

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF: EMPLOYEE	(First Named Claimant)	CASE NO. UD1281/2008 MN1183/2008
EMPLOYEE	(Second Named Claimant)	UD1282/2008 MN1184/2008
EMPLOYEE	(Third Named Claimant)	UD1283/2008 MN1185/2008
EMPLOYEE	(Fourth Named Claimant)	UD1284/2008 MN1186/2008

against

EMPLOYER (Respondent)

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. M. Levey BL

Members: Mr. J. Goulding
Mr. N. Broughall

heard this claim at Dublin on 17th July 2009 and 12th November 2009 and 13th November 2009

Representation:

Claimants: Mr. Blazej Nowak, Polish Consultancy Enterprise, 19 Talbot Street, Dublin 1

Respondent: Mr. David Farrell, IR/HR Executive, IBEC, Confederation House, 84/86 Lower
Baggot Street, Dublin 2
Mr Brendan Kirwan B.L. instructed by Ms. Deirdre Lynch, Matheson Ormsby
Prentice, Solicitors, 30 Herbert Street, Dublin 2

The determination of the Tribunal was as follows:

This case was heard simultaneously with ud47.09.

Respondent's Case:

A shift manager (MS) gave evidence that the respondent company operates a distribution centre for a supermarket chain. He oversees a number of team leaders on the nightshift from 3-11pm. Each team leader on site reports to him as shift manager. Thirty employees work on a shift either re-stocking or "picking" stock from the shelves for distribution to the shops. The business of the company is driven by the overall work rate.

As shift manager he has full responsibility for the shift and this includes compiling a plan for the shift, which the team leaders then execute. The system produces a report of the number of replenishments performed. The system logs the work performed and the idle times as well as allowing the shift manager to see the location of the pickers.

On the 1st August 2008, he was the shift manager on the 3-11pm shift. The company has an agreement in place with the unions regarding the number of replenishments per shift. The work rate for the shift was poor as both the picking and replenishing rates had decreased. MS asked NC as team leader to examine the situation. NC spoke to the second named claimant about the replenishment rate. The shift manager also spoke to the second named claimant during the shift concerning the replenishment rates. The shift manager observed the second named claimant speaking to the third and fourth named claimant. NC informed MS that there was a bad atmosphere and when he approached the third and fourth named claimant they had laughed and driven off as he approached them. NC expected them to say something during the shift. When MS walked the floor during the shift he observed some of the claimants were excessively sounding the horns on their forklifts around NC. MS felt they were conveying to NC that they were unhappy. At the time of the 1st August 2008 NC had been working with the company for six months but he was one of the top team leaders. NC took responsibility when he spoke to the employees on his team even if the instructions had come from MS as shift manager. The team leaders also have the authority to provide informal interview coaching and give verbal warnings.

At the end of the shift the employees return their headsets to the briefing area. The shift manager usually arrives to the briefing area some 10 minutes later as he has submits a report to senior management at the end of the shift. A map of the area was submitted to the Tribunal but this did not show the briefing area.

The employees use hand recognition to clock in and out of work. The turnstile report for that evening showed that NC clocked out at 23.17. When MS exited the building he observed a number of employees grouped around a car in the car park. As he made his way towards the car park he heard NC shouting "let me go, I want to go home, why are you blocking me in?" Six cars were parked around NC's car. The cars belonged to the four claimants and two other employees (P and S). NC's car was parked properly in a space but the other cars were not parked properly in spaces and they were surrounding NC's car.

When the shift manager reached the turnstile he started shouting and asking what was happening. He could see that NC was frightened and twelve people surrounded him. The four claimants did not move away immediately but one employee (P) did drive off as the shift manager approached. The shift manager told them it was a serious matter. Initially he received no response but then the claimants and their passengers started to leave. NC was extremely upset, physically shaking and saying that he did not need this, as his wife was ill. NC shouted at the third named claimant asking

him why he had blocked him. The third named claimant jumped back out of his car. The shift manager told NC to go home and he complied.

The shift manager spoke to the third named claimant telling him that if NC had spoken to him as a team leader concerning the pick rates for the shift it was because the instruction had come from MS as shift manager.

The shift manager subsequently contacted NC who had left the car park. NC told the shift manager that when he exited the car park there were two cars parked either side of the road and he felt he was being followed.

On Saturday, 2nd August 2008 the day shift manager was on duty on the 7am to 3pm shift. The claimants were on site from 7am that day. MS telephoned the day shift manager and informed her of the incident. MS attended at the respondent's premises later that morning and both managers consulted with human resources regarding the incident. Ms. M in human resources advised them to suspend the employees who had driven their cars to surround NC's car. The six drivers (including the four claimants and employees P and S) were suspended with pay until the following Tuesday. Each of the claimants were informed individually that they were suspended with pay. The first named claimant and another employee (P) were upset and concerned for their jobs and for NC.

The shift manager provided a statement and attended a meeting with human resources on the 11th August 2008 as part of the investigation.

During cross-examination it was put to the shift manager that using the horn on the forklifts was normal practice in the distribution centre. MS agreed it was normal practice for health and safety reasons but he found it to be excessive on the night of the 1st August 2008. He confirmed there was a security cabin approximately twenty yards from NC's car but he did not see the security guard at the time of the incident. It was put to MS that he had to hold NC back as he became aggressive with the third named claimant. MS stated that NC was not close enough to the third named claimant that he needed to hold him back.

In reply to questions from the Tribunal, the night shift manager stated that two of the claimants had said to him on a couple of occasions that NC was "over the top" about their rates but he receives complaints about other team leaders from time to time when the employees are told by the team leaders to increase the rates. NC always took responsibility when speaking to employees about their rates and he did not hide behind the shift manager.

The day shift manager gave evidence to the Tribunal. She attended for work at 6.30am on the 2nd August 2008 and met NC who informed her of the incident that occurred the previous night. The night shift manager telephoned her in relation to the incident also. However, prior to receiving the telephone call employee P came to speak with her and informed her that he was involved in the incident. The day shift manager told him it was a very serious situation. She informed P that she would be speaking with her manager, the night shift manager and human resources concerning the incident. P held his head down as he spoke to her. He was very worried, upset and he was concerned for NC.

The third named claimant also spoke with her on his own initiative. He told the day shift manager that they were only playing a joke on NC. The day shift manager said to him that it sounded like a serious matter and not a joke. She reiterated what she had said to P about speaking with the night

shift manager, HR and her own manager.

The night shift manager arrived at 10am and explained to her what had happened. They telephoned Ms. M in human resources and explained what had happened. The day shift manager confirmed that Ms. M advised them to suspend the six drivers with pay pending an investigation. The day shift manager was charged with the subsequent investigation. She wrote to the claimants individually on the 5th August 2008 and informed them that they were required to attend an investigative meeting. During the investigation employees P and S were very concerned but the other claimants did not seem as concerned. They were each interviewed as part of the investigation and almost all of the claimants read a statement that they had prepared in advance of the meeting. The conclusion reached in the investigation was that the incident was supposed to be a joke played on NC but while two of the individuals (P and S) believed it to be a joke the four claimants wanted to achieve more and intimidate and harass NC. Some further factors were also considered in finding that the four claimants were more seriously involved in this act. The day shift manager was not involved in the disciplinary process.

In reply to questions from the Tribunal, the day shift manager stated that throughout the investigation process P and another employee S were very remorseful but for the four claimants she felt the incident had an ulterior motive.

On the second day of the hearing the team leader (NC) gave evidence. In his role he supervises all the team members on the floor, he monitors the hourly pick rates and reports back to management. He would normally have 15 to 20 people working for him on an eight-hour shift. All the claimants were part of his regular team. He had a good working relationship with them, but he did not socialise with them outside of work.

On Friday 1st August 2008 his team seemed indifferent and were not achieving their pick rates. Walking up and down aisles, laughing, joking, it seemed that they were planning something. He had three teams that day so about 20 people in total. He finished work that night and left through the turnstiles. He could see a lot of people huddled in the car park; a big cheer went up when he came out of the gate. He felt that the crowd were hostile towards him, they were jeering and shouting, bantering at him in Polish. Six other cars were blocking in his car and he could not get in to it. A drawing was produced showing how the cars were blocking his. The car park is not well lit and it was dark at that stage.

He reacted, as he did not know what was happening. The third named claimant approached him and said your car is blocked and you can't get out. He told him to move his car, third named claimant responded by informing him he would be there all night. They all started to circle around him, he continued to ask them to move their cars, but they all just laughed. He started to put the registration numbers of the cars blocking him in to his mobile phone. They started to move towards him again, they were getting more aggressive; it was the most terrifying ten minutes of his life. He told them "move your f***** cars" as he was up to ninety. He saw MS coming to the car park; MS asked what was going on. At this stage some of the crowd got in to their cars, including the claimants. They were still laughing as they drove off.

He saw the third named claimant in his car and asked him to come over to him. The third named claimant took his jacket off and ran towards him, and squared up to him in front of MS. He asked the third named claimant why they had done this, and informed him that he had a sick wife at home. The third named claimant smiled and laughed at him.

MS then told him to go home; as he drove out of the gates he could see the fourth named claimant in his car on the right and the second named claimant in his car on the left of the main road. He believed that they were waiting for him, as there was a small gap between them, he put the foot down and drove through. The fourth named claimant drove after him right up to the back of his car and flicking his lights. He believed that both the fourth and the second named claimant followed him home on his ten-mile journey. He saw the fourth named claimant's car in his rear view mirror the whole time.

He was in work the next day at 7.00 am and brought the incident to the attention of the day shift manager (JL). The rest of his team came in, including the claimants, none of them approached him or apologised, they were still laughing and joking. JL informed him that the claimant's were going to be suspended that day so he would have to write a statement outlining the events of the previous night. This statement was produced in to evidence, he explained he was still very shaken on the Saturday when writing this.

Within this statement he stated that he felt they were specifically waiting for him, he explained that they had a bad attitude to him all through the shift, every time the first named claimant passed him he would laugh and make hand gestures towards him. He had asked him to stop this behaviour but the first named claimant responded by saying he was so happy. The incident had been planned. On the Sunday he added additional comments to his statement, stating he believed that the first named claimant and another employee (P) " were also heavily involved "as they had been in constant contact with they other three named claimants. On the Friday night he could see them all talking to each other when they drove by him they would all laugh at him. He did ask the third named claimant to improve his rates and he responded by jumping off his truck, and telling him he would kill him. The second and fourth named claimants were not achieving their rates that night.

Under cross-examination he confirmed he had never any problems with any of the claimants, he had respected and liked them. It was put to him that the claimants would say that the Friday was like any other shift, that they had made no comments towards him and had not laughed at him, he replied by saying that was their opinion. There had been a lot of talking on the transverse aisle, laughing, joking, they were not where they were supposed to be. He had complained to MS about their work practises on the shift, and had gone down to them. He had not complained about their behaviour before this shift. He denied that he had shouted at the second named claimant during the course of the shift, nor had he returned to speak with the second and third named claimant again about the performance.

It was suggested to him that his car had been blocked in as a joke, and that the minute he arrived in the car park he had started shouting at the claimants to move their f***** cars. This he said was untrue when he arrived in the car park the third named claimant approached him and told him he was not going anywhere. He had not raised his voice at this stage, in the end he did say move your f***** cars but not in a threatening manner. The gatehouse is close to the car park, at no stage did a security guard come over nor did he think to ask security for assistance.

It was put to him that the third named claimant had approached him to calm him down and had not tried to push him. The third named claimant was the ringleader; he was aggressive, sarcastic and hostile to him. The third named claimant would also say that he asked the lads to move their cars and he tried to explain the situation to him. He explained that the third named claimant was getting in to his car and he asked him to come over to him, MS at his stage had put his hand on his shoulder and told him and the third named claimant to go home. At no stage did he approach the

third named claimant in an aggressive manner. MS had told the third named claimant about his sick wife. As he was very stressed he informed MS in the car park that his wife was sick and in a lot of pain and he just wanted to get home. His wife's illness did not affect his work performance.

He denied giving the fingers to the fourth named claimant when he passed him on the road in his car. As he was driving by the lights of their cars were off, the fourth named claimant was getting out of his car and the second named claimant was there.

Replying to questions from the Tribunal he confirmed he has no difficulties with the claimants before this. It was different that day in work, they were out of control and clearly something was being planned. At the end of the shift he could see the third named claimant getting everybody out. He did not think it was a joke it was malicious. He had been terrified.

The AGM (MM) was next to give evidence on behalf of the respondent. He is responsible for the day-to-day running of the site, liaising with customers and management and he would know 99% of the staff on a first named basis. He was referred to the "principal statement of main terms and conditions of employment that all of the claimants received. Within this under the heading "Terms and Conditions of Employment" a larger "Team Guide" is referred to. He explained that this "Team Guide" document is held by management and is available to all staff on request and they are aware of this through the "principal statement of main terms and conditions of employment".

He referred to the Team Guide where the disciplinary procedures are set out. Within this under "summary dismissal" there are a number of offences listed including "Sex, Race, Disability discrimination or harassment/bullying". His ability to conduct the claimants' appeals is outlined in the team guide.

He gave evidence on each of the claimant's appeals. He did not review the CCTV of the car park as the incident happened in a blind spot. The appeal meeting of the fourth named claimant took place on the 9th September 2008, a note of which was produced in to evidence. This was read in to evidence. In attendance was this witness, a HR employee and the claimant. The claimant declined representation. During the course of the meeting he questioned the claimant about of the night of the incident, and then took a break to review everything. He felt his only choice was to uphold the decision to dismiss the claimant because as an employer they have a duty to care for their staff. It was a serious incident, NC had been intimidated in a situation where it was about ten people to one.

The second named claimant appeal meeting was set up for the 8th September 2008 at 3.00pm. The claimant arrived at the respondents premises at 11.00 am that morning and requested to have his appeal meeting then. The witness was not available at that time to meet with the claimant and subsequently the claimant failed to appear at the meeting at 3.00pm. HR wrote to the claimant and reset the appeal meeting for the 19th September 2008 at 3.00pm, and again the claimant failed to appear. He was unsure if the company had tried to contact the claimant on this day. No appeal meeting ever took place.

The first named claimant's appeal meeting took place on the 9th September 2008; an interpreter accompanied the claimant. Notes of this meeting were produced in to evidence. He upheld the decision to dismiss the claimant, as they need to have control over their employees. Employees need to respect each other in and outside of the work place. The incident in the car park only came to an end when he intervened.

The third named claimant's appeal meeting was held on the 8th September 2008, the claimant declined representation. Notes of this meeting were produced in to evidence. Again he decided to uphold the dismissal for reasons stated previously. Only six employees had been dismissed over the incident, these had been directly involved by moving their cars to block NC's car in. At the time of the appeals he did not consider another disciplinary penalty because of the seriousness of the incident.

Under cross-examination he was referred to the respondents harassment and bullying policy, he explained that this is displayed on site and beside the clocking machine. It was put to him that none of the claimants were made aware of the list of offences leading to summary dismissal; he reiterated that the team guide was available to all employees on request. It was suggested to him that the claimants had never been provided with a definition of bullying and harassment. He believed that the claimants' actions constituted gross misconduct. The company expect employees to leave the premises and the car park when their shift finishes. The blocking in of another employees car had never happened before this. During the course of the appeal meetings none of the claimants could explain how the "joke" was supposed to be funny. He had questioned the security staff in relation to the incident, but they had not seen it.

Claimants' Case:

The third named claimant gave direct sworn evidence. He commenced employment with the respondent in April 2006 as a member of the warehouse team; he drove a type of forklift truck. On the day of the incident there was no excessive beeping taking place. He explained they normally beep when they are turning in to aisles to let others know they are on their way. He did not tell NC on the day of the incident 1st August 2008 that he would kill him. Up to this point of his employment he had never had any problems with management or supervisors nor had he received any warnings.

On the 1st August 2008 when leaving to go to the car park they decided to play a joke on NC, it was everybody's idea and spontaneous. He parked his car on the passenger side of NC's car and then went to the smoking area. They were a long time waiting for NC to come out so they went back to their cars; at this stage NC came out and started screaming at them. "Take your cars away, you scratched my car", he informed NC that nobody had scratched his car. About two minutes later thenight shift manager (MS) arrived in the car park and he asked him what was going on. He told theMS they were messing but NC had gotten angry, MS asked them all politely to move their cars. He had gotten in to his car but he had to get out again to take his jacket off, at this stage NC had pointed at him and asked him if he wanted to piss him off, NC was waving his hands about. MS told NC to calm down, and then MS told the claimant to go. When NC left the car park he stayed with the night shift manager who told him that NC's wife was not well, and told him not to mess with NC and could he pass it on to the lads. Two friends were waiting for him he told them that NC had taken the joke the wrong way and they could not do anything like that again.

He did not know about NC's personal problems, he maintained he had a good relationship with NC on the warehouse floor. He had never received the respondent's Harassment and Bullying Policy nor the large Terms and Conditions of employment (Team Guide). He did receive the "principal statement of main terms and conditions of employment". He had never received any coaching in respect of bullying and harassment nor had seen any documents in relation to it on the corridors. During the course of the incident there were about 14/15 people in the car park at no stage did he

use foul language. It was suppose to be a joke, NC was shouting from the beginning. He gave evidence of loss.

Under cross-examination, he was referred to the “principal statement of main terms and conditions of employment” of which he had received a copy. Within this document under the heading “Terms and Conditions of Employment” it outlines that specific terms and conditions of employment are contained in the Terms and Conditions of employment relating to the ***** contract (team guide), copies of this document are held by team leaders and managers and are available on request. He had never asked to see a copy of this team guide, as from the start his English was poor. He did not think to ask for this document when he was suspended. He was referred to his appeal hearing with MM at which he said he just wanted his letter to finish so he could go to court. He accepted he said this, one of his colleagues (P) had told him of the outcome of his appeal, and also he was upset as only six in the car park that night had been spoken to and dismissed. His union representative had informed him that he would most likely be dismissed.

He was working with NC for about 10 months before the incident, he had a good relationship with him, and NC treated him well. He had probably played jokes on NC before and recalled one incident where he another colleague played a joke on one of the other supervisors and another where another colleague played a joke on a security guard. On the night of the incident they parked their cars around NC’s and went to the smoking area. He refuted that the blocking of NC’s car was planned during the day. He did not understand why NC said he was intimidated and was fearful on the night or why he said “10-1 not fair”, as he did not try to frighten NC. He thought the joke would be funny as NC would not be able to find his car in the car park. Normally after each shift they would go to the smoking area and have a chat and a cigarette for about 10 to 15 minutes. It was put to him that NC did not come out to the car park till 20 minutes after them. The claimant explained that they were waiting for NC to come out but as time was going on they went back to their cars and were going to move them when NC came out. He agreed that they only moved their cars when the night shift manager asked them to. He denied that he had told NC that he would not move his car and that NC would be there for a long time, nor had he told NC that he could do nothing to him as he was out of the building. He knew when he was in the car park he was still on the respondent’s premises.

He was referred to the investigatory hearing notes, where it is noted that he said, “ I couldn’t hear what he said”. The claimant explained that over the noise of the engines he could not hear what NC was saying, so he got out of the car, took off his jacket and went over to him. He maintained the reason he took off his jacket was when MS told him to get in to the car he just jumped in jacket on, he had a small car and needed to take his jacket off. It was put to him that MS was not holding back NC; the claimant said the MS had his hand on NCs shoulder. He was afraid of NC’s body language. NC left the car park before him.

In his evidence NC said that the claimant’s were laughing at him on Saturday morning. The claimant denied this and said they were laughing all the time but NC would not know what they were saying in Polish. On the Saturday morning he was not laughing, as the atmosphere in work was not good. He and another employee P had gone to the day shift manager that morning in respect of the incident the night before. The night shift manager in the car park had told him he could not be doing what they did, and that he would sort out on the following Monday.

He had moved SJ’s car as SJ had brought in polish vodka and sausage that evening, SJ had told him he could move the car. When they had come back from the smoking area they intended to go home as they were in at seven the next morning but NC had come out at that stage.

The second named claimant gave direct sworn evidence. He commenced working with the respondent in November 2005, through an agency after six months he became an employee of the respondents. During this time up to his dismissal he received no warnings in relation to his performance or conduct in the workplace. However he had received one coaching in relation to sick leave.

On the 1st August 08 NC and MS spoke to him about his rate of replenishments, it should be 12 per hour but he was doing 10 per hour. About 10 to 15 minutes later NC returned to him and again told him he must improve his work rate. He explained to replenish can take anything from 2 to 15 minutes, beeping is necessary when doing the job as you have to warn other people you are arriving in the transfer area. On the night of the incident, 1st August 2008 he was near the gate when somebody said lets play a joke on NC and block his car in. He moved his car bumper to bumper to NC's car and then went to the smoking area. When they saw that NC was not coming to the carpark they went back to their cars to go home. At this moment NC was just finished and he came to them and started screaming "move your f***** cars, you scratched my car" and then tried to take photos of his car. He was not aggressive to NC, the third named claimant tried to calm down NC by saying nothing had happened. This lasted about three minutes then MS came out to the car park; he did not move his car within these three minutes. They told MS they were playing a joke on NC and then MS told them to go home. He left the car park and stopped his car on the road about five metres from the entrance. He did not flash his lights at NC nor did he follow him home.

He went in to work the next morning on overtime, some people were talking about the incident the night before. He did not realise how serious the incident was. He confirmed he had received a "principal statement of main terms and conditions of employment" but had never seen the respondent's Harassment and Bullying Policy nor the large Terms and Conditions of employment (Team Guide). Nor had he seen these documents on display in the warehouse. He had not received these documents in the course of the investigation; he had seen them for the first time at this hearing. He gave evidence of loss.

Under cross-examination he was referred to the letter inviting him to his appeal meeting, this was to take place at 3.00pm on Monday 8th September 2008. The claimant explained he could not attend the meeting at 3.00pm as he was working, he rang the respondent asking for the meeting to be moved but he did not know whom he was talking to. He called to the respondent's on the same day at 11 am asking if he could have his appeal hearing, MM was not available. He did not attend his appeal meeting. He reiterated that he never received respondent's Harassment and Bullying Policy nor the large Terms and Conditions of employment (Team Guide). He was shown a copy of his induction record and was referred to page four headed Terms and Conditions. On this he had ticked and signed that he had been issued a "Team Guide Handbook", he did not recall this document being issued to him. He might have seen the Team Guide Handbook but he did not remember. He agreed he never asked to see them before or after the incident and he explained he would not be able to understand all of it. He had most probably played jokes on NC and the reason they played this particular joke with the cars on NC was because they spent eight hours with NC every day, they talked to him about problems so they know him better than others. Nobody had told him to park his car where he did, he did not know who the other drivers were as he was busy reversing his car in to place. He thought the joke would be funny when NC arrived out to the car park and they were all in the smoking area. When they came from the smoking area they had decided to go home, they thought that maybe NC had some problem with the

system. He was asked why he did not say this at the investigation meeting, he thought he had. It was put to him he hadn't explained that they were about to go home. He explained NC had come out at this stage and was shouting they were close to the cars then. He may not have explained during the hearings that they wanted to go home at this stage, he may have forgotten due to pressure and stress. He could not understand why NC was intimidated or afraid. He had another passenger in his car that night; he did not follow NC home. He refuted that he was laughing the next morning in work; he knew something was wrong and when the day shift manager and the MS suspended him he was shocked.

The first named claimant gave direct sworn evidence. He commenced employment through an agency in December 2006, and began directly working for the respondent in July 2007. He had received no warnings in relation to his work up to the time of his dismissal.

On the 1st August 2008 when leaving work someone just said let's play a joke on NC. He went to the car park blocked NC's car and went to the smoking area to have a cigarette. As NC did not come out they decided to go home and just when they got to their cars NC came out and started shouting at them. The third named claimant tried to calm NC down and asked NC to stop shouting. NC would not listen to them, and then the MS came out and asked what happened. MS told them to get in to our cars and go home. He left the car park just before NC and stopped just after gate and was talking to the second named claimant. He did see NC passing in his car, he did not flash or follow NC home.

The next morning he went to work, he did not laugh at NC that morning, but NC was laughing at them and he seemed to be happy. He described the atmosphere in work that morning as strange. He explained he did not know that NC wife was unwell at this time. He never received the respondent's Harassment and Bullying Policy nor the large Terms and Conditions of employment (Team Guide) during the course of his employment or dismissal. He gave evidence of loss.

Under cross-examination it was put to him that NC in evidence said he was stressed and upset on the Saturday, on foot of this he said he was sure NC was laughing at them on Saturday. The claimant was sure that NC was laughing at them. He denied that he followed NC home, he explained he was waiting outside, as he wanted to talk to the third named claimant. He did not know whose idea it was to play the joke on NC. He had never played a joke on NC before. It was a good idea to play a joke on NC as they were all good friends in the company and he thought it would be funny. He did not understand why NC was frightened and intimidated. In response to a question as to when he decided to move his car and go home, he replied when the MS told us, he was going to continue to block NC's car in. He agreed that when he was suspended he was made aware of how serious the respondent was treating the incident, but disagreed he was made aware that his actions may be found to be gross misconduct. He was referred to the letter he received inviting him to attend an investigation meeting, in this the purpose of the meeting is described as to investigate "an alleged act of gross misconduct" it further goes on that disciplinary action may be taken "up to and including summary dismissal". The claimant confirmed he received this letter. He agreed that the respondent had given him an opportunity to explain his side of the story. It was put to him that MM during the course of his evidence had said nobody could explain why this joke was funny. The claimant disagreed with this and said MM had only asked who had made the joke not why it was funny. He was referred to the notes of his appeal meeting where he was asked as to why it was funny, he accepted these notes.

The fourth named claimant gave evidence through an interpreter. He commenced with the respondent through an agency in November 2005, after six months he became a direct employee of

the respondent. He worked in the warehouse as a general operative sometimes driving a forklift. He had been spoken to previously to August 2008 in respect of sick leave and not achieving the pick rate. It was normal to beep on the warehouse floor, there was no excessive beeping on the 1st August 08.

He was in the car park on the 1st August 08 and somebody said lets make joke we will park our cars around NC's car. He blocked NC's car with his own car and went to the smoking area, which was about 50 metres away. They were there for about 10/15 minutes and there was no sign of NC coming out. They decided that they did not have time to wait so they went to their cars to go home. NC came out at this time; NC was furious and shouting at them to move their cars. They tried to calm him down; none of them were aggressive towards NC. MS then came out to the car park and asked them what had happened they told him it was a joke, the MS asked them to leave. He drove out of the car park and stopped on the road to speak with another colleague P through the car window. While talking to this colleague, NC drove by and gave him the finger. On the roundabout on the road he took the right turn while NC went left. He did not follow or flash NC.

When he went to work the following morning on Saturday, everyone was asking what had happened and they were saying you are bandits. He did not laugh at NC that morning and he had not known NC's wife was not well until the 1st August. He confirmed he received his contract of employment but he did not remember ever seeing respondent's Harassment and Bullying Policy and the large Terms and Conditions of employment (Team Guide). He gave evidence of loss.

Under cross examination he explained the following morning a number of the Irish lads had called him a bandit, he could not recall if he was laughing and joking. NC was in the car park for about two to three minutes before MS came out. He was referred to his induction record where he had ticked that he had seen the team guide; the claimant could not recall this and added that his English was not good so he had probably just signed this record without knowing the contents. He never requested the relevant documents when he was dismissed. He described his relationship with NC as "fine" before the incident. He had probably played jokes on NC before but had never blocked his car in. On the night there was about 20-30 cars in the car park. The appeal meeting was very quick and he felt that MM did not listen to him at it. He agreed that he had been given the opportunity to explain the joke at both the investigation and disciplinary meetings. Nobody had told him to park his car that night he just did. He did not agree that NC was upset and afraid or that the joke had been planned during the course of the shift. He did not follow NC's car.

The claimant's representative handed in to the Tribunal copies of the HSA "Code of practise for employers and employees on the prevention and resolution of bullying at work" and the "Code of practise on sexual harassment and harassment at work" for their consideration.

Determination:

It is well established that each case of unfair dismissal must be judged on its merits and what may justify dismissal in one situation may not in another. The role of the Tribunal is not to establish an objective standard but to ask whether the decision to dismiss came within the band of responses a reasonable employer might be expected to take having regard to the particular circumstances of the case.

The Tribunal is of the view that the blocking in of the supervisor's car could be reasonably regarded as intimidating behaviour given the circumstances and the fact there were a number of people acting in concert. The Tribunal finds that in all of the circumstances the decision to dismiss was proportionate. Therefore the claims under the Unfair Dismissals Acts, 1977 to 2007 are dismissed. Accordingly as the claimants were dismissed for misconduct their claims under the Minimum Notice and Terms of Employment Acts 1973 – 2005 must fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)