EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.
EMPLOYEE UD1286/2010, MN1241/2010

WT529/2010

against

EMPLOYER

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms N. O'Carroll-Kelly BL

Members: Mr. M. Flood
Mr P. Trehy

heard this claim at Dublin on 3rd February ,1st June and 20 September 2011

Representation:

Claimant: The claimant in person

Respondent: Mr Eamonn McCoy, IBEC, Confederation House,
84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

At the outset of the case the respondent's representative raised an issue regarding the date that the claim under the Unfair Dismissals Acts 1977 to 2007 was lodged with the Employment Appeals Tribunal and that it was lodged outside of the requisite time frame. The claimant stated that he received a P45 from the respondent, which indicated that his employment ended on the 23rd July 2009. He received a letter of dismissal dated the 6th of August 2009 on 8th August 2009 advising him of his dismissal.

The Tribunal determined that they are relying on the letter dated the 6th of August 2009, which is within the time frame for lodging a claim under the Unfair Dismissals Acts 1977 to 2007, and have jurisdiction to hear the case.

The representative for the respondent outlined that the claimant was dismissed on grounds of conduct The claimant was absent on sick leave and this could not be dealt with until he returned to work.

Respondent's Case

POD told the Tribunal that he was the section manager in the transport office and he dealt with drivers on a daily basis. Approximately seventy to eighty drivers were employed. The claimant was employed as a driver. Drivers started work between 6a.m. and 8am and undertook deliveries to the respondent's stores nationwide. Drivers worked a roster, which consisted of a four day twelve hour shift. On the 1st December 2008 he received a call from the claimant and he told him that he was disheartened with the respondent, unhappy with management and he was going to put procedures in place to get rid of management. He felt that this was threatening behaviour and he as a manager had responsibility for staff. He had a good working relationship with the claimant. Some days later the claimant reported for work at 6a.m. and he was not scheduled to work. He spoke to the claimant and told him to wait to be contacted by the respondent. The next time he spoke to the claimant was on the 29th December 2008 when the claimant telephoned him and told him that more than likely he would go to the media. Given the nature of the telephone call he felt it best to notify the senior team in the respondent about the matter. He became aware subsequently that the claimant was dismissed but he had no involvement in the dismissal.

In cross-examination when asked why it took so long to revert back to the claimant he replied that he documented it right away and notified senior management. He did not recall the claimant requesting payslips but he did recall the claimant phoning about payslips.

In answer to questions from the Tribunal he stated that if an employee were absent on sick leave the employee would have to provide a certificate that he was fit to return to work. If an employee did not have a fitness to return to work certificate he would be asked for it. He did not ask the claimant what his grievances were. The claimant had various different issues with the respondent and the witness did not want to say anything out of context. On this occasion he felt that the claimant's behaviour was threatening to him and to staff.

The second witness for the respondent, the transport manager at the depot DON told the Tribunal he was responsible for every aspect of transport and managers reported to him. He had day-to-day dealings with drivers and with managers. He was given a telephone message on the 5th December 2008 that the claimant requested to speak to him. He telephoned the claimant later in the day and they discussed the claimant's current sick leave. A letter was sent to the claimant prior to the claimant returning to work after sick leave with the company doctor. Once the claimant was certified to return to work he could do so. He established that the claimant had not received all of the sick pay that he was entitled to and the respondent owed him some pay.

In March 2009 the claimant arrived at the site in Donabate and he was stopping drivers. He decided to establish what was happening. He obtained information and consulted with CG HR and they spoke to the claimant. He observed a number of vehicles in a queue across the site. As he approached the exit car park the claimant came and went towards his own car. He sent an e-mail to managers, as they needed to be made aware of the interruption.

In cross-examination he stated he was employed for three years with the respondent and he started on the 25th January 2007. He recalled a telephone conversation he had with the claimant on the 5th December 2008. He told the claimant that he would need to organise an appointment with the company doctor. He did not have reason to check the claimant's record prior to this. He agreed that medical certificates needed to be submitted after three days. The policy in the

respondent wasthat you needed a fitness to return to work certificate from the respondent doctor. It was not thepolicy that employees who were absent for a week had to go to the company doctor. The payrolldepartment and HR decided if you were not to get paid. HR was responsible for employees' sickleave files. He referred the claimant to the respondent doctor to establish if he was fit to return towork. He was qualified to follow company procedures regarding guidelines to absence.

In re examination he stated that the claimant went to the company doctor. The claimant did not resume work after December 2008.

The third witness for the respondent, the section manager BD told the Tribunal that he knew the claimant. Drivers ensured that deliveries were completed. He received a call from the clamant on the 19th March 2009 while he was on night shift at 12.30.am. He sent an e-mail to DON transport manager and to CG in HR. The claimant told him that he would return to working in the warehouse. The witness believed that the claimant told him twenty minutes later in another call that his colleagues would lose their jobs. He had to inform the transport manager about this.

In cross-examination he stated that prior to those calls he did not have a difficulty with the claimant in their professional relationship. He was not a witness against the claimant in a disciplinary.

CB the fourth witness for the respondent told the Tribunal that she was section manager in the transport department. She knew the claimant as a driver. She received two calls from the claimant on the 29th December 2008. The claimant asked for DON. DON was not in the office and the claimant said to her it was a sign of things to come. He hung up the phone. She relayed this to DON the next day. At 7.15p.m. the claimant asked for the outcome of the call. He asked to speak to POD. POD was in the back and the claimant told her this was the best place for POD and he hung up the phone. After the second call she received another call at 9.45p.m. The claimant asked her if she had any news and she did not know what he was talking about. He told her that other members would have difficulties going forward. The claimant thought he was lower down the chain compared to everyone else.

OK worked in HR at the time and the witness was asked to document details of the calls from the claimant and how she felt the claimant was on the telephone. The claimant telephoned on 29th December 2008, he wanted to get something off his mind. At first she did not feel threatened. He told her there would be difficulties for colleagues. He asked her where BD lived. The witness was nervous after hearing this.

In cross-examination she stated that she could not recall a conversation with the claimant about a social housing scheme. As part of the disciplinary process the only thing she did was send e-mails to HR and attended the interview with the claimant.

The fifth witness for the respondent, CG the personnel manager told the Tribunal that she knew the claimant and she had previously worked with him on another site. Regarding the incident in March 2009 she tried to understand what the situation was. She did not recognise the claimant's car. A number of people were in the area at the time. She was standing side by side with DON. Sheunderstood some time prior to this the claimant contacted the site. The claimant left his phonenumber, she phoned the claimant and the claimant told her he wanted to return to work. A doctor'sappointment had been scheduled for the claimant. The claimant had taped the conversation andplayed it to various members of transport staff and that is what she was told. She was not in LH onthe 15th March. She was concerned and she could not understand why

someone would tape aconversation. She had a very open relationship with the staff on site. At the disciplinary the RDManager KD asked her to make a statement. She could not recall the full context of theconversation she had with the claimant.
In cross-examination she stated that she was not involved in the disciplinary meeting. The sick pay policy in the respondent was under her remit. The process regarding sick leave was that a medical certificate had to be submitted on the first day of illness. If a medical certificate was not submitted payment was made on submission of a certificate. Prior to March 2009 employees were paid a full weeks wages and social welfare received the cheque. This was changed and Social Welfare would be stopped at source the third week of illness so employees were not out of pocket. The calls she received from the claimant did not relate to absence but concerned the consequences for some employees. These calls were made at night and there was no senior manager on duty. She made a statement to her line manager and this statement was passed to others without her knowledge.

In answer to questions from the Tribunal she stated that the claimant was not allowed back to work after he had been absent on sick leave.

Giving sworn testimony, KD said that her 2009 role had been as HR manager for the respondent and that she had worked in distribution for the respondent in Drogheda. She had known of the claimant as a driver but had not met him. She attended related meetings. In attendance were the respondent's operations manager and the line manager in distribution, the claimant and CC (the claimant's trade union official).

Regarding a 2 June 2009 meeting KD said that she wanted to see if the claimant was fit to return. Allegedly threats had been made. She put that to the claimant. She told him that it was her role to see all people's dignity protected. Allegedly threats were made to management. She put issues to him. She provided details. She gave CC and the claimant copies of documentation including the dignity at work policy. CC wanted to read the documentation. There was a twenty-minute break.

Asked at the Tribunal hearing what was the nature of the claimant's response, KD replied that the claimant had said that he might have made one or two calls and that she had said that she would have to suspend him with pay.

The Tribunal was now referred to a letter dated 5 June 2009 from KD to CC stating that a meeting had been arranged for the claimant on Friday 12 June and that she and MK (operations manager) would attend.

In the letter KD stated that in the 12 June meeting she would like to give the opportunity for a response to the allegations put to the claimant on 2 June 2009 under the respondent's dignity-at-work policy, the Equality Act, 2004, and the Health and Safety Act, 2005, mainly regarding duty of care in relation to comments and telephone conversations between the claimant and respondent employees up to and during his absence from work.

KD told the Tribunal that the 12 June 2009 meeting was to follow on regarding responses and that she had had to establish if the claimant was on medication. The claimant said that he was not on medication.

Asked at the Tribunal hearing what issues had been raised, KD cited calls to the respondent's CB and BRT and threats to management regarding its chairman (TL) and general manager. There had been an issue as to where CB and BRT lived. KD put information to the claimant from CB including an alleged allusion to BRT's son. The claimant said the allegations were not in keeping

with any part of his personality. He did confirm that he had spoken to CB. The meeting got no further. KD had to go and investigate further.
Questioned at the Tribunal hearing as to whether tone had been an issue, KD replied that some of the language had not been appropriate. She had some concerns which she wished to investigate.

The Tribunal was next referred to a letter dated 17 June 2009 from KD to CC which stated that a meeting had been arranged for the claimant on 24 June 2009 in relation to allegations put to the claimant and the responses to those allegations. The letter added that KD was now in a position to issue her findings (under the respondent's dignity-at-work policy) in relation to comments and phone conversations between the claimant and respondent employees up to and during his recent absence from work. KD said that the respondent usually dealt with an employee's union official.

The next document seen was a note of the 24 June 2009 meeting. Asked how the meeting had started, KD replied that she was going to give her findings from the investigation and that they went through all the information. The meeting lasted about twenty minutes. KD's note-taker in the room was MMcC (shift manager). She asked the claimant why he had called CB and why would he ask where CB and BRT lived and why would he make references to people's families. The claimant said that he had no recollection. It had been said that the claimant had used the phrase 'a sign of things to come'. At first the claimant denied this saying that he had not used the expression. Regarding CB and BRT, the claimant said that he had only been talking about affordable housing. In summary, the claimant had said that he had not used certain words and that he had spoken about affordable housing.

KD told the Tribunal that a reference had been made to BRT ending up back in the warehouse and that this would have been a demotion. The claimant had asked if he had had tarot cards out. The claimant had stopped trucks coming to the depot and had spoken to drivers. However, the claimant had said that he had just been saying hello to colleagues and that he was not stopping trucks. KD said that she wanted to take it all away again. She gave the claimant statements and said that she would move it to a disciplinary phase now. She said that it could lead to dismissal. She contacted CC by phone. She said that it was now going to a disciplinary hearing and that it was her role to see if threatening calls were made and to see if there had been inappropriate behaviour contrary to the respondent's dignity-at-work policy.

At a disciplinary hearing on 21 July 2009 the claimant had said that he had had a drink problem (and a gambling problem) but that he had not had a drink for nine days. The claimant said that he recalled some but not others. KD said that she wanted to consider everything and that it could lead to a finding of gross misconduct.

After the 21 July 2009 meeting KD gathered everything up and spoke to senior management. They decided to dismiss the claimant. By letter dated 4 August 2009 the claimant was dismissed on the grounds of serious misconduct for abusive and threatening behaviour towards management and other staff.

Giving sworn testimony, CC (the claimant's abovementioned trade union official) said that he had been subpoenaed to give evidence. (The respondent's representative described CC as a hostile witness.) CC confirmed that he had represented the claimant at meetings. He said that the respondent was giving its transport out by transfer of undertaking to a company (STB). Voluntary redundancy was on offer. CC had explained the possibility of the claimant availing of this and wrote to the claimant with the respondent's redundancy figures. However, the claimant did not take up the offer. CC had been just trying to help the claimant who was short income.

Giving sworn testimony, FT said that he was the head of employee relations for the respondent and that he had become involved when asked to hear an appeal. The claimant had objected to the initial appeal officer (AR, transport manager).

FT introduced himself to hear an appeal of KD's decision to dismiss the claimant. He wanted to hear the claimant's version of events. The claimant said that he was okay with FT being involved. The claimant said that there was no case against him, no witness, no opportunity to cross-examine and that he had been presented with e-mails none of which he believed would uphold KD's decision to dismiss him. The claimant did generally acknowledge that calls had been made, kept saying that he might have made the calls and kept turning to CC.

FT understood that the claimant accepted having made the calls but that the claimant disputed their content. It went to the claimant not disputing the content but the context of the calls. The claimant submitted that the calls had not been threatening, said that he had wanted to get BRT on an affordable housing scheme and acknowledged that he might have asked where CB lived. FT got no indication of a witness being requested or denied in the disciplinary process.

Asked at the Tribunal hearing if the claimant had said why the calls had occurred, FT replied that CC had said that the claimant had been drinking quite heavily at the time. CC put that down to stress and to the claimant being under medical supervision. The claimant was asked if he was happy with what had been said and said that he was.

FT tried to confirm why the claimant had been drinking so much. FT understood that the claimant had put himself forward as a representative for another driver and that he had had trouble about the respondent not recognising him as a representative. The claimant said that he would have made the respondent's doctor fully aware.

Asked what the respondent's line management would see, FT replied that the medical adviser for the respondent was a qualified male nurse (LR). A line manager could pose questions to lr as the respondent's medical adviser about whether the claimant would be fit soon. FT was not medically qualified. That was why the respondent had a professional medical adviser. The claimant referred to the medical adviser in a very derogatory way as "the nurse".

The claimant alleged that the respondent had acted improperly and had had a conspiracy. The claimant said that his record had been exemplary, became quite threatening and said that a court injunction would have to be got.

FT very clearly stated to the claimant and CC that it was not appropriate for the claimant to approach the respondent's doctor. FT notified LR to inform a company doctor who might want to notify the gardaí. FT also told the gardaí and the respondent's head of security.

After the hearing there was a discussion between FT and CC. There was a transfer of undertaking coming. The respondent had decided to outsource its transport. Regarding if the claimant could apply for a redundancy package, FT felt that it would be appropriate without prejudicing the outcome of the claimant's appeal. There was a voluntary redundancy package available as well. Some drivers would not need to transfer. The offer was just made available to the transport drivers. The respondent would normally do a sheet of figures. FT did that for CC.
The appeal process was put on hold. A redundancy package of some forty-five thousand euro was available for the claimant. FT wrote to the claimant on 29 December. He knew that the appeal

process had to move on. He got no response. CC told FT that the claimant had not contacted him.

Claimant's Case

The claimant commenced employment with the respondent as a driver in November 2000. Up to May 2008 he operated from a depot in southwest Dublin and subsequent to that date and up to his cessation of employment in July 2009 he was based at a depot in north county Dublin. He told the Tribunal that the company treated him less favourably than many other drivers in that he was given less attractive routes and put under undue pressure regarding deliveries and performance. By early December 2008 "things getting on top of him" and that is when the situation concerning his work "took off".

Throughout that month the claimant was absent from work on health grounds. His attempt to re-commence duties at the end of that month was unsuccessful as the respondent insisted he obtain a medical fitness to return from a company doctor. On a visit to that doctor in early January 2009 she told him that the respondent did not want him back into the workforce and suggested to him that he go on annual leave. However, and unknown to him at the time the contents of letters and reports among medical professionals and the respondent's health manager prevented him from returning to work right up to early summer of 2009 when the respondent declared itself satisfied he was fit to return to work. At a meeting with the company personnel on 2 June its regional development manger informed the claimant that he was being suspended pending an investigation concerning allegations of a bullying and threatening nature against certain colleagues and management staff.

The claimant acknowledged to himself that "something was happening" due to that suspension and those allegations. In completely denying those allegations the witness told the Tribunal that he did not even curse or use any profanities when engaging in any communications with the reported recipients of that communication. In particular he was adamant that he never threatened another employee on the grounds of his nationality especially so because he too shared that nationality. In fact he did not have any problems or issues with the respondent and just wanted to get back to work "to fix the wallet". The claimant expressed displeasure at the respondent's conduct at an investigation meeting with him on 24 June and was also critical of his trade union representative.

That investigation meeting led to a disciplinary hearing on 21 July that examined the claimant's recent conduct and behaviour towards the respondent and some of its staff. The witness maintained that the respondent's notes presented to the Tribunal on that meeting and hearing were constructed in such a way as to give a misleading account and impression as to what actually transpired when the parties met on 24 June and 21 July. The claimant however accepted he was given adequate opportunity to present his case to the respondent. While he was unhappy with his representation and indeed with some of the personnel attending those gatherings and subsequent appeal hearings the claimant did not air those views at the time. He described the contents of a dismissal letter issued to him on 4 August 2009 as a complete bombshell and appealed that sanction to the regional transport manager. That letter read in part: *The grounds for my dismissal "abusive and threatening behaviour towards management and other staff" are completely and utterly unfounded ...*

Up to 21 October that appeal process had still not concluded and in a letter that day to the head of human resources the claimant gave a week's notice to the respondent that his participation in that process would end. Through the claimant's trade union the respondent offered him a redundancy package in November 2009. In declining to accept that package the witness stated that to have done

otherwise would have been unlawful. In January he received a letter from the head of human resources inviting him to conclude the appeal process. He neither replied to that letter nor another one from the same author on 5 March. That latter letter informed him that the respondent now assumed that he no longer wished to appeal the company's decision to dismiss him.

Determination

The Tribunal has carefully considered all of the evidence adduced at the four-day hearing, the documentation handed in during the course of the hearing and the evidence given.

The Tribunal is satisfied that a full and frank investigation took place into the claimant's conductand that the claimant was an integral part of that investigation. Three investigation meetings tookplace. The first was under the heading of "welcome back" meeting that took place on the 2nd June2009. Following that meeting, the claimant was suspended with pay, pending further investigation.Two further meetings took place on the 12th June 2009 and the 24th June 2009. The claimant was inattendance at all of those meetings and was fully represented by his union representative. TheTribunal is satisfied that all seven issues under investigation were put to the claimant and he wasafforded the opportunity to respond to each and every one of them.

The claimant alleged that the notes taken at the investigation meetings (which were put into evidence) were not contemporaneous and were a complete fabrication. The Tribunal do not share the claimant's opinion and could find no evidence to suggest that the notes taken were anything other than completely accurate.

The claimant was then invited to a disciplinary meeting that took place on the 21st July 2009. The claimant was fully represented by his union representative. The Tribunal is satisfied that all of the issues that were under investigation were again put to the claimant and he was afforded an opportunity to respond to each and every allegation.

The claimant suggested that he was very unhappy with his union representative, CC, and that he had grave suspicions about his motives. He suggested that CC was a Trojan horse placed there by the respondent to stitch him up. However, the claimant did not at any stage object to CC representing him. The Tribunal could find no evidence to suggest that CC's motives were anything other than honourable. Furthermore, the Tribunal finds that CC represented the claimant to the best of his ability and did his utmost to find a solution/package that would be of benefit to the claimant and that the claimant, for his own reasons, frustrated that process.

Following the disciplinary meeting the claimant was dismissed by letter of the 4th August 2009. That letter stated, " *Your dismissal is on the grounds of serious misconduct under the followingheading:*

- *Abusive and threatening behaviour towards management and other staff. "*

The claimant was informed of his right to appeal and he did exercise that right.

The appeal hearing was held over a two-day period, 27th August 2009 and 11th September 2009. The claimant was again fully represented by his union representative. The claimant during the

hearing voiced his objections to LOB being in attendance at the meeting. However he did not object at the material time or at any other time.

FT was in attendance at the second day of hearing on the 11th September 2009. He replaced AL. The claimant voiced his objections to FT being in attendance to the Tribunal but he did not voice those objections at any stage prior to that. The meeting finished however, the appeal hearing itself had not yet concluded. FT wrote to the claimant on the 29th December 2009 that said letter was received on the 14th January 2010. FT requested that the claimant get in touch with his representative to arrange a date to conclude the appeal hearing. The claimant did not respond directly to this letter. He did however lodge his claim with the LRC on the 25th January 2010. That could be interpreted as a reply to the letter of the 29th December 2009. His intentions at this juncture were clear. The Tribunal finds that by January 2010 the claimant had made the decision not to prosecute his appeal but to bring the matter to a different forum. The Respondent was unaware of this at this juncture. FT wrote to the claimant again on the 5th March, 2010, still unaware of the LRC claim, stating " *... to date I have not received any response. This leaves mewith no option but to assume that you no longer wish to progress your appeal of the decision toterminate your employment. "*

The Tribunal finds that FT's assumption was correct. The claimant did not exhaust the appeal process available to him and that is potentially fatal to his unfair dismissal claim.

The claimant's evidence that he had lost faith in the system because he knew that the company had from the outset conspired to get rid of him is not well founded. The Tribunal could find no evidence to back up the claimant's conspiracy theory.

The Respondent at all times acted in accordance with the company's procedures as set out in the company handbook. They carried out a full and thorough investigation. They corresponded with the claimant and his representative at every stage of the procedure. They gave the claimant several opportunities to defend the allegations. They carried out an appeal hearing, which was also meticulously dealt with the allegation. The claimant made a decision not to exhaust the appeal process but instead to lodge a claim with the LRC. That was a fatal flaw. Leaving that fatal flaw aside, the Tribunal finds that the grounds upon which the claimant was dismissed were well founded and justified in all the circumstances.

The claim under the Unfair Dismissal Acts, 1977 to 2007 fails.

The appeal under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 is not allowed.
The appeal under the Organisation of Working Time Act, 1997 is dealt with under PW283/2010

Sealed with the Seal of the

Employment Appeals Tribunal

This ____________________________

(Sgd.) ____________________________
(CHAIRMAN)