EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF: CASE NO.
3 Employees UD707/2007
RP371/2007
MN571/2007
WT242/2007

UD708/2007
MN572/2007 RP372/2007 WT243/2007

UD709/2007 MN573/2007 RP373/2007
WT244/2007
against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001
REDUNDANCY PAYMENTS ACTS, 1967 TO 2003
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)
Chairman: Mr L. Ó Catháin
Members: Mr G. Phelan
Mr J. McDonnell

heard these claims in Horse & Jockey, Co. Tipperary on 18 June 2008
and 30 September 2008

Representation:
Claimant: Mr. Martin Hughes, F.P. Gleeson & Co., Solicitors,
Thurles, Co. Tipperary

Respondent: Ms. Michelle Nunan, O'Donnell, Breen, Walsh, O'Donoghue, Solicitors,
Trinity House, 8 Georges Quay, Cork

The representative for the Respondent told the Tribunal that she is instructed by the Liquidator. The name of the Respondent is Moremiles Tyre Services Limited (In Liquidation), per representative of the Respondent. It was agreed to run all the evidence together, however at the start of cross-examination the Tribunal decided that cross-examination should be for each particular Claimant.

Respondent's case:
The Tribunal heard evidence from the chief executive of the company. He told the Tribunal that the company was in existence since 1963 and he traded since 1963. In April 2007 the company went into liquidation.

The company is a retailer and distributor of tyre products. Ninety nine percent of the business was tyres. They sold to garages, hauliers and other wholesalers.

The witness gave evidence as to the second-named Claimant (GM). He told the Tribunal that GM was worked in excess of thirty years and was a "nice decent lad". He was an excellent employee and through the years he was promoted up to area manager in the company.

They had nine depots and GM was the area manager. GM did administrative work, co-ordinated sales, debtors and other functions. GM worked close to him on a one-to-one basis. For some time GM enjoyed his confidence. Then he noticed something about phone calls. GM would call the company, usually on Fridays and GM was incoherent and rambling. He would find that he could not contact GM until Monday or Tuesday. GM would not have a recollection of the phone calls and would "plat it down". This occurred in 2003 and 2004. He expressed great concern to GM.

Circa January 2006 an event occurred with GM. He was talking to GM about administration to "keep things straight", and completing advice notes. The witness explained that the advice notes equal sales created on credit and in many of the cases the signatures were incorrect. He had previously gone to a customer who had complained he went to the depot and found that there was no record of the transaction.

> The witness digressed to the third named Claimant's (KM's) case. He told the Tribunal that in KM's case it seemed that he was buying the tyres himself and selling the tyres himself. There were two men in that depot.

In reverting back to the second named Claimant GM's case he referred to a letter dated 22nd March 2006. This was from a company that said damage was caused to their vehicle. He wrote to them to ask them to send a report.

The witness referred to a letter dated 19th May 2006. He sent this letter "again" as "we were getting the documents back incorrectly".

The witness referred to a document at tab three of the booklet; Document dated 23rd August 2006 regarding a stocktake. He told the Tribunal that his son found items/property. His son found regrooving equipment. They did not allow regrooving to take place except in one depot and that was a controlled situation/ environment. They found tyres that were borrowed. They found tyres

that they would not stock and these tyres were from outside the European Union area. Regarding the cash system they found that some sales were not recorded.

The witness explained that all processing of invoices was done in a central office so all transactions had to be documented as it occurred. Also explained was that no stock should be there that had not been ordered by the central office.

He arranged a meeting with GM and this took place at The Ragg depot on 15 September 2006. It was just himself and GM at the meeting. He put questions to GM.

> The witness explained that questions were put to all three Claimants and the answers were recorded.

In answer to the first question that he asked GM, GM replies that it was "not our stock". In answer to the second GM replied that he did not know. To the third question he replied, "(named person) bought the tyres". To the fourth question he replied in the negative. The witness went through the questions and answers that were recorded.

The witness further elaborated on the questions and answers by explaining that they don't allow stock on the premises that does not belong to them, that stock should only be ordered through the head office. Regarding the regrooving issue GM told him that no regrooving was done on the premises.

The witness was referred to the last page of document at tab three and he explained that GM told him that he did not know. GM denied that there was a private enterprise being carried out on the premises.

Arising out of the meeting and the stock take he wrote to GM on 13th November 2006, (tab four). The letter was opened to the Tribunal.

He was to meet with GM on 15 November 2006 but the meeting took place on 21st November. He made notes of the meeting. The notes were opened to the Tribunal. The purpose of the meeting was to go over the answers again to see if GM wished to change his answers. He understood that there was no change to the answers.

He decided to wait some time so he waited until after Christmas, also he himself had been ill.

The letter of termination of GM's employment dated 29 January 2007 was opened to the Tribunal.

He had a series of meetings with GM after that. The reason being was that they had actually rented a property from GM to carry out their business and the left the property back to GM. GM then bought the stock from them.

The witness also told the Tribunal that they rented property in Galway and that they kept up to date with their rent. However the landlord arrived with an ejectment order and told them that they did not revert to him on time. The landlord told him that GM did not get back to him on time.

Regarding the phone calls that GM made GM said that he did not recall them. He had to report one call to the Gardaí as G M threatened his daughter's house.

Arising:
The representative for the Respondent asked the witness to sum up the misconduct in a sentence. He replied, "In general terms (there) could have been another business being carried out on the premises".

Cross-examination:
The witness when asked told the Tribunal that he did not have written terms and conditions for the employees. It was put to the witness that GM found it difficult to contact him. The witness explained that he had a detailed record going over the years and he can produce the record.

It was put to the witness that the GM would deny making personal threats

The Tribunal asked the witness if GM was issued with written warnings and he told the Tribunal that the GM was given two written warnings.

The Tribunal asked the witness what made him decide to dismiss GM. He told the Tribunal that it was because he did not consider that he got satisfactory answers to the questions. Also GM told him that if he had any queries he would revert to him through his solicitor and no one got back to him.

Giving sworn testimony, JD's son (hereafter referred to as CD) said that he had worked for the respondent for more than twenty-five years and that he had worked in the respondent's head office in Cork. Asked about stock, CD said that the respondent had maintained a certain amount of stock at all times. All ordering was done centrally. Stock quantity would be checked by head office and ordering would be done accordingly. Dockets would be looked at to check that a sale was done. All dockets had to be signed off. Documentation was required. The respondent had a number of depots. All goods in and out were recorded. All three claimants (GM, KM and CK) were employees of the respondent.

Asked if there had been any problem with the Thurles depot, CD replied that there had been a difficulty with stock issues. He said that orders had come in which "were not based on anything really" and that when the respondent would ask where was the relevant docket documentation "there was always a tale". There were "virtually no problems elsewhere" among the other depots.

It was put to CD that GM had said that there had been a problem at head office. CD replied that the respondent would check stock at a location and would not "double up". If a depot said that it did not have something the respondent would ask where it was.

CD was asked if depots did not order items and replied that they did not do so unless they asked the respondent to facilitate if something was needed urgently. The Thurles depot never said that it wanted something urgently but at stocktakes CD found goods that had been lent or "blah, blah, blah" from another place. There would not have been a problem if permission had been sought or if a paper trail had been used.

Asked about a stocktake on 23 August 2006, CD said that he had gone to Thurles and had found items that had not been ordered. These items were not in the respondent's stock but were on the respondent's premises. That "raised questions". GM was the area sales manager for an area that extended from Thurles to Galway and Limerick. GM was a "senior person" and JD "would have taken him into his confidence.

Under cross-examination, CD said that he had dealt with the Thurles depot since it had opened and that "stock order forms should be filled in". When it was put to him that a lot of the problems had been just before the liquidation he conceded: "A lot happened lately." However, when it was put to him that a problem had arisen from an "inability to order" he replied that he disputed this and added that there had "seemed to be a problem" where GM had been "in control".

It was put to CD that GM would say that his time had been given to sales rather than administration. CD stated that he accepted that GM's area had extended from Thurles to Limerick and Galway but said that GM had covered "sales and his area".

Giving sworn testimony, GM said that he had begun work with the respondent about thirty-five years earlier and that, about four years after he had started, he had become area sales manager. He went out to hauliers and garages and collected money. He worked in three different areas but was not involved in administration, as he would not be there at the depot. There was a manager there for that. GM spent more of his time in Limerick and Galway. He was not involved in processing order forms. That was the depot manager's job.

All went well for a long time and there was plenty of stock. However, about three or four years from the end, stock became harder to obtain. GM had to ring a manufacturer himself. The depot manager could tell more about this. They were always out of tyres. GM had to go to another depot. Customers got annoyed and a lot of customers were lost.

GM told the Tribunal that he had never got a written job description and that he would not have anything to do with dockets. He would go in and say that he wanted ten to go to one place, five to another and to send out the dockets. At the end of the month he would collect money.

In the final three or four years it got worse every year. Someone rang and said that GM's pension had been stopped for a year and three months. He realised that his salary had been debited for all that time. Getting on the phone to JD's daughter and secretary, GM said that he would go to Cobh if JD did not get back to him. JD did not speak to him for three months after that. GM subsequently "got a registered letter with the money back but no apology". His relationship with the respondent deteriorated then.

Asked about September 2003, GM said that the respondent "sold Limerick to the opposition" but that he had not been told. At this point in the Tribunal hearing the respondent's representative objected that this had not been put to JD.

The Tribunal was now referred to the typed notes of an interview with GM dated 15 September 2006 which was headed "Points arising from Stocktake on 23.08.06". These notes contained questions asked of GM (and answers given by GM) in respect of different categories of stock, regrooving activity, recording of stock movement to and from the Thurles depot, unrecorded sales, KM's timekeeping and the signing of advice notes by GM.

In the said typed notes there was a record of the question whether GM believed that KM had been "carrying out some private business on the side" but there was no record of a reply to this specific question. In the notes it was also put to GM that, in spite of many warnings and GM's written agreement in October 2004, he had continued to ignore his duties regarding the recording of stock movements and daily sales. The notes recorded GM's response as: "Do not agree. Definitely say

no."

The typed notes of the 15 September interview concluded with the following questions and answers:

What is your response to the level of unrecorded stock movements/sales etc. highlighted from the investigations following CD's stocktake on 23.08.06? Did not know.

Following the unsatisfactory responses from CK and KM to JD and CD regarding the stocktake issues, do you believe them to be completely trustworthy? No reason to tell lies. They are doing their best.

Due to the incidences of non-respondent stock on site and irregularities recording cash sales, it occurs to me that there is some private enterprise been (sic) carried out here. What is your comment on this? If this was going on stock would not be in store. They are not that stupid.

There appears to be a lack of supervision of staff; what is your response to this? So miniscule it is crazy.

What disciplinary action is in your view appropriate for KM and CK considering the breaches identified in the 23.08.06 stocktake? Handbags is what I call this.

Asked at the Tribunal hearing if he now disagreed with any of the answers attributed to him, GM replied that he did not disagree but that he should not be asked because he did not do that work. He said that he had been in Galway when the stocktake had been done, that he had not done the Thurles depot stocktake and that the said stocktake had not been part of his function but rather that of CK who had been the Thurles depot manager.

The Tribunal was now referred to a note of a 21 November 2006 meeting in which JD was said to have given GM "a full opportunity to address the matters under review", to have particularly drawn GM's attention to "how serious" this was (i.e. the "implications") and that "he (GM) had the opportunity to have a rep present with him". The note went on to say that GM said that, "he did not need anyone present but, depending on the meeting, would have his solicitor ready". The note stated that GM "wanted to know if CK was being checked into also".

Asked at the Tribunal hearing to comment on this, GM said that, when asked questions, he had said that he had had nothing to do with stock, that this was all about stock and that the respondent should ask CK (who saw dockets every day whereas GM would only see them every three days). GM told the Tribunal:

"I said I couldn't source tyres but, as usual, he fobbed me off. He said other depots were going well and that only our depot had a problem. Then Galway closed. I was under terrible pressure. I spent a lot of time in Galway due to difficulties with having no depot. I said that CK, as depot manager, should answer because I was out on the road. I could not know what anyone was doing in a depot. I did not look after any documents."

GM now told the Tribunal that in late December/early January he was told that he and KM were to be "let go".

The Tribunal was now referred to a 29 January 2007 letter from JD to GM, which, alluding to the meeting of 21 November 2006 stated that "over an extensive period of time" JD had been concerned about GM's performance and conduct in the respondent operations under GM's supervision. The letter went on to say that the respondent had been obliged to give GM oral warnings on a number of occasions, had given him a written warning on 19 May 2006 and a final written warning in a 13 November 2006 letter. The letter stated that, having heard what GM had had to say on 21 November 2006, JD was not satisfied that GM had not been engaging in actions that were a clear breach of his long-standing terms of employment and added that JD was "also not satisfied that you were not engaging in Serious Misconduct". The letter concluded by dismissing GM for breach of his terms of employment and for serious misconduct.

Asked if he had indeed committed a breach of his terms of employment, GM rejected this saying that he had felt for three years that JD had been trying to get him to resign. GM said that he had "tried to get through to him after the letter" and that, in the first week of February, he had "got him" whereupon JD had said that he could not give redundancy to GM because he would then have to give it to KM.

GM now told the Tribunal that JD had owed him about nineteen thousand euro for rent, that he (GM) had had to do a deal with JD about stock "to try to get that nineteen thousand out of him" and that JD had agreed to give him that stock. He added that he had set up his own business in March.

It was put to GM that JD had said that he believed that there had been buying and selling for a third party at the Thurles depot. GM, acknowledging that the Limerick and Galway depots had borrowed, said: "Till the last three years we'd not had to do that." However, he did accept that stock had become very scarce. He told the Tribunal that he knew nothing about regrooving but that he had been told that a customer had brought in a regroover.

GM told the Tribunal that, when he needed tyres from CD, sometimes CD would get them and sometimes not. GM normally dealt with JD and very rarely had contact with CD. GM had contact with CD once or twice a week. He (GM) would usually ring a depot and the depot staff would fax in the order. The depot manager would tell GM if something was wrong. Sometimes, GM would ask for proof that the order had been made.

Under cross-examination, GM said that he had been an area sales manager for the respondent, that he had held the post for over thirty years and that his relationship with JD had been good. Asked if the relationship had suffered because of the pension issue, GM replied:

"That was the start. That soured relations for a few months but I got over it."

When GM was asked if this had not been around the time that things went wrong he replied that problems had started in 2006. It was put to him that, though he was not expected to see every form, JD had trusted that he (GM), as area manager, would have had something to say if there was an issue with documents. GM disagreed saying that people in the office would look after such matters. Asked to confirm that he had been the area manager, he replied: "Area sales."

It was put to GM that, regarding documents, the buck stopped with him even if he was not expected to sign off every one and he was asked to confirm that, when something was told to him, he would deal with it. GM replied that the depot manager had about twenty-five years' experience, that he (GM) had never been told to check dockets, that he had informed JD of this and that he would not

do all these things.

Asked to accept that he had had responsibility, GM replied that he had not been doing administrative work, that CK would have had more experience than him and that he (GM) had just done sales.

Pressed to accept that the buck had stopped with him, GM replied that he had "had nothing to do with admin", that he "was not an admin manager but a sales manager" and that the only problem highlighted to him had been in 2006. When it was put to him that he had been area manager and a trusted member of staff he replied that he had "had a sales job for three big areas and did not have time". He added that, if a docket was wrong, someone would tell CK it was wrong and he would get it right the next time.

GM did acknowledge to the Tribunal that, if the respondent had debt collection proceedings against a customer, he would be called to give evidence. Asked why he would be called rather than CK, he replied that JD would ask him. Asked if this was because he was area manager, he rejected this and said that it was because he would know the customer.

It was put to GM that in a number of cases the respondent had no proof of delivery for certain stock and that he had been well aware that the buck had stopped with him regarding KM and CK. GM replied that he did not do paperwork and that he had not handled the hiring and firing of staff.

Asked about regrooving, GM said that he had not been aware of regrooving being done. He conceded that he had been told that it had once been done by a customer and that KM had let this customer do it on the depot premises.

It was put to GM that, if he had not known that regrooving was happening, it was worse if he had not known. GM replied that he had been in Galway. Asked to acknowledge that he had not taken his duties seriously, he said that he would tell KM not to do it and that KM did not know how to do it.

Asked to accept that JD had been reasonable in expecting him to know what was happening, GM maintained that he had not known about regrooving and that he had been told that it had been done by a customer. Asked to agree that it was worse to let a customer do it, GM replied: "I wouldn't have let a customer do it. I wasn't there."

When GM was asked about the ordering of stock and asked to comment on the different brands that had been on the premises he said to ask CK, that he (GM) had had nothing to do with it and that he would not be in the depot for more than a very small amount of time each day. Asked if he would not have seen a large volume of different tyres, GM replied that he had left this to CK who had been there for twenty-five years.

When it was put to GM that he had been responsible for the proper running of the depot, he replied: "I was under pressure for sales. I'd do a hundred miles to Galway and the same back. It was the depot manager's function to see that everything was signed for."

The Tribunal was now referred to a letter dated 13 November 2006 from JD to GM, which was stated to be a final written warning. This letter alleged the following non-exhaustive misconduct and breaches of GM's terms of employment:

" 1. Failure to ensure all stock movements are recorded and to comply with Company Policy in this regard.
2. Allowing stock, which does not belong to (the respondent) to be kept on the premises, thereby breaching express Company Policy.
3. Allowing work to be carried out on the premises, which is not being recorded in the Company Records.
4. Failure to ensure cash sales are recorded accurately in line with Company Policy.
5. In some case, failure to record cash sales.
6. Forwarding incorrect record documentation to Head Office.
7. Allowing the submission of incorrect time sheets in relation to (KM)'s employment to Head Office.
8. Carrying out or facilitating the carrying out of re-grooving work on the premises, despite the fact that you have been made fully aware that the Company does not permit unauthorised re-grooving works to be carried out.
9. Storing a re-grooving machine, which is not company equipment, on the Premises.
10. General failure in your supervisory duties, which are central duties in your Terms of Employment, which duties, you have previously carried out without question over the years.
11. Your failure to carry out your functions properly was a significant contributory factor in (the respondent) losing its procession (sic) of its company premises at Galway.
12. Making express personal threats against me."

Commenting on the twelfth allegation, GM said that JD had owed him a lot of money for rent, that the rent had always been in arrears, that he would be very upset about the rent and that he had not been able to contact JD.

In re-examination, GM stated that he denied the 13 November 2006 allegations.

Questioned by the Tribunal, GM stated that, for a year and three months, he had been docked money for his pension but the respondent had not been paying in. He said that he had taken over the business (and had taken on KM and CK) subsequent to the respondent finishing but that a lot of customers had been lost through not having had tyres and that the respondent had kept the depot for three months with no-one in it.

GM said that the sales manager for Kilkenny, Waterford and Clonmel would be "on the road" as well rather than in a depot and that everything was done in head office although the depot manager did have a function. He (the depot manager) was good, was there twenty-five years and could show GM how the work was done. The depot manager reported to head office. GM reported to JD.

Under final cross-examination by the respondent's representative, GM said that he had done nothing for four months after his dismissal. JD had said that he was giving GM back the depot in April. Asked to confirm that he had incurred no additional loss, GM replied that it had been a redundancy.

Giving sworn testimony about KM, JD said that in 1994 KM had started as a tyre fitter in Nenagh for the respondent but that, when the respondent moved to The Ragg in Tipperary, KM continued

to be employed although he remained resident in Nenagh.

Asked about KM's performance, JD replied, "we all have sons" but then told of an incident in 2004 when a customer had had a tyre fitted to his car that had come from a third party and had not been documented in the respondent's system. When a wheel came off the car this led to what JD told the Tribunal had been "a big insurance situation". JD spoke to all concerned, considered the situation and "decided to let one chap go". He told the Tribunal that he had kept KM on "because his dad (GM) asked me" to do so. JD stressed to the Tribunal that the tyre that had come off had not been ordered through the respondent, that a third party had been involved and that no funds had come to the respondent although the respondent "had a legal case" about the wheel that had come off. JD said that KM had acknowledged to him that he (KM) had done a tyre transfer and said that both employees had expected dismissal.

The Tribunal was now referred to a respondent memo dated 8 October 2004 from JD, which opened:

"It is company policy to raise either a Cash Sale Docket or an Advice Note for all goods or services at time of transaction.

All goods taken into stock must be completed on Goods Inwards."

After a series of instructions regarding cash sale dockets, advice notes, "Accounts on Stop" (overdue accounts), closed accounts, new accounts, order numbers, pre-booked stock and "Goods Inwards" (i.e. that all goods received into stock had to be entered into a goods inwards book on the day received) the memo ended as follows:

"Failure to comply with above is a serious offence and non-compliance will result in instant dismissal."

JD told the Tribunal that there had been other problems that the respondent could not prove and that there had been constant problems with KM. One related to timekeeping. JD knew from CK that KM had not been there at times on his timesheets. All employees had timesheets except area managers.

Asked if KM had had other business, JD replied that, on KM's late days, he was informed that KM was working for his father and that CK had kept him (JD) informed.

Asked if there had been problems, JD said that dockets and signatures had been missing and that CK had confirmed this. JD would speak to GM and GM would speak to three or four employees.

The Tribunal was referred to a note from 23 August 2006 of questions put to KM and answers given by KM. Asked how long certain tyres had been on the premises, KM had replied that they had been there three months and that TM (his brother) owned them. Asked who had delivered them, KM had said that he did not know. Asked where TM had got them, KM said that he had got them from an uncle (JM). Asked how TM was going to fit these tyres, the reply was noted as being that KM "was going to do it some night as a favour for him". Asked for what TM had wanted these tyres, KM was noted as having replied: "His wife's uncle."

The next issue put to KM on 23 August 2006 was regrooving. Asked how much regrooving was done on the premises, the reply recorded was: "F**k all." Asked about the regroover, KM's

recorded reply was that a named business owned it and that the said business's fitter did some grooving in the depot. Asked about an old regroover, KM was noted as saying that it was twenty years old and belonged to a named individual (GG). Asked if he did any regrooving, KM replied in the negative.

When a question was asked about another kind of stock, the reply recorded for KM was that KM had borrowed two from a man (NG) and would have to return them because other stock had come in on time though KM had thought that he might have needed the borrowed items for a customer.

Asked about another brand of tyres, the reply attributed to KM was that "some fella came in one day with them and needed two different tyres; so he swapped for the customer". Apparently, KM did not know the man's name or what he swapped and had done no dockets.

Asked about certain tractor tyres, the reply recorded for KM was that they belonged to someone (SC) who left them there for KM to fit if and when he needed.

Regarding other tyres of a particular type, the recorded response was that they belonged to the respondent and that this could be explained by the fact that they had come off a truck belonging to a driver who had not liked these tyres and therefore had fitted others. Asked if a credit note had been done for these, the reply noted for KM was negative on the basis that they were "going back on again" and that the driver's employer "still own them".

JD told the Tribunal that he had not been present at this stocktake and the respondent's representative said that CD would give evidence.

It was now submitted to the Tribunal that documents from various specified dates in 2006 had been unsigned or that transaction records could not be traced.

At this point, the Tribunal was referred to a letter dated 31 October 2006 from JD to KM, which was stated to be a final written warning. This letter alleged the following non-exhaustive misconduct and breaches of KM's terms of employment:

" 1. Failure to record all stock movements and to comply with Company Policy in this regard.
2. Failure to comply with written Company Policy as set out in the Policy Document dated the 8th of October 2004.
3. Keeping stock, which does not belong to (the respondent) on the premises, thereby breaching express Company Policy.
4. Carrying out work in the premises, which is not being recorded in the Company Records.
5. Failure to record cash sales correctly, in line with Company Policy.
6. In some cases, failure to ensure cash sales are recorded.
7. Failure to correctly complete advice notes.
8. Forwarding incorrect record documentation to Head Office.
9. Submission of incorrect time sheets in relation to your work hours to Head Office.
10. Carrying out or facilitating the carrying out of re-grooving work on the premises, despite the fact that you have been made fully aware that the Company does not permit unauthorised re-grooving works to be carried out."

In the letter JD continued as follows:

"As a result of your failure to comply with your terms of Employment by recording all

stock movements we were obliged to request you to sign an acknowledgement that you understood andwould comply with Company Policy regarding stock movements on the 8th of October 2004. Youacknowledged at that time that non-compliance with Company Policy would result in instantdismissal. You have, however, failed to comply with that Policy.

I have repeatedly attempted to be reasonable with you and to give you every opportunity to improve your practice within the Company.

I met with you on the 5th of September 2006 in order to address my concerns about serious Misconduct, which came to my attention during our stocktake on the 23rd of August 2006. I warned you during that meeting of the seriousness of your non-compliance with your terms of employment and that your position within the company was in danger.

The breach of your Terms of Employment and your blatant Misconduct with (the respondent) has left me with no alternative but to issue you with this Final Warning. I hereby request you to attend at a Meeting with me on Friday 3rd November at 11pm (sic) in the Head Office in Pouladuff in Cork in order to explain your actions. You may bring such personal representative to this meeting as you may wish.

You should be in no doubt that this is a Final Written Warning and that in the event that you do not adequately explain the reasons for the persistent breach of your Terms of Employment and your Misconduct at that meeting, it will result in your dismissal from your employment without notice."

The Tribunal was referred to a 2 November 2006 letter from JD to KM which acknowledged that KM had indicated that he wished to take legal advice and stated that, if KM failed to attend a meeting agreed for 8 November 2006, he would be "running a very serious risk" of losing his position with the respondent.

The Tribunal was now referred to a letter dated 7 November 2006 from KM's legal representative to JD. The letter alluded to the reference in JD's 31 October 2006 letter to KM's terms of employment, stated that KM had repeatedly sought written terms of employment without success and formally called on JD to furnish KM with same.

The 7 November letter also addressed the ten allegations specified in JD's 31 October 2006 letter stating that some of them were denied, some had already been the subject of explanations and that others required clarification.

At this point in the Tribunal hearing JD said that at the 8 November 2006 meeting he reminded KM that he had a right to have someone with him and that KM "gave the same answers as before" whereupon JD drew the conclusion that he would reflect on this.

Regarding a meeting scheduled for 4 January 2007, JD told the Tribunal that he had been ill over Xmas and that he had only briefly met KM and GM. JD said that there had been "full and frank discussions" but that KM thought all the questions were "a bit of a joke" although the answers caused JD concern. Feeling that the respondent had come across a very serious sequence of events and that the concerns raised had not been allayed, JD felt that he had had no option but to dismiss KM by letter dated 29 January 2007.

In cross-examination, JD was referred to the 8 October 2006 memo as to the respondent's

procedures. When it was put to him that KM had pleaded for respondent documentation to be copied to him, JD said that he was not saying that it had all been given to KM previously but that he had given KM a copy when KM had asked him for it.

When it was put to JD that KM's representative had asked, in his letter dated 7 November 2006, for a copy of KM's terms and conditions of employment, JD replied: "He got a copy on the eighth."

After the Tribunal was referred back to JD's end October 2006 final written warning to KM and to JD's 2 November 2006 letter (telling KM that if he failed to attend a 8 November 2006 meeting his job would be at very serious risk) it was put to JD that he had not replied to the request by KM's legal representative for clarification as to which incorrect record documentation JD had been referring in the final written warning. JD replied that he had met KM on the 8th and JD did notdispute that KM had not got terms and conditions of employment at the outset.

Regarding CK, it was put to JD by his own representative that CK had been with the respondent since 1980. JD replied that CK was "a very decent man", who had been twenty years with the respondent and who had been very attentive to everyone but that JD would rarely deal with CK personally and would go through GM.

The Tribunal was furnished with a record of the 23 August stocktake and an account of CK's answers to related questions. Asked where certain type of tyres had come from, CK said that he had not seen them and that he knew nothing about them. Asked if regrooving had gone on, CK said that he never saw regrooving and that he would only very seldom see some rubber on the floor. Asked why there were tyres out to GM but with no docket done, CK said that, when GM, who had over thirty years' service, said that he would pay in the next few days, CK believed him.

Regarding the first type of tyre mentioned in the points arising from the 23 August 2006, CK accepted that this stock had not been recorded in the system but replied to most of the follow-up questions by saying that he did not know. Regarding the second type of stock queried, CK said that he had been on holidays and that he had seen it when he came back. He accepted that KM had collected it and that he (CK) had been wrong in delivering tyres that did not belong to the respondent. He did not know if GM had queried this.

Asked about other unrecorded stock, CK admitted that KM had been on site when it was delivered but CK did not appear to know any more nor whether GM had questioned this. JD said to the Tribunal that it was a small depot and that one would see this.

Regarding a certain type of tractor tyres, CK said that KM would be doing some business and GM would be turning a blind eye. To the other questions about this he (CK) replied that he did not know apart from saying that he did not think so when asked if GM had known of this. JD told the Tribunal that no sales docket could be traced in head office.

Regarding another type of tyres, CK said that KM had said who owned them and CK said that other questions should be addressed to KM. CK admitted that he had not done a credit note for these tyres but did not appear to know why they had not been recorded or whether GM had been made aware of this transaction.

Questioned about another kind of stock, CK had said that the stock had been on the premises for two weeks but that he did not know who had delivered the tyres, who had been on site when they

had been delivered nor why this stock had not been recorded in the respondent's stock system. CK answered in the negative when asked if GM had questioned these tyres.

Asked who had authorised regrooving to be carried out on the premises, CK had replied that he did not know. Asked who had done the regrooving, he replied that it might have been KM and, asked who owned the regroover, CK said that GM owned one. Asked where sales were recorded for regrooving work, CK accepted that there was no record. Asked if regrooving work had been cleared with GM, CK replied that GM "probably does know". Questioned as to who had allowed use of the premises if regrooving had been carried out by a third party, CK replied that it had perhaps been KM. Asked if GM knew about the regrooving, CK said that he (CK) presumed that GM knew about it.

CK confirmed that he had given tyres to someone (NG) without documentation and that GM knew about NG.

Asked why sales for six tyres (circa two hundred euro in value) were not recorded and why stock entries relating to the above transaction were not recorded, CK said that there had been no cash sale book in the van. Queried as to why money related to the above sale had not been lodged, CK said that it had been given to CD. Asked why tyres out to GM had not been recorded, CK replied: "Did not book tyres out." Questioned as to why a sale of €150.00 paid by visa in the shop of TM (KM's brother) had not been recorded, CK replied that he (CK) had not booked the tyres out and that KM had written no document on the day of sale.

Questioned about KM's timesheets, CK confirmed that KM was not in on time and that KM sent in his own timesheets Asked if timesheets submitted by KM were incorrect, if CK knew this and if GM knew this, CK answered all three questions in the affirmative.

After these answers from CK, JD met him in September 2006 and spoke to him in October 2006 warning him of his position. In late November 2006 JD met CK in Killaloe, discussed the position with him again and heard an admission from CK that KM's timesheets had not been correct.

On the last week in March 2007 JD met CK in head office. CK knew that JD had given three months' notice on the lease in The Ragg. Regarding the depot, the respondent did not know where tyres were coming from. CK was taking delivery of tyres, which were not for the respondent but for GM and KM. CK confirmed this to be correct. JD told CK that no goods should be taken in without agreement. JD told him that there was no point in going on. Within days, JD wrote to him dismissing him.

In cross-examination, JD was asked why CK had been dismissed. JD replied that it was because it had come to JD's attention that CK had been taking goods in to the depot for GM and KM. JD confirmed that, though he had met CK in 2006, he had dismissed him in 2007. JD said that he had met CK in a pub in Killaloe and recalled offering CK a depot job. Asked if he recalled getting a list of all customers, JD replied that it would be available to the respondent. When it was put to JD that CK would say that the respondent had been anxious to get such a list JD reiterated that it would be available to the respondent.

JD said that CK had said that he had not wanted to get involved with KM and GM. Asked what reason he had given for dismissing CK, JD said that it had been when JD found out that CK had been taking tyres into stock from a particular supplier. When it was put to JD that CK denied this,

JD said that CK had told him and had confirmed it. JD added that that the supplier could confirm it.

Questioned by the Tribunal, JD confirmed that 5 April 2007 had appeared on a P45, said that there had been fourteen or fifteen people working for the respondent when the liquidation had occurred and added that nobody was working in Thurles for the respondent at that stage. JD said that he had invested heavily in the respondent to keep it running and that the liquidator was appointed on 5 April 2007. He said that, having had difficulties, the respondent had taken advice and that, otherwise, JW would have put in more money. Asked if he had had any other reason for dismissing CK, JD replied that he had had enough reason but that he had heard about stock coming in and that he had warned CK many times.

Further questioned by the Tribunal, JD said that CK had known that the depot was closing, that CK had been offered a position and that CK could work from his own home. He could be a salesman for the region. JD told the Tribunal that CK had been thinking about it that that "events overtook it".

Giving sworn testimony, CD (JD's son) said that when he had gone to The Ragg he had seen tyres that he knew had not been ordered. CD said that most orders went through him and that sizes and treads had stood out. CD told the Tribunal that, as he moved around, people tried to move objects so that he could not see them. CD would see tractor tyres and then they were moved. CK was there and KM came later. CD asked KM who said that TM (his brother) owned them. CD asked why they were there and was told that they should have been in TM's garden.

CD asked CK and KM about a regroover and was told that it was from a named company. That would have insurance implications. A certain kind of tyre was "covered over". This stock had been borrowed from a third party (NG). This order had not come through centrally but the respondent should have had a record because the respondent could have a problem if there had been a problem with a tyre obtained from the respondent's premises.

After one staff member left there was a problem about paperwork. No paperwork could be found for a certain kind of tyre. There was work going on that was not on behalf of the respondent. CD told KM that he (CD) would have to report what he had found. It did not seem to bother KM.

Regarding CK, CD told the Tribunal that CK had been there when CD had arrived and that CD had made rough notes on the day. The Tribunal was referred to the answers CK had given.

CD told the Tribunal that CK admitted that regrooving had been going on but never seemed to have seen it. CK admitted that he had sold six tyres but had not done a docket. CD was thinking that a docket should have been done.

Under cross-examination, CD said that his function had been to count stock on the day and ask how, who or why. He added that it would not be his function to give warnings. Asked if he had known that CK had been offered a job in February 2007, CD replied that he had not known.

CD told the Tribunal that CK had been with the respondent a long time and that CD had not asked

why CK had been dismissed. CD admitted that he had been a bit surprised but that when he heard why (CK had been employed by the respondent and jobs were taken in for a third party) he was told that the allegation could be backed up by people who had delivered stock.

Giving sworn testimony, KM said that he had worked summer holidays with the respondent before starting as a tyre fitter for the respondent about thirteen years earlier. KM said that when stock was ordered one could not be certain of getting it and that tyres were got to keep the customer happy.

Referred to the respondent's memo of 8 October 2004 regarding stock procedure, KM told the Tribunal that he had said that he was not signing it but that he wanted a copy.

KM told the Tribunal that TM (his brother) lived next door to the depot and that KM did not do regrooving although a man had done it because he was moving up a tyre on his vehicle. KM said that TM had a right of way and that TM had a back garden with two gates. Tyres were put in and out. Nothing was gained but to keep customers happy.

Asked about a particular type of stock, KM said that he had rung CK about a type of tyre but that he could not get a guarantee that the tyres would be there before Friday. A couple of other tyres were got to keep a "big customer" happy.

Regarding timekeeping, KM said that he had stopped working Saturdays because he had been expected to work four hours for twenty-two euro but that JD had fallen out with him over this and had not spoken to him for three months after that. KM denied that he had been doing a milk round and said that CD had talked down to him "the whole time".

KM told the Tribunal that he had "answered the truth" when he had been asked questions about stock and that he was doing the same before the Tribunal.

Asked about the final written warning he had received, KM said that "the writing was on the wall" and that he "had seen it happen at other depots". He added that people had "whispered on the grapevine" that the respondent would close.

KM stated to the Tribunal that he had always gone where the respondent had sent him and that he felt that he had been unfairly dismissed so that the respondent would not have to pay him redundancy. He said that the respondent would not get a certain kind of tyre if it were ordered.

Under cross-examination, KM stated that when he was seventeen he had worked for the respondent while studying full-time and that he had worked summers for the respondent. Asked if he saw a problem with having so many types of tyres, he said that he did not and that he was only now seeing the respondent's memo although he did confirm his own signature on it. Asked why he had a problem with JD finding it antagonistic that he (KM) had all this stock and that correct documentation was not done, KM replied that JD had not been stocking the depot properly.

Asked to accept that the respondent had been paying him, KM replied: "Poorly." Asked why he had stayed with the respondent in that case, he said: "I was waiting for redundancy."

KM rejected the proposition that he had been taking the respondent's paycheque and operating to his heart's content. Asked about regrooving he said that it had stopped after a piece of rubber had been found on the ground. He accepted that perhaps he should have rung GM or JD about it and said that he had not known that the respondent's insurance could be invalidated.

KM said that JD had been unreasonable and that he (KM) had not been running his own business. He admitted that he had allowed regrooving and said that he understood that now.

Asked about timekeeping, KM said that he got up at 8.00 a.m. and left at about 8.45 a.m. to go to the Ragg. He added that JD had started ringing at 9.05 a.m. after KM stopped doing Saturdays.

When it was put to KM that he had felt that he could run his own business and the respondent's business he replied that regrooving had been done twice to two tyres. Asked if he understood that documentation could have been done better, he replied that tractor tyres were nothing to do with him and that they related to his brother.

Giving sworn testimony, CK said that he had been with the respondent since 1980 and that he had been depot manager in Roscrea, Nenagh and The Ragg. He did his best for the respondent and had a good relationship with JD and CD until the last couple of years. Asked when was the change, CK said that he could not put his finger on it but that a depot was closing, the respondent was cutting back and he could not get the stock.

Asked about the 23 August 2006 stocktake, CK said that CD had come in with another man (TQ). Asked about a certain kind of tyre, CK said that KM had said that they were on TM's property. CK also said that he had not seen regrooving and that he had returned borrowed tyres to the lender (NG). CK said that there were no documents because the tyres were not sold and, therefore, that there was no need for paperwork. NG had always obliged them when they were short. This had been frequent in the last number of years.

CK said that he had not seen tractor tyres and that he had been in CD's company all the time during the stocktake. He rang KM who rang GM. CK had just wanted to keep a customer happy.

CK said that the depot had no bank facilities and had to do a bank lodgement every day. Sometimes, transactions were recorded on the following day.

Regarding KM, CK admitted that KM would sometimes not come in until 9.30 a.m. CK said that the respondent had not wanted him to lie for KM. CK would leave the depot to do his sales and KM would do his own timesheets.

Regarding work in the Nenagh area, CK said that it was not advisable for KM to come from Nenagh over to The Ragg and drive back to Nenagh. It was a no-win situation. KM could have done the work quicker if still in Nenagh.

Asked if he had ever got a written warning or a letter about his behaviour, CK said that he had not and that he thought that he had only got a document relating to certain questions a few hours earlier.

Asked if he recalled verbal warnings, CK replied that JD had been very polite and had said that he would always have a job for CK.

Questioned about the meeting in a public house in Killaloe, CK said that JD had told him that "it could get dirty" between JD and GM and KM. JD asked CK to send him a list of customers. A few days later, JD asked him about this. CK said that he had not had time to do it. CK got round to it in a day or a few days and sent it.

CK said that, when he met JD in Cork, JD was very tense and said that GM and KM had set up their own business. CK told the Tribunal that "The Ragg is a big place" and that he had not seen any other tyres anywhere.

CK was to attend a meeting in Urlingford and was told that it was quite serious. He told his wife that he thought he was being dismissed. He got a dismissal letter on 5 April 2007. He had got no verbal or written warning. CK told the Tribunal that JD had had no reason to go after him in all CK's time. CK got the letter the day the respondent went into liquidation.

Under cross-examination, CK said that he had got three offers of employment but that he had been working with GM and had said that he would give it a year to see how it went. Collecting money was not a pleasant job.

Asked how he could have been on the premises day in, day out without seeing what stock was there, CK said that he had been on holidays for two weeks prior to that and therefore was not up to date on stock. He had asked about one kind of tyre and KM had told him the story about them being borrowed from NG.

CK added that there was holiday pay, which he had not received. His representative and the respondent's representative said that details of this would be submitted. The claimants' representative said that no outstanding holiday entitlements were being claimed for GM and KM.

Questioned by the Tribunal, CK said that he would call to garages selling tyres and would spend about an hour-and-a-half at the depot. He was on the road most of the time. He would have to be at the depot at 9.00 a.m. He would load the van then. He would be there to sign in dockets and he would make an entry on a "cardex" system.

CK said that the respondent had switched off his mobile phone and that he had not been verbally told that he was dismissed. JD had not met with him although JD had said that he would. CK said that he had worked "hand in hand" with GM and that he had always looked up to GM, JD and JD's son (CD).

Determination:

Regarding CK (the first-named claimant), the Tribunal noted that a new business had begun from another premises in March prior to the end of CK's employment. As a consequence, the Tribunal considers that there was no transfer of undertaking. In these circumstances, the Tribunal finds that he was dismissed by way of redundancy.

Therefore, the Tribunal finds that he is entitled to a redundancy lump sum under the Redundancy Payments Acts, 1967 to 2003, based on the following details:

Date of birth	24 January 1953
Date employment commenced	01 March 1980
Date employment ended	05 April 2007
Gross weekly salary	€463.94

(It should be noted that payments from the social insurance fund are limited to a maximum of €600.00 per week.)

This award is made subject to the appellant having been in insurable employment under the Social Welfare Acts during the relevant period.

As claims for unfair dismissal and redundancy are mutually exclusive, his claim under the Unfair Dismissals Acts, 1977 to 2001, automatically fails.

The Tribunal also awards him €3,711.52 (being the equivalent of 8 weeks' pay) under the Minimum Notice and Terms of Employment Acts, 1073 to 2001.

In addition, the Tribunal awards him €510.33 (being the equivalent of 1.10 weeks' holiday pay) under the Organisation of Working Time Act, 1997.

Regarding GM (the second-named claimant), the Tribunal finds from the evidence presented that he was not unfairly dismissed. Therefore, his claim under the Unfair Dismissals Acts, 1977 to 2001, fails.

In addition, his claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001, fails.

His claim under the Organisation of Working Time Act, 1997, fails.

His claim under the Redundancy Payments Acts, 1967 to 2003, also fails.

Regarding KM (the third-named claimant), the Tribunal finds from the evidence presented that he was not unfairly dismissed. Therefore, his claim under the Unfair Dismissals Acts, 1977 to 2001, fails.

In addition, his claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001, fails.

His claim under the Organisation of Working Time Act, 1997, fails.

His claim under the Redundancy Payments Acts, 1967 to 2003, also fails.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)