

## EMPLOYMENT APPEALS TRIBUNAL

**CLAIM(S) OF:**

Employee

**CASE NO.**

MN1063/2005

UD1446/2005

against

Employer

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001  
UNFAIR DISMISSALS ACTS, 1977 TO 2001**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. J. Fahy BL

Members: Mr. T. Gill  
Ms. H. Henry

heard this claim at Galway on 29th March 2007  
and 22nd May 2007  
and 23rd May 2007  
and 25th May 2007

**Representation:**

Claimant(s) : Mr. Shane MacSweeney, MacSweeney & Company, Solicitors,  
First Floor, 1 Merchants Gate, Merchants Road, Galway

Respondent(s) : Ms. Ger Moriarty, Local Government Management Services Board,  
Floor 2, Cumberland House, Fenian Street, Dublin 2

The determination of the Tribunal was as follows:-

On the **fourth** day of the hearing the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 was withdrawn.

**Respondent's Case:**

Giving evidence, a supervisor (hereafter referred to as JOC) said that he supervised fifty-six men and that there were a lot of difficulties if staff did not turn up. Men had to be redeployed. Between JOC and the claimant (hereafter referred to as C) there was a line manager (hereafter referred to as JJC). JOC had a day-to-day involvement if JJC had difficulties.

He told the Tribunal that he was familiar with C as an employee and that C had been “a mediocre employee at best”. C had complained about overtime around autumn 2003. C had been asked to do Saturday overtime and had refused. JOC saw him doing other work on a Saturday. JOC took C off the rota. C made a bullying allegation against JOC. JOC was subsequently told by his superior that he (JOC) had no case to answer.

At this point in the Tribunal hearing the Tribunal was referred to a written report on a disciplinary meeting to consider C’s refusal to carry out instructions. The report, signed by his superior, referred to four incidents but said that the stated incidents did not constitute bullying. He told the Tribunal that he had never been disciplined by the respondent “for anything” and that he had never had any “finding” of bullying and harassment “upheld” against him. At this juncture, the chairman of the Tribunal division asked if there had been separate investigations into the claimant and into the allegations against the witness. The chairman was told that there had not been separate investigations.

He now stated to the Tribunal that C’s trade union organised a meeting in Rockfield Park about problems with C. He did not recall the exact date of this meeting but said that it occurred around September 2003 and that it had been about the overtime issue. He had agreed to meet C and C’s trade union representative. They had discussed C’s absence, C’s giving of sick certificates to R and C’s doing of other work. The meeting took place within working hours. JJC (C’s abovementioned line manager) was not present. After discussion the witness shook hands with C and thought all was resolved. The issue of C working outside the respondent was raised and was accepted by C. The witness thought that C would improve and would not work outside the respondent.

Subsequently, the respondent had to make operational changes. An employee complained of a shoulder problem. The witness and JJC spoke. He told C that he (C) would be moving.

The witness told C why the change was being made. Initially, C seemed to accept it. Then, C sought the engineer’s number to complain. C did not take up his duties in the new team. This was October 2004. The witness tried to talk him round. C refused for about five days.

At this point in the Tribunal hearing the witness was asked about a 8 November 2004 incident about lifting bags. He replied that he had not been involved but rather that he had been told of the incident by JJC.

On the **second** day of the hearing the witness said that there was no record of the meeting in Rockfield Park. When asked, he said that he was unaware if C had personal difficulties at home.

The City Manager gave evidence (hereafter referred to as JMC). He explained that he had commenced in the post on February 2<sup>nd</sup> 2005.

He explained that he had been the person to decide that C was to be dismissed. He explained that it was company policy that if an employee was on certified sick leave and found to be working elsewhere it constituted dismissal, but that there was no blanket ban on people working elsewhere.

The witness read out an extract from C’s contract – *“Other Occupations..... You shall not engage in any gainful employment, other than as an employee of the local authority, to such extent as to impair the performance of your duties or which might be inconsistent with the discharge of your duties as a local authority employee, or which conflicts with the interests of the local authority.”* However, the witness stated that this was not the issue at the hearing, C had been

working while on certified sick leave and was issued a final written warning.

When put to him, the witness stated that C had been paid while working elsewhere and on sick leave from the respondent. When put to him, he stated that he had spoken to the supervisor (JOC) and C's colleague (hereafter referred to as CD) and was informed that a meeting had taken place in Rockfield but that there were no minutes of this meeting. When put to him, the witness said that a meeting held by the roadside was normal practice if all parties were agreeable to it.

The witness told the Tribunal that he had interviewed the private investigator (hereafter referred to as PI) hired by the respondent to carry out surveillance on C over three days. C had been given a copy of the PI's report prior to his appeal hearing. When asked, he said that the PI's report had formed part of his decision to dismiss C along with the report from the Director of Services (hereafter referred to as TC).

When asked the witness said that he had made the decision to dismiss because of four issues. C's attendance pattern, C's failure to comply to duties assigned to him on November 8<sup>th</sup> 2004, an allegation that C verbally abused a colleague (hereafter referred to as JL), was generally disruptive in the course of his duties on November 17<sup>th</sup> 2004 and the allegation that C was working while absent on certified sick leave. The witness decided that a written warning was sufficient in the case of the first issue, no further action for the second issue, a verbal warning for the third issue and dismissal for the fourth issue.

On cross-examination the witness said the appeal hearing was heard on May 12<sup>th</sup> 2005. When put to him, he said that the main issue for dismissal was the issue of C working while on sick leave. When put to him, he stated that the grievance procedure had been agreed with staff members. He explained that C had been dismissed for gross misconduct as per section 7 of the respondent's grievance and disciplinary policy. He explained that C already had a final written warning on his record, dated October 19<sup>th</sup> 2004.

When put to him about an allegation of C seen driving an other van in August 2003, the witness said that if C was on certified sick leave then it would have warranted dismissal for gross misconduct. He had not been employed as City Manager at the time. When put to him that JOC had observed him driving, the witness stated that this did not constitute work, making deliveries would. When put to him, the witness said he knew C had horses but had not been given any information that C had been tending his horses while he was observed by PI. When asked, the witness said that the respondent had not got C independently examined. He was not aware what the medical condition was that C had at the time of his certified sick leave in question. When asked the witness said that he was aware C had applied in the past for a transfer to the housing section.

The Senior Executive Engineer (hereafter known as GOL) for waste management gave evidence. He explained that JOC was the Senior Foreman; there were also two other foremen.

He told the Tribunal that JOC was a "no nonsense foreman" and he "liked his style". C had a poor record. Routes were left unfinished and bins were left in the middle of the road.

In late 2003 he was made aware that C was working elsewhere while on sick leave. He spoke to the Senior Executive Officer (known hereafter as ER) in HR. ER wrote to C on September 18<sup>th</sup> 2003 quoting the Organisation of Working Time Act, 1997. There had been no response to the letter as far as he was aware.

He stated that C had been made aware of his record and his record of absenteeism. A meeting was held with C on January 28<sup>th</sup> 2004 to discuss the issues. C told the witness that his absenteeism was due to bouts of flu because of the rain gear issued to him. C was informed that his absenteeism could lead to his dismissal. He wrote to C on February 10<sup>th</sup> 2004 about his absenteeism and was informed that he would be reviewed in three months. A copy of the minutes of the January meeting was also sent to C.

On October 11<sup>th</sup> 2004 C was rostered to work on another bin truck but C refused. The witness was informed of the incident and went to the yard to speak to C. C again refused even when the witness instructed to go on the truck. The witness told the Tribunal that this was insubordination. When asked, he said that he was not aware C and JOC did not get on. If there was a problem between staff, they could always come and talk to him, he had "an open door policy".

C's union representative sent a letter dated October 14<sup>th</sup> 2004 to HR regarding a bullying allegation. A meeting was held on October 14<sup>th</sup> 2004 in City Hall. An allegation of bullying against C by JOC was raised at the meeting. This was the reason, C said, why he continually refused instructions given by JOC. JOC was met the following day and the allegations were put to him. The witness found there was no bullying taking place.

A letter, dated October 19<sup>th</sup> 2004, was sent to C informing him that his work must improve and that having investigated the matter, the witness found there was no bullying. A final written warning was issued which would stay on C's file for fifteen months. C appealed the decision and lost. C returned to work.

Some time later JJC informed the witness that C was again not performing his duties. He would not lift the bin bags. The witness told the Tribunal that all staff had attended a manual handling training course. If bags were too heavy, two men would lift them.

On November 15<sup>th</sup> 2004, the witness wrote to ER concerning C. C had requested a day off on compassionate grounds on November 11<sup>th</sup> 2004. It was granted but C did not attend for work the following day. C rang JJC to say he had overslept. The witness told the Tribunal that this was serious insubordination. On November 17<sup>th</sup> 2004 the witness wrote to ER informing her of another incident between C, JJC and JL. There was a problem with the truck. While JL checked out the problem C abused JL for holding up the run. The same day, November 17<sup>th</sup> 2004, the Director of Services (TC) wrote to C to request his attendance at another disciplinary meeting on November 26<sup>th</sup> 2004.

The witness told the Tribunal that between November 11<sup>th</sup> and November 26<sup>th</sup> 2004 he decided that a private investigator (PI) would be hired to follow C. The witness instructed the PI on October 28<sup>th</sup> 2004. He received the PI's report and handed it to HR. TC took over the matter.

On cross-examination the witness told the Tribunal that C had been formally disciplined in October 2004. Before this date it had been informal. The witness stated that there had been no formal disciplinary process agreed with the unions until 2003. He could not tell the Tribunal when C was given a copy of the disciplinary procedure. When asked, the witness said that C's overtime was taken away from him in 2003 because he had not turned up one day. This was normal practice. C's overtime was later re-instated. When put to him he said that he had no prior knowledge of the tensions between C and JL. JJC and JOC decided to change C to JL's truck. It had been agreed with the unions to change staff around if needed.

When put to him, the witness said that he had not told C of the PI but that C had been told to improve his work and absenteeism. When put to him, the witness said he had issued a final written warning to another staff member for not lifting bin bags.

When asked by the Tribunal, he said that he had not decided in the third paragraph of the letter of October 19<sup>th</sup> 2004 to dismiss C. When asked, he said that after C was assigned to JL's truck, JL had told JOC he was not happy.

On the **third** day of the hearing the Director of Services (TC) for the Environment Section gave evidence. He explained that he got involved in the investigation through his letter to C dated November 17<sup>th</sup> 2004. Prior to this GOL had overseen the matter with C. In this letter four issues were highlighted to C. His attendance pattern, his alleged working while on sick leave, his failure to complete his duties and his alleged abuse of JL on November 17<sup>th</sup> 2004.

On November 26<sup>th</sup> 2004 a disciplinary interview was held with C. A Senior Staff Officer and a representative for C were present at the meeting. C was given the PI's notes prior to the meeting. When asked for a copy of JL's complaint against C, the witness told the Tribunal that it was a verbal complaint.

In relation to C's absenteeism, the claimant said that he had been suffering stress from Christmas 2003 and also suffered from a leg complaint. In relation to C allegedly working while on sick leave, C stated that the van had been loaned from a very close friend and had delivered some items as a favour. It was on his way to where his horses were kept. The van had a tow bar and C used it to trail his horsebox. In relation to not carrying out his duties, C said that the bin bags were too heavy for him to lift. In relation to the alleged abuse of JL, C said that they were waiting for a customer to bring out the correct bin; JL had gone to the side of the truck and was fixing something. C said that he told JL that he had reported the fault the day before and JL was only "killing time".

Following the interview a report of the interview was sent out to C. C was invited to a meeting on January 7<sup>th</sup> 2005 to discuss the matter. The witness told the Tribunal that he had determined what to do but wanted to see C again. Further representations were received from C's union. A meeting was held on January 13<sup>th</sup> 2005. The witness, C, his representative and a member of HR were present. C was very unhappy with the conclusions. A further letter from C's union was submitted stating C's concerns. C and his representative were invited to a meeting on January 31<sup>st</sup> 2005. The witness stated, at this meeting, he listened to the arguments put forward but nothing came out of it.

The witness told the Tribunal that the issue of bullying had been raised and investigated but there were no findings of harassment. The witness stated that he studied the four issues raised and the PI report when making his decision.

On cross-examination he said that his sole basis of dismissing C was the issue of C working for someone else while on sick leave from the respondent. He did not dispute the medical certificates shown to him at the third day of the hearing and said it had not occurred to him to get C medically examined. When put to him, he said that he had solely relied on the PI report when making the decision to dismiss C. When put to him, he said that he had not seen the video surveillance from the PI.

When asked by the Tribunal, he said that he had not interviewed C's close friend, the person he had been allegedly working for while on sick leave. He felt it would not have added to the internal investigation.

Video footage and pictures were shown to the Tribunal.

The Private Investigator (PI) gave evidence. He informed the Tribunal of his experience in his field of employment.

He told the Tribunal that he had been asked in October 2004 to investigate C and was given any relevant details, e.g. C's car registration and his home address. He was informed that C was working while on sick leave.

He commenced his observations of C on the afternoon of October 29<sup>th</sup> 2004. When asked by the Tribunal, he said that the difference of an hours time line on the time on the camera footage and his written note, the correct time he said, on the picture could have been because he may not have altered the time change on the camera. The clock would have gone forward at that time of the year. The pictures showed C putting something into his car.

The following day the witness went to C's home, his car was not there but a white commercial van was present. C came out of his home and drove towards Galway city and into an estate of fifteen to twenty houses but was then out of sight of the witness. C left some minutes later and again drove towards the city. The witness then observed the white van at the premises of the name on the van (hereafter known as IR). After 11a.m. C put a lawnmower in the van and drove to his house and observed him talking to some people. Again the Tribunal questioned the time difference in the photos submitted. At 12p.m. C delivered the lawnmower to a house in Ardilaun road then left.

On November 1<sup>st</sup> 2004 C's car was parked outside his house. C came out and drove to Dyke road. He did not observe C again until 2.40p.m. driving to Terryland Retail Park. He observed C loading a van but could not see what it was. C drove away and eventually stopped at a house. When asked, he said that he had not videoed C unloading anything. He did observe C with a green and white object in his hand. He left the item with the occupants of the house and drove back to the city. At 7p.m. the witness observed C's car still at the retail park and at 9p.m. he observed the white van parked close to C's house. The witness concluded that C was working. When asked, he said that he did not see C limping.

On cross-examination he said that he had not observed what C had done in Lakeview Park on October 30<sup>th</sup>. He was aware there was a field at the bottom of the road and had no reason to doubt that C could have been tending his horses. When put to him, he agreed that he had observed C perform two tasks. He was unaware of C's illness, planar fasciitis. When asked, he said that he had not enquired at IR's premises if C was an employee.

When asked by the Tribunal he said that the times had been written on the photos at the time they were taken and handed over to the respondent on November 2<sup>nd</sup> 2004. He could not explain why the times were different to that logged by the camera.

A former colleague gave evidence. On November 10<sup>th</sup> 2004 a colleague, PB was moved. Having seen the claimant at his truck he approached his supervisors JOC and JJC and told them that the claimant and he could not work together. He was told by JOC if he had any problems he was to contact JOC or JJC. The witness explained that there had been problems between the claimant and himself in the past and they had been switched to different crews. Everyone knew of the problem between the two men.

On cross-examination the witness explained the altercation in the past between the claimant and himself three years previous to the claimant's dismissal. When this incident occurred the witness had approached GOL who had dealt with it.

### **Claimant's Case:**

The claimant gave evidence. He explained that he had a recurring illness that had been diagnosed by his doctor. This illness, planar fasciitis, affected his leg. He could not stand properly or walk long distances and had to take medication. The normal route for his job was to walk up to eight miles a day. His illness did not affect him driving or lifting items.

On October 29<sup>th</sup> 2004 he was accompanied by his nephew and explained that he was storing presents in the attic of his house. On October 30<sup>th</sup> 2004 he dropped off a lawnmower for IR on his way to Lakewood Park to tend his sixteen horses. IR often asked him to drop something off if he was driving the van. He was never paid for it. On November 1<sup>st</sup> 2004 he again dropped off an item for IR on his way to view a new pony. He explained that he bought and sold all types of horses.

IR was his life long friend and often borrowed his van or even his Jaguar XRS; he's been doing it for years. He used the van to bring feed and water to his and IR's horses. He told the Tribunal that he had never hid that fact that he drove the vans for his employer, he often parked them beside where he worked. He was not allowed to bring a named van onto the premises. He gave evidence of loss.

On cross-examination he said when the respondent employed him he had thirty-seven horses. When asked about the letter dated October 16<sup>th</sup> 2003 from the respondent concerning his illness, he said that he did not respond to it as he had trouble reading and writing and his solicitor had completed his T1A form. His sister helped him reading correspondence. When asked, he said that his sister had written the letter of March 1<sup>st</sup> 2005 to HR and he had signed it. When asked if he expected a reply, he said that he was "sick and tired" of talking to GOL and nothing was done.

When asked, he said that he was unsure how many vans IR had. When asked, he said that his horses took priority over his job. He told the Tribunal that the only fair hearing he had attended was with the City Manager (JMC). He said that he felt JJC and JOC wanted to get rid of him from the start. When asked, he said that no meeting had taken place in Rockfield Park but JOC told him he was back on overtime if he wanted.

On re-examination he told the Tribunal that he had requested a transfer in September 2003 because of his leg.

On the **fourth** day of the hearing the claimant's lifelong friend (owner of IR) gave evidence on behalf of the claimant. He explained that he his business dealt in garden machinery and small engines. He had four vans, two of them with the company's name on them. When asked, he said that he did some small dealings in vans.

He explained that he had grown up with the claimant, they both liked bikes, had horses and socialised together. The claimant did not work for him but did borrow a van or the witness's car from time to time. Sometimes the claimant could have the van for a few days. He would use it to bring feed to his and the witness's horses. If there was any deliveries to be made on the way, the claimant would do it as a favour.

On cross-examination the witness said that his business was seasonal. When asked, he said that he not charge his customers for delivery. The claimant only delivered if the witness was really stuck. He knew the claimant had a problem with his leg but had never asked him why he was not at work.

When asked by the Tribunal, the witness said that he had not paid the claimant for dropping off a lawnmower.

**Determination:**

Having heard lengthy evidence from the claimant and the respondent over a period of four days the Tribunal is satisfied that the claimant was unfairly dismissed. The Tribunal is not satisfied from the evidence that was relied solely by the respondent, that is the private investigator's report, that his observation of the claimant effecting two deliveries in a marked delivery van for a lifelong friend constituted work. The Tribunal is satisfied that the claimant failed to demonstrate to the Tribunal that he had made a genuine effort to mitigate his loss.

In the circumstances the Tribunal awards compensation in the amount of €15,000.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)