EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:		CASE NO.
Employee	- claimant	UD800/2008
		MN741/2008

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. P. Clancy

Members: Mr. G. Phelan
Mr. A. Kennelly

heard these claims in Limerick on 20 February and 23 April 2009

Representation:

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Claimant(s):
Ms. Antoinette M. Simon BL instructed by
Melvyn Hanley, Solicitors, 16 Patrick Street, Limerick

Respondent(s) :
Mr. Lorcan Connolly BL instructed by
McMahon O'Brien, Solicitors, Mount Kennett House,
Henry Street, Limerick

The determination of the Tribunal was as follows:-

Giving sworn testimony, the claimant said that he had worked in construction before commencing employment with the respondent (in September 2005). He worked in various roles both supervising and on the ground. His work covered many things including carpentry, shuttering and hands–on duties involving concrete and steel. He had supervised work related to plastering, carpentry and plumbing as well as also working on large contract.

When the claimant joined the respondent in September 2005 it was as a working foreman on a contract for showrooms for HY (a major motor company) on Limerick's Ballysimon Road. The site was barely started at the time. With the claimant as foreman the project lasted more than two years.

They took it from start to completion.

The respondent also had a job on Limerick's Gerald Griffin Street for a group of doctors. The respondent had to deal with boundary walls, internal rooms, plumbing, electrical work and air conditioning. That was the biggest job after HY.

The respondent had work that involved taking out rubble and soil from Thomas Street. This work started in late 2006. Health and safety had not been a problem at HY where there were regular safety meetings. However, the claimant felt that Thomas Street which the respondent's principal (hereafter referred to as FC) owned was drastically unsafe.

In early 2007 the claimant had concerns such as that the respondent had never done demolition work. Although construction was dangerous demolition was more dangerous. One could have unforeseen situations around the taking down of supporting walls. The claimant was the health and safety officer on the site.

The claimant told the Tribunal that from September 2005 he and FC had had a very good relationship. They always discussed issues. When not both on a particular site they had regular phone contact about what they would do. They always communicated very well. Their relationship "was more amicable than most".

Asked if he had had any disciplinary issue before December 2007, the claimant replied: "Nothing major, no." Asked if he had been pulled up regarding health and safety, the claimant replied: "Only if somebody was not wearing the right jacket after lunch. Nothing big."

The claimant said that before December 2007 health and safety had been good on the respondent's sites and that the Health And Safety Authority (HASA)had not visited any of them. However, towards mid-December 2007, work was being done on-site when a HASA official appeared and introduced himself. He said that he had got a complaint from parents of children attending the crèche next door.

The claimant stated to the Tribunal that the site had not been safe before the HASA visit. Asked if there had been occurrences, he replied that he would have had concerns about putting up and taking down scaffolding. There was no person qualified as having a ticket for working with scaffolding.

The claimant said that there was a five-day course in scaffolding and making it safe but that, even with that course, one could not sign off on big scaffolding works. That would need somebody with "a second-level qualification or higher".

The Tribunal was now furnished with photographs. The claimant identified the respondent's Thomas Street site and said that the photos featured a bent bar, broken planks and damaged scaffolding. He alleged that budgets were being cut, that "short cuts were being taken here", that safety was being affected by cutbacks and that this "would have been done properly" on the HY site.

The claimant told of putting in new walls and taking existing walls out from a distance of only a few metres. He stated: "We were on the edge of a disaster with part of the adjoining building coming in on top of us. We were working in a basement where we could not escape. I admit it was a big basement."

Referring to another photo, the claimant said that a machine driver on top of a bank could not see his own basket where the ground was being dug to facilitate the putting in of a wall near where an operative was standing. The claimant said: "If there is subsidence, the bank might all end up on top of the operative." He referred the Tribunal to a metal pick "which dislodges soil and makes it more dangerous".

The claimant also used as an example an occasion where some ground had fallen into a hole and an operative was shovelling into the bucket of an excavator whose driver could only see the operative's helmet. The claimant said that there was a minor incident when a couple of stones fell on the man's shoulder but that "a bigger fall could happen", that the claimant had been concerned about this and that this photograph had been taken after the HASA inspection.

Regarding electricity, the claimant referred the Tribunal to the respondent's wiring in one of the photos and said that the respondent should not have had wiring for two hundred and forty volts and that "one hundred and ten volts has less than half the chance of killing you if you come in contact with it".

The claimant referred the Tribunal to another photo (also taken after the HASA inspection) in which timber was being used to shore up to prevent debris from falling. He alleged that there was a "weight issue" because there was a huge amount of debris which required men to go in and move by hand. Also, rubble was falling on top of plywood. Plywood strips had to be stretched across a space to maintain it and to prevent further rubble coming down.

Referring the Tribunal to a photo in which steel reinforcing bars were seen to have yellow caps, the claimant told the Tribunal that these caps had been recommended by HASA but had not been present before that. The claimant explained that, if somebody stepped down on to the bars, he would get a bruise but would not get cut. The claimant said that he could not recall bringing these "re-bar" caps to FC's attention but the claimant told the Tribunal that it had been one of the issues about which ha had been concerned.

Asked if he had told anybody about his concerns, the claimant said that he had brought many of these issues to the attention of PB (a safety consultant who had worked for the respondent and whom the claimant would ask onto the site if the claimant had safety issues).

PB and the claimant had meetings. Initially, the claimant had concerns that the operatives did not have experience in demolition. PB would have come on site early in the project and would liaise directly with the claimant. They informed "the lads" that demolition was an added danger.

The claimant said that he would go for supplies to builders' suppliers, that he would move from site to site and that, some days, he was most of the day on the road between sites. He kept a work diary at all times. It was kept for company records. However, there was a lapse in his recording because, when he was given a diary for 2008, he thought the 2008 diary was a catalogue and left it there thinking that there was no diary. He put his own notes in a pocket diary which he was not asked to give to the respondent before he resigned.

Asked if he had done other errands for the respondent, the claimant said that every instruction given was followed and that he would be asked to get items from an early learning centre or from a department store. He had no issue with this. He and FC "had a good working relationship".

The Tribunal was now referred to a 7 December 2007 letter from HASA to the claimant regarding a

HASA visit and detailing "matters requiring attention" regarding the respondent's Thomas Street site. Asked if these matters had been major or minor, the claimant said: "Both." When he was asked if capping a reinforced bar was minor, he replied that it was major if someone got hurt. He said that most issues were addressed but that they were not all fully addressed and that he would bring them to the attention of PB (the abovementioned safety consultant).

The claimant told the Tribunal that the HASA inspector (MMcD) had told him that he would be back in two weeks to reinspect but that MMcD did not do so in two weeks and the respondent continued to do dangerous demolition. It was FC's own project and, in the claimant's opinion, short cuts were being taken as it would have been more expensive to do the work properly.

The Tribunal was now referred to a 15 December 2007 letter from the claimant to FC (but copied to PB and MMcD) which was headed "Re:- Safety issues at 19 Thomas St., Limerick." The letter contained the following:

"I regret the fact that I feel compelled to take a formal course of action on the above, however I am witnessing total disregard for Safety at 19 Thomas St. in place of unrealistic deadlines, proper procedure (sic) or even the appointed engineers instruction on undertaking the works.

I am in no way adverse to achieving timetable or budgetary targets where due regard is paid to Health and Safety issues, however I find these to be very low on the list of priorities. This was particularly evident to me on Fri. morning 14th Dec. '07 when I was precluded from speaking with our safety consultant after making an appointment to address Health and Safety issues highlighted by the Health and Safety issues highlighted by the Health and Safety Authority on Thurs 6th Dec. '07. Most of these issues have not yet been addressed. Having attended for work and inspected the site today (sat 15th December '07) and found many safety shortcomings with no obvious attempts to address them, I do not wish to visit or supervise works on this site until all Health and Safety issues are addressed, verified by our safety consultant and acceptable to the Health and Safety Authority.

I will be seeking professional and legal advice on this issue."

The claimant told the Tribunal that, having expressed concerns to the respondent and to its safety consultant (PB), he had felt that he had "no choice but to put pen to paper and make it formal". The claimant stated to the Tribunal that the respondent wrote on 18 December 2007 refuting what he had said, called it defamatory against the respondent and turned the claimant's protests into a disciplinary procedure warning him that "any further failure to comply with health and safety regulations on the site will be likely to lead to further disciplinary action".

Asked at the Tribunal hearing if he had previously received any warning that might have indicated a possibility of disciplinary matters, the claimant replied: "No, there had been no mention of anything like a warning. I was extremely surprised and upset. I was doing my duty in a responsible manner." The claimant added that the respondent had not written to him before and that this was the first communication of this kind that he had had from the respondent.

Asked if he had called a meeting with the respondent, the claimant replied that he had been called to a meeting in Thomas Street, that he had met the respondent and PB on site and that he had asked PB to come to the site to address safety issues for HASA. The claimant "had inspected them to re-inspect on the Monday " (17 December 2007). PB had phoned a few times and did attend on the Friday. The claimant had hoped to sort out the health and safety issues but they were not addressed

in any way. The meeting was stopped by FC and PB was sent away. The reason that FC gave was that they were in the middle of work and that it was not the right time for a meeting. HASA were due back on Monday. The claimant had no doubt that they would shut down the site if changes were not made. The respondent broke three days before Xmas.

Regarding the chain of events, the claimant told the Tribunal that PB was directed from the site on a Tuesday, that the claimant had written to the respondent on a Saturday and that the claimant was called to a meeting on the Monday. PB, FC and everyone in charge of works were there. The claimant "got a battering" about his management ability chiefly about his ability to supervise and to have works carried out. Everything was called into question. The claimant felt that he was not believed because he was thrice asked by FC to consider his position. The claimant replied to FC by asking if FC was asking him to resign because of health and safety issues. FC nodded as if to say yes. The claimant asked for a few days to consider it. This was "a crucial point" in the claimant's career with the respondent. He thought that his job "was untenable after this".

The Tribunal was next referred to a letter (originally dated 21 December 2007 and then dated 3 January 2007 (sic)) from the claimant to FC headed "Re: Safety Issues at 19, Thomas Street" which contained the following:

"In response to your letter of the 18th December 2007 and meeting yesterday, I wish to reply as follows:-

I do not accept that my allegations are defamatory against the company. Safety issues were not being given priority and I was not being afforded time to address health and safety issues.
I do not accept the content of your letter nor do I see it as reasonable or fair to have any form of warning enforced.

I have been concerned by health and safety issues for some time and arranged a safety meeting with (PB) on Friday the 14th December 2007. When I approached (PB) on the morning of the meeting, I was instructed by you to go back and drive the machinery. This I did, leaving you with (PB).

On Monday the 17th December you called a meeting to address Health and Safety issues in response to my letter to you. I understood from your comments at that meeting that you asked me to consider my position within the company and you mentioned that we no longer had a workable relationship.

At this stage I feel that I am not receiving a proper hearing and I am therefore requesting a copy of the Company's Grievance Procedures as I wish to envoke(sic) same.

I am returning to work at your request today, however, the above mentioned issues remain outstanding."

Commenting, after this letter had been opened to the Tribunal, the claimant: repeated the allegation that FC had said that they no longer had a working relationship; said that he had read the respondent's disciplinary and grievance procedure; and said that his "problem" was that he "was being given written warnings".

Asked if there had been anything else in January 2008, the claimant replied that he had got a written warning in early 2008, that he had had to go to a meeting with FC in a hotel and that, after

being given a written warning, he had requested that it be taken off his record.

The Tribunal was now referred to a 21 February 2008 letter from FC to the claimant which contained the following:

"There are a number of serious issues I wish to raise with you as follows:

1 In light of the fact that you failed to renew your teleporter and 360 tickets I have had to hire in on a full-time basis a ticketed driver and also a temporary ticketed driver. This has put considerable additional expense on the company at a time when we simply cannot afford it and, if you had your tickets, it would be unnecessary.
2 While you were banksman for the teleporter driver on Monday 11.02.08 on the Thomas Street project you allowed the driver to place one of the stabilising jacks on to a 110 mm waste pipe from a neighbouring property which, had I not spotted when I came on the site, could have caused an accident.
3 Two recent trips to Chadwicks for basic architrave and skirting resulted in the wrong materials been(sic) brought by you for the job in O'Connell Street.
4 When I looked for the site diary on Friday 08.02.08 you said you didn't think we had one for Thomas Street for this year but you have notes taken in the van. There is a diary for Thomas Street this year and I had recorded in it during your holidays and left it on the desk for you to continue to fill it up. How could we be five weeks into the new year and for you not to ask for a diary or not think it necessary for the accurate recording of day-to day activity on the project?
5 When I instructed you to transfer the scaffold from Thomas Street to Ballinacurra, we agreed on ten standards, enough planks and ledgers and two no. 21' poles for angular braces. When you arrived, you only had six standards and five planks and no 21' poles. I also asked for a roll of polythene and the Hilti gun by text but you only brought the polythene; on the next trip you brought the remaining standards but didn't bring the poles for bracing. It took three trips through the city to get what is a relatively small quantity of scaffold. This is a most inefficient use of company time and resources.

I firmly believe that the above stems from complacency and lack of concentration on the job in hand. Unfortunately, your attitude has become too casual and your ability to focus on the job is been(sic) hindered by your direct day-to-day involvement in your cleaning company. During the limited time I spend with you on any given day invariably you take calls that are not relevant to (the respondent) and it follows on that when I am not in your company I have no doubt that you make and receive calls that have nothing to do with (the respondent).

To help overcome this problem I have purchased a phone for you to be used exclusively by you for (the respondent) business and the only phone to be used by you during the working day.

The hired-in truck will now be the primary form of goods transportation for the company. Any expenses that have been paid to you for the hire of your van or use of your phone will cease to be part of your remuneration.

Finally, for the company to defray the cost of hiring in ticketed drivers I am proposing to reduce your salary from €46,000.00 to €36,000.00. However, I wish to discuss this with you.

Items listed in 1-5 are only a sample of recent mistakes but going back in the recent past there are a

number of others, which have the same root cause. Collectively, these fundamental but serious mistakes indicate a failure by you to perform your duties to an acceptable standard. On the basis that I have spoken to you and written to you previously on these issues, I feel I now have no option but to invoke disciplinary action in line with our company procedures.

I am putting you on notice that your attendance is required at 10 Emmet Place on 28.02.08 at 3.00 pm for a disciplinary interview to discuss these issues. You are entitled to be accompanied by a representative of your choice and you will also have a right of appeal if you are unhappy with any disciplinary penalty imposed."

The claimant told the Tribunal that a new foreman was taken on in January (2008). The claimant introduced himself to this new foreman. An operative told the claimant that this man was a new foreman who had been on Thomas Street taking levels and had been on another site doing a snaglist. The claimant had not been told that the respondent had taken on a new foreman. In previous times, the claimant would have had a discussion with FC even about an operative or a contractor (let alone a new foreman). This made the claimant feel very insecure.

At this point in the Tribunal hearing, the respondent's representative objected that this (the new foreman allegation) had not been mentioned on the claimant's written claim to the Tribunal. When the representative was told that the claimant could add other issues the representative said that this should not be done with something so significant.

Resuming his testimony, the claimant stressed that he had been "pretty upset" about this other person being employed by the respondent, that he had had no prior knowledge of it and that he had (as a consequence) felt very insecure in his position.

Asked if it was unusual to have two foremen on a site, the claimant replied that it was and that there had not been enough operatives to justify it. There were two (or three at most) employees on the site. The ratio (of foremen to operatives) was now almost one to one. The claimant could understand that contractors might be brought in but this new foreman was present on Thomas Street taking levels and measurements and did a snaglist on another site. The claimant had previously done the snaglists for the respondent's contracts.

Asked if the new foreman had taken on most of his duties, the claimant said that the new man had taken on part of his duties.

The claimant told the Tribunal that he had received a warning, that he had asked the respondent to take it off and that he felt that he was being brought to a disciplinary hearing and through a disciplinary procedure without getting a chance to go through the grievance procedure. At the abovementioned meeting in the hotel he had been given a letter which was putting a written warning on his record. He wrote a letter asking that this warning be taken off his record. (The claimant's representative mentioned that she did not have this letter.)

The claimant said to the Tribunal that when he received the respondent's 21 February letter he saw that his pay and expenses were to be cut and that his mobile phone was to be stopped.

Regarding the tickets required to show competence to drive various site vehicles, the claimant told the Tribunal that he had had the tickets before working for the respondent but that their expiry date had come up and the tickets had lapsed during the claimant's employment. However, he said to the

Tribunal that, when he had said this to FC, FC had said: "You're all right. You won't be seen in there anyway." The claimant told the Tribunal that the respondent would usually pay for vehicle training and the renewal of or obtaining of tickets and that it would be the respondent's remit to pay for all safety training.

The claimant acknowledged that he should not have been operating as a banksman and that a banksman should have a ticket.

Regarding the allegation in the respondent's 21 February 2008 letter that two recent trips to a builders' suppliers for materials had resulted in the wrong materials being brought by the claimant to a job in O'Connell Street, the claimant said: "I made a mistake. I did not have much time."

Regarding the allegation about diary shortcomings, the claimant said that he had thought that the Thomas Street diary had been a brochure and had not realised it was a diary with the result that he had used his own diary.

Regarding the allegation that it had taken three trips through the city to get what was a relatively small quantity of scaffold, the claimant spoke of getting vague instructions by texts and phonecalls but that, previously, there would not be so much hurry and rush. One would see what one wanted and would get it.

Regarding the proposed reduction in the claimant's salary from €46,000.00 to €36,000.00 to defray the cost of hiring in ticketed drivers, the claimant said: "I could not afford a ten thousand euro hit on my salary. It was nearly twenty-five per cent. It was huge money to me."

Speaking about his performance for the respondent, the claimant told the Tribunal: "I was not perfect but I felt I was pretty damn good."

Regarding the allegation that he had been using the respondent to further his own business (hereafter referred to as JJ), the claimant said that he had made calls regarding JJ (which had regularly done work for FC when he and FC had had a better relationship) but that this would not affect his work for the respondent because he had been averaging ten hours per day and a half-day on Saturdays with no lunchbreaks. He believed that he had not been interfering with the respondent's business by taking calls.

The claimant stated to the Tribunal that he had been stressed about the meeting (on 28 February 2008) to which he was summoned in FC's letter dated 21 February 2008 and that he got a cert from a doctor to take a week off. He told the Tribunal that he put up some signs for a company while on certificate. He explained that he would go round putting up signs for various companies, that if he had a contract to put up signs he would do so and that this was "just an extra way to make money".

Asked why he had worked while out from the respondent on stress, the claimant replied that the stress had just related to the respondent. He added: "It was therapeutic or a relief of stress to put up signs while on a medical cert. I was not physically injured."

Asked why he had not ultimately attended a rescheduled meeting with the respondent, the claimant replied that he could no longer stay with the respondent and that he "could not take any more".

The Tribunal was now referred to a letter dated 29 February 2008 from FC to the claimant which

contained the following:

"The meeting you postponed because of your medically certified acute stress has now been rescheduled for 12.00 Wednesday 05 March. In addition to the issues raised for discussion at that meeting and in light of information received in recent days about you carrying out work for somebody else, and attending business development meetings, we will also be discussing these issues on Wednesday.
The company has arranged for a medical examination with Doctor (note: name, address and phone number given but here referred to as DM) at 5.30 p.m. Tuesday 04 March. Dr. DM has considerable expertise in stress diagnosis and management which I feel would be of some benefit to all parties concerned.
Because I've heard nothing to the contrary I am assuming you will be in attendance at 8.00 a.m. on Thomas Street (on) Monday morning. You can text me to confirm this is the case."
Commenting on this letter, the claimant told the Tribunal:

"I was upset by that letter. I felt I was being railroaded. I was being referred to another doctor (DM)." He went on to say that his only source of stress had been the way he was being treated by the respondent, that he had felt threatened and that his position was being undermined. He felt that he would be forced out. He did not return to work but got a cert saying that he would be out due to stress. He did not feel that he could operate any longer because of the way he was being treated by the respondent. He felt that resigning was his only option.

Determination:

The claimant did not discharge the burden of proof that the respondent behaved in such a manner that he could not reasonably be expected to continue in his employment. Also, he did not discharge the burden of proof that he had exhausted all of the respondent's procedures before resigning. The claim under the Unfair Dismissals Acts, 1977 to 2007, fails.

Regarding the claim lodged under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, the Tribunal did not find the respondent to have breached this legislation and, therefore, this claim is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)