfriend got him a job with a multinational for some eight months. He subsequently tried to get a PSV licence to do chauffeur driving but he "could not get the test". He started a job in Naas at the beginning of March 2011. He now earned eighteen thousand euro per year. With the respondent he had earned twenty-six to twenty-seven thousand euro (and commission) each year. It was submitted that he had incurred a financial loss of some €32.5k since his May 2009 dismissal from the respondent.

Determination:

There was conflicting evidence regarding the claimant's performance but the respondent was very lacking in procedures and did not establish that it had handled the matters correctly and carefully. It was not established that the respondent received customer feedback with maximum accuracy and promptness. There was no real clear evidence against the claimant who was quickly dismissed without properly-established certainty as to the degree to which he might or might not have been liable to criticism.

On the balance of probabilities, the Tribunal unanimously finds that it was not established that there were substantial grounds to justify dismissing the claimant. Allowing the claim under the Unfair Dismissals Acts, 1977 to 2007, the Tribunal decides compensation to be the appropriate redress in all the circumstances of the case and deems it just and equitable to award the claimant compensation in the amount of €32,500.00 under the said legislation.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)