EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:	CASE NO.
Employee **- Claimant**	UD221/2008 MN207/2008 WT105/2008
against	
Employer **- Respondent**	

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
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. P. O'Leary B.L.

Members: Mr. R. Murphy
Mr. P. McAleer

heard this appeal at Cavan on 6 November 2008
and 26 January 2009

Representation:

Claimant:
Mr. Daniel Coyle B.L. instructed by Mr. Joseph Traynor,
Traynor & Co. Solicitors,
86 Clanbrassil Street, Dundalk, Co. Louth

Respondent:
Ms. Maeve McElwee, IBEC, Confederation House,
84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

The claimant was employed as a grade 2 operative from 30 March 2006. The employment was uneventful until the claimant was injured in an industrial accident on 15 June 2007. From that point on the claimant was issued with a series of medical certificates, which he provided to the respondent. On 12 July 2007 the claimant met the Human Resource Officer (HR) and the

Production Manager (PM) to discuss a return to work date for the claimant. At this meeting the claimant was reluctant to discuss the matter and on 16 July 2007 HR wrote to the claimant stating that his actions were threatening his continued receipt of sick pay. At a follow up meeting on 23 July 2007 the claimant agreed to keep in touch with HR and keep her informed of his progress towards a return to work. On 27 September 2007 HR wrote to the claimant requesting him to attend a company appointed doctor on 8 October 2007. The company doctor issued a report to the effect that the claimant was fit for work.

On 10 October 2007 HR contacted the claimant by telephone and asked the claimant, who had a medical certificate from his GP issued on 1 October 2007 until 19 October 2007, to return to work on Friday 12 October 2007. The respondent's position is that the claimant agreed to this. The claimant's position is that he needed to see his GP, something he was unable to arrange until Friday 19 October 2007 at which time the GP gave the claimant a certificate of fitness to resume work on 22 October 2007.

On 12 October 2007 HR wrote to the claimant questioning his continuing absence from work and reiterating her belief that he had agreed to return to work at 2-00pm that day. On 18 October 2007 HR wrote to the claimant invoking a clause in the terms and conditions of employment whereby an employee who has been absent for four days without contact is considered to have voluntarily resigned without notice. Following receipt of this letter of termination the claimant's union representative wrote to HR on 23 October 2007 to appeal against her decision. The Managing Director heard this appeal, which was unsuccessful, on 20 November 2007, with the failure of the appeal communicated by letter of 24 November 2007.

Determination

The clause invoked by the respondent to effect the termination of the claimant is contained in section (15) Absenteeism of the company union agreement. This states

"If employees are absent from work because of illness or some other unavoidable cause, they must notify their supervisor or have somebody do so on their behalf not later than 4 hours after scheduled starting time.

If employees are absent from work due to illness, it will be necessary for them to submit a medical certificate not later than the third day of illness and continue to send one each week while their illness lasts. The Company may take into account exceptional circumstances.

It is agreed that if employees are absent for four consecutive days without notifying their Supervisor, they will be considered to have voluntarily resigned without notice.

Where a regular pattern of absenteeism is established, the Company reserves the right to take appropriate action including termination of employment."

The Tribunal is satisfied that for the employer to implement the clause referred to above in the circumstances was unreasonable. To infer that an employee has voluntarily resigned by the mere mental exercise of an employer without the consideration of the circumstances and the implementation of correct procedures renders the dismissal unfair. Such an action is a dismissal and not a resignation. The Tribunal determines that under the Unfair Dismissals Acts, 1977 to 2007 reengagement from 2 February 2009 is the appropriate remedy in this case. The period from 18 October 2007 until 2 February 2009 is to be treated as a period of unpaid suspension, thereby preserving the claimant's continuity of service. In those circumstances a claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 does not arise. As no evidence was adducedunder the Organisation Of Working Time Act, 1997 the claim under that Act must fail.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)