EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:		**CASE NO.**
*C**laimant A*** **–** EMPLOYEE	-	UD868/2010
MN824/2010		
*C**laimant B*** **–** EMPLOYEE	-	UD1104/2010
MN1067/2010		

Against

Respondent **-** EMPLOYER

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. McGrath BL

Members: Ms A. Gaule
Ms M. Mulcahy

heard this claim at Dublin on 22nd September 2011, the 25th November 2011, the 8th December 2011 and the 9th December 2011

Representation:

Claimant: Mr Paul D'Arcy, D'Arcy & Co, Solicitors, Claregate Street, Kildare, Co Kildare

Respondent: Purdy Fitzgerald Solicitors, Kiltartan House, Forster Street, Galway

Determination:

The Tribunal has carefully considered the evidence in respect of the cases brought by both claimants (DW and MC).

In October of 2009 the claimants who had been employees of a company for between nine and seven years were made aware of the fact that the haulage division of the company was to be taken over by the respondent company by way of a Transfer of Undertaking. A lead in thirty day consultation period was provided for with the actual date of transfer being the 26th of November 2009.

Of relevance to the proceedings before the Tribunal is that part of the consultation process which dealt with the first employers - employee privileges terms and conditions which would carry through to the workplace under the respondent. The labour Court became involved and indicated that a €5,000 lump sum should be paid to all employees who would be transferred to the respondent company by way of compensation for the loss of the privilege card which all employees were in possession of from the former employer. This was confirmed by KD in his recommendation dated 26th November 2009.

The workforce were anxious to have receipt of these said monies in circumstances where the date of Transfer had co-incided with the findings of the Labour Court and from that date forward (26th November 2009) the employees including the two claimants herein had no contractual relationship in law with their previous employers from whom they were expecting to get paid an ex gratia paym ent of €5,000 pursuant to the Labour Court recommendation.

What is clear is that the first employer was reluctant to pay the monies. By the middle of December 2009 the company had failed to pay the said €5,000 and was now proposing different options which the transferred employees might wish to consider. There can be no doubt that the claimants along with all their co-workers were concerned that the first employer were in fact not going to pay the monies and a policy of obfuscation and delay was now in operation.

It is noted that the union branch organiser (CC) working on behalf of the workforce in a letter to the Labour Court vocalised the workforces position when he stated "it is our members view that this is in breach of the Courts decision" in his letter of the 14th of December 2009. None of the various excuses heard by the Tribunal for non-prompt payment by the first employer had formed any part of the case made before the Labour Court. There was a great deal of retrospective intervention. On that same day the claimants had come to work early in the morning in the ordinary way. It is impossible for the Tribunal to pinpoint exactly how the rumours gathered momentum but what is clear is that the workforce believed that the first employer was not minded to pay the €5,000 Labour Court recommendation and that other, diluted, offer might instead be proffered.

Inevitably the claimants and their colleagues were concerned that they had no rights as they were no longer employees of the first employer. There can be no doubt that the employees were angry at what they perceived to be the loss of monies they believed was due and owing. In light of the fact that Christmas was only two weeks away the tensions were somewhat heightened. Indeed the evidence suggested that some people had relied on this lump sum in preparation for Christmas.

As the two shop stewards on the ground (together with another FM), the claimants found themselves taking questions they had no answers to. What is obvious from the statements taken subsequently is that the shop stewards were forced into leadership roles for which they had little or no training. They attempted to manage the situation but at the same time were as aggrieved by what they perceived to be the loss of their €5,000 as any of their colleagues were.

Again, the Tribunal cannot pinpoint who organised that the employees should converge in the canteen to discuss the situation. It seems that the respondent management was aware of this movement and indeed directed employees coming in to work to the canteen to catch up on the meeting.

The respondent company's evidence is that this situation was beyond its control. i.e. that it couldnot force the payment of money by the first employer. As far as the respondent company wasconcerned it's workforce was refusing to go to work until the situation was clarified.

There can beno doubt that the situation escalated very quickly.

The respondent company's only concern was that the trucks should be on the road and the drivers should be getting them out there.

The respondent company did address the shop stewards and were in no doubt that a collective decision had been made that the drivers would not drive until the money was guaranteed. The respondent company was left in a difficult position as effectively the respondent was being used to intervene between its own (albeit new) workforce and its own client the previous employer.

At the same time various calls were being made to the union headquarters which yielded no response.

The respondent company suspended everybody in response to their refusal to go to work. There followed an unseemly protest outside the gates of the respondent company.

Without it being clear to the Tribunal as to how it happened it became clear that the claimants and their colleagues wanted written confirmation that their €5,000 ex gratia payment was still on the table and capable of being paid forthwith. There is no doubt that the claimants believed that such was the relationship between the first employer and the respondent company that the former would be obliged to give the confirmation required regarding the €5,000 in the interests of preserving good commercial relations into the future.

The Tribunal recognises a special relationship existed between the first employer and the respondent company in circumstances where they both operated out of the same depot and in response to the situation that had unfolded in the workplace it appears that the respondent company communicated with the Head of Employee Relations at the first employer a Mr AR who eventually signed a letter which gave the claimants and their colleagues the degree of comfort required to go back to work.

The respondent company therefore acted as the brokers between the employees and the first employer company and resolved the situation for their own benefit.

Arising out of the circumstances of the 15th of December 2009 the respondent company conducted an investigation into the actions of its workforce such that gave rise to a refusal to go to work. All thirty seven participants were investigated by ER. The Tribunal had very many of the statements opened to it but notes that these were not made known to the claimants in the course of the disciplinary process to which the claimants were asked to attend on 26th February 2010 accused as they were of actively misleading the workforce and encouraging participation in unofficial and illegal industrial action.

The Tribunal further notes that a not unreasonable request by the claimants to have legal representation at their disciplinary hearing – regarded as being potentially gross misconduct – wasrefused and the Tribunal cannot understand that such a policy be considered reasonable in all thecircumstances. The failure to show flexibility in light of the seriousness of the charges is hard toreconcile with a fair process and the potential sanctions faced on the two claimants.

Given the detrimental outcome to the disciplinary process, resulting as it did in the termination of employment by reason of gross misconduct – the Tribunal cannot accept that there was sufficientevidence adduced that demonstrated beyond doubt that the claimants knowingly

mislead theircolleagues or incited other persons into illegal activity. The Tribunal recognises that a personaldifficulty between the claimants and the union Branch Manager coloured the evidence somewhatand the disciplinary process was clearly influenced by the evidence of the union official who wasnot there on the day and remained uncontactable throughout.

The Tribunal finds both claimants were unfairly dismissed.

The Tribunal awards Claimant A - €122,304.00 under the Unfair Dismissals Acts, 1977 to 2007.

The Tribunal awards Claimant B – €138,632.00 under the Unfair Dismissals Acts, 1977 to 2007.

There was no evidence adduced in relation to the claims under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 therefore the Tribunal dismiss the claims for want of prosecution.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)