EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF: CASE NO.

Employee UD576/2008

Against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey BL

Members: Ms A. Gaule
Mr C. Ryan

heard this claim at Dublin on 25th September 2008
and 15th December 2008
and 16th December 2008

Representation:

_____

Claimant(s) Mr. John McGuigan BL and Ms. Catherine McLoone instructed by Padraig O'Donovan & Company, Solicitors, Unit 3, Block 7, Abberley Law Centre, High Street, Tallaght, Dublin 24

Respondent(s): Mr Loughlin Deegan, IBEC, Confederation House, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

Background

The solicitor for the respondent outlined to the Tribunal that the respondent delivered products to pharmacists. Orders were delivered twice a day both morning and afternoon. It was imperative that the product was delivered on time and reliable customer service was crucial. The respondent had a good relationship with the union and had a well developed disciplinary policy. The claimant was one of the longest serving drivers with the respondent and had thirty-three years service. The claimant was aware of the procedures that were in place. The claimant returned to work in 2008 after a long period of absence due to illness. In 2005 an incident happened and the claimant was subject to disciplinary action. The claimant was suspended in January 2008 on full pay for refusal to do a delivery run. Prior to the claimant going on sick leave he received a final written warning

for his failure to follow procedures. In January 2008 the claimant refused to undertake a run and his previous warnings did not lead to the dismissal. He refused to undertake a run on a specific day; the claimant was represented by his union and then a legal representative and was afforded fair procedures. The respondent decided to dismiss him.

Counsel for the claimant told the Tribunal that the claimant was issued with a final written warning and dismissed on the same day. The respondent conceded that any prior warnings were no longer active. All previous warnings were on his file for twelve months and there were no active warnings prior to the final written warnings. That was used as a basis for dismissal. There was no warning on his file for over two years and this should not be taken into account.

Respondent's Case

BM told the Tribunal she was general operative manager in distribution. This area undertook picking and packing of product and supplied product to pharmacist's nationwide and it was very critical product. It had two main competitors. A system called DOE direct order entry was in use. A pharmacist placed an order electronically if stock was depleted. If an order was received before 12 noon it was delivered that evening. If the order was received before 8p.m. it was delivered the next morning before the pharmacy opened. Drivers were very aware of the deadlines. The drivers knew the staff and pharmacists in the pharmacies. Drivers informed the respondent if there was a problem with road works on their route. If the respondent did not have the product that a pharmacist requested it placed an order with another company. If the product did not arrive the pharmacist telephoned the respondent within twenty minutes of the delivery time .On occasion couriers sent orders to pharmacists. On a difficult day the product would take longer to deliver. Pharmacists did not order from the respondent every day. Drivers undertook deliveries every day on various shifts.

The respondent had regular meetings with the union and had structured meetings on a monthly basis. If an employee had a complaint there was a policy to follow and the complaint could be raised with a shop steward. The respondent adhered to a very strict disciplinary process and investigative meetings were documented. She had her first dealings with the claimant in 2007. She was employed with the respondent for eight years. The claimant was one of the drivers who started early in the morning and she and the driver reported for work at different times. In August 2007 the witness was promoted to district manager and was responsible for all deliveries. The claimant was absent on sick leave in August 2007. She had an involvement with the last two meetings with the claimant who had representation and HR was also present and these related to offences that the claimant had committed. The claimant had an issue with return to work .The respondent had to get value for money and the claimant had to be happy with the run. Four runs were awarded to the claimant at the meeting. The claimant returned to work the end of January 2008 and he did not raise an issue concerning his salary for 2006. The claimant had questions regarding service pay, which was a bonus for long time service, and that matter was finalised. If an employee was employed for thirty years they were entitled to an extra five days service pay. Service pay was not related to weekly wages or salary. She was 100% confident that the matter had been resolved. She discovered on Tuesday that the claimant had failed to deliver to two pharmacists and the claimant had agreed to undertake a run. The claimant failed to notify the respondent. She was made aware on Wednesday that the claimant did not undertake the delivery and the driver that was rostered for Wednesday had already left the respondent premises. This was a very serious matter and if a driver could not undertake a run the respondent contacted the pharmacy. Then the next course of action was decided and on occasion a courier delivered product for the respondent. The pharmacist may inform the respondent that they could wait until the next

day for the product. The respondent was always proactive and telephoned the pharmacist. She did not receive a call from the claimant on Tuesday. On Wednesday the claimant came to the despatch area. Two loads were discovered in the back of his van by a supervisor on site. This meant that the pharmacist was now left without two deliveries. As the respondent failed to deliver to the pharmacist the contract with the respondent could be discontinued and this could be construed as wilful negligence. At that stage the claimant was invited to a meeting to discuss the failure to deliver customer orders on Tuesday. He was accompanied by his shop steward and she took a minute of the meeting. The claimant felt that he was entitled to raise other issues. The claimant told her on Wednesday that he had issues with wages that he was due from 2006. He told her that he was due a back week's pay from when he had last worked. She was not sure of what dates he was paid in 2006 but she knew he was paid for a considerable period of time in 2006. The claimant told her that he needed to be paid the following day. She told him that she would check with the wages department when it opened and revert to him as soon as possible. She obtained a printout of some old payslips, which indicated when the payments were made to the claimant. The claimant was paid in cash and received a payslip. She communicated this to the claimant and he was unhappy. She went through payslips and sick pay and there was no back pay due to the claimant. The claimant told her that she could print what she wanted but he wanted money on Thursday and he insisted on being paid that week. As far as she could recall she told the claimant that there was no payment due. The claimant again asked for his wages and she told him that he was not entitled to it. She asked the claimant to come to her office and he told her that if he did not get paid that he was not completing his run. She told him that not undertaking his run was considered gross misconduct. The claimant reiterated that he had to be paid and he refused to undertake his run. She asked the claimant for the keys of his van.

A meeting scheduled for 11 February 2008 was rescheduled for 12 February 2008. Two disciplinary matters were dealt with (1), failure to deliver to the pharmacy and (2) gross misconduct. Failure to deliver to a pharmacist constituted gross misconduct. The respondent had to depend on drivers to deliver product and drivers needed to be reliable. The claimant received a previous warning, which was upheld on appeal. The claimant refused to take a run and this was gross misconduct. She told the claimant "please do not say you are not doing a run". The delivery of the product was time critical and the driver was aware of this. The claimant was aware that this was dealt with on appeal and it had to result in dismissal. The witness wanted to ensure that everything was understood and a shop steward and union represented the claimant. The claimant appealed the decision to dismiss him. The claimant attended both appeals and BM was not part of the appeal process. She wanted to make it clear at the meeting that there were two completely separate offences.

In cross-examination she stated that the last two pharmacies were on the claimant's run and it was not feasible for someone to accompany the claimant in the van. Other drivers could undertake a run in the agreed time span and all drivers took breaks, which they were paid for. She did not accept that the claimant telephoned two pharmacies at 5.45p.m. on the day in question. She would not expect a driver to drive fifteen hours a day. When the claimant was offered the run he could establish the length of time that it would take him to complete the delivery.

At all the disciplinary hearings with the claimant the matter of a telephone call from the claimant was not raised. She was in contact with the pharmacy on a daily basis and if there were issues with deliveries the respondent contacted a courier to undertake the delivery. She agreed to put another employee in the van with the claimant. The claimant was not available because he refused to take out a run. The claimant was given a first written warning for failure to deliver customer service requirement. Written warnings were previously given to the claimant. The claimant was aware of

the seriousness of his actions and the final written warning on his file was not taken into account in dismissing him. The claimant was aware of the sanctions. The claimant was absent on sick leave for a considerable length of time following a robbery on a delivery run. She was not sure if the claimant had exhausted his sick pay. She disagreed that it took the respondent three weeks to organise the claimant's return to work. The claimant returned to work either on 28 or 29 January 2008. She was not aware of the claimant's financial circumstances. She apologised to the claimant for using the term hardship fund. She tried to reassure the claimant that he was not being fobbed off.

The claimant told her that he did not trust the respondent. When she tried to give the claimant print outs of payslips he told her that he did not want them. She told the claimant about the seriousness of his actions. Two employees including the claimant were paid in cash and they received payslips.

In answer to questions from the Tribunal she stated that the run that the claimant did not complete on Tuesday and which was completed on Wednesday was the same run. Six options were given to the claimant and he was not happy with any of them and she then gave him four options. At a meeting the claimant did not want to choose an option. The claimant agreed to take the run that she chose.

The second witness for the respondent BB the operations manager told the Tribunal that he was responsible for distribution of all vans on the route. He was the claimant's manager at this time. The claimant was sick in 2004 and during 2004 restructuring was implemented on some routes to improve the service. A second service was introduced to the Waterford area. The claimant was now going to operate two runs a day, one from Dublin to Kildare and the other run from Dublin to Waterford. In 2004 all drivers undertook a two run schedules and the claimant was not happy with the change. The claimant was given the reason for this and was given the opportunity to discuss the matter. The claimant was one of the senior drivers and his earnings were protected. In early January 2005 the claimant refused to carry out a run, as it was not ready. The claimant was told that he would be suspended with pay on 18 January 2005. On 8 March 2005 an investigative meeting regarding the claimant's refusal to undertake a delivery in January 2005 took place and it was agreed that a disciplinary hearing would take place on March 23 2005. At a disciplinary hearing on March 23 the claimant raised other issues. The claimant was represented by his trade union representative at this meeting. A written warning was given to the claimant as he refused to undertake a delivery. The claimant's union representative had asked for a private session regarding the claimant and it was requested that the claimant's service be taken into account. This was taken into account and that was the reason for the written warning. The claimant understood the consequences for refusing to undertake a run.

He relayed an incident, which occurred on 15 April 2005 to one of three new customers in Wexford. The claimant failed to make a delivery, the claimant returned the product and one of the boxes was broken. The claimant asked PF pharmacist if he could leave an order for another pharmacist with him. The claimant gave product to another driver to return and the clamant continued with his run. If a product was damaged the respondent would reassemble the product. The respondent endeavoured to contact the claimant but was unable to make contact with him. The claimant then telephoned the respondent. At that stage the claimant would have put the run in jeopardy if he retuned to base. PF, pharmacist was asked to make a written statement regarding the incident on 15 April 2005. The shop steward was informed of the claimant's action. The claimant was asked to provide a statement of his account of events on 15 April 2005. This lead to a disciplinary hearing and it was impossible to establish how product was damaged. The claimant

was aware that he had a damaged order for the customer and that became clear as the respondent received statements. At the end of the process the claimant was fully aware of the difficulties he brought on himself.

In early February 2006 the claimant undertook a delivery to Leixlip. A robbery was in place, and the claimant encountered people with guns robbing the shop. The claimant was sent home that day. PR and ID from the respondent checked to see if the claimant was alright and to establish what the respondent could do. The claimant was absent from work for a short period at that stage. The claimant returned to work and then went on holidays. The claimant reported for work on Monday and he refused to undertake the run on health and safety grounds. He asked the claimant could he get a representative to the office. The clamant brought in a driver representative TL. He asked the claimant to confirm that he refused to take out the run and BB could not understand why the claimant was now refusing to undertake the run. The claimant told him he did not want to undertake the run on health and safety grounds. He told the claimant that he had already undertaken this run on a number of occasions. At the end of the discussions BB asked the claimant was he prepared to undertake the run and not to deliver to the pharmacy where the raid occurred. The claimant refused the alternative run that he offered. PR, the claimant's manager suspended the claimant. A city run was based in and around the Dublin area. Some drivers undertook country deliveries and it was based on seniority. It made no sense that the claimant would not undertake a city run.

The claimant refused to do a run on 27 March 2006. A letter was sent to the claimant on 31 March 2006 advising him that his suspension with pay would continue. He was required to attend a disciplinary meeting on 4 April 2006 at 3.30p.m. This meeting was rescheduled for 7 April 2006. The claimant was invited to attend a disciplinary hearing on Thursday 20 April 2006. The claimant returned to work on 25 April 2006 and the respondent agreed that the claimant could undertake the run and not deliver to the pharmacy where the raid occurred but the claimant refused to undertake the run. This was his first day back after a period of suspension. In 2007 the respondent made efforts to bring the claimant back to work.

In cross-examination he stated that on 18 January 2005 the claimant reported for work at 8.30a.m. There was a delay of fifteen minutes on the second run that day and a delay in a run was not unusual. The claimant made it clear that he was not undertaking any part of the run. On 28 May 2005 there were two items under investigation, failure to deliver and a delay in getting a statement from the claimant. The claimant was suspended in relation to the day run. A senior driver has a first refusal on a run.

He did not have the information as to when the respondent ceased paying the claimant. He was not aware of any complaint from the claimant in relation to pay when he was suspended and on sick pay.

The group HR manager MG told the Tribunal she commenced employment with the respondent in September 2004. She asked the claimant would he not do a run to the pharmacy that was raided and he refused but he told her he was willing to do a run. She attended a disciplinary hearing on 7 April 2006. The claimant was invited to another disciplinary hearing on 20 April 2006. BB said that he offered the claimant an alternative run and the claimant said he would undertake an alternative run but was not offered any on the day. Prior to 20 April 2006 she had not heard anything regarding delivery. When BB spoke to the claimant he told the claimant that he was suspended without pay but it should have been with pay. As soon as she realised this matter was rectified. She sent a letter to the claimant on 24 April 2006 whereby she told him that in the event

that he presented himself for work but refused to undertake his run that it was likely that he would be suspended with pay pending an investigation and disciplinary process. The claimant reported for work on 25 April 2006 and refused to undertake a run. The run was the same as usual but the pharmacist that was raided was not included. The claimant was suspended. She met the claimant on 4 May 2006 and he mentioned that he was on medication and was having sleepless nights. She felt a medical assessment was necessary to assess the claimant's current health situation. The claimant attended for medical examination on 8 May 2006, which indicated that the claimant was unwell and the context of the meeting then changed. Under the respondent sick pay scheme the claimant was entitled to a maximum of twenty-six weeks pay in a twelve-month rolling period.

A meeting regarding security was held and drivers volunteered to attend. The claimant had taken some unofficial action previously. She had requested on the claimant's behalf that he would be paid a figure inclusive of overtime and paid a normal rate of pay for that time. The claimant was having some financial difficulties and the respondent told him it would pay the money as a cash IOU. The claimant was always paid in cash. On 6 June 2006 she received a letter from Dr. SM who requested that she arrange that the claimant meet him. The claimant met with Dr. SM on 28 June 2006. In a letter from Dr. SM addressed to her on 17 July 2006 he requested that the necessary parties i.e. management HR and the claimant sit down and discuss the way ahead. The witness was on holidays the last two weeks in August. 2006. The claimant's trade union representative Omc D had previously asked her if the respondent would be in a position to give the claimant a package. She wrote to the claimant on 17 August 2006 regarding a meeting, which took place on 14 August 2006, and she outlined to him that the respondent would facilitate his return to work. She wrote to the claimant on 1 September in which she outlined to the claimant that the respondent was willing to consider and discuss any necessary reasonable amendments in order to facilitate his return to work. She received letter dated 18 October from the claimant on 20 October 2008. In this letter the claimant requested the respondent to outline to him in writing the type of work they proposed for him to do. He sought to be reimbursed for loss of earnings. She responded by letter on 24 October 2006. In a letter dated 22nd November 2006 the claimant's GP informed Dr. SM that he was of the understanding that the claimant would have a new route clarified next week and in his opinion the claimant should resume work then. The witness understood that the claimant would be fit to return to work after the new route was clarified. She sent a letter dated 27 November 2006 to the claimant whereby she outlined that the respondent was willing to make reasonable amendments to his current run. By letter dated 6 December 2006 she informed the claimant that as his GP had now certified him fit for work and if he failed to indicate his preferred run that the respondent would select a delivery run for him.

On 12 December 2006 PR selected a run for the claimant. MG received a letter dated 16 December from the claimant in which he enclosed a copy of the delivery run proposals. He was told her that he was available at anytime to come to a consensual agreement. The claimant's medical certificate expired on 31 December 2006. The claimant in a letter dated 10 January 2007 outlined that two of the routes did not bring him up to his earnings and these proposed routes were not in line with agreements he had with the company for working twelve hours daily.

She sent a letter to the claimant on 18 January 2007 whereby she requested the claimant to report for work on Monday 29 January 2007. She outlined to him that PR was willing to meet the claimant in order to discuss any final concerns regarding commencement of his run. The respondent calculated six minutes per run to each pharmacy and there may have been one hundred pharmacies on a run. The drivers had three breaks during the day, one at morning, lunch and evening. By letter dated 31 January 2007 she told the claimant that she was disappointed that he had refused to re-commence work. The claimant was invited to a disciplinary meeting on Friday 9 February

2007. Had she known that the claimant was ill she would not have invited him to a disciplinary meeting. The claimant's last medical certificate expired on 31 December 2006. In a letter dated 12 February 2007 she outlined to the claimant that he must at all times provide medical certificates to the respondent for periods of ongoing absence regardless of whether or not he was in receipt of payment from the respondent. She requested certificates for the intervening period between 31 December 2006 and 1 February 2007. The respondent's sick pay was paid exclusive of overtime and the claimant was paid in lieu of sick days in 2006. She told him that he could take holidays when he returned. A letter issued to the claimant on 4 December 2007 inviting him to a meeting on 10 December 2007. The purpose of the meeting was to discuss the claimant's return to work. The claimant was due to return to OHS and the claimant was fit to return to work. She again reiterated that it was put to her if she would consider giving the claimant a package. She informed the claimant by letter dated 28 December 2007 that the respondent was not in a position to agree to a redundancy package for him. This letter was copied to the claimant's union representative. She received a letter from the claimant on 7 January 2008 in which he outlined that he did not state that under any circumstances that he would not return to work. What he stated was that he found it difficult to return to work because he had no confidence in management. He stated that his union representative OMcD would contact her to arrange a meeting to discuss a further proposal concerning his return to work. She attended a meeting on 11 January 2008.

In cross-examination she stated that in the course of an investigative meeting the issue of drivers safety was raised, this was not a regular occurrence. Two drivers were not assigned to each van. She reiterated that the claimant refused to undertake a run. BB said that he offered the claimant alternatives and there was a difference in the version of events. She wanted to clarify what had taken place and she felt that the claimant was aware in advance that he was not going to undertake the run. The first written warning issued to the claimant on 20 April 2006 and the other one probably related to the Ballinakill incident. The Gardai had completed a risk assessment. The claimant had raised issue regarding logos in vans. The claimant was ill for some time after the incident. She was not aware that he continued to see his GP until 4 May 2006. On the 8 May 2006 the claimant attended OHS. Because there was such a significant difference between drivers' salary on overtime and basic pay the respondent made arrangements to pay the claimant full pay. She needed clarification regarding what the claimant meant by medical and related issues.

The claimant was on guaranteed earnings and the run value was calculated on ten hours. The driver got paid for twelve hours if he worked ten hours. The amount of "fat" on a run was one-hour max. The value of the run and difference of pay was one to two hours and the drops were calculated on one hundred drops per run. When the claimant returned to work on 28 January 2008 he was aware that he had to submit a medical certificate to cover a period of absence. After the event the claimant requested payslips, and the witness was sure this was after the event. She could not put a time on those. She was aware that there were issues before the Labour Relations Commission.

The third witness for the respondent DK told the Tribunal he was group-marketing director and he had very little involvement with the claimant. He heard the appeal hearing on the first written warning on 9 April 2008. A letter issued to the claimant on 18 April 2008 advising him that he had exercised his right of appeal under the respondent disciplinary procedure and the decision was final.

The fourth witness for the respondent the group finance director told the Tribunal that he joined the respondent in Spring 2008 and he was asked to chair an appeal meeting. The claimant's previous warnings were not taken into consideration. He was aware of the decision based on the previous

meeting. He wanted to chair the hearing on the facts of the case. On Wednesday the claimant raised the issue of pay in 2006. BM told the claimant that she would act on his query and that the payslip would be retrieved. He felt that the claimant wanted back pay investigated, and two days later the claimant refused to undertake a run, that represented gross misconduct, he felt that the decision that was made at the hearing was warranted. He believed that the claimant was aware of the custom and practice regarding the grievance procedure.

In cross-examination he stated that the claimant took the matter of the grievance of his pay into his own hands and he decided that he was not going to undertake his run. The claimant had been offered copies of payslips on several occasions.

Claimant's Case

The claimant told the Tribunal that he commenced employment with the respondent in February 1975. He had not received a contract of employment. When the respondent introduced HR and an operations manager was appointed in 2005 things were enforced. The claimant undertook deliveries and was away from the office all day and he was not aware of anything in writing.

The claimant returned to work on the morning of 28 January 2008. He proceeded to undertake his run, which took thirteen to fourteen hours. He undertook his run on Tuesday and after his lunch, which he had between 1.30p.m. and 2.30pm he went to Enniscorthy/Wexford He went to Enniscorthy first and then he went to Wexford and arrived there at 5p.m. The respondent considered the product time sensitive. If a delivery was really urgent a courier company was assigned to deliver the product. On Tuesday 29 January nothing urgent was needed. He knew that he was not going to arrive in New Ross by 6p.m. and he informed the pharmacist. The pharmacist told him that he would be on the premises until 6.30p.m. and if he wanted to leave a delivery for another pharmacy he could do so. When he arrived in New Ross one of the pharmacies was closed.

On his return to work on Monday he completed a time sheet for his wages. He was informed that there was no money for him. The claimant went to BM and she mentioned something about wages that were being investigated and that was Tuesday. On Wednesday he undertook the run again and he then went to a member of staff who told him that there was no wages for him. He went to BM and she told him that she was still investigating the matter. Friday he enquired if there was any wages for him as the time sheets had been completed since Monday. He was the most senior driver with the respondent. The other drivers had their rosters and he was offered a different roster. He found that working twelve hours was stressful and he was offered runs on ridiculous hours. The respondent was entitled to make changes and the run was imposed on you and any driver could undertake the city run. He was at loggerheads with the respondent for two to three years regarding his hours of work. There was no way he would have stated that he was unwilling

He undertook a run on Wednesday and on Thursday he undertook the delivery and he had no breaks. On Friday he reported for work and he queried his wages. This was his first week back in work and he asked for some money to tide him over. He stated that he would undertake the run when he received his wages. He was frogmarched off the premises. He had a van loaded and was ready to undertake a run. He had no intention of not undertaking his run and he did not demand cash.

In 2002 he attended a Labour Court hearing concerning the change of work practices.

In cross-examination he stated that he was not aware that he could be summarily dismissed for gross misconduct. After the raid, which occurred in 2006, he went home. Raiders manhandled him and he had a gun put to his head. He was under stress and he was asked to undertake a delivery to this area again. After the trauma he experienced he attended his doctor and on the respondent's instructions he returned to work. The claimant's own doctor told him that he was not in a position to do so. He was threatened with gross misconduct and possibly dismissal when under doctor's orders. He attended hospital in 2007. His union representative OMcD raised the issue of a redundancy package but at no time did he want to leave the respondent. He sent a letter to HR on 7 January 2008 whereby he outlined that he wished to remain in the respondent.

After the Labour Court hearing he felt that the respondent was looking for an excuse to give him a final written warning. There was an agreement that an employee would travel in the van with him while he was undertaking a run but it did not materialise and he did not want BM's friend in the van. When he returned to work he felt that he should not be at any loss of earnings. His pay discontinued on 15 November 2006 but his back pay was always there. The claimant maintained that he was owed a weeks pay.

When he returned to work on 28 January 2008 he did not demand money but he asked for money for the weekend. He was not informed that he was being suspended after this and had he known this he would have undertaken the run. He told BM that he would undertake the run when he queried his wages and these were the last words he had with BM. BM requested the keys and told him that he was being suspended. He did not receive a termination letter at his home. He was going to management about the matter and BM told him that it was not her problem.

Determination

Having considered all the evidence in this case the Tribunal find that there was a clear option for the claimant to follow the grievance procedure. From previous events he was aware of the seriousness of the situation. The decision to dismiss the claimant was taken on the basis of one incident on 1st February 2008. The refusal to undertake the run was gross misconduct. The respondent followed proper procedures for the investigation, disciplinary meeting, dismissal and the appeal. The Tribunal finds that the claim under the Unfair Dismissals Acts, 1977 to 2001 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)