EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:	CASE NO.
EMPLOYEE **- claimant**	UD487/2010 RP679/2010 MN836/2011
against	
EMPLOYER **-respondent**	

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. S. McNally

Members: Mr. D. Hegarty
Mr. J. Flavin

heard these claims at Cork on 31 March 2011

Representation:

Claimant: Mr. Fachtna O'Driscoll, Fachtna O'Driscoll Solicitors,
9 South Mall, Cork

Respondent: XXXXXXX

The determination of the Tribunal was as follows:

At the outset the respondent consented to the addition of a claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005. The claim under the Redundancy Payments Acts, 1967 to 2007 was withdrawn.

The claimant was employed in the respondent's dry cleaning business from October 2004. Initially the claimant worked on a full-time basis but from some time in 2008 the claimant was working part-time 17.5 hours, five mornings a week. The respondent has two other employees and the respondent also works in the shop. The employment was uneventful until 2009 when the claimant was absent for twelve days in the period January to August 2009. The respondent's position is that they only got short notice of the absences typically by text and that this meant the roster constantly having to be changed. The claimant's position is that the majority of the absences were planned and notified well in advance. It is common case that in July 2009 the claimant told the respondent that she had received an electric shock from a drying machine. The claimant's position is that when she

reported this incident the respondent called her a "stupid girl".

The claimant was out sick for the week from 7 to 11 September 2009. The contract issued to the claimant at the start of the employment provides "The first 4 days of any sick leave count as annual leave. Time taken off after that will be unpaid." Despite this provision the respondent agreed to pay the claimant for the week she had been out sick. She was asked to provide a medical certificate on her return to work on 14 September 2009, this had not been provided by Friday 18 September 2009 the last day the claimant worked in the shop.

On that morning the claimant parked her car in a parking space outside an adjoining business to the respondent's. The respondent, who was in the vicinity, phoned the claimant and asked her to move her car on to the street as the adjoining business proprietor (BP) had told the respondent not to park in his spot. The claimant's position is that she then approached BP and he told her there was no problem with parking where she had apart from when he received a delivery of stock on a Wednesday. There was then at least one text from the respondent to the claimant instructing her to move the car and then a phone call which ended abruptly, the claimant's position being that the respondent would not listen to her explanation. After this phone call the claimant left the shop, as she was hysterical at the irrational way the respondent had spoken to her.

The claimant returned to the shop with her sister at around 5-00pm on 18 September 2009 in an attempt to resolve the matter that had arisen between her and the respondent. This was unsuccessful with each side accusing the other of provoking the earlier incident. The respondent's position is that the claimant was asked to return at 6-00pm after the shop closed. The claimant's position is that the respondent screamed at her and told her to get out of the shop and would deal with her later. The claimant felt sick and could not go back to work. She consulted her GP and was in receipt of weekly medical certificates citing work related stress from that point. The claimant also supplied a medical certificate for the week of 11 September 2009.

Medical certificates were supplied to the respondent from 21 September 2009. On the same day the respondent wrote to the claimant about her performance and recent incidents. Matters raised in this letter were the claimant's absence for a total of eighteen days and no certificate provided, failure to comply with written instructions on methods of operation including phone numbers on dockets and the car park incident. The claimant was warned that the car park incident was regarded as gross misconduct and a similar incident would result in summary dismissal. The letter was to be taken as a final warning of a need to improve her work performance.

On 29 September 2009 the respondent wrote to the claimant stating that as at 18 September 2009 she had taken all her sick leave entitlement for the year and any further absences would be unpaid. It is common case that this letter was produced at the request of the claimant for social welfare purposes.

On 12 October 2009 the respondent wrote to the claimant stating that her level of absence was having a detrimental effect on both the business and the other staff. The respondent asked when the claimant was likely to return to work, as the current situation was not sustainable.

On 23 October 2009 the respondent sent the claimant a letter of termination and referred to her lack of response to the letters of 21 September and12 October 2009 adding that there was no alternative in order to make sustainable arrangements for the running of the business.

Determination

It is abundantly clear that the catalyst for this dismissal was the car-parking incident on 18 September 2009. Whilst BP was not called to give evidence the respondent told the Tribunal that BP complained to her two or three times a year about car-parking. She accepted that he never complained about the claimant parking in his spot. In such circumstances the Tribunal is satisfied that the respondent's actions in instructing the claimant to move her car by way of two phone calls and a text message represent an over-reaction on the part of the respondent. The Tribunal is further satisfied that the respondent exceeded her authority in instructing the claimant to move her car. In relation to both the last phone call on the morning of 18 September 2009 and the meeting in the shop at 5-00pm the same day the Tribunal prefers the evidence of the claimant and is satisfied that the intention of the claimant in going to the shop with her sister was to resolve the issue that had arisen before she was next due to work. From 21 September the respondent was well aware that the claimant was suffering from work related stress. Her response was to issue the claimant with a final written warning, which referred to other warnings none of which were brought to the attention of the Tribunal. The respondent made only perfunctory attempts to enquire after the claimant's well being and was offended that the claimant was seen in the vicinity of the shop despite the knowledge that her mother works in nearby premises. The respondent made no attempt to have the claimant medically examined by a doctor nominated by the respondent and, some five weeks after the car-park incident, summarily dismissed the claimant, an employee with five years service, for failing to advise of the likelihood of a return to work. For all these reasons the Tribunal finds that the claimant was unfairly dismissed and awards €13,000-00 under the Unfair Dismissals Acts, 1977 to 2007.

During the hearing of these claims the respondent asserted that the employment began on 1 November 2004. The claimant in her form T1A stated that she was employed from 4 October 2004 and the contract of employment proffered by the respondent also refers to a commencement date of 4 October 2004. Accordingly, the Tribunal is satisfied that the requisite period of notice for an employee with the claimant's service is four weeks. The evidence having shown that the claimant was summarily dismissed the Tribunal further awards €1070-00, being four weeks' pay, under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)