EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:		**CASE NO.**
Employee	*– claimant*	UD890/2007
		MN701/2007
against		WT300/2007
Employer	*– respondent*	

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001
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: Ms. M. Petty

Members: Mr. J. Redmond
Dr. A. Clune

heard this claim at Limerick on 30th July 2008
and 6th November 2008

Representation:

Claimant(s): Mr. Andrew D'Arcy, Andrew D'Arcy & Co., Solicitors, First Floor, The Mill, Glentworth Street, Limerick

Respondent(s): Mr. David Farrell, IR/H.R. Executive, IBEC, Confederation House, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

Claimant's case:

In his sworn evidence, the claimant said that he began working for the respondent in February 2003 as a van driver. He never received a contract of employment. He delivered pallets of material around Limerick, Clare and Tipperary.

The claimant's hours of work at the commencement of his employment had been 6.00am until 3.00pm but he had been told that these hours would only be for the first three to six months. In the summer of 2003, he agreed with his manager that the hours of work would change to 5.00am until 2.00pm. The change was agreed because of the large volume of traffic that the clamant encountered during the morning hours.

The claimant's complaint before the Tribunal included a claim for 400 hours of unpaid overtime. From 2.00pm until 7.00pm, the claimant said that he worked between four to five hours daily

overtime. The claimant kept a written record of the hours of overtime worked and at the end of each week, gave this written record to his manager. He got paid for some of the overtime hours but was always left short by one or two hours. The claimant was unsure as to how many hours of overtime that he was now due but felt that it would be between 200 to 250 hours. The respondent did not operate time sheets or a clock-in system. The overtime hours being claimed were based on the hours that had been submitted to his manager at the end of each week.

The night porter was the only person on duty in the depot when the claimant would commence working in the morning. He would load his van for a drop to Ennis, return and load for a drop around Limerick and then return again to load for a drop to East Clare.

On the last day of employment - 6 June 2007 - the claimant had commenced work at 5.45am. On that day, he showed a new driver the routes and both had done drops together to East Clare. On returning to the depot, there had been banter going on and the claimant had joined in it. The banter had not been about the claimant. His manager had come out and said "what the f*** are you laughing at" and directed him to take a pallet to Raheen. The claimant had replied "no I won't, I'm tired". To this, the manager had pointed his finger, called the claimant a "fat c***" and told him to go and clean out his van. The claimant deemed from this that he was dismissed. Up to this time, the claimant had taken his van home at the end of a day's work and had never been told to clean out his van before.

The claimant dropped the keys of his van on a pallet. His manager accused him of "throwing a strop" but, in reply, the claimant had said to the manager "if I were throwing a strop, you would know about it". The manager then told the claimant to "get out of the f***ing warehouse", and he was shouting at the other drivers that they were not to drive the claimant into town. His home was a mile and a half from the depot and he would have had to get a taxi to get home. However, one of the respondent's drivers had given him a lift to his mother's house. The claimant had refused to take the pallet to Raheen as he had been very tired and had been driving since 5.30am that morning. He had been driving without a break and his manager should have known this.

The claimant had loved his job with the respondent and there had never been any disciplinary issues. In his mother's house, he was shaking over what had happened and told his mother about it. While there, he received a telephone call from his manager but did not answer it. The manager did not leave a message. He also received a telephone call from a colleague/driver. He told this person that he would not telephone his manager to resolve the matter. The claimant said that the manager had not offered him his job back. In order to accept such a job, the claimant would have had to be offered same and get a letter of apology.

Early on the day after his dismissal, the claimant called to his local Citizens Information Service to seek their advice. About a week later, he received a telephone call from them, asking if he would take his job back. He also went to his doctor who certified him sick and unfit for work.

The claimant confirmed that he met the manager in the manager's office when he returned to the depot to collect his P45 form. He rejected the suggestion that he had said to the manager that he had loved his job but could not return to it because to do so would be to lose face. What he had said was that he had loved his job and would like it back. The manager had said that his leaving had left them in the s*** but that the job was now gone. The manager had asked the claimant for a round figure for the overtime and they would settle the case but the claimant did not know how to reply because he had never been in such a position before.

The claimant established loss. He confirmed that he had sought alternative employment with transport companies and security companies. He had gotten a number of different jobs but none had lasted longer than six months and all had been at less that he had earned when employed with the

respondent. Currently, the claimant is unemployed.

In cross-examination, the claimant said that he had known the manager prior to beginning employment with the respondent and that they had been good friends.

It was put to the claimant that his hours of work were from 8.00am until 5.00pm. The claimant accepted that he had a guaranteed two hours of daily overtime from 6.00am until 8.00am (a guaranteed 10 hours of overtime each week) paid at a rate of time and a half. The claimant also accepted that the practice of "work until finish" existed and that he could finish at any time up to 5.00pm once his deliveries had been done, but said that he never got home early. He denied that he had been fully paid for all of the written overtime claims that he had submitted to his manager but said that he did not really know how much overtime he was due.

The claimant did not agree that there had been no need for him to start work any earlier that 8.00am as businesses to which he was delivering were not opened before 8.00am. It was put to the claimant that it had been his personal choice to start his day's work at 6.00am. The claimant said that it had been his understanding that any work done after 3.00pm was to be paid as overtime.

It was also put it to the claimant that, in banter, the manager had said to the claimant "you relax, we will get you chauffeured home" to the reply of being "too tired" to take a pallet to Raheen, and that the claimant's reply to this had been "I have had enough", and had given over the keys of the van. The claimant confirmed that he had refused to go to the manager's office to discuss the matter but had wanted it discussed there and then in front of the lads.

The claimant rejected the suggestion that the manager had not shouted while in the warehouse or had not used bad language. While at his mother's house, the manager had only telephoned him once but that he had cut the telephone call off because he was in such a rage.

The claimant confirmed that he had gone to the local Citizens Information Service the next morning at 9.30am. He also confirmed that he later received a telephone call from the Citizens Information Service to take his job back. He thought that the offer of his job back had been given by his manager to the Citizens Information Service to be passed on to him. He agreed that the only way he would have taken his job back would have been on receipt of a letter of apology. He rejected the suggestion that his colleagues had encouraged him to take his job back but said that they had asked him to sort out the problem.

It was put to the claimant that when he called to the respondent company to collect his P45 form, he had said that he wished he had his job back but had been told that it was gone. He rejected the suggestion that he was sorry he walked out of his job, stating that he "did not walk out".

The claimant confirmed that he had been certified as unfit for work for a period of three week after the end of his employment with the respondent. He also confirmed that there were no disciplinary reasons as to why any of the alternative employment he had found had not lasted longer than six months. The claimant also said that on the day he had called for his P45 form, his manager had asked him to make an offer on the 400 hours of overtime.

Replying to the Tribunal, the claimant confirmed that he had calculated his overtime hours from 3.00pm onwards as he had been told that anything that he worked after 3.00pm was overtime. It was in his second year of employment that he became dissatisfied that his overtime was not being paid and he raised the issue once only. He confirmed that he had one or two rows with his manager but none of them had been serious and he agreed that the last incident was not unique.

The claimant did not say anything to his manager on being dismissed. His interpretation that he had been dismissed was taken from the instruction to clean out his van. He confirmed that the van he had driven had been a light van, which had not required a tachograph. He did not know whether it was permissible to drive for more that eight hours daily or if any of the other respondent's drivers had an early morning start. He confirmed that there were businesses that he was able to call to before 8.00am as he had keys and codes that allowed him to gain access to these businesses.

From the commencement of his employment, his manager had allowed him personal use of the van and it had been his only mode of transport. He confirmed that some days, he could finish work by 1.00pm but generally, his work ended between 5.00pm to 6.00pm. On the day of his dismissal, he had refused to take the pallet to Raheen because it had been a long and very hot day, he was very tired and he thought that the location for the delivery of the pallet would be closed by the time he would arrive there.

When asked for his understanding of "work to finish", the claimant said that he had never heard of it. He confirmed that he had submitted overtime claims to his manager every week. He agreed that he had worked up overtime, never got paid for it, did not keep a copy of the claims that he had submitted to his manager but had let the situation role along because his manager had been a friend. He stated again that he had been told that if he started work at 6.00am and finished at 3.00pm, then everything after 3.00pm would be overtime. It was confirmed to the Tribunal that no claim in respect of the unpaid overtime had been made to the rights commissioner's service.

The claimant denied that it had been months after the termination of his employment that the manager had telephoned and made a financial offer to settle the matter. The offer had been made in the manager's office on the day he went to collect his P45 form. He had gathered from the statement by the manager that he had left them in the s*** to mean that they had been moving warehouse and could not get a replacement driver. The claimant confirmed that he had known from other drivers that the depot was being moved but he had not known when the move was to happen.

Respondent's case:

An ex-advocate of the Citizens Information Service was called to give evidence on behalf of the respondent. Before he commenced giving his evidence, the issue of "privileged information" was addressed. The respondent's representative highlighted that most of the evidence that would be directed to the CIS advocate had already been introduced to the Tribunal. The Tribunal determined that a certain amount of leeway could be allowed in relation to the evidence that this witness could give.

The CIS advocate gave sworn evidence that the claimant had called to the office of the Citizens Information Service on the morning of 7 June 2007. He said that the direction to CIS officials is to seek settlements at a local level. He telephoned the respondent and spoke to the manager of the claimant. When put to the witness that the manager had said that the claimant was a valued employee of the respondent and had not been dismissed, the witness admitted that though he could not remember the exact words of the telephone conversation, this had been the "spirit of the conversation" and the manager's response to his telephone call had been positive. The witness said that in accordance with CIS procedures, the claimant would have been contacted and informed about the positive response with a view to trying to resolve the matter. It would have been unlikely that he would have encouraged the claimant to take his job back but would simply have repeated whatever the manager had said. When put to him, the witness could not confirm or deny that he had told the respondent that the claimant was not going back to work for them. He said that once the CIS became aware that the matter had been referred to a legal representative, their involvement in the matter came to an end.

In cross-examination, the witness confirmed that employees of the Citizens Information Service have a code of ethics which covers "privilege", but in cases of higher advocacy such as this one, it could be discussed before a Tribunal. He also said that in cases such as this one, the CIS code would advise a client to contact a legal representative.

The witness confirmed that he did not remember when he had telephoned the respondent or when they had telephoned him. He also confirmed that he had not remembered who had telephoned him from the respondent until that person's name had been mentioned at the Tribunal hearing.

Replying to the Tribunal, the witness confirmed that he had understood from the telephone conversation he had with the manager that the respondent's door was still open to the claimant in relation to his job.

In sworn evidence, MO'T explained that he was manager of the respondent's distribution depot covering Limerick, Clare, Tipperary and Kerry. Twenty two people had been employed.

MO'T had known the claimant since mid 2000 and they had worked together on nightclub security in Limerick. They had been friends. In 2003 when the respondent had a vacancy, MO'T had offered a job to the claimant. The claimant had been employed as a van driver working from 8.00am until 5.00pm. He did three key drops from 6.00am until 8.00am, Monday to Friday. The respondent found that 6.00am was a sufficient start time within which to get these key deliveries done. The claimant had keys to gain access to the depot. The respondent treated the hours of 6.00am to 8.00am as overtime so the claimant received ten hours overtime every week. This was the amount of overtime that was agreed and the claimant was paid accordingly if more hours were worked. He had never been left owed for overtime and no claim had been made by the claimant to the rights commissioner's service under the Payment of Wages Act, 1991.

The issue of unpaid hours was not raised on 6 June. At mid-afternoon on 6 June, MO'T, the claimant and three others were in the warehouse having a joke and laugh. MO'T asked the claimant to do one delivery to Raheen but he refused. The claimant had been asked to do the delivery because there was no one else to do it and it was within his area. The claimant had returned to the depot at around 3.30pm and this would have been his last delivery of the day. The claimant had said that he was too tired and that he was going to clean out his van. MO'T said nothing in reply. The claimant next came back into the warehouse, left the keys of his van on a pallet and said that he would see MO'T in court. The claimant was invited to MO'T's office to discuss the matter but the claimant wished to discuss the matter there in the yard. MO'T asked the claimant if he was throwing a strop and the claimant had replies that he would show MO'T a strop. At this stage, the discussions got heated and MO'T had used expletive language.

Realising that the issue was not going to get resolved at that time, MO'T told the claimant to get out of the warehouse. Another driver followed the claimant and gave him a lift home. MO'T continued his work and on his way home between 5.30pm and 6.00pm, telephoned the claimant but the claimant hung up. When he failed to make contact with the claimant, he telephoned the driver who had taken the claimant home. This person telephoned the claimant and then telephoned MO'T back with the instruction from the claimant that he was not to be telephoned again. MO'T had telephoned the claimant because he wanted him back to work. He believed that the claimant would return to work, as they were friends.

MO'T had intended to telephone the claimant the next morning – the 7 June – after completing some essential work at the depot but before he made the call, he received a telephone call from the CIS advocate. The CIS advocate had said that the CIS would mediate to try and get the matter resolved.

MO'T told the CIS advocate that the claimant's job was still available and that the claimant was wanted back at work. Respecting the claimant's instructions, MO'T did not try to contact the claimant again but used the CIS.

Sometime within the following three weeks, MO'T received a telephone call from a company in Raheen seeking a verbal reference for the claimant. MO'T told them that the claimant was a severe loss to the respondent and had been a great employee. At that stage, MO'T knew that the claimant was not returning to the respondent.

The next time MO'T met the claimant was when the claimant returned to the depot to collect his P45 form. There had been no confrontation that day and they had talked about the incident. MO'T told the claimant that he had wanted him back but it was not possible now, as his job had been filled. The claimant has said that he had enjoyed the work but would not be returning as to do so would be to lose face.

MO'T had not dismissed the claimant. As depot manager, he did not have the power to dismiss without authority from head office.

In cross-examination, MO'T confirmed that he was the depot manager looking after the day-to-day running of the business. In relation to the management of personnel, there were limitations as to what he could do, and the hiring and dismissal of staff had to be authorised by head office in Dublin, in conjunction with his recommendation. He could deal with the vast majority of issues on a day-to-day basis and Dublin would be contacted depending on the seriousness of an issue. MO'T applied his discretion and common sense when deciding on what matters to refer to Dublin. It was also open to employees to use their common sense and refer matters to senior management if they wished to go over his head, but no such incident had arisen that required this course of action.

MO'T confirmed that terms and conditions of employment had not been issued to employees. He did not know why this was the case and H.R. in Dublin had responsibility for same. He agreed that a contract and terms and conditions of employment would have assisted with the hours of work and a disputes resolution in the case of the claimant.

It was the respondent's arrangement to have overtime in the morning rather that the more usual evening. The overtime arrangement for the claimant was between the hours of 6.00am until 8.00am, for the morning drops. Other employees were doing the same thing.

MO'T confirmed that he had heard of the regulations contained in Statutory Instrument No. 89 of 2006, European Communities (Road Transport) (Recording Equipment) Regulations 2006 but he was not as familiar with their detail as he should be. He confirmed that the unladen weight of the claimant's van was 1800 kilogrammes and did not require a tachograph. The claimant's representative contended that, with reference to section 4(g) of S.I. No. 89 of 2006, the claimant's vehicle was not exempt from having a tachograph because, despite its unladen weight, in the course of his work, the claimant travelled a distance of greater than 50 kilometres radius from the place where the vehicle was normally based. MO'T confirmed that the claimant covered a distance of greater than 50 kilometres. The claimant's representative contended that if the respondent had complied with S. I. No. 89 of 2006, a record of the hours that the claimant worked, would exist. MO'T contended that the respondent had operated a system of good faith, but accepted that this system of good faith had failed in this case.

MO'T confirmed that the claimant had received two hours of overtime daily and that nothing was currently due to the claimant. The witness could only recall one occasion when the claimant had complained about not being paid for overtime. He rejected the claim that the claimant had

complained about unpaid overtime on numerous occasions. On the occasion that he complained of being tired of doing the early morning deliveries, the claimant had been advised that this was overtime and if he gave up doing the early morning deliveries, he would lose this overtime. The claimant had not been prepared to lose this overtime.

On the day of the incident in the warehouse, there had been three other named individuals present and within earshot of the conversation. It had been mid-afternoon when the claimant had returned to the warehouse. MO'T asked him to take a pallet to Raheen but he refused. He said that he was too tired. MO'T might have replied with "poor [*first name of claimant*]" but did not recall saying, "you're a hero". He recalled the claimant saying that he was too tired but did not recall him saying that he wages were never right. MO'T rejected the suggestion that he had told the claimant to go and clean out his van.

MO'T confirmed that the claimant had said that he was going to clean out his van. He had been able to take the van home in the evening. It had been his decision to leave his secure job after four years of employment. After cleaning out the van, the claimant had come back into the warehouse, left the keys of the van on a pallet and said that he would see MO'T in court. MO'T had wanted the claimant to come to his office to talk about things.

MO'T confirmed that he had said that the claimant was "throwing a strop" and the claimant had replied, "you would know if I was throwing a strop". MO'T had asked the claimant if he was threatening him and the discussion had got heated. MO'T confirmed that he could not remember exactly what was said but both parties had used profanity. He had not made a written note of what was said. He confirmed that he had told the claimant to get out of the warehouse. The claimant had left the warehouse after being told to do so.

The tiredness of the claimant to do the delivery to Raheen had not been considered by MO'T because it never got to that stage. The claimant's refusal to do the delivery to Raheen was the claimant being the claimant. He was prone to bad days. Raheen had been a small delivery out the road which would have taken fifteen minutes. It was only 3.30pm so it was still within the claimant's working day. Despite the claim of being tired, the claimant would still have been driving the van home. It had been the claimant's choice to start work at 6.00am.

MO'T had tried to contact the claimant by telephone but his call had been rejected. The next contact from the claimant had been through the Citizens Information Service. As the claimant had decided to make contact through the CIS and they had said that they would mediate, MO'T decided to leave the matter to them.

MO'T did not inform H.R. in Dublin that the claimant had left their employment until eight or nine days later, when a replacement driver was required. The claimant had been an extremely valuable employee and they had been good friends but he had left his job. It was completely illogical to MO'T that the claimant might have given up his good job based on light-hearted banter. It was not the case that MO'T had demeaned the claimant and told him to clean out his van. MO'T denied that he dismissed the claimant.

In re-directed evidence, MO'T confirmed that on the day that the claimant came to the depot to collect his P45 form, no mention had been made of a claim before the Tribunal or the outstanding 400 hours of overtime. The first time MO'T became aware of the claimant's appeal to the Tribunal was when informed by H.R. in Dublin. The respondent's financial director instructed him to contact the claimant and try to resolve the matter without causing too much grievance to anyone. As instructed, he had contacted the claimant and asked him if they could resolve the issue. In reply, the claimant had said that he would have to revert back to him, as he had never dealt with such a situation before.

Subsequently, the claimant had telephoned MO'T back and mentioned a specific amount of compensation. The claimant had not mentioned outstanding hours. On informing the financial director of the compensation figure mentioned by the claimant, MO'T was told to forget about it.

Replying to the Tribunal, MO'T confirmed that the delivery to Raheen had not been done. The new driver who had been accompanying the claimant on the 6 June had not been asked to do the Raheen delivery, as it had only been his first day at work. The claimant had been a direct employee of the respondent. The respondent also employed sub-contractors who are owner/drivers. When the claimant did not return to work, it was decided to use the subcontractors. The early morning deliveries between 6.00am to 8.00am had also been delegated to the subcontractors.

MO'T had not considered the possibility of a dispute from the claimant because the Citizens Information Service had told him that the claimant was not returning to work and when they had not pursued the case, he assumed the matter was over.

MO'T denied that he had offered the claimant overtime or settlement money to settle the matter. It had been implied to him from head office in Dublin to offer the claimant one or two week's wages as a goodwill payment to sort out the matter. The possibility of this offer had been to the claimant at the time of the telephone call, when the claimant had asked for a specific amount of money.

MO'T confirmed that currently, there are eighteen staff in the depot, twelve employees and six contractor/owner/drivers. The claimant's replacement, who was recruited three or four weeks after the claimant had left, now drives the van that the claimant used to drive. The other van drivers are in employment for three or four years.

Determination:

The case before the Tribunal was not one of non-compliance with Statutory Instrument No. 89 of 2006, European Communities (Road Transport) (Recording Equipment) Regulations 2006 and the Tribunal has no jurisdiction in relation to such a matter.

The facts presented to the Tribunal do not warrant a finding of dismissal as defined under the legislation and accordingly the claims under the Unfair Dismissals Acts, 1977 to 2001 and the Minimum Notice and Terms of Employment Acts, 1973 to 2001 are dismissed. As no evidence in relation to the claim under the Organisation of Working Time Act, 1997 was adduced to the Tribunal, this claim is also dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)