EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	**CASE NO.**
EMPLOYEE	MN444/2010
- claimant	UD516/2010

against
EMPLOYER

- respondent

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr D. Hayes BL

Members: Mr. R. Prole
Ms. A. Moore

heard this claim at Dublin on 5th November 2010
and 15th March 2011
and 16th March 2011

Representation:

Claimant(s) : Ms. Patricia Hill BL instructed by:
St. John, Solicitors, 14 City Gate, Lower Bridge Street, Dublin 8

Respondent(s) : Mr. Roddy Horan SC instructed by:
Byrne Wallace, Solicitors, 2 Grand Canal Square, Dublin 2

The determination of the Tribunal was as follows:-

Respondent's Case:

The Senior Human Resources Manager (CMcC) of Organisation gave evidence.

The claimant was originally employed by the respondent as an Airport and Fire Officer from 1989. In 2007 he decided he wanted to change his career to work in the HR department, after two attempts he was successful. His role was very different to his previous one and was on a secondment basis for a period of 5 years. The witness trained him in the new role and he also attended a course given by an American company. He was located in the Castlemoate House (CHB); the rest of the HR department was in the Old Central Terminal Building (OCTB).

In August He met with the witness informing her he wanted to expand his role. It was agreed and

his role changed to that of training and support. It was a permanent post, no 5-year secondment. The claimant preformed well. In late 2008 the claimant and his colleagues in the CHB were moved to the OCTB in order to unify the HR department to one location and to cut overheads. The claimant and a colleague complained of the move. One reason was that they had parking first outside the other building and they would now have to park in the public car park (for free).

In February 2009 all staff relocated to the OCTB, which was an open plan office. In March 2009 the claimant was absent on sick leave with a viral infection for a period of 3 weeks. On March 29th he attended a review meeting with the witness. His targets were down and admitted he was struggling in the role.

On April 1st 2009 he had a meeting off site with the witness. She told the Tribunal that he looked tired. He told her that "his body had gave in" but was okay to return to work. The witness wasabout to commence annual leave, told him who was covering her role and asked to meet him againon her return from leave. She asked the claimant was his sick leave stress related but told him theyspeak about it on her return.

In mid May 2009 the witness met the claimant briefly and asked how he was. He replied he was settling in. They again met on May 29th 2009 to get an overview on the 3 projects the claimant was working on. He was again struggling to meet targets, said he felt he did not have the skill set to carry out the role and was not happy. She replied that they would support his needs and to take a day off.

In early June 2009 he received a call from the claimant informing her that he was not coping and was attending his doctor. He was absent on sick leave from June 2nd to July 15th 2009 with stress. On June 16th the claimant was sent to the respondent's Occupational Health Assessor.

On July 17th 2009 she again met with the claimant to discuss the way forward. The claimant informed her he was suffering from work related stress and that his current skill set was not relevant to the role he was performing. He agreed he had received sufficient support from the respondent. He said that he would revert back to his previous role in Airside Training. The witness said she would explore redeployment.

On July 23rd a team event was held, the claimant did not attend. The witness rang the claimant and he arrived a half hour later.

On August 20th 2009 the witness emailed the claimant to compile a rating of his performance to date and his development plan. He was also informed they would discuss his absence record. The claimant was quite upset with the witness

The following day he emailed the witness. He stated his appreciation of the way his circumstances had been dealt with in a sensitive and professional manner. He documented the four periods of sick leave he had had in the previous 36 months.

The third issue he rose was the 2 options he been given – to remain in HR in the OCTB or move back to airside training. In respect of the first option he stated it was not an option as this was how he became ill in the first place. In relation to the second option he stated that would find it "unpalatable" to report to one of his former colleagues (ER) who was not even of management status. This person had the same position and status as the claimant. He stated that he would move back to Airside Training "under protest to facilitate the day to day operation while awaiting an

expeditious investigation and resolution to the matter." He finished by saying he had no doubt of ER's capabilities and would support him and the team.

A brief meeting was held on August 31st 2009 with the claimant. The claimant again stated he would only work to ER under protest. She later emailed him regarding the situation and reminding the support, advice and accommodation given to him in order his maximum performance. He was also informed to relocate back to the OCTB, as it was important for me "to review your progress on an ongoing basis."

On September 4th 2009 the claimant did not turn up to the OCTB but was in the CHB. The witness went there and asked to speak to him. He said that he was going to the OCTB. She told him she no option but to suspend him as he had not compiled was any reasonable requests.

On September 7th 2009 the Senior Group Head HR Manager (JMC) received correspondence from the claimant's union representative to arrange a meeting to discuss the claimant's issues with the respondent.

On cross-examination she stated she had made the decision to suspend the claimant after spoken to JMC in detail. She told the Tribunal that she felt the claimant had been given ample training, support and feedback regarding his performance. When asked she said she had no minutes of meetings.

The Occupational Health Assessor gave evidence. He met the claimant on June 16th 2009. The claimant had explained his employment history and stated that his health had deteriorated during the 2 years he was working in the HR department. He described a sense of discomfort "because he felt he may not have the appropriate skills or value set to carry out his duties". This was affecting his well-being and for that reason he was absent on sick leave. The witness found that the claimant was fit to return to work and advised discussions concerning the situation between the claimant and HR department.

He again met the claimant on October 9th 2009 to review the situation. He stated the claimant could present him with no objective independent advice that there was a health and safety risk. The witness stated in his report that he found it inappropriate to medicalise the issue and could not declare him unfit for work.

On cross-examination he said he did feel he had to contact the claimant's doctor.

The person who investigated (JT) gave evidence. He met the claimant on September 16th 2009, with his union representative, after he had been suspended by CMcC in refusing to cooperate to carry out specific instructions. The claimant had lodged a complaint with his union about the matter and felt he did not have to carry out the instruction until his grievance case was held. The claimant felt he should not have been suspended.

The witness told the Tribunal that he had met CMcC separately. The witness gave his recommendation in the matter. His recommendation was:

1. *(The claimant) should be lifted provided he carried he returns to carry out his duties in the OCTB immediately without prejudice to any future actions or decisions.*

2 *As it was a very serious issue to refuse an instruction from his Senior Manager,*

a disciplinary meeting should take place on (the claimant's) returning to work but no later than Monday 21st September 2009.

3 *In accordance with relevant procedures likewise (the claimant's) grievance should be referred to his Departments Head (name given) and he should then give his reply within 10 working days of this referral.*

4 *The findings of this report should be forwarded to (the claimant).*

On cross-examination he stated the claimant had requested notes from other meetings but he disagreed he should see them. He had a note taker and the claimant's meeting but not when he met CMC. When asked he said that he had not interviewed ER. He said that he felt his recommendation was fair. When put to him he was not aware had been under counselling and taking medication at the time. When asked he said that he based his recommendation on the fact the claimant was not medically unfit to return to work.

The Senior Group Head HR Manager (JMC) gave evidence. He was aware of the situation with the claimant. CMcC had spoken to him about it and it had been decided to suspend the claimant for failure to carry out an instruction. An investigation had taken place and he was given a copy of the recommendation. He said he was prepared to on all 4 points.

On September 23rd 2009 the claimant was requested to attend a disciplinary meeting in the OCTB on Monday 28th 2009 and advised he could bring a representative. However, the claimant became ill and could not attend. It was decided to request the claimant to again attend the Occupational Health Assessor on October 9th 2009. The disciplinary meeting took place and the witness wrote to the claimant on November 18th 2009. It stated that having heard what the claimant had to say and reading the medical reports and investigation recommendations he found that disciplinary action was appropriate. He was informed the witness there as there had been a complete breakdown in trust and confidence between the claimant and the respondent there were substantial grounds to dismiss him. These grounds included his gross misconduct and his own ability to carry out his contracted role with the respondent.

The witness said he felt the claimant had been treated fairly and had been given more than adequate training in his role.

On cross-examination he stated that he had become aware the claimant was suffering from work related stress in June 2009 when he received the Occupational Health Assessor's report. When asked he said the company now had a policy on stress.

The Head of Retail in the airport (GC) gave evidence. He heard the claimant's appeal for the decision of dismissal on December 22nd 2009. The claimant attended with his union representative. The claimant's representative did most of the talking saying the sanction was too harsh consideringthe claimant's impeccable record and 20 years service. The witness told the Tribunal that he hadnot been given a copy of any medical records. The claimant told the witness that it was on 1 offsituation and he felt he could fit into another role.

When asked he said that this was the first appeal he had ever heard. The decision to dismiss was upheld.

Claimant's Case:

The claimant gave evidence. He explained that he prior to joining the respondent in 1989 as an Airport Police Officer / Fire Officer he had 7 years previous service in the Defence Forces. He also gave extensive details of his education and courses he had attended over time. He became the Safety Representative for his colleagues and acted as liaison with unions and management.

In April 2007 he was successful in acquiring the 5-year post as Airside Trainer in the CHB. In 2008 his role changed to development and support for which he did not have the training. He asked for formal training and sourced a course he wanted to attend. As time passed he began to feel stressed because of his problems with the role.

In January 2009 CMC informed him they were all to be moved over to the open plan OCTB building. Airside Training was to remain in the CHB. The claimant told the Tribunal that problems started to arise. There was no privacy in the open plan area and all the staff were "scattered around". He could overhear private conversations of which he did not want or need to hear. If staff had to be met the only private room available was CMcC's.

As time passed he felt he needed to attend his doctor, as he was very stressed. He was fearful of the symptoms stated on his medical certificates and his doctor told him to speak to his Manager – CMcC. He met CMcC off site and spoke his stress and spoke of his values and the values in the HR department. He was prescribed medication in June 2009. CMcC went on leave and he met her on her return. They discussed the matter but he realised things had not changed. He decided to work for 1 week in the CHB.

The claimant told the Tribunal he was overwhelmed at how he felt and felt the only way to get out of work was to harm himself. He again attended his doctor, was prescribed more medication and advised to have counselling. The medical certificates he lodged stated occupational health. He again went on sick leave in July 2009 and attended the Occupational Health Assessor. He told him exactly what was going on and felt better that he was away from the environment.

He again met CMcC and it was agreed he would work in the CHB in the interim, there could be position arising in Health and Safety. He was to work in Airside Training and was asked he had a problem reporting to ER. He replied that it wasn't a workable situation to have someone of the same grade discipline you.

Various emails passed between the claimant and CMcC. He told CMcC he would work in Airside Training with ER but only under protest. He told the Tribunal that staff had worked under the protest in the past until issues were rectified. They discussed his redeployment and CMcC told him that his excessive sick leave could affect it. While working in the CHB CMC came to see him and asked him to withdraw his grievance. CMcC and ER went to a meeting and on their return they asked to speak to him. They told him it would not be pleasant. The claimant was suspended and he contacted his union.

He attended his doctor. He attended the investigation meeting but told the Tribunal JT never spoke to him directly. He again attended the Occupational Health Assessor but could not remember when he received the report. He was dismissed and appealed the decision which was upheld. The claimant gave evidence of loss and the affect the case had on his health and family life.

On cross-examination he stated while he had been in the Defence Forces he had never disobeyed

any order given to him. He had not as an Airport Police / Fire Officer either.

The claimant's doctor gave evidence. The claimant had been his patient 1997. He told the Tribunal that the claimant had never been so ill in the past. He issued many medical certificates. The witness told the Tribunal that the claimant had all the classical signs of stress including depression. He was on medication for 18 months.

A union shop steward gave evidence. He stated the claimant had been suspended without a representative present. He said that JT had told him they were under pressure to complete the process. He felt there were flaws in the investigation report. He had not been involved in the appeal.

Determination:

The claimant was initially employed in 1989 as a member of the Airport Police and Fire Service. In 2007 he left that service on secondment to human resources and took up a role as an airside trainer. In late 2008, the claimant applied for the post of organisational capability adviser. Following interview, he was appointed to this post. It was suggested that this new appointment ended his secondment and that he was now a permanent employee in the Human Resources department with no possibility of reversion. However, the Tribunal was not shown any contractual document reflecting such a change. In any event, the respondent remained at all times his employer.

None of the applicants for the post of organisational capability adviser, including the claimant, was possessed of the correct technical skills for the role. The three most promising were short-listed and the claimant was successful. He received both on-the-job and off-the-job training. Nonetheless, it appears that the claimant struggled with the new role in a way that he had not in any previous role.

In March 2009, the claimant was on sick-leave for three weeks. He submitted two medical certificates for the period. The first referred to "viral illness" and the second to a "medical condition necessitating taking two weeks from work". In late May, the claimant met his manager. She told the Tribunal that the claimant was, at that time, beginning to miss targets and said that he did not have the skills necessary for the job. She counselled him not to be too hard on himself. In early June the claimant again went on sick leave, this time for six weeks. The medical certificates relating to this period of leave referred to "occupational stress".

The claimant was requested to attend a company doctor. His opinion was as follows:

> *"This gentleman has experienced difficulties at work, which he attributes to a mismatch between his skills and values as opposed to those required for the job. He recognises this mismatch and does not apportion any blame or responsibility to the organisation or indeed, his colleagues in HR. This does not appear to be primarily a medical issue here and I do not believe that any medical intervention is likely to resolve the difficulties experienced. I think that a dialogue between him and HR is the appropriate response in order to resolve his difficulties and to determine what role he might be suited to within the organisation. Perhaps you might begin this dialogue and concurrent with this, I believe that he can be considered medically fit to return to work."*

This was, perhaps, sage advice.

CMcC met the claimant in mid-June to inquire into the causes of his stress. This meeting was after

his consultation with the company doctor but before his report. She felt that the claimant's answers were vague. It appears that the claimant was having difficulties with his working environment.

The claimant had, until January 2009, worked in the CHB. At that time he was moved to the OCTB. He had been reluctant to make the move. CMcC told the Tribunal that his concern at the move was to do with the lack of a car-parking space. The claimant said that his concerns related to the lack of training rooms and about the lack of access to necessary files in the OCTB. He told the Tribunal that the move also took him away from his colleagues in organisational training.

CMcC told the Tribunal that there were three options that could be considered. Firstly, he could stay where he was. Secondly, he could return to an airside training role. Thirdly, he could be redeployed to some other role, such as a health and safety role. This third option was the least practical, given that the respondent was at the time involved in a voluntary redundancy programme.

The claimant had a meeting with CMcC on 20th August 2009 in the course of which the first two options were put to him. The claimant wrote to her by email on 21st August. He thanked her for removing him from the OCTB and for dealing with his concerns sensitively. He indicated that the first option was not viable, given that working in that environment had caused his illness in the first place. He described the second option as being "more than unpalatable" as he would be reporting to a colleague of the same grade and service. He made it clear that his difficulty was not the colleague in question, rather their equivalence. He indicated his decision in the following terms:

> *"To be told that I must accept one of the two options outlined above I feel that, under duress, I have no choice but to comply by working in the Airside Training Department. However, I will do so under protest to facilitate the day to day operationwhile awaiting an expeditious investigation and resolution of this matter."*

In the section of the respondent's Employee Handbook dealing with the grievance procedure the following is stated:

> *"However, should differences of opinion arise on any matter, it is accepted by all parties that work shall not be held up while these differences are resolved - and employees would be required to work under protest while the grievance is in process."*

The Tribunal is satisfied that CMcC was put out by the claimant's declaration that he was working under protest, notwithstanding that it was part of the respondent's own procedures. She said that his working under protest made no sense to her and that she had accommodated him and still he protested.

CMcC and the claimant met again on 31st August. Subsequent to that meeting she wrote to him by email. Having noted how the claimant had been accommodated, she said that certain behaviours and attitudes were not acceptable and had to change with immediate effect. One such behaviour was "agreeing to only report to the Airside Team Leader under protest." The claimant was required to furnish a written undertaking that his behaviour would be corrected and he was directed to locate back to the OCTB main HR office. While she discussed this email with JM before she sent it, CMcC told the Tribunal that the decision to require the claimant's return to the OCTB was made by her.

The claimant did not return to the OCTB. On 2nd September his union wrote to JM, a senior manager seeking to meet him to discuss the claimant's grievance. This letter, for some reason, was

not received until 7th September. On 3rd September there was a testy exchange of emails between the claimant and CMcC. The conclusion of this particular correspondence seems to have been understood at cross-purposes by each party. The claimant sent an email in the following terms:

> *"In furtherance of your previous mail I wish to clarify that am willing to comply with all reasonable management requests subject to the concerns set out in my previous mails."*

CMcC understood him to mean that he would return, as directed, to the OCTB. The claimant intended to convey the message that a request to return to the OCTB was unreasonable.

On 4th September, the claimant went to work in the CHB. As a result he was suspended by CMcC for not having complied with a reasonable request made by management.

In cross-examination, CMcC told the Tribunal that she knew that the claimant had a problem with working in OCTB but that he had never made it clear what the actual problem was. Of course, had the grievance procedure been allowed to take its course she might well have found out. She accepted that her requirement for the claimant to return to work in the OCTB set at nought any previous accommodation that she had made.

Subsequent to his suspension a disciplinary investigation was commenced by JT, who was then a human resources manager based in Shannon. JT made the following recommendations:

> *"1. [The claimant's] suspension should be lifted provided he returns to carry out his duties in the OCTB immediately without prejudice to any future actions or decisions.*
> *2. As it was a very serious issue to refuse an instruction from his senior manager, a disciplinary hearing should take place on [the claimant's] returning to work but no later than Monday 21st September 2009.*
> *3. In accordance with the relevant procedures likewise [the claimant's] grievance should be referred to his Departments (sic) Head [DL] and he should then give his reply within 10 working days of this referral.*
> *4. The findings of this report should be forwarded to [the claimant].*
>
> *If [the claimant] refuses to accept these steps then his suspension should continue pending the outcome of the disciplinary hearing."*

JT's report was sent to the senior manager, JM. Subsequently, JM received a letter from the claimant's union official indicating that it remained the claimant's position that a request to return to the OCTB was unreasonable. By letter dated 23rd September, JM summonsed the claimant to a disciplinary meeting. The claimant again took ill and the disciplinary hearing did not take place until the 9th November 2009.

JM took JT's conclusion that the claimant had failed to follow an instruction as a determined fact. He told the Tribunal that it was his understanding that there was no dispute over whether there had been such a failure. Indeed, it is clear that the claimant was instructed to return to the OCTB and failed to do so. JM appears to have taken the view that JT had determined that the management request had been a reasonable one and he did not further examine that issue. By letter dated the 18th November 2009, the claimant was informed by JM that he was to be dismissed. The reasons for the dismissal were the failure to follow the instruction from his Manager together with comments that the claimant had made about the integrity and values of the human resources department.

The claimant appealed this decision. The appeal was heard on the 22nd December 2009 by GC. This was the only appeal that GC has conducted. No new issues were raised in the course of the appeal and the claimant's union representatives confined themselves to the issue of mitigation. On the basis that no additional material facts were put forward, GC saw no reason to overturn the earlier decision. The Tribunal heard uncontested evidence from a union official that it was the ordinary practice within the respondent's organisation to confine appeals to issues of mitigation.

Much was made in the course of the hearings about perceived failings in the conduct of the disciplinary process. The Tribunal does not need to examine the procedure in the circumstances of this case. The claimant was experiencing difficulties at work. That this was so was clearly accepted by the respondent. He had been appointed to a post to which he was not fully suited. He was struggling with his work and did not enjoy his working environment. The claimant was absent from work during much of the Spring and Summer of 2009 due to ill-health. The respondent was aware that at least six weeks of this leave was attributed to occupational stress. After his return to work, an accommodation was made whereby he was allowed to return to his previous workplace. However, on his return he was to report to a colleague of equivalent seniority and the claimant took exception to this. However, given that his choice was to remain in status quo or to move, he decided to move but to do so "under protest" while his grievance was investigated and resolved. That he was entitled to do so was made clear in the respondent's Employee Handbook. The Tribunal is satisfied that his manager did not understand the significance of his invocation of the grievance procedure or of his entitlement to work under protest. The Tribunal cannot accept that it was reasonable to make the accommodation and to then require that the claimant return. The Tribunal makes no determination as to whether there was any merit to the claimant's grievance. However, there would seem to be little point in having grievance procedures if employers were to treat them as was done in this case. Once there was a grievance, the grievance procedure ought to have been followed. It was not. If it was not reasonable to make the requirement that the claimant return to the OCTB, and if the claimant was entitled to work in the CHB under protest, then his refusal to return to the OCTB cannot have amounted to misconduct warranting dismissal. The Tribunal is satisfied that the claimant was unfairly dismissed.

The Tribunal is satisfied that compensation is the appropriate remedy. Pursuant to his claim under the Unfair Dismissals Acts, 1977 to 2007, the claimant is awarded compensation of €65,000 as being just and equitable in the circumstances.

The claimant is entitled to eight weeks gross pay in the amount of € 8,414.96 under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)