EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF: CASE NO.
EMPLOYEE -*Claimant* UD2366/2009
MN2191/2009

against

EMPLOYER -*Respondent*

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. McGrath B.L.
Members: Mr E. Handley
Mr D. Thomas

heard this claim at Dublin on 28th March 2011

Representation:

Claimant: Ms. Jayne Maguire B.L. instructed by Keans, Solicitors,
2 Upper Pembroke Street, Dublin 2

Respondent: Mr. Oisín Scollard B.L. instructed by Hughes & Liddy, Solicitors,
2 Upper Fitzwilliam Street, Dublin 2

The determination of the Tribunal on the preliminary issue was as follows:

The Tribunal has carefully considered the submissions made by the parties regarding the jurisdiction of the Employment Appeals Tribunal to hear the application of this Claimant, to bring a claim under the Unfair Dismissals legislation.

The Claimant commenced employment with the U.K. based company (the respondent) in or around February 1998. He worked with the company in the U.K. up until 2003.

An opportunity arose in 2003 wherein the Claimant was appointed on secondment to the Irish-based outlet of the business, namely the "RC" in Dublin. A letter dated 31st January 2003 wasopened to the Tribunal, which sets out the general terms of the proposed arrangement between theclaimant and respondent.

It is worth noting that the letter of appointment confirms that the "current terms and conditions within (..your..) contract will remain, except where legislation relating to Ireland or the local area or any overriding European Union legislation means we are unable to do so."

The Claimant came to Ireland at some point in 2003 and remained within this jurisdiction until at

least the 8th July 2009 at which time his employment was terminated.

The Claimant lodged a T1A with the Employment Appeals Tribunal on the 21st October 2009 (within the six-month period allowable under the Unfair Dismissals legislation.) The Claimant named another company (and not the above-named respondent) on the T1A form, though it is now accepted that the correct Respondent is the U.K. based company. The respondent initially named on the form is a now dormant company, which had formerly operated as a holding company. The T1A has been amended to reflect the correct name.

In their submissions the Claimant's legal representatives rely on the Posting of Workers Directive 96/71/EC which was implemented in Ireland through Section 20 of the Protection of Employees (Part-Time Work) Act, 2001 and the Claimant makes the case that Section 20 purports to confer a wide range of protective legislation on workers posted to this jurisdiction both within the meaning of the Directive or otherwise, and that this would have to include Unfair Dismissals legislation.

The Tribunal notes that in addition to posted workers, Section 20(6)(ii) includes a person, irrespective of nationality or place of residence who works in the State under a contract of employment and the Claimant's legal representatives make the case that even if the Claimant is not a "posted worker" within the Directive definition, he qualifies as a person who works in the State under a contract of employment (Section 20(6)(ii)) and is therefore entitled to the employee protection legislation which is applied pursuant to subsection (3) of Section 20. Equally, it could be suggested that the Claimant might be seen as a person who has entered into a contract of employment that provides for his or her being employed in the State per S.20 (2)(6)(ii).

It is clear that nothing in the Unfair Dismissals legislation precludes an employee who is dismissed by an employer who is not based in Ireland from initiating proceedings under the Unfair Dismissals legislation and this is illustrated in the case of Kay-v- Nobrac Carbon Limited (18th December 1985, unreported) C.C. wherein an employee was allowed to proceed against a non-Irish based employer.

The Respondent's legal submissions state that in the event that the Claimant seeks redress under Unfair Dismissals legislation then the appropriate jurisdiction is that of the U.K. The Respondent relies on the fact that the Claimant took instruction from his Line Manager in the U.K. based company (which it is accepted is the employer). The Claimant was obliged to report on a monthly basis to the U.K. head office and take direction and advice from the parent company. When the issue of a disciplinary matter arose it was the parent company in the U.K. that conducted the investigation, decision-making and appeals process. The Respondent makes the case that, as there was no interaction with an Irish-based employer the Claimant's contract of employment can only be read in conjunction with appropriate U.K. Legislation. Irish legislation simply does not apply.

The contract of employment which is undated and unsigned but presumably came into being in 1998 recognises that the Claimant may not always work within the U.K. but is silent on what legislation would be applicable should a posting or secondment be effected. The original contract of employment must however be read in conjunction with the letter of the 31st January 2003 already referred to and the contract of employment updated and refined by that letter.

The Respondent describes the Claimant's period in Ireland as a secondment period. In general, a secondment is seen as a "loaning out" of an employee whereby the employee continues to be employed by the original employer but is subject to day-to-day direction at a local level namely from the party to which the employee has been seconded. Of course, the Claimant in this case was

not under anybody's direction at local level (in Dublin) as he was essentially sent into Ireland to head up the organisation in this jurisdiction.

The Claimant favours the title "posted worker" which term comes from the E.U. Directive which hoped to apply minimum terms and conditions into the working conditions of employees being moved from place to place within the E.U. body. The Directive is particularly concerned with matters such as minimum pay rates, health and safety, the employment of pregnant women and equality and non-discrimination (Article 3).

As already stated, the Claimant may be a "posted worker" within the meaning of the Directive but also might be a person in the State under a contract of employment or a person whose contract of employment provides for him being employed in the State. In any of these circumstances the Claimant would fall within the parameter of Section 20 of the Protection of Employees (Part-Time)Work Act, 2001. The Respondent does not accept this contention. They argue that the U.K. contract of employment was unchanged by the letter of 31st January 2003. The Tribunal does notagree with this argument especially in circumstances where the contract of employment beingrelied upon is unfinished, incomplete, unsigned and undated. The letter of 31st January 2003constitutes a clear offer, which was accepted by the Claimant when he moved to Ireland.

The Respondent has sought to limit the meaning of S.20 whereby there can be no doubt that all the employment protection legislation on the statute book in the State was intended to apply to "posted workers" and (by extension to persons employed here under contracts of employment) in the same way as it applies to Irish workers. The full range of protective legislation must include the Unfair Dismissals legislation under which the Claimant brings this claim to the Employment Appeals Tribunal.

The Respondent's suggestion that the legislative intended to only to deal with the narrow range of issues referred to in Article 3 and intended further to specifically exclude Acts such as the Unfair Dismissals Acts is not accepted by the Tribunal.

For example a posted female worker unfairly dismissed by reason of being pregnant is clearly protected under Section 20 (enacting the Directive) and her recourse is to have her issue heard before the Employment Appeals Tribunal under the Unfair Dismissals Acts. Any interpretation of Section 20 as it applies to "posted workers" includes the full range of legislation. In addition, therefore, the worker here under a contract of employment must also have the full range of legislation applicable to the workings of his contract of employment in this state.

The Claimant's application under the Unfair Dismissals Acts, 1977 to 2007, is correctly within the jurisdiction of the Tribunal.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

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I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. McGrath B.L.

Members: Mr E. Handley
Mr D. Thomas

heard this claim at Dublin on 10th November 2011 and 11th November 2011

Representation:

Claimant: Ms. Jayne Maguire B.L. instructed by Keans, Solicitors,
2 Upper Pembroke Street, Dublin 2

Respondent: Mr. Oisín Scollard B.L. instructed by Hughes & Liddy, Solicitors,
2 Upper Fitzwilliam Street, Dublin 2

Note: A preliminary determination in this case issued to the parties on 10th June 2011.

The determination of the Tribunal was as follows:

The Tribunal has carefully considered the evidence adduced over the course of the two days of evidence. The claimant was employed by the respondent company as General Manager in their Dublin-based leisure club. The Tribunal does acknowledge that the claimant had a unique position within the company in that he was a director of the Dublin-based club and that position did most certainly entail many decision-making powers outside the remit of his U.K. based comparators. In particular general managers in the U.K. did not exercise the same level of free will as that given to the claimant as they were curtailed by orders and directions handed down by head office. So, for example, it seems the claimant had much more power with respect to suppliers and franchisees etcetera that provided service within the Dublin-based club than his counterparts would ever expected to have in the U.K.

It was in his capacity as director of the club that the claimant enters into contractual arrangements with third parties with which the Dublin club did business. So it is not correct for the respondent

company to state that the claimant was an average general manager with no special privileges or powers attaching. The claimant was quite clearly, distinguishable from his U.K. counterparts by reason of his non-U.K. posting which allowed him run the Dublin based company in consultation with a board of directors with which he appeared to generally have had a good working relationship.

The claimant's success in the running of this club does not seem to have been in question. Even before he was appointed to the Dublin position the claimant had earned a deserved reputation for turning around clubs which were performing below par.

From 2003 to 2008 the claimant seems to have successfully built up the Dublin-based leisure club. Membership numbers were up and were being maintained. The claimant's assessment was classified as exceptional from year to year- albeit there does appear to have been an element of self-assessment contained therein.

Over the years the claimant's style of general management was not questioned or interfered with. It seems the claimant had good relationships with all levels of the company hierarchy. His methods were never challenged and to be fair to him were never regulated one way or another. It is significant that nobody could put their hands on a contract of employment to show to the Tribunal.

The overall impression given to the Tribunal was of an Irish division of the U.K.-based company which was successfully being brought forward from year to year with the claimant at the wheel. There was no interference from head office and no audit or accountancy figures were ever questioned.

The claimant never had any disciplinary issues and was never called to task over decisions made or practices being used.

An example of the laissez faire attitude would have to have been the fact that the claimant had a company credit card which he was entitled to use in respect of company expenses. The claimant appears to have been the only general manager in perhaps the whole group to hold a company credit card, which again must be reflective of his director status as much as on his status as a general manager. What was quite clear from the evidence was the fact that no guidelines, directives or recommendations were ever given to the claimant with respect to the use of the said credit card. The consequence of this was, of course, that the claimant latterly developed bad habits with respect to its use and became careless about reconciling those expenses which should be covered by a company credit card and those which should most certainly not have been. Although it is noted that the club administrator said that these practices were very rare.

In October 2008 the claimant's direct line manager and regional manager changed to a Mr. S. who gave evidence at the hearing. In early February 2009 the claimant wrote a letter to the overall C.E.O. of the whole respondent group expressing disquiet over the increasingly prevalent style ofmanagement which involved, "adherence and compliance." What is clear from the tenor of this letter was the fact that the claimant was finding the new changes in management brought about bythe different knock on effects of corporate decisions and changes in company

structures havingbeen made over the recent past.

It is worth noting that the claimant was not operating under any cloud of suspicion at the time and this letter was penned with the simple intention of getting clarification of what his role should be and to avoid "possible conflict or frustration." It is also noted that the claimant was experiencing considerable difficulty with human resources at this time in connection with putting together an appropriate contract of employment such that would reflect any and all of the terms and conditions of his employment as they had evolved over the preceding five years. He was not getting much satisfaction in this regard.

At some point towards the end of February 2009, Mr. S received an anonymous communication with respect to the claimant and which he felt obliged to follow up on. This was Mr. S' prerogativebut the Tribunal wonders at the wisdom of acting on foot of a poisonous pen letter designed toseriously damage the reputation of one of its own employees. It seems extraordinary that the dutyof care owed to the employee was disregarded in favour of the views of an unknown entity whosemotives can only be guessed at.

On foot of the enquiries subsequently made the claimant was investigated in relation to four matters including:

1. Employing the services of a company owned by the Sales Manager.
2. Inappropriate commitment of company expenditure on a trip to Spain.
3. Insubordination for non-attendance at a general managers' meeting.
4. Misuse of the credit card.

The Tribunal has carefully considered the evidence adduced with respect to each of these headings. The claimant, his line manager and the relevant auditing manager were all examined and cross-examined.

Mr. S on concluding his investigation into each of these four headings makes the observation," the allegations against you are serious and if founded constitute gross misconduct which is likely to lead to instant dismissal."

Determination:

The Tribunal having considered the same evidence cannot conclude that the allegations and findings amounted to gross misconduct warranting the claimant's immediate dismissal.

The Tribunal accepts that the claimant may well have been in need of some form of disciplinary sanction in relation to some aspects of his behaviour but for years the claimant was not being effectively managed from the United Kingdom and was not being given any direction. He had been meeting targets and demonstrating a successful management style and being left to it.

The sanction imposed well outweighed any wrongdoing committed. The Tribunal cannot accept that there was an intention to in any way defraud the company or act for his own benefit to the

detriment of the company for some reason.

There was no attempt to bring proportionality to the reaction of the company to the claimant and right up to the end of the hearing the attitude towards the claimant was belittling. For example, having terminated the employment of a highly successful senior manager to suggest that he should not try for such a job again was an attempt to undermine and belittle him. The claim under the Unfair Dismissals Acts, 1977 to 2007, is successful and the Tribunal finds the appropriate award to be compensation in the sum of €280,000.

Accordingly, the Tribunal also finds that the claimant is entitled to the sum of €19,038.42 (being the equivalent of six weeks gross pay under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

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(Sgd.) _____
(CHAIRMAN)