CORRECTING ORDER
EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF: CASE NO.

EMPLOYEE UD1448/2011
MN1533/2011

against
EMPLOYER 1

EMPLOYER 2

EMPLOYER 3

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. R. Maguire, B.L.
Members: Ms. J. Winters
Mr. M. O'Reilly

heard this claim at Dublin on 13th December 2012

Representation:

Claimant:
Mr. David Miskell, Mandate Trade Union, O'Lehane House, 9 Cavendish Row, Dublin 1

Respondent:
Mr. Eamonn McCoy, IBEC, Confederation House, 84/86 Lower Baggot Street, Dublin 2

This order corrects the original order dated 4th January 2013 and should be read in conjunction with that order. Respondent number 3 was omitted from the original order

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

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Respondent's case

The respondent is a supermarket chain and the claimant was employed in one of their stores as a cashier from 2nd March 1998 to 10th June 2011. The claimant was dismissed when it was discovered that she had stolen money from the till on two separate occasions and not charged customers for bags on a number of other occasions.

The security officer spotted the claimant on CCTV taking money from the till and putting it in her pocket on 20th May 2011 and immediately informed the Store Manager (CC). The Store Manager held a meeting with the claimant on the same day. The claimant admitted that she had

taken the money, apologised and offered to pay it back. She also told CC that she was desperate and could not hold onto money. CC decided to have a follow up meeting and this was arranged for 24th May 2011.

At the meeting of 24th May 2011 the claimant's union representative (DM) accepted that the claimant had done what she was accused of but he attributed these actions to the fact that the claimant was on medication for depression and that this medication was causing her to do silly things.

CC Then arranged for a further meeting on 3rd June 2011 in order to allow himself time to consider the matter further. At the meeting of 3rd June the claimant submitted a letter from her G.P. which stated that she was suffering from depression and CC took a break from the meeting to consider this letter. Having considered the matter CC decided to dismiss the claimant and told her so. CC made this decision based on the fact that it was not an isolated incident but that there were a number of incidents over a period of time. He did not seek independent medical advice before making the decision to dismiss the claimant.

The claimant appealed the decision to dismiss her and this appeal was heard by the manager of another store (CN) on 11th August 2011. Prior to the appeal hearing CN received a report from a psychiatrist on behalf of the claimant. CN considered this report but concluded that as the actions of the claimant constituted gross misconduct and there a breach of the "honesty policy"of the respondent he had no alternative but to dismiss the claimant. He did not seek the adviceof an independent expert in relation to the claimant's condition as he was satisfied that the actions she admitted to were over a period of time and were not an impulsive isolated act.

Claimant's case

The claimant agreed that she had committed the acts she was accused of, however she attributed all of these actions to her psychological condition and the medication she was on at the time of these actions.

The claimant had only returned to work two months previous to her dismissal, having been on sick leave for five months due to depression. She felt pressured into returning to work, having been told by a manager of the respondent that if she did not return to work she would be dismissed.

It was the claimant's contention that no proper consideration was given to the medical opinions provided to both the original decision maker and the appeal decider. The respondent had the facility to refer her case for a second medical opinion but failed to do so.

Determination

The Tribunal finds that the essential facts were not in dispute as between the parties: it was accepted that the claimant did the acts complained of. First, she took money on two occasions from the till, on one of those occasions passing the money after approximately 20 minutes to a customer that she did not charge for a box of tic-tacs. In addition, she did not charge for plastic bags on two occasions, for a total of four or five plastic bags.

The claimant had worked for the respondent for thirteen years without incident or complaint. She had been on sick leave for a period of 5 months for psychiatric illness returning approximately 2 months before 20 May 2011. She gave evidence that was not controverted that she had returned to work because she was in fear of losing her job, having been corresponded with a number of times while on sick leave by the Respondent. The Claimant had been certified as fit for work by her own doctor at that time, and by the doctor of the Respondent.
At the two scheduled meetings after the incident of the 20 May 2011, the Respondent was provided with two medical reports: first, a report of a General Practitioner that referred to a psychiatric condition and that she was attending a psychiatric service. A report was also presented, on 6 June 2011, from a psychiatrist from the Department of Adult Psychiatry stating that the Claimant was taking medication recently that "could have significantly impacted her behaviour and led her to engage in behaviours and make decisions she would normally not havemade. I feel that this could have materially impaired her judgment over the past months". Hertreating doctors were still clarifying the diagnosis, the report stated.

The Respondent, nevertheless, proceeded to terminate the Claimant's employment at the meeting of 10 June 2011. Evidence from the Store Manager who made that decision was thatthe Claimant was terminated because of the fact that the behaviour was not isolated, and because there was "collusion" in relation to the passing of money to another individual. The sanction was based on the honesty and theft policy of the Respondent.

In the appeal of the dismissal, the Store Manager who decided that stated that he looked at the side-effects of Effexor in material presented by the union representative of the Claimant. This was because the Store Manager understood that she was still on Effexor, and he understood that this was being presented as the cause of erratic behaviour. He looked at the list of the Claimant's prescriptions and inferred that she was not taking Effexor at that time, as she had not had a recently-filled prescription of that drug, and he made adverse inferences as regards the culpability of her actions on this basis.

In the appeal, another medical report was submitted. The report was dated 6 September 2011, from a Consultant Psychiatrist, and stated that the Claimant previously had mood swings but that these had stabilised by 3 August 2011.
Neither psychiatrist linked the Claimant's behaviour to Effexor, nor did the report of the General Practitioner. The claimant's internal appeal was rejected.

The Tribunal finds that it was totally unacceptable for the company to terminate the employment of the Claimant for actions in relation to which they had prima facie evidence before them to state she was not responsible. The Respondent did not even examine their own medical records in relation to the Claimant before they terminated her contract of employment. The Respondent personnel took a decision, in both the original disciplinary process and again in the appeal, to second-guess the reports of psychiatrists without any medical evidence, and to draw conclusions of culpability that were simply not supported in the evidence before them. The Respondent could have requested the Claimant to attend their own medical practitioner to

obtain a second opinion in relation to the culpability or otherwise of her actions but it failed to do so. In all of the circumstances, the dismissal was unfair. While there may have been grounds for sick leave for the Claimant, or grounds to move the Claimant away from particular roles within the Respondent, there was no basis for a sanction of any kind before the Respondent, let alone a sanction of dismissal.

The Tribunal finds that in the exceptional circumstances of this case, having received the submissions of both parties on the potential remedy, that the Claimant be re-instated into her job or a role of similar grade as at the date of dismissal. The reinstated date is to be activated immediately upon receipt of this Order. In those circumstances the appeal under the Minimum Notice and Terms of employment Acts, 1973 to 2005 does not arise.

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(CHAIRMAN)