EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF: CASE NO.
EMPLOYEE UD503/2010

against

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony BL

Members: Mr. G. Andrews
Mr. F. Dorgan

heard this claim in Roscrea on 23 March 2011 and 23-24 June 2011
and in Nenagh on 7 September 2011

Representation:

Claimant(s):
Mr. Ger Kennedy, SIPTU, Connolly Hall, Churchwell, Tipperary Town, Co. Tipperary

Respondent(s):
Ms. E.J. Walsh BL instructed by
A & L Goodbody, Solicitors,
I.F.S.C., North Wall Quay, Dublin 1

The determination of the Tribunal was as follows:-

The claimant commenced employment with the respondent as an underground workshop operator in the respondent's mine on 1 November 2005. While he performed general workshop duties, his primary duty consisted of managing the tyres of the respondent's fleet ofmachines.

The claimant had been issued with a disciplinary warning in late 2007 for failing to report that he had he slipped and fallen in the shower at work on 29 September 2007. He continued at work following the injury but for around two weeks later his condition deteriorated and he rang in complaining of back pain. He was referred to the company doctor. He returned to work on 30 November 2007. Following a medical assessment on 17 December 2007 the company doctor reported he had made a full recovery from his injury and was fit for a full range of duties. The claimant had some painful clicking in his right chest wall.

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In March 2008 the claimant passed the fitness test to become a member of the mine rescue team; this test requires a very high level of fitness. The claimant did very well, completing the 45-minute test in 25 minutes and received the declaration of fitness qualifying him to be a member of the mine rescue team.

On 3 November 2008 the claimant suffered injury to his lower back while lifting a bin/container during a mine-rescue practice session. He was referred to the company doctor, who diagnosed an injury to his lumbar spine and recommended that he was not fit for underground work or manual handling but he was fit for general office work and light duties on the surface. The company prefers employees to remain at work rather than be designated unfit. Over November and December 2008 the claimant was allocated a variety of tasks, including *inter alia* painting, putting information on a data base, filing records and other light duties. In early December because he complained of a sciatic pain down his leg he was referred for an MRI scan, which found his lumbar spine to be normal. The doctor was puzzled by the lack of improvement in the claimant's symptoms despite the physiotherapy treatment received throughout December 2008 and in particular in light of the normal MRI finding.

However, over January and February 2009 the claimant indicated to his manager that he was having problems performing the lighter duties: he could not bend down to pick up paper for shredding, the ground was too uneven for him to walk to the compound to do a tyre audit he could not walk to the compound to do a tyre audit because the ground surface was too uneven, he could only sit in a chair for a very short period and after one to two hours he was reporting that he was suffering pain and either asked to go or was sent home at around 10.00am

In early January 2009 the claimant was referred to an expert in the rehabilitation of back injury but following a four-week exercise based physiotherapy course the claimant reported a deterioration in his condition and he was referred to an orthopaedic surgeon who saw him in late March 2009. While under the latter's care he was referred to have an MRI scan on his thoracic spine, which showed some degeneration and he recommended further physiotherapy and, if it did not work, injections.

Puzzled by lack of improvement in the claimant's condition and, in particular in light of the normal MRI finding the respondent engaged a company of private investigators.

On 18 April the claimant was observed by a private investigator travelling as a passenger in a VW transporter with an attached trailer travelling to a certain business premises, where the claimant was seen over a 15-20 minute period, in conjunction with the driver, carrying sheets of metal, from a shed and lifting them into the trailer and aligning them, without any obvious physical distress or restriction, apart from a slight limp, in his movement; the tasks had involved some bending and stooping. The claimant removed and replaced a side panel of the trailer and assisted his companion to secure the load with strapping. They then returned to the claimant's home and on leaving the trailer was empty. The respondent could not reconcile what they had seen on the video with the claimant's complaints.

However, two days later, at a review with the company doctor on 20 April 2009 the claimant indicated that: he had continuous upper back pain which becomes worse with any activity, he could neither stand nor sit for any prolonged period, was unable to lift his child or his child's buggy to put it in the car, do simple chores around the house and was precluded from driving very far. The company doctor found it unusual that despite intervention and treatment therewas no improvement in a young man with a strong physique.

On 2 May the claimant was observed by the private investigators leaning into a car and lifting his infant and buggy, a carrier type basket, from the rear seat out of his car and place it on a stroller. He was also seen holding the baby for some time. One of the private investigators reported that on that date the claimant was displaying obvious physical restriction of movement when lifting some material from the floor and he overheard the claimant telling a third party that he was in constant pain and discomfort.

As well as receiving the reports of the private investigators and the doctor's report the respondent's head of safety (HS) also reported that on 23 April he observed the claimant walking without a limp or any sign of difficulty but on seeing HS he started to limp. On thesame day HS saw him bending and twisting without any difficulty or sign of discomfort. Theclaimant indicated to HM the same day that he had not yet picked up his baby and that hecould not sit or stand for any prolonged period without experiencing extreme pain.

Having received these reports the respondent held an investigation on 28 May 2009. The meeting was conducted by the respondent's mine manager (MM), an HR representative and the claimant's manager were also present and the claimant was accompanied by his shop steward. MM outlined the claimant's inability to perform the lighter work duties assigned tohim, which *inter alia* were that he was unable to stoop, to hold his baby and that he could notwork beyond 10.00am most days. The claimant agreed with this. MM then informed himthat, contrary to his representations to the respondent, they had information that he was seenlifting sheets of metal and holding his baby. When asked if he wanted to say anything theclaimant indicated that he did not. The claimant was suspended on full pay pending adisciplinary hearing in early June.

The respondent's letter of 29 May 2009, inviting the claimant to a disciplinary meeting, set out certain allegations:

1. that he had been consistently representing to his supervisor that that he was unable to perform his work duties,
2. that on 18 April he had been seen lifting approximately a dozen sheets of metal, each weighing approximately 25kg,
3. that two days later, on 20 April, he told the company doctor that he was in continuous pain, unable to do anything at all, unable to do minor chores around the house unable to lift his child, unable to put his child's buggy in the car and was precluded from driving very far,
4. that on 2 May he was seen leaning into a car and lifting his baby and his baby's buggy out of the car and
5. that on 23 April HS had seen him walking without a limp but that on seeing HS he began to limp and that on the same day he was seen bending and twisting without obvious discomfort.

The letter continued to inform the claimant that as the behaviour referred to might constitute gross misconduct the disciplinary meeting could lead to disciplinary action up to and including dismissal. Enclosed with this letter were the reports of HS, the company doctor and the two private investigators.

The disciplinary meeting on 3 June 2009 was conducted by MM, the HR manager (HRM) and the claimant's manager were also present and the claimant was present with his trade union official. The claimant's manager outlined examples of the claimant's inability to perform even the lightest tasks, giving as examples: his inability to walk across the yard to measure tyres, to lift file boxes for a member of staff, bend down to pick up paper for shredding and to sit at a desk for more than a short period. At the meeting the claimant provided his written responses to the reports given to him in late May. The meeting was cut short by the claimant's union official who, on learning that private investigators had been involved, wanted to make a complaint under the data protection legislation

In his letter the claimant set out his responses to the reports furnished to him by the respondent. A friend had asked him to assist in putting the steel into the trailer and that, having concluded that it did not present a risk, he assisted a friend to load the sheets of metal; these sheets were less than 25 kg whereas he had been lifting 35 kg while on his back in physiotherapy sessions recommended by the company doctor. He vehemently disputed the contents of the reports of both HS and the company doctor. His child only weighed 13 lbs. He considered the doctor's letter to be a gross misrepresentation; what he had told the doctor was that he could not hold his baby for an extended period. He denied having told the doctor that he could not do minor chores or that he was precluded from driving and pointed to the fact that he had travelled to Dublin as a passenger for treatment but his back is symptomatic after these activities. He considered it very unfair that private investigator(s) gate-crashed his family's private christening party. There was a dispute as to whether the doctor had advised him not to drive because the medication may cause drowsiness. The claimant suggested that HS was motivated by "complete prejudice". His treatment

had progressed to having injections administered, which were extremely uncomfortable and painful. He suggested to MM that he should direct any enquiries regarding his health to the orthopaedic surgeon or other independent medical practitioner rather than relying on the prejudicial statements of people who have a financial interest in the provision of the results.

The claimant could not be sure if it was he had lifted his child out of his car on 2 May and suggested that it might have been his brother. His brother lifted the buggy out of the car.

A further meeting was held on 15 June 2009 to afford the claimant and/or his representative the opportunity to cross-examine the witnesses who had provided the reports to the respondent.

The video footage and other documentary evidence were furnished to the claimant and he was given an opportunity to furnish any further information he might wish to have considered before the respondent made its decision.

Having considered the facts MM and HRM concluded that the claimant had "consciously misrepresented" to the company and its doctor the extent of his limitations and his inability to carry out the lighter duties and concluded that this constituted gross misconduct warranting immediate dismissal. Throughout this time the respondent had accepted the claimant's representations and paid him in full as well as reimbursing him for the costs and expenses incurred in his treatment and rehabilitation. By letter dated 25 June 2009 MM informed the claimant of the decision to dismiss him and in therein set out the respondent's reason for his dismissal.

By letter dated 1 July 2009 the claimant's trade union lodged an appeal ,with the general manager (GM) on grounds that dismissal was a disproportionate sanction and that the full principles of natural justice had not been adhered to. By letter dated 6 July 2009 HRM informed the trade union that GM and himself would be present to hear the appeal on 10 July2009. In a letter dated 16 September 2009 addressed GM, the claimant explained that he wasunable to work underground, that having to carry a self-rescuer and lamp would put a lot ofpressure on his back, that the doctor and HS had agreed that he could attend work but not doany regular duties so that the respondent would not have to put the injury down as an LTI. However other duties were assigned to him and he had performed those duties. He attendedwork as often as his injury allowed and found it difficult to do so after physiotherapy. At hisphysiotherapy sessions with the specialist he had been lifting weights that were around threetimes the weight of the sheets of metal he had helped his friend to load into the trailer. Nowork had been assigned to him after 17 December 2008. He was subjected to inappropriateremarks when he did attend work and he felt intimidated (these remarks, the dates on whichthey were made and the names of those who made them were identified). He felt that therewas an unfair effort to remove him from the company. In this letter the claimant also made anumber of criticisms of the doctor: he had helped to discredit him at the respondent's bidding,he had failed to inform him that his allegiance was to the company and had failed to refer himfor an MRI scan at his request. In a

letter of response sent to GM the doctor stated *inter alia* that at all times he had indicated to the claimant that he would be in contact with managementabout his condition to which the claimant consented and furthermore the claimant wasattending his own doctor; he had referred him for an MRI once he presented with sciatica;while the claimant did lift heavier weights during the course of his physiotherapy treatmentthis was in a controlled environment under the supervision of a professional and there wasnothing questionable in asking him what tasks he felt he could do.

The appeal hearing was conducted by the general manager (GM). HRM was also present. The appeal failed. HRM's evidence was that he attended at the appeal hearing in an administrative role, to take notes, as well as to ensure due process was adhered to . Apart from one interjection in relation to the letter of appeal, which was immediately objected to by the claimant's representative, he had no input whatsoever into the making of the appeal decision or no influence on GM. The claimant's trade union representative objected to HRM's presence at the hearing but he remained on at the meeting.

In his evidence to the Tribunal the managing director of the company engaged to act as private investigators, informed the Tribunal that the company was registered with the Data Protection Commissioner and that the respondent had also engaged the company in 2007 to investigate whether the claimant was running a customised business from his home. He noted that the claimant had no difficulty in getting in or out of the car on 2 May 2009.

The doctor's evidence was that at all the consultations the claimant had presented with severe symptoms. The claimant had indicated that he was attending his own doctor. Employers prefer to have an employee at work as long as he agreed that it was safe for the employee inthe particular circumstances. In his opinion the injury had been at the minor level. The doctordenied that the claimant had complained of drowsiness or that he had advised him that themedication could cause it.

In his evidence to the Tribunal the claimant's position was that he was not assigned lighterduties but just given a series of tasks such as: painting, filing, doing a computer survey, shredding papers. He had not refused to lift boxes or to do a tyre audit. He had not said toeither the doctor or HS that he could not hold the baby; what he had said was that he couldnot hold the baby for an extended period. His medication caused drowsiness. He did not usethe complaint of drowsiness as an excuse to be allowed to go home early. He had driven tothe christening on 2 May and to work every day. The claimant denied that he was carrying ona business at his home. While he was skilled in panel beating he did not have a qualificationin it. He was the registered owner of three of the cars photographed in front of his house andhis brother owned the other. A neighbour had complained to the county council that he wascarrying on a business at home. The county council had investigated this on a number ofoccasions. The claimant produced a letter dated 16 July 2008 from the county councilconfirming that he was not carrying on a business there. On 18 April he had gone with afriend to collect the steel for his brother but he did not know why his brother wanted the steel;it was dropped off at claimant's home as his

brother was staying there. He had not been certified fit to return to his full duties at the time of his dismissal. In cross-examination he agreed that on occasions he asked to go home early. In cross-examination the claimant agreedthat the charges were put to him at the meeting on 28 May 2009. At the meeting of 3 June hediscovered that the respondent had engaged private investigators.

Determination

The respondent dismissed the claimant for deliberately misrepresenting his inability to work due to the extent of his injury. The respondent considered that the misrepresentation amounted to gross misconduct.

The function of the Tribunal and the test to be applied in cases of misconduct has been variously stated and is well set out in *Looney & Co. Ltd. v. Looney* (UD 843/1984):

> "It is not for the Tribunal to seek to establish the guilt or innocence of the claimant,nor is it for the Tribunal to indicate or consider whether we, in the employer's position, would have acted as (the respondent) did in his investigation, or concludedas he did or decided as he did, as to do so would substitute our mind and decision forthat of the employer. Our responsibility is to consider against the facts what areasonable employer in (the respondent's) position and circumstances at that time would have done and decided and to set this up as a standard against which the employer's action and decision be judged."

The test of "reasonableness" was set out in *Noritake (Irl.) Ltd. v. Kenna* (UD 88/1983),namely:

1. Did the company believe that the employee mis-conducted himself as alleged: If so,
2. Did the company have reasonable grounds to sustain that belief? If so,
3. Was the penalty of dismissal proportionate to the alleged mis-conduct?

The Tribunal is satisfied that the respondent, having considered the reports before it and the claimant's responses, including his written responses set out in his undated letter, had reasonable grounds for believing that the claimant was guilty of the alleged misconduct. Onasking itself whether the sanction of dismissal was disproportionate the Tribunal is satisfiedthat based on its genuine belief that the claimant was misrepresenting his inability to workover an extended period while in receipt of full pay from the respondent that the sanction ofdismissal was not disproportionate. Furthermore an express term of the claimant's contract ofemployment stated: *"The company requires that that the employee's honesty and integrity bebeyond doubt"*. The Tribunal finds that the dismissal was substantively fair.

The Tribunal considered the procedural issues raised by and on behalf of the claimant. In his

evidence to the Tribunal the claimant accepted that he was aware at the meeting of 28 May 2009 that it was an investigation and that at that meeting he had been informed of the allegations against him. Those allegations were further outlined to the claimant in the respondent's letter dated 29 May 2009. The claimant was afforded an opportunity to answer those allegations at the meeting of 3 June 2009 and at that meeting he submitted written replies to the allegations. Following the meeting, the claimant was given further opportunity to make any representations that he might wish before a decision was taken by the respondent.

In rejecting a number of other complaints raised by the claimant on procedural grounds the Tribunal finds that the claimant was informed in the letter of 29 May 2009 that the procedure invoked against him could lead to his dismissal, that as this letter clearly stated that the meeting on2/3 June 2009 would be a disciplinary meeting he was well aware where the investigation ended and the disciplinary process began. Finally, it is not best practice, to have one of the members of management who made the decision to dismiss the claimant present at the appeal hearing, albeit in an administrative capacity. However, the Tribunal is satisfied that HRM did not participate in or influence the decision-making process on the appeal. In the circumstances the Tribunal also finds that the dismissal was procedurally fair.

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

Sealed with the Seal of the
Employment Appeals Tribunal

This ________________________

(Sgd.) ________________________
(CHAIRMAN)