EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:	CASE NO.
EMPLOYEE	UD464/2011 MN504/2011
against EMPLOYER	

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: Mr R. Maguire, B.L.
Members: Mr W. Power
Mr S. O'Donnell

heard this claim at Dublin on 19th July and 25th September 2012

Representation:

Claimant : Ms Niamh McGowan B L instructed by
Nathaniel Lacy & Partners, Solicitors, Kenlis Place, Kells, Co Meath

Respondent : Mr. David Farrell, IBEC, Confederation House, 84/86 Lwr Baggot Street, Dublin 2

Respondent's Case

The claimant was employed by the respondent from 4th November 2002 to 20th September 2010. He was dismissed for abusive, objectionable and threatening behaviour towards his manager.

An investigation into an allegation against the claimant was undertaken by a H.R. supervisor (JD) on foot of an e-mail received by him stating that the claimant had been suspended for abusive language and improper behaviour towards a manager on 23rd August 2010. The manager in question had suspended the claimant after he allegedly called the manager a fucking moran.

A statement was taken by JD from the manager and a witness to the incident. He also took a statement from the claimant.

The claimant told JD that he called the manager a moran but denied that he used bad language. However JD concluded that the claimant had acted inappropriately and had used abusive and offensive language towards a fellow employee. In a letter dated 1st September 2010 JD requested the claimant to attend a disciplinary hearing in relation to the matter and asked him to "please note that is considered a serious offence and is listed as gross misconduct in our company handbook and any action up to and including dismissal may be taken".

JD handed the matter over to others to conduct the disciplinary hearing and had no further involvement in the matter.

The human resource manager became directly involved in this case as a replacement for a colleague that was listed to hear a disciplinary meeting into the claimant's reported behaviour towards his direct manager on 23 August 2010. By that stage a human resource supervisor who conducted an investigation into that behaviour concluded that the claimant's misbehaviour amounted to gross misconduct. That direct manager had placed the claimant on suspension immediately following that incident. The human resource manager met the claimant on the basis of the concluded investigation.

The human resource manager met and interviewed the claimant on 3 September 2010 at this initial disciplinary hearing. She described the claimant's body language and demeanour as erratic at this meeting to the extent she became concerned for his welfare. No decisions were reached and the disciplinary process was reconvened three days later. At that meeting she secured the claimant's consent for him to attend the clinic of the respondent's occupational health consultant. That doctor issued a preliminary medical report that was sent to the respondent and the witness confirmed she read it. In that report the occupational health consultant stated, among other things, that it would be advantageous for the claimant and his direct manager to meet for mediation purposes. It was also his opinion that the claimant would not pose a danger to himself and others should he return to work. That doctor also stated that the claimant was fit to return to work.

The witness told the Tribunal that a copy of that report was not given to the claimant as part of this disciplinary process. A reconvened disciplinary hearing took place on 20 September and following an adjournment the witness decided that the appropriate sanction was dismissal. Due to the claimant's behaviour towards the end of that meeting she did not explicitly inform him of that outcome. However, it was clear that he was aware of it. That decision was formally relayed and confirmed in a lengthy letter she wrote to him on 23 September.

The human resource manager cited several factors in deciding to impose that sanction. These included the claimant's lack of remorse at the way he spoke to and treated his direct manager. While she accepted that the claimant was upset at the approach of his direct manager to him she feltthat the claimant's response was abusive, intimidating and threatening. The witness was also influenced by the claimant's lack of a guarantee that such a scenario would never happen again with him. This manager did not consider using a mediation process in addressing this issue and conducted the disciplinary process solely in the light of an investigation report. Her main role in that process was to determine the sanction.

Claimant's Case

The evidence of the claimant was restricted to his financial loss and possible remedy as a result of his unfair dismissal.

Determination

The Tribunal finds that the dismissal of the Claimant was, in all of the circumstances, unfair. The procedures adopted by the Respondent were not even-handed. It was admitted in evidence by the HR Supervisor that he had considered conversations that he held with colleagues, and that were not noted and shared with the Claimant, in his decision to have the Claimant disciplined.

There was no explained basis for finding, at the initial investigation stage, that the Claimant had been threatening in his behaviour. The classification by the HR Supervisor of the incident as gross misconduct was not reasonable in all of the circumstances. It was not stated by the HR Supervisor in his letter of 1 September 2010 what the "abusive and offensive" language was. It was never established during the procedure that the Claimant had actually cursed at the manager.

The proceedings steps of the disciplinary procedure were not proper either. On the notes of the company from the meeting of 3 September 2009, the Claimant apologised for calling the manager a moran, yet it was repeatedly put to him in the reconvened meeting with the same parties that he had never apologised.

The Claimant was sent to a Medical Occupational Health Consultant as the company expressed concern about his behaviour. The report of that doctor found that the Claimant was fit to return to work and was not a danger to himself or others. The report was not shared with the Claimant, though at the reconvened disciplinary meeting, he was questioned by the company on the veracity of details he provided to the doctor and asked what the doctor's view of what the Claimant told him. The report's recommendations in relation to the Claimant and his manager that there would be mediation was ignored by the company.

On foot of the Claimant not giving a reassurance that he would not have outbursts in future, which he stated he felt he could not give, coupled with the stated "seriousness of the issue," the Claimant was terminated in his employment. The company contained the claimant in the disciplinary meeting, trying to tell him that he was going to be dismissed, and he had to ask repeatedly, on their own notes, to let him leave.

The company had a comprehensive company handbook including an extensive disciplinary policy. For an isolated incident of the level complained of, termination was a disproportionate sanction in light of the other options available. Punishing the Claimant with dismissal for a possible future infraction where an occupational physician had stated that he was not a danger was likewise disproportionate and in all the circumstances unfair.

The Tribunal finds that in the exceptional circumstances of this case, having heard the submissions of both parties on the potential remedy, that the Claimant be re-instated into his job as at the date of dismissal or a role of similar grade. The reinstated date is to be activated immediately upon receipt of this Order.

The appeal under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 must fall due to the remedy under the Unfair Dismissal Acts.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)