EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.

EMPLOYEE –**Claimant** UD663/2010
MN620/2010

against

EMPLOYER - **Respondent**

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 K.T. O'Mahony BL

Members: Mr G. Andrews
Mr T. Kelly

heard this claim at Nenagh on 8 September
and 17 November 2011

Representation:

Claimant:
Mr Krystian Boino, J C Hoban & Company Solicitors,
Suite 114 The Capel Building, Mary's Abbey, Dublin 7
Respondent:
Mr Peter Leonard BL instructed by Mr Tim Treacy,
Patrick F. Treacy & Co. Solicitors,
29 Pearse Street, Nenagh, Co. Tipperary

The determination of the Tribunal was as follows:

Dismissal being in dispute it fell to the claimant to prove the fact of dismissal.

Summary of the Evidence

The claimant was employed in the respondent's factory from September 2006. From early 2007 his duties primarily involved driving a truck, usually referred to as a shunter, and also driving a gantry crane. His duties were fundamental to the logistics of moving raw materials, stock and product

around the respondent's factory. The respondent has around 300 employees. There is a comprehensive agreement in place between the respondent and a trade union which sets out, inter alia, a disciplinary and grievance procedure. Copies of this are made available in various languages including the claimant's native Polish.

Due to the economic downturn various cost saving measures were introduced in early 2009 and from 16 March 2009 the claimant, along with around a dozen others, was placed on a three-day week. This lasted until mid-May 2009 when the respondent was looking to restore the claimant to full-time working. On 18 May 2009 the claimant wrote to the general manager (GMA) suggesting that he be allowed to continue in a part-time capacity in order to pursue the development of additional skills. The respondent's position is that the claimant maintained that he was better off on a three-day week with social welfare than being full-time with the respondent. The claimant also talked of refusing to drive the gantry crane as a result of which a meeting was held on 22 May 2009. The meeting was attended by the respondents' two general managers (GMA & GMB), the human resource manager (HRM), the claimant's supervisor (CS) a Polish employee (PE) acting as interpreter, the senior shop steward (TU), and the claimant were present. At this meeting the claimant was warned that if he continued to refuse to drive the gantry crane then his rate of pay would revert back to that of a general operative. After discussions with TU the claimant decided to revert to full-time working and agreed to drive the gantry crane. The claimant's position is that after this meeting he lost faith in TU.

The claimant was on sick leave in early November 2009 and received no payment in respect of two of those days. On 9 November 2009 he raised the matter with HRM. The claimant did not contribute to the sick-pay scheme.

On 11 November 2009 another supervisor mentioned to GMA that the claimant had not moved apallet when requested that morning. The claimant's supervisor (CS) then mentioned to GMA thathe had not been able to find the claimant the previous day between 11.30am and 12.30pm. As aresult GMA called the claimant to a meeting shortly after mid-day. This meeting was attended byGMA, HRM, PE as interpreter and the claimant. The claimant's position is that he believed he wasbeing called to the meeting to discuss his query about sick pay.

At the meeting, which the respondent describes as informal to discuss the situation, GMA put the complaints of both supervisors to the claimant. When the claimant gave an explanation of his whereabouts the previous day GMA was not satisfied with it. The respondent's position was that GMA had been in that vicinity at the time and had not seen the claimant. The claimant told GMA that he had not been able to move the pallet as other things had been in the way. GMA told the claimant that the other supervisor had moved these obstructions quite easily and he was not satisfied that the claimant had given a reasonable explanation.

The claimant's position was that GMA treated him in an aggressive manner throughout this meeting and he felt stressed and nervous when GMA kept asking him the same questions and telling him that they were "not idiots". In "the heat of the moment" the claimant said that he wouldrather resign at the end of the year if this was the way he was being treated. The respondent's position is that the claimant said words to the effect that he hated the job and was going to leave inthe next two weeks. GMA then said to the claimant, "If you feel that strongly it might be best for allconcerned to part company now". On leaving the office the claimant was going towards the factoryto return a key when GMA followed him out and pointing to the exit gate said, "Get out". GMA'sposition was that he was worried as to what might happen if the claimant went back on the plant. Incross-examination GMA accepted that the claimant had no history of violence.

The claimant felt theinterpreter was not translating what he was saying correctly. The claimant's shift was due to end at2.00pm.

The claimant returned to work the next morning for his normal 6.00am start but was unable to enter the premises as he had been taken off the fingerprint clocking system. He attended the premises later that morning with a friend as interpreter in an attempt to meet HRM to resolve the situation. While the claimant could see HRM in her office she would not come to speak to him. His request to see another manager was also refused. HRM arranged for the claimant to collect his P45 later that afternoon. While HRM agrees that she was in the office when the claimant called her position was that she was unavailable at the time and that, furthermore, the claimant had not made an appointment to meet her.

Around a week later in a letter dated 18 November 2009 from Social Welfare it was indicated that there was work available for the claimant in the respondent company. The claimant accompanied with his friend, again returned to the respondent company but no manager was willing to meet with him. As they were about to leave GMA came in to the reception and, on reading the letter from Social Welfare, told the claimant that there was no work for him in the company. GMA's position was that this was not the place to meet the claimant. The claimant was not replaced.

Determination

The claimant disputes the accuracy of the remarks attributed to him, by GMA, at the meeting of 11 November 2009. Whichever version of the claimant's statement made at the meeting is the correct one it was in any event overtaken by the words used by GMA in response, about which there is no dispute. It was reasonable for the claimant to interpret GMA's statement, "If you feel that strongly it might be best for all concerned to part company now", as amounting to a dismissal. GMA's subsequent action of ensuring the claimant did not return to the plant and pointing him to the exit gate supports this finding. Accordingly, the Tribunal finds that there was a dismissal.

The issue of the termination of an employment relationship is a serious matter to which a reasonable employer would give some priority. The Tribunal finds that the reasons advanced by HRM for her failure to meet the claimant when he returned to the premises on 12 November, the day following his dismissal were not reasonable. Similarly the response of GMA when he met the claimant on a further visit to him was not reasonable in that there was no indication of any wish to communicate with the claimant on the matter either then or at a later stage. Furthermore, there were no substantial grounds justifying the dismissal.

The Tribunal does not accept the respondent's contention that the meeting on 11 November 2009 was informal. While it was GMA's evidence that minor issues with employees are dealt with informally on the floor as and when they arise, in this case the claimant was invited to the office. The claimant had no prior notice of the meeting or its purpose and reasonably believed it to be about non-payment for two sick days, which he had shortly before then raised with HRM. On arriving in the office the claimant was confronted with two senior members of management while he, on the other hand, did not have a colleague or representative with him and, accordingly, was in an unequal and unfair position and found the meeting tense. Even if the Tribunal were to accept the respondent's position that the meeting was intended to be informal, which it does not, a reasonable employer would not in that case, have continued with the meeting when the possibility of terminating the contract of employment arose. In a plant such as this where there is a comprehensive company-union agreement in place a reasonable employer would have sought the involvement of a shop steward at that stage.

For the reasons outlined above the Tribunal finds that the dismissal was unfair and the claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds. The Tribunal awards the claimant compensation in the sum of €24,757.20, being one year's pay, under the Acts.

The Tribunal further awards the claimant the sum of €952.00, being two weeks' pay in lieu of notice under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)