EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOEE – *claimant*

CASE NO.
UD2226/2009
MN2069/2009

against

EMPLOYER – *respondent*

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P O'Leary BL

Members: Mr A O'Mara
Mr O Nulty

heard this claim at Monaghan on 17th May 2011

Representation:

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Claimant(s): Mr Alan Wilkie
Wilkie & Flanagan, Solicitors
Main Street, Castleblayney, Co Monaghan

Respondent(s): Mr Richard Grogan
Richard Grogan & Associates, Solicitors
16 & 17 College Green, Dublin 2

The determination of the Tribunal was as follows:-

Respondent's Case:

At the outset of the hearing the respondent's representative conceded that the dismissal of the claimant was technically unfair, but contended that there was a contribution on the side of the claimant which should be taken into account by the Tribunal when deciding on the level of compensation. The respondent's representative conceded that the claimant was not paid in lieu of notice and that he was due eight weeks' pay under the Minimum Notice and Terms of Employment Acts.

The first witness for the respondent gave evidence that she and her husband bought the business in

2005. The business is a wholesale distributor of chilled, frozen and ambient food products. The claimant's employment commenced in 1991. He was a store man who picked orders for delivery. From 2005 to January 2009 they had no difficulties with the claimant. There were some small issues, but they did not mention them as everyone got on well.

In January 2009 they began having difficulties contacting the claimant. He was only contactable by mobile phone while in the stores and sometimes they couldn't contact him for a number of hours, which was an issue as they provided a same day delivery service. They asked him to keep an eye on his phone.

They introduced new picking sheets and new procedures. The claimant was not collecting the sheets and they issued him with a warning. He said he would do his best to change. They agreed that the claimant could take lunch from 12.30pm to 1.30pm, as he was not happy when they changed it to 12pm to 1pm. They gave the claimant a CB radio. They changed the claimant's hours to 9am to 6pm in order to facilitate later orders. The claimant had received overtime prior to this. The claimant coached football two nights a week and they let him leave early on those nights.

There was an issue in March 2009 when the claimant left without completing all the orders. They employed a second store man to help with picking and to cover holidays. He also did deliveries. They encouraged the claimant to get a level C driver's licence, but he didn't get one. On Sunday March 15th 2009 the claimant notified them that he wouldn't be in the following day, as he could not get back from England. They did not discuss that absence with him. During the week he requested the Friday off, but they could not cover it so they did not give permission. The claimantcame in an hour early and left at 1pm.

The witness asked him on Monday whether there had been an emergency and he told her that he had to mind his children as his wife was going away. She and her husband held a disciplinary meeting with the claimant that day. They discussed the claimant's absences the previous week, the communication difficulties they had with him and the claimant's hours of work.

They issued the claimant with a final written warning, by letter of March 24th 2009, and offered him the opportunity to appeal within seven working days. The claimant responded by letter dated March 31st 2009 stating that he did not accept the warning and that he was available to meet again to discuss the issues. The witness responded seeking the reasons for appeal and to clarify that there was no redundancy package available as requested by the claimant at the meeting. The claimantdid not respond. It was agreed that he would meet the witness's husband on a monthly basis tomonitor the claimant's performance.

The office staff found it difficult to contact him while he was in the stores. When the claimant didn't fill a complete order the driver and the office had to deal with the customer.

They held a meeting with staff in July 2009 and told them that as business was down they may have to lose an employee or implement pay cuts. They asked staff if they would take a pay cut or go on a three-day week. The claimant wanted to go on a three-day week, but it was not possible at that time. The claimant's performance deteriorated after his overtime was removed, due to the new store-man, and he was refused a redundancy package or a three-day week.

The witness was on maternity leave when her husband dismissed the claimant in September 2009.

During cross-examination the witness stated that she spoke to the claimant in January about not

answering his phone. The second store-man was in place then. She disputed that the claimant had been authorised to take the Friday off in March 2009. He was told to come to the office the following Monday to notify him of a disciplinary meeting at a later time but he was happy to proceed there and then. No written warning had issued prior to the final written warning. They did not have statistics on the picking levels.

The husband of the first witness gave evidence that he did not give the claimant permission to take Friday 20th March 2009 off. The claimant wanted to go on a three-day week after the meeting in July 2009, but the witness said it wasn't going ahead. His performance kept deteriorating after that.

On the day he dismissed the claimant in September 2009 there were a number of deliveries which were short of products. One client asked for baps which weren't delivered. He asked the claimant if they were in stock and he said no. The witness went to the stock room and found the baps in stock. After lunch he asked the claimant what the problem was. The claimant said he was doing his best. The witness said it wasn't good enough and dismissed him.

During cross-examination the witness stated that the monthly performance meetings promised after the March 2009 meeting were held on the floor and were not recorded. Incorrect picking by the claimant was the problem not incorrect inputting. There were issues everyday or every other day with the claimant's picking. The mistakes made by the claimant were not quantifiable. The witness and another member of staff were responsible for stock control. They did not have automatic ordering if stock dropped below a certain level. All staff took a 10% pay cut.

Claimant's Case:

The claimant gave evidence that he did not receive any warnings prior to March 2009. He asked for Friday 20th March 2009 off and he was told to take it but to come to the office on Monday morning. He felt that his employer was trying to push him out and so he suggested that they gave him redundancy. He didn't accept that there were daily problems with his performance. They did not have monthly meetings after the final written warning was issued. He did not receive any further warnings.

The claimant picked items off the list he was given. If an item wasn't there he put an 'x' beside it and sent the list back to the office. The office staff could then notify the customer if an item was not in stock and arrange a different product or a later delivery. The stock was always short. In 2009 the company only ordered what was needed. On the day of his dismissal the drivers were all keen to be on their way so he gave a list to someone else to do. He told his employer that someone else had checked the list, but he said it was the claimant's job.

During cross-examination he disputed that issues were raised prior to March 2009. He was often told that items were short, but he could not pick them if they weren't in stock. What was on the delivery docket was what was picked. He was told if there was a problem with a delivery but no major issues were raised prior to his dismissal.

Determination:

The respondent conceded that the dismissal was unfair and therefore the Tribunal had only to decide on the level of compensation, the preferred remedy of both parties, to be awarded to the claimant. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2007, succeeds and the Tribunal awards the claimant €27,000 (twenty-seven thousand euro).

The respondent also conceded the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, and accordingly the Tribunal awards the claimant €4,024 (four thousand and twenty-four euro) in respect of eight weeks' pay.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)