EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:	CASE NO.
EMPLOYEE– *claimant*	UD1567/2009
	MN1546/2009
	WT664/2009

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. J. McGovern BL

Members: Mr. W. Power
Mr. F. Keoghan

heard this case in Dublin on 22 July 2010 and 9-10 December 2010 and 31 May 2011

Representation:

Claimant: Mr. John McGuiggan BL instructed by
Jean Connors & Co. Solicitors,
48 Main Street, Bray, Co. Wicklow

Respondent: Mr. James O'Donnell BL instructed by
Ms. Colleen Cleary, Colleen Cleary, Solicitors,
23 Moorehouse, Loreto Abbey, Dublin 14.

The determination of the Tribunal was as follows:-

Respondent's case

The managing director of the respondent company gave evidence. The company started out making external awnings. They manufacture wooden blinds and Venetian blinds and they sell wholesale blind components to other manufacturers of blinds. When the managing director started with the respondent there were 17 employees. Now there are 350 employees. About 80% of the business is done in the UK.

The claimant started working for the respondent in July 2007. He was the sales manager for the wholesale business in ROI. Early in 2008 the managing director was aware that sales in the claimant's area were declining. The national sales manager had an informal meeting with the claimant on 23rd May 2008. The national sales manager was concerned that sales in the

claimant’sarea were lower than the previous year when the claimant’s position was vacant. The national salesmanager was concerned that the claimant was not effectively targeting customers. Not every product suits every customer and if customers are offered the most suitable products for them individually sales are increased. A plan was put in place to help the claimant reach his targets.

The national sales manager left the respondent in June 2008. Thereafter the managing director had direct interaction with the claimant. He met the claimant on 1st July 2008. He expected the claimant to tell him where the potential business was in his area. When he asked the claimant about which businesses should be targeted, the claimant gave him a blank look. When he asked the claimant how he felt about the low sales figures for his area the claimant replied that he meditated. The managing director stated that this was a response that he had not heard before.

The claimant complained about problems with the respondent’s products and with their customer service. The managing director felt that their product was better than that of their competitors. The claimant blamed the downturn for falling sales but during that period their main customer did not experience a halving of sales. The managing director was disappointed by the meeting, nothing useful had come from it.

The managing director decided to put a capability plan in place for the claimant. The claimant would be helped to sell more product. A meeting was arranged with the claimant for 9th July 2008. However the claimant did not attend as he went on sick leave on 3rd July 2008. The claimant gave no indication of when he would return to work.

A meeting was held in mid-March 2009 and was conducted by the respondent’s head of human resources (hereafter referred to as MMC). The managing director (hereafter referred to as RD) stated that, after the meeting, he felt that the claimant had no real desire to return to work with the respondent. RD acknowledged that there had been correspondence involving the claimant’s solicitor but said that the respondent had ultimately dismissed the claimant because he was unfit to return to work in the foreseeable future and as a result had frustrated his contract. There was no indication that the claimant would ever return. The respondent tried to have the claimant attend a counsellor but the claimant refused.

Giving sworn testimony, the respondent’s operations director (hereafter referred to as AS) said that, after the respondent’s national sales manager (hereafter referred to as JG) left the respondent on 20 June 2008, AS and RD took responsibility for the respondent’s sales team. AS e-mailed the claimant on 20 June 2008 and spoke to him on the phone on 27 June to arrange a meeting for Tuesday 1 July. There was no indication that the claimant was stressed.

The 1 July 2008 meeting took place at 2.00 p.m.. The claimant, RD and AS attended this meeting. AS “was driving the meeting” and “was trying to learn what was happening” but the claimant “turned up with no prepared strategy or no pen and paper”. AS asked about a particular item. There was no reply from the claimant except that, according to the claimant, the quality of the product was not great. The claimant did not want to engage with them about strategy. He said that he thought he was doing all he could but that the economy was not as strong as it was. The claimant was laying everything on the respondent’s plate to sort out. They asked the claimant about his strategy whereupon he reached the point where he said that he just meditated. AS heard nothing about stress at any stage during that meeting. AS came away feeling that the claimant needed help

from the respondent's perspective. The respondent had a capability procedure which it had invoked in the past. It had never been part of the respondent's disciplinary procedure. It was AS's decision to invoke it. After the meeting AS wanted to try to help the claimant. He had got no response when he had asked for the claimant's strategy to create sales.

The Tribunal was now referred to the first paragraph of a letter dated 18 July 2008 from the claimant's solicitor to MMC (the respondent's abovementioned head of human resources). The said paragraph referred to the claimant and "his developing concerns as to the manner in which he was being treated by the company" and requested that MMC would forward any communications through the said solicitor's office.

AS now told the Tribunal that the claimant had not expressed any concerns to him. They had just had a meeting on 1 July 2008. The respondent had a grievance procedure for any grievance that any employee might have. The claimant had gone on sick leave on 3 July 2008. 11 July 2008 was the first that AS heard about stress. More than reviewing the claimant's performance the respondent had been trying to help him.

In referring to the penultimate paragraph of the abovementioned solicitor's letter, AS said that he had "thought a pay-off was being looked for". AS confirmed that the claimant had got occupational injury benefit between April 2009 and September 2009 and that this was fourteen months after July 2008. AS did not know of any indication of the claimant being fit again. With MMC he had explored the possibility of the claimant seeing a counsellor.

The Tribunal was referred to a 14 October 2008 e-mail from the claimant's solicitor to MMC in which the solicitor requested confirmation that the counselling session arranged for the claimant would be confidential and would "not be released to any member of your company".

In response to this e-mail MMC e-mailed on 16 October 2008 confirming that the respondent would receive feedback following the claimant's counselling sessions. The claimant's solicitor was asked to confirm if the claimant would be attending the sessions as the respondent had to provide forty-eight hours' notice and a reason to the counselling entity if appointments were to be cancelled.

The Tribunal was also referred to a 16 July 2010 (sic) e-mail from the counselling entity to MMC stating that the only information shared would be statistical feedback on attendance and feedback (containing no personal details) on how successful the sessions were in the opinion of the counsellor. For client confidence in the service all clients would be made aware of anything that was fed back.

There were no further meetings involving AS whose overall impression was that the claimant did not want to engage in the capability procedure with AS or with the respondent in general. The claimant never said that he saw an end to his stress-related injury.

AS stated that he was told of all formal grievances raised with the respondent. When it was put to him that on 2 July (2008) the claimant had sought a copy of the respondent's grievance procedure but had not raised a grievance AS replied that anybody could do that.

Giving sworn testimony, the abovementioned MMC said that he had been HR manager since March 2007. He dealt with employee issues and first became aware of absence issues involving the

claimant on 2 or 3 July (2008). He would have agreed the employment contract drawn up for the claimant by a member of the respondent's team. MMC was also involved in drafting the capability procedure document and setting up action plans for an employee who was struggling or not performing. MMC was the author of this policy.

Asked what was the difference between the respondent's capability procedure and disciplinary procedure, MMC said that the respondent dealt with attitude through the disciplinary procedure. If performance was not acceptable (especially in sales) it would be agreed through the capability procedure which was a support mechanism. Regarding the respondent's occupational sick pay procedure, MMC said that it was for an employee on a long absence and was made available through the respondent's intranet site. The grievance procedure was also on notice-boards throughout the respondent company premises.

Asked what was the purpose of the grievance procedure, MMC said that concerns could be raised if an employee was unhappy. He said that he had some knowledge of employment law and had worked as an employee relations consultant for a big company. However, at no point had the claimant raised a grievance or sought the procedure before going on sick leave. An employee should raise any issue with a manager or with HR whereupon the issue would be referred to MMC if not raised with him directly.

The claimant's illness was brought to the attention of MMC who knew of AS's capability procedure which was not, however, invoked even though MMC knew that AS had asked the claimant to a meeting where it could be invoked. MMC liaised with AS about what could be invoked. Regarding the claimant's sick certification MMC said that it would be sent to a HR colleague but that he would have been aware of it. Before receiving the sick certificates in July 2008 he was not aware that the claimant was alleging work-related stress.

MMC told the Tribunal that he had been surprised to get the 18 July 2008 letter from a solicitor regarding the claimant's absence. The claimant had only just gone off sick. The claimant and MMC had had phone conversations. The claimant said he was unwell. MMC asked how he was. The claimant said that he was going to see his GP and MMC asked to be kept informed about that. He had initially assumed that the claimant was just off for a few days because the claimant had not told him of suffering work-related stress. He thought that a solicitor's letter would only arise if there was a breakdown between employee and employer. The letter said that all further correspondence should go through the claimant's solicitor. MMC found this unusual. He could not understand why everything had to go through a solicitor.

MMC understood from the solicitor's letter dated 18 July 2008 that the solicitor wanted to meet to discuss or agree a compromise agreement. The letter also said that the claimant had been advised not to give his consent to the respondent having access to his medical records. From the tone of the letter it was MMC's understanding that the claimant wanted a financial settlement.

The Tribunal was furnished with a copy of an e-mail dated 16 July 2008 from MMC to the claimant entitled "Contacting HR" which indicated to the claimant that MMC had been expecting a call from him as promised but that to date MMC had not had any word from him. The e-mail asked the claimant to call MMC to discuss a doctor's visit.

The Tribunal was also furnished with a copy of an e-mail dated 17 July 2008 from MMC to the claimant with as subject "Medical Consent to Approach your GP for a Report". This e-mail

attached a blank medical consent form so that the respondent would be able to approach the claimant's GP for a report on his condition which in turn would "enable the Company the opportunity to manage your absence sympathetically". The e-mail stated that consent was voluntary and the claimant could decide whether or not he wanted to provide consent. It also asked if the claimant was happy for MMC to continue to communicate with him via his personal e-mail account and asked the claimant to call MMC on 22 July to let MMC know how the claimant had got on at his doctor's appointment on 21 July.

MMC asserted to the Tribunal that he believed that the claimant wanted a pay-off to leave the respondent and that litigation could ensue.

In August 2008 MMC received a first report on the claimant from DT (the respondent's occupational health physician). This report followed an examination by DT of the claimant on 25 August 2008. DT wrote that he suspected that the claimant "would benefit considerably from additional counselling support" and he recommended a "counselling organisation". DT concluded his medical report by stating that he "would be happy to receive a report from a counsellor after perhaps three or four counselling sessions have been completed and would wish then to review (the claimant), with a view to advising on his fitness for work or indeed to meet management to discuss how a return to work could be arranged". MMC thought that this was good advice from DT. MMC himself had arranged several appointments for the claimant. MMC contacted the counselling organisation.

The Tribunal was referred to an e-mail dated 14 October 2008 from the claimant's solicitor to MMC in which the claimant's solicitor sought confirmation that the counselling arranged for the claimant would be confidential and "not be released to any member of your company". MMC told the Tribunal that he "just wanted to know that he (the claimant) had attended". The claimant did attend DT on 5 November 2008. In referring to a medical report dated 23 January 2009 by DT drafted on foot of an examination of the claimant on 5 November 2008, MMC confirmed that the claimant's position had not improved and that the long-term prognosis was that the claimant would not return to work for the foreseeable future. MMC believed that the claimant would return to work and that the respondent had been trying to support the claimant while he was ill but that the claimant had not been co-operating with the respondent. The claimant refused to take up an offer of counselling and did not give the respondent consent to talk to the claimant's GP. The claimant had disengaged and did not want to return to work. The claimant had been off since July 2008.

Commenting on the respondent's "capability procedure", MMC said that it was designed to help staff with their performance. Asked about the withdrawal of a major contract by a particular client, MMC said that he had no knowledge of that.

The Tribunal was referred to a letter dated 26 January 2009 from MMC to the claimant regarding his absence, his future capability for work and the options open to the respondent. The claimant was told that a meeting had been arranged for early February 2009 and that, as his employment would be under discussion, he could be accompanied e.g by a trade union representative. The claimant was not afforded the right to have a legal representative at the meeting.

The claimant's meeting with the respondent was rearranged for 13 March 2009. By then the claimant had not invoked the respondent's grievance procedure though he had asked for a copy of it. The claimant had said that he had been advised by his GP to consult a solicitor and that the claimant's GP had felt that the claimant was being badgered. All that the respondent had ever got from the claimant's GP was sick certificates. The claimant did not offer any prognosis regarding his

work issues. MMC did not initially know the causes of the claimant's stress. KM (the claimant's trade union representative at the Friday 13 March 2009 meeting) indicated to the respondent that the respondent needed to make a business decision as to whether to continue with the claimant's employment or not.

Although DT's 23 January 2009 medical report (on his examination of the claimant on 5 November 2008) stated that DT had advised the claimant that counselling might still be of benefit to him MMC stated to the Tribunal that no request was made for further counselling and that at the 13 March 2009 meeting the respondent still did not know the claimant's reason for being on sick leave. The claimant felt that he had been belittled at a meeting with the respondent in July 2008 but, when MMC asked him why he had not invoked the grievance procedure, the claimant said that he had been too ill to submit a grievance and that he never should have joined the respondent. Regarding the claimant returning to work KM said that the claimant was unlikely to be ready for the foreseeable future. MMC told the Tribunal that he had asked if there were other issues and had been told that there were but that no issue had ever been raised about the claimant working in an isolated position. Asked if any suggestions had been made that the claimant could consider alternative employment, MMC replied that nothing had been offered.

The Tribunal was now referred to an e-mail dated 17 March 2009 from MMC to the claimant's solicitor in which MMC stated that, at the 13 March 2009 meeting, the claimant had "alluded to the fact that there were a number of factors that had resulted in him suffering from work related stress". In the e-mail MMC said that the respondent would be keen to know what factors the claimant was referring to and asked the claimant to list them by 20 March given that the respondent wished to bring matters to a conclusion.

The Tribunal was next referred to a letter e-mailed from the claimant's solicitor to MMC in which it was alleged that the claimant had been told that he had to take over the retail sales manager's job (in addition to his own job) or he would be let go whereupon the claimant felt bullied and under duress. It was also alleged that the claimant had not been given the option of being accompanied at a meeting at which he had that right and that RD had wanted to get rid of him. It was further alleged that the respondent had been supplying counterfeit goods to customers, that orders were not being fulfilled and that the claimant had had to deal with dissatisfied customers but that the respondent had failed to act after these matters were brought to its attention with the result that customers were losing confidence in the respondent and this reflected poorly on the claimant. The letter also stated that (as a result of the aforementioned) the claimant continued to suffer from work-related stress and asked "what steps (the respondent) will take on board to facilitate (the claimant's) return to work when he is deemed medically fit".

This was some eight months after the claimant had gone on sick leave but MMC told the Tribunal that he had not got details of this before, that the claimant had never raised a grievance about unrealistic sales targets and that before the 20 March 2009 letter he had not heard of any alleged vendetta against the claimant. In fact, the respondent could have dismissed the claimant in his first year with no sanction if it wished. The first MMC knew of the claimant's concerns was on 13 March 2009.

By means of a lengthy letter dated 1 April MMC contested the 20 March 2009 letter and enclosed a dismissal letter from RD for forwarding to the claimant. In the dismissal letter RD stated that he had concluded that the claimant would not be able to return to work in the foreseeable future either in his current role or any other alternative role. MMC told the Tribunal that the dismissal decision was made between himself and RD.

On 8 April 2009 MMC wrote to the claimant's solicitor to acknowledge receipt of a 3 April 2009 appeal against the dismissal. MMC told the Tribunal that he was "out of the process" then.

Asked at the Tribunal hearing if the respondent had forced the claimant to take on work, MMC replied that that was not in the culture of the respondent. People took on work after they had been consulted and agreements were made with full co-operation.

MMC told the Tribunal that an employee could be removed from being subject to the respondent's capability procedure if targets were met but that there could also be an extension. Escalation to the next level could occur if the employee's performance kept sliding. If an employee engaged with the respondent he or she would get a report from management. It would all be agreed but if an employee did not engage targets could still be set and insisted upon if the employee did not agree them. A written warning would stay on file for twelve months.

The first that MMC knew of the allegation of bullying was when he got the doctor's report in early 2009.

MMC said that the respondent had only one sales representative for Scotland where there were nearly three hundred accounts and that he would consider the nearly two hundred accounts assigned to the claimant as easily manageable given that some forty of them were dormant. He considered that four customers per day was enough to contact and that this was "easily acceptable".

MMC denied that the claimant's dismissal was premeditated and said that when he had tried to meet the claimant in February 2009 it was not to have been a disciplinary meeting but that the purpose had been to share medical reports and look at the causes of work-related stress. No alternative role for the claimant had ever been suggested to MMC. Neither did KM (the claimant's trade union representative) ever say that they would go to an independent counsellor. MMC said that he would accept a report from the claimant's own GP. It would have been the respondent's preferred option to get written consent and to get a report from the claimant's own medical practitioner.

Regarding the reference to the claimant's "return to work" in the 20 March 2009 letter from the claimant's solicitor MMC said that the claimant was not deemed medically fit when MMC received that letter and that he "was not convinced at all that (the claimant) wanted to return to work after the 13 March 2009 meeting". The 20 March 2009 letter was a week after that but there had been no agreement from the claimant. Counselling and consent to see medical reports were declined. MMC thought that the claimant did not intend to return. MMC told the Tribunal that the claimant "was dismissed for frustration of contract due to continued ill health".

Claimant's Case

Giving sworn testimony, the claimant said that he had started with the respondent in late July 2007 as area sales manager for trade which was business that one called into as opposed to retail which one called on to. A colleague (CM) covered retail which the claimant considered a separate and different job to trade.

The claimant was on probation for six months. There was no suggestion of extending it. He had a good relationship with AP (his then manager) who was in Newcastle but would fly over.

One day, the claimant was driving when he was contacted by a retail customer rather than a trade customer. The claimant was told that the respondent's salespeople had said that he had taken over CM's "patch". He then found out that he had indeed taken over this area. He had not been consulted. In the past he would get a call. He had thought it would be for HR to say if he had a new role.

In early 2008 the claimant was told to go to headquarters. AP had said the claimant's contract was just for trade. The claimant met RD (sales director) and AS who was national sales manager for retail. It was put to the claimant that he would take over retail. He already had ninety accounts. Retail also had ninety. Trade was selling into manufacturers while retail was a different job completely. The claimant said that he had no previous experience or training in retail and his skill lay in trade. The claimant told RD he would not be interested in the new area. RD got very agitated about the claimant saying no and "was vibing (the claimant) out" with a continuous drumming of his fingers. The claimant responded that he would not be capable of dealing with a doubled workload. He had been quite proud of his work in trade with AP as line manager. RD said that it was essential that the claimant take on this role. The claimant said that he would still refuse it even if he were paid what had been paid to CM. He believed that he had been "snowed under already including Saturdays".

The claimant felt that had quite upset RD. Some three weeks later, a colleague (JG) told the claimant that RD would get rid of the claimant if he did not take the role. At this point in the Tribunal hearing, the respondent's representative objected that this had not been put to RD (who had given his testimony to the Tribunal and had left the hearing) and asked that this evidence be disregarded. The claimant's representative said that he was happy that RD could be recalled, that the High Court would regularly take a witness again and that there were "bits and pieces" of the claimant's own evidence that he did not yet know himself. He added that it would cost a lot more money if the Tribunal hearing was appealed for this reason. The respondent's representative said that the respondent was not prepared to have RD back.

The claimant told the Tribunal that he had refused the post at the first related meeting but that he had known that he had to take the post and accepted it under duress. No contracts were put to him. There was nothing from HR. He got no communication about all this. The only contract he ever signed was for trade.

The claimant took over retail in March 2008 while continuing with trade. There was nobody looking after the retail accounts prior to this as the previous retail representative was not replaced. He thought he would try it because he had no choice. It was hard juggling trade and retail.

It was put to the claimant that his performance dropped. He replied that the more customers he had the more they would want to contact him which all took more of his time. Furthermore, it was much harder to generate actual sales in retail in the time he could allocate to each customer. He said that there was a difference between customers per se and viable buying customers. Asked how he had done with regard to targets, he replied that they had been set too high and had been made for having one person in retail and another in trade. Asked if he had been coping he replied that he had not.

The claimant stated that on Friday 27 June 2008 he was at home doing administrative work making appointments with customers. He contacted DK (the owner of a blinds company). After phoning this customer the claimant phoned AS who asked him to go to Belfast. The respondent had set up a meeting without the claimant knowing. The claimant heard about it through phoning the customer.

The claimant went to the meeting. RD and AS were there. Before they sat down RD made a comment about figures being so bad. There was no agenda or structure to the meeting. The claimant was “bombarded” with issues which he addressed. RD turned to the claimant and asked did he not feel like s**t when he drove from Cork to Kerry. The claimant replied that he did not and that he meditated. RD mockingly said that the claimant was obviously meditating too much. The claimant felt humiliated and “down”. He used the bathroom quite a “bit”. RD barked at him about this asking where he was going.

RD asked why the figures were so bad in the Republic of Ireland. The claimant said that it was the economy. RD held up his hands to AS and said: “I told you so.” The end of the meeting was that the claimant was going on a performance review process.

The day after the meeting an upset Limerick blinds business phoned him saying that an order was incorrect. He went to his GP and went on sick leave. The claimant submitted sick certificates saying that he was not fit for work due to stress. The claimant gave evidence that his GP recommended that the claimant get legal advice. The claimant instructed a solicitor soon after going on sick leave. The respondent wanted him to see an occupational therapist in Belfast which the claimant did.

In relation to the meeting of 13th March 2009 the claimant said that he attended with his trade union representative. Also in attendance was RD, MMC and a minute-taker. “Yes or no” questions were put to the claimant. He was not prepared to let the respondent access his medical files. His GP had said that this was not something he should authorise.

A letter dated 1 April 2009 from RD to the claimant conveyed RD’s “decision that you will be dismissed in lieu of notice for reason of ill health” and that “your last day in the Company’s servicewill be 1st April 2009”. In cross-examination the claimant confirmed that he was on illness coverup to the 6th April 2009 and was not fit to do sales work at this juncture and remained unfit to dosales work up to September 2009. He said that in April 2009 he was looking forward to returning towork but could not give a date for his return.

The claimant appealed his dismissal to the respondent. His appeal hearing was scheduled for 15 April 2009. He attended without his trade union representative who could not make it. His appeal was not allowed and the respondent did not re-engage him as an employee.

Giving sworn testimony, JG said that he had worked as group sales manager for the respondent. He said that the claimant had been quite forthright in not wanting to take on retail. JG had wanted a solution for the territory and he told the claimant that it would be in the claimant’s interests to take on retail and to give thought to his answer.

Asked what had made the claimant change to take the job, JG replied that he had not given the claimant an ultimatum but that the claimant had to think about taking on retail.

Determination:

The Tribunal considered the evidence tendered over four days of hearing very carefully.

It is the respondent's case that the claimant was dismissed as he was unable to indicate when or if he could return to work following nine months of sick leave. Lengthy evidence was given by both parties as to the claimant's capability and performance for the eleven months he worked with the respondent but the reason for the dismissal did not centre around his performance but rather the fact that the claimant could not give a date for his return to work following a nine month paid absence from work. It was accepted in evidence by the claimant that as of April 2009 he did not see himself returning to work with the respondent in the foreseeable future. This was further acknowledged by his Union representative in his appeal hearing. The Tribunal accepts the respondent's position that the claimant was dismissed not because of performance, but rather his inability to give a date to return to work. The Tribunal accepts that the respondent dealt with the claimant in a reasonable manner.

The claimant gave evidence that he felt the respondent's sales director wanted to 'get rid of him' from January 2008. The claimant commenced work with the respondent in or about late July 2007and went on sick leave on the 3rd July 2008. The claimant remained employed with the respondentwhile on sick leave for a further nine months until his dismissal in April 2009.
On balance the Tribunal finds that if the claimant's assertion was the case, the sales director could have dismissed him during the first eleven months of employment (before the claimant went on sick leave) without any negative consequence to the respondent under the Unfair Dismissals Acts. No grievance procedure was ever invoked by the claimant in relation to the issues raised in evidence nor does it seem that the claimant ever communicated his complaints in any satisfactory manner to the respondent.

The Tribunal finds that the claim under the Unfair Dismissals Acts, 1977 to 2007, fails.

The claims under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, and under the Organisation of Working Time Act, 1997, are dismissed. The Tribunal did not find the respondent to have breached the said legislation.

Sealed with the Seal of the

Employment Appeals Tribunal

This _________________________

(Sgd.) _________________________
(CHAIRMAN)