EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:		**CASE NO.**
EMPLOYEE	***-claimant***	UD1623/2009
		MN1594/2009
		WT682/2009
against		
EMPLOYER	***-respondent***	

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms N. O'Carroll-Kelly B.L.

Members: Mr M. Murphy
Ms. A. Moore

heard this claim at Monaghan on 28th October 2010
and 28th February 2011
and 1st March 2011
and 2nd March 2011

Representation:

Claimant: Ms Audrey Coen B.L. instructed by McCartan & Burke, Solicitors, Iceland House, Arran Court, Smithfield, Dublin 7

Respondent: Ms Helen Callinan B.L instructed by A & L Goodbody, Solicitors, I.F.S.C., North Wall Quay, Dublin 1

The Determination of the Tribunal is as follows;

Dismissal is not in dispute so it falls to the respondent to make their case.

Respondent's Case

The Director of the respondent (PD) gave evidence. The respondent is a residential workplace for artists. Both the North and South of Ireland's Art Councils fund the respondent. The premises is owned and run by the Office of Public Works and the company is run by a Board of Management. The respondent has been in operation for thirty years. The position of Chairman alternates between a person from the North of Ireland and a person from the South of Ireland.
The claimant commenced employment as the Grounds Manager in 1997. The claimant received a copy of the employee handbook. The claimant did not sign his contract, which included the

disciplinary procedure. The employee handbook includes a definition of harassment and states that 'it may be persistent or an isolated incident.' The handbook also includes a 'Dignity at Work' policy, which among other things prohibits bullying or harassment on grounds of nationality.

On the 3rd of November 2008 PD issued the claimant with a Verbal warning. This warning was the result of the claimant's behaviour and conduct towards PD. The claimant refused to use a new clocking machine and on front of the residents and staff said to PD, 'you know you can shove your f*****g clocking-in machine, and you can shove it as far as you can.' PD informed the claimant that the newly appointed Chairman was adamant that all legal requirements were complied with to which the claimant responded, 'we don't want his sort down here. He should never have been let cross the border, in fact he should have been shot at the border, and I'll do it myself. You can tell him that.'

The respondent received a complaint against the claimant as a result of an incident that occurred on the 11th of December 2008. On front of two witnesses the claimant verbally abused a consultant that was engaged to look at cost cutting measures in the respondent. The consultant ordered oil for the respondent; the claimant questioned the consultant saying, 'its none of your f*****g business about oil and I do the ordering of oil not you and it would fit you better to keep your f*****g nose out of it and my contract also states that it is my job to order oil not yours.'

The respondent discovered that on the 31st of December 2008 the front door was left wide open. This is a serious breach of security.

The respondent wrote to the claimant on the 17th of February 2009 requesting his attendance at a disciplinary hearing. The letter included the offer to bring a witness and outlined the allegations as follows;

1. that on the 3rd of November 2008 and you used racially abusive language in respect of the Chairman.
2. that on the 11th of December 2008 you used abusive language to a consultant and treated her in a manner that could be construed as harassment.
3. that on the 31st of December 2008 you were responsible for a serious breach of security at the centre.
4. that you have been grossly negligent in respect of the use and consumption of the heating oil at the centre and have raised a suspicion that you may be using some heating oil paid for by the centre for uses other than that of the centre
5. that on the 21st of December 2008 when the centre was closed you purchased and charged to the (respondent) some 27 litres of diesel, and on the 20th January 2009 a further 47 litres was purchased. This is sufficient to keep an average tractor running for over three to four months. Again you have raised a suspicion that you may be using this diesel for your personal use.
6. that over the weekend of 24th/25th January whilst you were absent on full paid sick-leave, you entered the (respondent) and took a large amount of scrap metal belonging to and of value to the (respondent) for your personal use or gain.

The letter stated that each of the above allegations are potentially Gross Misconduct and could lead to the claimant's dismissal without notice.

The disciplinary meeting took place on Thursday the 19th of February 2009. PD, a Board member (PF) and the claimant's solicitor were present at the meeting. The allegations in relation to the oil and diesel and the breach of security were not considered when making the decision to dismiss the

claimant, as they could not be substantiated. The claimant apologised for the first two incidents and accepted the sixth incident occurred but it was not 'theft.' It was decided to suspend the claimant on full pay and he was informed of this by letter of the same day.

After consideration the Disciplinary Committee decided to dismiss the claimant and informed him of this by letter of the 27th of February 2009. The committee found, following an investigation and the disciplinary hearing that the first two allegations and the sixth allegation to be substantiated and that they amounted to Gross Misconduct. The letter of dismissal outlined the claimant's right to appeal this decision.

The respondent received a request for an appeal on the 2nd of March 2009. A Board Member (MP) who had no prior involvement with the proceedings held the appeal. There were no new explanations provided for the claimant's behaviour and although the claimant apologised the incidents still occurred in the first place. Consequently MP decided to uphold the decision to dismiss the claimant for Gross Misconduct. The claimant was informed of this by letter of the 25th of March 2009.

On the **second** day of the hearing the witness was cross-examined. She stated that the relationship between herself and the claimant changed after the meeting concerning the NERA visit. She explained that had spoken to other similar companies and herself and MC had looked at various systems before choosing the Biometric clocking in system. She also stated that it was a very discreet machine.

She stated that after the incident that she had given the claimant a verbal warning after the incident concerning the new clocking in system and the comments concerning BG. She had tried to tape the meeting with the claimant but it was not working. When asked she said that she felt the claimant had meant the apology he had given her in respect of his comments but she felt the original comment he had made was with "venom" and was "an appalling threat". She told the Tribunal that some of the staff had said they had found the claimant intimidating but the matter had not pursued.

She told the Tribunal that there had been a matter in September 2008 with another member of staff (LMA) concerning the issue of her being stopped for shoplifting. LMA was a chef for the respondent company and purchased the groceries for the respondent. She was given a verbal caution by the Gardaí. She contacted the shopkeeper to find out the facts of the matter as rumours were "flying around the village"; apparently this was not the first time. She asked LMA to inform the other staff what had occurred and did so.

When asked who had compiled the evidence of the 6 allegations she replied she had after speaking to BG. When asked how the letter of February 17th requesting the claimant to attend the disciplinary meeting she replied it had been dropped to his house. When asked she said that at the meeting she had accepted the claimants' apologies regarding the comments to the consultant and BG but stated that his "hotheadedness" was unacceptable in such a quiet environment. She said it felt they were on a "roller coaster". When asked why she did not take him aside and speak to him to stop the roller coaster she replied that she felt it would garner another incident.

The decision was made to dismiss the claimant and he appealed this decision. The witness stated that she attended the meeting as a note taker. When put to her that she had answered questions and made comments during the appeals meeting she stated the claimant had spoken to her directly and she had only answered questions to give clarification and support to MF. When asked would a note taker ask at the end of the meeting if there were "anything else" the claimant wanted to add she

replied that at the meeting she had been "wearing two hats". She did tell the Tribunal that in hindsight maybe someone else should have taken her place.

When put to her that in the minutes of the meeting there had been a lot of the phrase "we" in it and had made the final decision she stated that MP had decided the outcome having taking hours to determine it. She stated she had no "hand, act or part" in it. When put to her she stated that she had only clarified issued at the appeals hearing.

When put to her that a letter given to a Board member (SC) concerning the new clocking in system, the way things were changing in the respondent company, the fact his wife's grade (also an employee) was downgraded and that fact he and she objected to the new system, she replied that she said that it was not normal procedure for staff to go straight to a Board member. The proper action was to give her the letter. And she felt it was "bypassing" her role.

In respect of the issue of the scrap metal the claimant had disposed of she explained that JM had informed her that the scrap metal located around the premises could be worth some money. He had suggested gathering it and disposing of it. However, the claimant disposed of it himself.

When asked she stated that all allegations stated in the claimant's letter of dismissal warranted gross misconduct.

On re-direction she stated that at the appeals hearing she had been there to assist the process but again had no hand, act or part in the decision but did state that she had been wearing "two hats" – as note taker and Chief Executive / HR Director. She stated she had no influence over the Board of Directors.

The Chairman (BG) gave evidence. He gave evidence of his previous education, expertise and employment to the Tribunal. He stated that when he heard he had appalled by the claimant's comments concerning him and did not want it know publicly that he had been threatened and had taken no further action concerning it. He said that the claimant had been rude and aggressive at the staff meeting in December. He stated that he had no input to MP's decision to uphold the decision of dismissal.

When put to him that LMA had been treated differently in her case of shoplifting he replied that they (he and PF) had met her, discussed the events and gave her space and time to ease back into the work environment. He told the Tribunal that he had received a letter of apology, dated March 5 th 2009, from the claimant concerning the comments made about him. When asked he said that he did not accept this apology.

On cross-examination he stated the claimant had been aggressive at the meeting of December 12th 2008 but there had been no threats made at this meeting. The claimant had spoken in the same tone to PF as he had to him. He stated PD had not spoken to him before the day of the appeal hearing.

One of the Directors (PF) gave evidence. He stated that he had been a former resident on the respondent's premises and in 2007 had been invited to become a member of the Board.

He was present at the staff meeting on December 12th 2008. He stated that at the outset it was clearly antagonistic. He stated that he had been informed of the comments made against him by the

claimant and had been appalled. He had not witnessed the verbal warning the claimant had beengiven. He stated that he had received an apology from the claimant concerning the comments hehad previously made against him but this was received after the claimants' dismissal.

On cross-examination he stated that he had been called to a meeting with LMA concerning the issue of shoplifting. He stated that he felt the claimant had been completely over reactive and aggressive at the staff meeting.
MP gave evidence. He explained that he had been involved in the arts and had been asked by the Board of the respondent company to join. He only attended 3 to 4 board meetings a year. When asked he said that he had never spoken to the claimant before.

He chaired the claimant's appeal hearing on March 18th 2009. PD was present as a note taker for the respondent and the claimant's brother was present was his note taker. He went through the 6allegations made against the claimant. The witness said that he wanted to see if the claimant couldjustify what had happened.

The claimant agreed to the 2 verbal incidents that had occurred regarding the comments concerning BG and the comments he had made to the consultant regarding the ordering of oil. The claimant said that he had sent a letter of apology. The witness told the Tribunal he felt the comments made concerning BG could be seen as a criminal, were very serious and "once said could not be taken back". He also felt as the incidents were occurring a pattern of behaviour was developing.

He told the Tribunal that he was confused with the explanations for the use of the high volume of diesel and the more given the more the claimant was "contradicting himself". At the meeting PD gave him the respondent's side of the issue.

On cross-examination he explained that he had not been involved with any disciplinary or appeals process in the past. When asked if he had indicated at the meeting that PD was present as a note taker he replied he did not think so. PD had given him a copy of the apology sent to BG by PD. He said he found it helpful to have PD present at the meeting. When asked he said that PD speaking during the meeting did not influence his ultimate decision.

When put to him that in the minutes of the meeting the phrase "we" when answering the claimant, considering it was he alone that was carrying out the appeal hearing, he replied that he had to hear PD's side of the situation. When put to him that he allowed PD to make her point at the meeting he replied that he was listening to both sides. He told the Tribunal that PD concluded the meeting. He told the Tribunal that dictated his immediate thoughts and he and PD spent a half hour making sure all the points were covered.

The decision of dismissal was upheld.

JM gave evidence. He explained that he was employed on the premises by the Office of Public Works to restore it. He worked to the claimant and had not replaced him after he was dismissed.

He was aware scrap metal was lying around the grounds. He explained that in the past he had been made aware scrap metal could be worth some money, he had exchanged it in the past. He spoke to PD about the scrap metal on the grounds and told her the respondent could make some money from it. There were about 2 and a half tonne of scrap metal. The claimant asked the witness for a loan of his trailer and a friend of the claimant lifted the scrap onto the trailer. The witness explained that his trailer could hold 8 tonne and it was full of metal.

The witness told the Tribunal that the claimant told him he had received £ 35 for the scrap. The witness explained that when he had sold three quarters of a tonne of scrap metal he had received £ 135.

He stated that he had no hand, act or part in the removal of the claimant's old cars from the grounds.

On cross-examination he stated he had told PD the crap metal was valuable before Christmas 2008. He was not aware the claimant had been absent on sick leave when he had walked the grounds with PD in February 2009. PD had been amazed at the state of the grounds. He stated that he had no idea that the claimant had taken the scrap metal for his own personal gain. He assumed it had been sold for the respondent.

Claimant's Case:

The claimant gave evidence. He explained that his parents had worked for the original owner (TG) and he had been born at the main house. TG passed away in 1971, he married and he and his wife took over as caretakers of the premises originally on a part time basis and then pull time in 1997 when he was hired as estate manager. When the Arts Council took over the premises he was given a house on the grounds.

In January 2007 PD took over as Director. They worked well together and they had no "run ins". His wife was appointed house / cottage Manager. However PD started to undermine her.

He explained that he had known of the visit from staff from NERA but was not aware of the details of the outcome. PD informed him and other staff of a new clocking in system to be introduced. He said that it had been mentioned it would be a "fingerprinting job". He explained that as he had grown up on the estate he was aware of the wishes of TG of how the estate would be run and the grounds would be left open for people to roam the acres. With the new regime the place started to shut down, gates were closed and no one was allowed in.

On November 3rd the new machine was to be installed in the computer room used by residents. He went to PD and told her he would not be using it and told her what she could do with it. He left and later got a call from PD to meet her. MC was present at the meeting. He apologised for what he earlier had said and said that he always "shot from the mouth". When he was leaving the meeting he noticed a tape recorder on the table. He asked had the meeting been taped and was told yes. He told the Tribunal this was when he had made the comment concerning BG into the tape recorder. He remembered receiving a verbal warning and received a copy of it.

A staff meeting was held with BG, PD another Board member (PF) and staff. BG informed them the meeting was to inform staff that the respondent company had to become more compliant and staff would have to have proper contracts of employment but did tell them they could not be forced to sign them. The meeting became heated. He asked BG what he knew of the reasoning for the estate. He told the tribunal that he had not been antagonistic at the meeting. He was not happy with the outcome of the meeting.

When asked he stated that he had dictated the letter given to SC concerning his concerns. He said that he did not give it to PD as he felt she would not give it to the Board.

He had an operation in January and returned to work in February. He was shocked to receive a letter, pushed under his door, to attend a disciplinary meeting 2 days later. He attended the meeting with a friend, who was also a solicitor but not in this capacity, where 6 allegations were put to him. These entailed:

1. The racial abuse language he had used concerning the Chairman – BG
2. The abusive comments he had made towards the consultant concerning the ordering of stock.
3. The issue of security as the front door of the premises being left open on New Years Eve.
4. The issue of the grossly negligent use and consumption of heating oil for the centre.
5. The excessive amount of diesel purchased between December 21st and January 20th.
6. The issue of him removing a large amount of scrap metal belonging to the respondent and whilst on sick leave.

The claimant stated that he had made a comment about BG but it was not to him personally and was into a tape recorder and since apologised for it. He had also apologised to the consultant for the comments made to her. He felt these apologies had been accepted. He explained to the Tribunal the reason for the purchase of the diesel during December and January using some of it to repay locals for supplying him over time as well as normal use.

In respect of the scrap metal he explained that he had a number of broken down cars on the premises he had removed. The other scrap metal had accumulated over years and in the past it was common practice that if staff had a use for scrap metal they could take it. He had been told by PD to remove "the junk" and this is what he had done, he had not stolen it. When asked he said that it had been worth £ 35 and offered to reimburse it. He had not known PD and JM had discussed the disposal of the scrap metal.

On February 27th 2009 he was sent a letter to outline the outcome of the disciplinary hearing. In relation to the first and second allegations they were found to be substantiated. In relation to the third allegation it was found to be unsubstantiated. In respect of the fourth allegation in was not taken into account when making the decision to uphold the decision to dismiss the claimant. The fifth and sixth allegation were also deemed to be substantiated. MP found that having regard to all the allegations that where substantiated it was deemed as gross misconduct and therefore the decision to dismiss was upheld.

The claimant told the Tribunal that he could not believe that the decision to dismiss was upheld. He had made apologies for the comment he had made and felt he had explained the situation concerning the scrap metal.

The claimant gave evidence of loss and of his personal circumstances.

On cross-examination he gave evidence of jobs he had undertaken. When asked why he had resisted to sign a contract of employment he explained that he had never had a contract in the past. He was not the only staff member who refused to sign it. When asked he stated that he had only made the comment concerning BG on one occasion and had made it into a machine.

When asked why he suddenly rushed in while on sick leave to remove his cars off the grounds he replied that they would still have been there if he had not been asked to remove them.

A former Director (SP) gave evidence on behalf of the claimant. She explained that when she was employed there they had tried to keep the family homely feeling in the centre. The Office of Public Works became involved and things became more formal.

She explained that she had lived on site. There had been a clocking in system in place for a time but it ceased. She explained that overall the centre had been strictly run but it had a "country sense". Water used by the centre was pumped from the lake and neighbours would help out with the work. Money never changed hands but help was repaid. She stated that she found the claimant a very trustworthy person and had liked working with him. She would never question his honesty, had used "colourful language" and was a "lovable rogue".

On cross-examination she stated the ethos of the centre was encapsulated in the will of TG. She agreed she had a contract of employment. When asked she stated that it was normal for staff to take and use any scrap from the centre, it as a form of recycling. She had even offered it to them.

Determination:

The claims under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and the Organisation of Working Time Act, 1997 were dismissed.

The Tribunal have carefully considered all of the evidence adduced, the documentation handed in and the legal submission proffered over the four-day hearing.

The claimant commenced his employment formally in 1997. PD became the director of the respondent centre in January, 2007. The claimant and PD had a very good working relationship up and until PD began to implement the NERA recommendations. That occurred in and around mid 2008. The claimant was said to be reticent to the changes and vocalised his views in a rude and insolent manner. He did so in front of residents and staff. PD was justified in taking offence at the claimant's comments. She called him to her residence to issue him with a verbal warning. She chose that venue for reasons of privacy. Present at that meeting was MC, PD and the claimant. PD issued the verbal warning. When the claimant was leaving he noticed that MC was holding a recording device. This incensed him. He then proceeded to making threatening and disparaging remarks about the chairman of the board, BG. At the hearing great emphasis was put on the gravity of the words spoken by the claimant however despite such emphasis no warning, either verbal or written was ever given to the claimant. PD repeated the threat to other persons and to BG thus exacerbating the gravity of the comment. BG upon hearing the threat made a conscious and informed decision to do nothing about it. Despite no warning being issue to the claimant this issue became one of the six allegations set out the letter of the 17.02.09 and was one of the issues substantiated at the disciplinary hearing. At the appeal hearing the allegation about GB was upheld merely on the fact that it happened and the claimant admitted it happened. No consideration was given to the lack of a warning given, the claimants own personal circumstances the apology issued or GB's inaction. MP stated in evidence that "once the words were spoken they were spoken and they couldn't be taken back". His evidence led the tribunal to conclude that he pre- decided the issue and didn't entertain any of the facts surrounding the issue. That defeats the purpose of an appeal hearing and it was unfair to the claimant to do so.

The alleged repeat of the threat didn't, in PD opinion, warrant a warning either nor did it form part of the six allegations set out in the letter of the 17.02.09 and therefore the tribunal place no

emphasis on it.

On the 11.12.08 the claimant used abusive language to MB. What precipitated the claimant's outburst was a feeling that his role was being usurped. He had not been informed that MB had been employed by the centre and had not been informed that she had been allocated some of his duties. This outburst didn't, in PD's opinion, warrant a warning, either verbal or written. Shortly after the outburst the claimant apologised to MB and formed the view that the apology had been accepted and the matter had been resolved. The claimant was justified in considering the matter closed once his apology has been accepted. Despite such acceptance this matter formed part of the six allegations set out in the letter of the 17.02.09. At the disciplinary hearing this allegation was substantiated. At the appeal hearing this allegation was substantiated and was deemed to be gross misconduct contrary to the definition given in the employee handbook. Rudeness to colleagues is described as misconduct and not gross misconduct. Again no consideration was given to the fact that the claimant did not receive a warning, that he had apologised and that his apology had been accepted.

On the 21.12.08 and the 20.01.09 the claimant purchased 27 litres and 47 litres of diesel fuel respectively. The claimant at the hearing gave a creditable explanation for the purchase of the diesel purchases. At the material time he gave numerous explanations for those purchases. MP at the conclusion of the appeal hearing stated that there were too many explanations and it just didn't make sense to him. The Tribunal questioned the claimant on the issue and was given the same explanations as were given to MP. On working out the litres purchased against the use they were put to the Tribunal concluded that none of the diesel fuel was for the claimant's own private use as alleged. This allegation was substantiated at the appeal hearing and by virtue of that substantiation was deemed to be gross misconduct.

On the 24th and 25th January '09 the claimant allegedly whilst on sick leave misappropriated scrap metal from the centre for his own personal gain. It was clear from the evidence given by PD and from the notes of the disciplinary hearing that PD had requested the claimant to " get rid of junk". The claimant's evidence was that he was acting on PD's orders when he removed the scrap. PD said that she was actually referring to his motor vehicles that were on site and not the scrap. She referred to her agreement with JM to sell the scrap. However, the claimant was not aware at the material time that PD and JM had come to an arrangement to sell the scrap metal. The voice message left by PD on the claimant's phone did not brief him on the issue. Further evidence was given by SP that the practice in the centre during her tenure was that scrap could be taken or used by the staff for their own personal use. It was encouraged as a form of recycling. The claimant did not receive a verbal or written warning in relation to this issue either. At the very least it could be said that the claimant misinterpreted PD orders and should have been given the benefit of the doubt. At the disciplinary hearing and at the appeal hearing this matter was substantiated and was therefore deemed to be gross misconduct.

Mere substantiation does not in itself translate into an automatic finding of misconduct, gross or otherwise. MP on each allegation he deemed to be substantiated automatically, by virtue of that substantiation, deemed the conduct to be gross misconduct. Other than the substantiations, no further consideration seems to have been given to the matters leading to an unjust conclusion.

In the Employee handbook at page 9, it states that the process normally applied to disciplinary matters is that an employee will first receive a verbal warning, followed by a written warning, followed by a final written warning before dismissal unless there is a finding of gross misconduct,

in which case the employee will be dismissed immediately. The claimant received only one verbal warning in relation to the abusive words spoken to PD and this allegation did not form part of the disciplinary process. The respondent completely neglected to follow its own procedures and subjected the claimant to a disciplinary hearing on matters for which he had never received any type of warning.

The Appeal procedure set out in the employee handbook states "Appeals against dismissal should be made in writing to the director (or if the director was the disciplinary officer than the board) ..." PD was the disciplinary officer and the investigator. As such she should not have played a role in this particular appeal. The respondent did and does have every right to be represented at the appeal hearing but the representative should be made known to the claimant and should be present at the appeal hearing in that capacity only. PD was present at the meeting as a note taker and not as a representative of the company therefore she should not have participated in the meeting in the manner that she did. Her participation led to an interference with the fairness and impartiality of the hearing. Furthermore her role breached the respondent's own procedures.

The claimant stated that the reason he got so animated and upset about the proposed changes was out of a sense of loyalty to TG. His mother and father worked for TG (the premises resident of the premises) and he knew him very well and had lived on site most of his life. He was fully briefed on TG's will and his wishes for the use of the centre going forward. The proposed changes went against everything TG had envisaged for the centre and his annoyed and upset the claimant intensely. TG's wishes were corroborated by SP. The claimant's history with the centre and his relationship with TG did not seem to have been something the respondent considered when coming to the conclusion it did.

The Tribunal, having considered all of the above, find that the claimant was unfairly dismissed and award reinstatement.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)