EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

CASE NO.
UD2521/2009
MN2356/2009

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. J. O'Connor

Members: Mr. P. Casey
Mr. D. McEvoy

heard this case in Tralee on 30 June 2011 and in Cork on 25 July 2011

Representation:

Claimant: Ms. Eliza Kelleher B L instructed by
Galvin Broderick, Solicitors, 16 Ashe Street, Tralee, Co Kerry

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

The determination of the Tribunal was as follows:

Respondent's Case

Among other activities the respondent provides a cleaning and janitorial services to its various clients. By the summer of 2008 it had acquired a cleaning contract with a county council based in the southwest. As a consequence of that acquisition the respondent in a transfer of undertaking process employed staff from a former contractor who had by then lost their contract with that council. The sales director told the Tribunal that the respondent had certain issues with the cleaning staff regarding their behaviour and attitude towards their work. He informed the council that cleaning standards would improve as a result of the respondent's takeover of the contract. As part of that commitment the witness issued a notice to the contract cleaning staff requesting them to sign in and out regarding their shift work and hours. The claimant who was a member of a large trade union was employed as a general operative whose role it was to attend to cleaning duties. She was under the supervision of a manager who has since left the respondent.

In a letter dated 17 September 2008 to the claimant's trade union representative the sales director commented unfavourably on the timing and method used by the claimant to secure a day's leave.

In November that year the witness reprimanded but did not discipline the claimant over reported shortcomings in her work relating to time keeping and her refusal to fully comply with cleaning instructions. The claimant was refusing to undertake certain work unless her trade union sanctioned that work. As part of that process the witness sent two registered letters to the claimant and at least one was returned with the label Not Called For. Despite drafting another letter to her in early January 2009 about her cleaning duties the claimant was still refusing to fully perform her work.

As a result of a meeting with the claimant in mid January 2009 the witness again wrote to her about her work. The main topics in that letter were the claimant's relationship with her supervisor and the outstanding completed Garda clearance form. The sales director had no recall that by then the claimant had formally complained of the treatment she was receiving from her supervisor. A copy of a letter dated 8 January 2009 containing those complaints written by the claimant and addressed to the respondent's human resource manager was submitted into evidence.

On 6 February 2009 the witness emailed the claimant's trade union representative and ventilated his displeasure and annoyance at her poor work performance. That representative's undated written response to the sales director was read to the Tribunal and the witness commented that he had no recall either of its contents or of receiving it. That correspondence stated that the claimant was not only refuting the allegations made against her but lodging a formal grievance against her supervisor. The writer expected an investigation into that grievance to be conducted without delay. On the same day the sales director wrote to the trade union official the claimant absented herself from work on health grounds. At that time the witness was unaware that the claimant had a respiratory problem and on hearing the news she thought that this was due to the fact that she did not like her conditions at work. He added that it was unlikely she got sick due to work as she was continually refusing to clean walls in certain ways and places.

The respondent received medical certificates stating the claimant was unable to work from 9 February up to at least early July 2009. Those certificates were sent to its human resource section. The witness however stated that the claimant did not communicate with the respondent from the time she went sick and since she was sick the respondent did not write to her by registered post during that time. The witness said he was also unaware that subsequent to her absence on 6 February that the claimant spent three weeks in hospital. Since it was not easy to get replacement cover for the claimant the respondent was keen to contact her with a view to establishing a date when she could resume duties. The respondent's efforts to communicate with her proved fruitless and so in that regard the witness wrote to her by ordinary post on 12 April 2009 expressing his concern that she had failed to contract the respondent. He also wrote that he believed she was working elsewhere and told her that the respondent would assume she was no longer interested in working for it should she not state the contrary within three weeks. By that date he "had run out of options" as both the claimant and a representative on her behalf had not communicated with the respondent.

A P45 issued without a covering letter to the claimant giving her date of leaving as 14 May 2009. In declaring that he would never terminate someone's employment while he/she was out sick the witness justified the dismissal on "a much bigger picture" than those written in the respondent's T2B form. That form signed on behalf on the respondent read in part: *The claimant went absent due to ill health……As a consequence of the claimant's refusal to communicate with the company her employment was terminated.* It was the view of the witness that the claimant had difficulties following instructions in dealing with her he "hit a stone wall". Had she communicated with the respondent during her absence from 6 February onwards she

could still be in employment with company.

Giving sworn testimony, the claimant said that she had initially worked for another employer (hereafter referred to as GX) but that, when the respondent took over from GX, she continued in employment. She did cleaning duties including office hovering and dusting.

Asked to comment on a 6 February 2009 incident, the claimant replied that she had been pursued every day by her supervisor (hereafter referred to as SPX) regarding the cleaning of certain walls although this had never been in the cleaners' contract. On the evening of 6 February 2009 the claimant was alone when she started to clean down walls but got a terrible pain in her chest. She only had a very small sponge. She could do no more because of severe pain in her chest. She went to a Kerry hospital which was just across the road. She was there for hours and was discharged. Having been sent to a Cork hospital she had a procedure. She was in the Cork hospital for three weeks. Her son texted SPX to say that she was sick. A text message to SPX's mobile phone was the claimant's usual method to contact SPX. SPX did not respond. Medical certificates (the first for one month and then shorter ones) were sent to the respondent. There was no response from the respondent. There was no contact between them after she went out sick.

Some time in May 2009 the claimant got a P45 (with a termination date of 14 May 2009) in the post. There was no cover letter with it. The claimant's medical certification had told the respondent that the claimant had had a lesion on her oesophagus which was no minor ailment.

The Tribunal was now referred to a letter dated 12 April 2009 from the respondent's sales director (hereafter referred to as DX) to the claimant. The letter stated that, although the respondent had tried to contact the claimant by phone, regular mail and "recorded" mail, the respondent had failed to do so. The letter said that this was, in part, because the claimant had refused to accept the respondent's "recorded mail" which had been returned to the respondent.

The letter further stated that the respondent was concerned that the claimant had failed to contact the respondent (either directly or through her trade union) and that the respondent, needing to know when she might return to work, now urged her to make contact with it within the next three weeks after which the respondent would have to assume that the claimant no longer wished to work with the respondent and would issue a P45.

The letter went on to remind the claimant that, even after the respondent issued a P45, she had the right to appeal if she wished to return to work with the respondent although DX understood that she might already have taken up employment with another company. The letter concluded by seeking urgent clarification from the claimant or from her trade union official (hereafter referred to as TUO) so that the situation not be left unclear.

However, the claimant told the Tribunal that she did not receive this letter from the respondent. She also denied that DX, SPX or anyone from the respondent had contacted her and said that her P45 had come in a plain envelope by ordinary post.

The Tribunal was now referred to a letter dated 4 March 2010 from DX to the claimant's solicitors requesting that the claim to the Tribunal be withdrawn as its circumstances were "flawed". The letter stated that the claimant had provided the respondent with medical certificates up to and including 4 May 2009 when she was contacted regarding her employment status but that she had refused to accept "recorded" mail (because items had been returned to the respondent) and that the

claimant had further refused to accept phonecalls such that the respondent "had little choice but to issue her a P45 as she failed to come back to work". The letter further stated that it had been brought to the respondent's attention that the claimant "was in fact working for another company while medically unfit for work".

At the Tribunal hearing the claimant countered this by saying that she had never received phonecalls and had never been contacted. Asked if she had done work for another company, she replied that she had been home alone and that her doctor had told her that she might improve if she got work whereupon she went to a department store (hereafter referred to as DS) for a few unpaid days per week for some weeks in April 2009. The work was just supervising, walking around and recording what was done. The claimant was still attending a doctor.

The Tribunal was next referred to a letter dated 4 November 2008 from DX to the claimant stating that he was disappointed that she had again failed to sign out on Tuesday 21 October 2008 despite her having signed a document agreeing to fully comply with sign-in and sign-out instructions. The letter concluded with DX stating that he would not tolerate this situation again and entreating the claimant to take note that disciplinary action would be taken against her if this were repeated.

The Tribunal was also referred to a letter dated 26 November 2008 from DX to the claimant regarding their conversation at about 7.00 p.m. the previous day in which DX expressed amazement that she had wished to yet again query the instructions of her supervisor and asked the claimant to note that it was not her decision what to clean and that the respondent's client had complained about the standard of cleaning and marks on walls. DX explained that he was not interested in what had gone on while the claimant had worked for GCS, that it was because of what had not gone on that GCS had lost the confidence of the client and that standards had to be raised so that the client would be "kept happy". DX stated that he did not wish to be reminded about the claimant's trade union (which he said had nothing to do with the cleaning specification) and that she would be disciplined if she did not wish to clean as instructed. He concluded by expressing the hope that he would "not have to cover this ground again".

However, the claimant told the Tribunal that she had never received this 26 November 2008 letter.

The Tribunal was next referred to a 28 November 2008 e-mail (about the claimant) from SPX to DX stating that she had surprised the claimant arriving forty minutes late (and not in uniform) for a ninety-minute shift and a 1 December 2008 follow-up letter from DX to the claimant stating that any further breaches of procedure would result in disciplinary action being taken against her.

Again the claimant denied to the Tribunal that she had previously seen this documentation.

The next document seen was a copy of a 6 January 2009 letter from DX to the claimant (at her work address). Regarding the claimant's cleaning duties it stated that the respondent had received complaints from a client (here referred to as MSB) that the standard of cleaning was not as required particularly with respect to bathrooms, kitchen floors and vacuuming of carpets. The letter asked the claimant to ensure that the points mentioned were improved on, told her that SPX would direct her on what needed to be achieved and said that the respondent needed "to see a general rising of standards going forward".

The 6 January 2009 letter further stated:

"It is also noted that you have returned any mail sent to you in the past – (without any explanation) this is not acceptable and I would ask you to note that the mail in question does not exempt you from having received same as the issues raised remain on your file.

I trust I will not have to bring this subject to your attention again."

Commenting to the Tribunal on this letter, the claimant said that she had never received it but that she would dispute what it said and that she "had been having some difficulty with" SPX.

The Tribunal was next referred to a letter dated 22 January 2009 from DX to the claimant regarding their conversation on 20 January 2009 when DX had "tried to explain that we at (the respondent) want a peaceful life as well and that the demands made by (a client here referred to as KX)) have to be acted on and our service levels have to be improved and maintained if we are to ride out the difficult times that have come over this country".

The letter continued:

"I am asking for your help, why? Because by pulling together this will ensure the stability of our contract and improve job security for everyone – I am not asking you to carry out any tasks that are unreasonable but I am asking you to be flexible! What was good yesterday is not always good for today.

I want you to work with (SPX) – to take direction and instruction in the way they are meant – we are not going to threaten you or try to intimidate you – you are your own person and that is why we want you to stay with us and be part of the Team.

With regard to the Police Clearance form – (SPX) will give you one of these and I would ask you to complete same asap – (We will pay you the fee) as it is a condition of the contract that we supply same to (KX) for each member of staff working on this contract.

I trust that the above gives you some insight as too (sic) our thought process and I would be happy to talk again with you when next I am down in early February.

Thank you for your time."

Commenting to the Tribunal on this letter, the claimant said that she had received it and that she had told the respondent that SPX had been harassing her constantly. The respondent's representative objected that this had not been put to DX whereupon the claimant's representative said that the letter spoke for itself.

The Tribunal was next referred to a letter dated 8 January 2009 from the claimant to the HR manager of the respondent's group (and copied to TUO) in which the claimant said that she wished "to report grievances which occurred working under the transfer of business to (the respondent's group) since July 2008." The letter alleged that there was "very poor communication and instruction" and that "every situation is dealt with aggression and denial" (sic). The letter further alleged tardiness by the respondent in addressing unfit equipment without any acknowledgement of wrong accusation to cleaning staff. The claimant claimed to have relevant proof.

Alleging continuous incidents of nit-picking or fault-finding, the claimant wrote that the most serious of these had been in November (2008) when SPX "threatened and harassed me not to go to my place of work and that I would not be paid". It was claimed that this could be proved as five other workers had been witnesses.

The claimant further alleged that she had been asked to clean down walls in a Portakabin with no sufficient equipment or time and that, moreover, "it was not in our contract".

The claimant wrote that it was a two-floor Portakabin where she was allotted one hour to clean, dust and hoover sixteen offices and four toilets. She wrote that the cleaners had been flexible and had stretched themselves e.g. by dragging heavy rubbish over long distances and lifting it into large dustbins (such that health-and-safety was at issue).

Resuming her oral testimony to the Tribunal, the claimant said that her trade union had not told her of written contact from the respondent, that she had been in phone contact with TUO (her abovementioned trade union official), that she had not understood herself to have been on some kind of warning and that she had not thought the 22 January 2009 letter from DX (the respondent's abovementioned sales director) was disciplinary.

Regarding her medical condition, the claimant said that she had had to go for endoscopes, that she had been fit after fourteen months and that she had unsuccessfully tried to get work.

Determination:

The Tribunal was not satisfied that the respondent took sufficient steps to address the grievance raised by the claimant or to have the claimant medically assessed. The employer needed to tell the claimant to pull up her socks and to make it clear that her job was in danger. The respondent is a big company but did not discharge its responsibilities properly. If it believed the claimant was working elsewhere it could have asked her to collect her P45 rather than sending it out to her. There was conflict between the sides regarding communications between them. However, as the Tribunal was not satisfied that the respondent had complied with all appropriate procedures the unfair dismissal claim succeeds.

The Tribunal considered the fact that the claimant was unfit for work for a long time and the extent to which she subsequently tried to mitigate her loss by seeking new employment.

Allowing the claim under the Unfair Dismissals Acts, 1977 to 2007, the Tribunal considers compensation to be the appropriate remedy in all the circumstances of the case and, having heard about the claimant's loss, her availability for work and efforts to mitigate the said loss, deems it just and equitable to award her the sum of €7,000.00 in compensation under the said legislation.

The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, fails because the claimant was not fit for work and actively seeking it during her minimum notice period.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)