EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	**CASE NO.**
EMPLOYEE	UD1337/2010
- claimant	MN1294/2010

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: Mr D. Hayes

Members: Mr R. Murphy
Mr N. Dowling

heard this claim at Dublin on 14th November 2011
and 9th January 2012

Representation:

Claimant: Mr Kevin Darcy BL instructed by Spelman Callaghan, Solicitors, Corner House, Main Street, Clondalkin, Dublin 22

Respondent: Matheson Ormsby Prentice, Solicitors, 70 Sir John Rogerson's Quay, Dublin 2

The determination of the Tribunal was as follows:

The respondent is a company engaged in the maintenance of the gas network. The claimant was employed as general manager. His roles included the supervision of fitters and the carrying out of inspections. His annual salary was €60,000 together with a bonus and regular allowances. The allowances included the private use of his company vehicle. His gross weeklypay was €1,788.

The respondent had successfully tendered for a network maintenance contract in 2006 and the claimant was directly approached and offered employment as general manager. He accepted and commenced employment in early 2007.

In 2009 a tracker was placed on is vehicle. He was assured that this was not for the purpose of tracking him but to facilitate emergency response. No trackers were placed on the directors' own vehicles. The claimant was required on occasions to drive these vehicles so as to increase their mileage.

In April 2010 it was noted that in the previous fifteen weeks the claimant's vehicle had been driven 15,000km. It should be noted that the claimant lived in south Co. Kildare and had a daily round trip of 120km, thereby accounting for almost two-thirds of the total mileage alone. When the tracker reports were looked at by MS, a director, he noted what he thought was an abnormal concentration of attendance by the claimant in the Kilmainham area of Dublin. Although much of the respondent's work was in that area, MS knew that the claimant's origins were in Kilmainham and he became concerned about duties that the claimant was carrying out. MS discussed the matter with MK, the claimant's HR consultant. A meeting with the claimant was arranged for 16th April 2010.

The claimant was not told the purpose of the meeting. At no time was he told that it was disciplinary or investigative in nature. He was asked to come for a chat. Both of the respondent's witnesses told the Tribunal that the meeting was disciplinary in nature. It is clear that the claimant was never formally told this. The Tribunal is not satisfied that he was told it even informally. In the course of the meeting, the claimant explained that he was supervising a number of fitters in the area and that he had permission from another director to visit a sick friend, with whom he had a quasi-familial relationship, in St James's Hospital. MS was not satisfied with the explanation. He told the Tribunal that he also had concerns about the supervision of fitters in other areas. It should be noted that there was no evidence before the Tribunal of any supervisory failures on the claimant's part. Nor, as part of the investigation, does there appear to have been any assessment of the level or nature of supervision performed by the claimant.

The claimant was asked to review the 2010 tracker report over the weekend and to attend a further meeting on 19th April. He was told that MS would require an explanation of the time spent by the claimant on the Kilmainham area at the next meeting. Over the weekend MS further considered the tracker reports, which he said, raised serious questions about the claimant's whereabouts during working hours. It is noted that the respondent's T2 Form alleged that the claimant "abused his position…through unauthorised absenteeism, misuse of company property and failure to fulfil his duties." There was no evidence before the Tribunal of any misuse of company property. Indeed, it was not contradicted that the claimant was entitled to unlimited personal use of the vehicle. Nor was

there any evidence that the claimanthad failed to fulfil his duties. At best, there was a suspicion that because he had failed to adequately explain his frequent presence in Kilmainham he must have been absent from work. None of the fitters named by him as having been supervised in that area appear to have been interviewed. Other than a suspicion that there was a lack of supervision in other areas, there does not appear to have been any attempt to ascertain whether this was in fact the case.

At the meeting on 19th April, the claimant read a prepared statement that referred to his hospital visits and a resultant over-supervision of the Kilmainham area. The claimant also made a number of proposals as to how his supervisory and investigatory work might be better performed. MS and MK felt that the claimant was not addressing their principal concerns. Theclaimant told the Tribunal that, in essence, it was being suggested to him that he was working for someone else. No evidence that might have substantiated such a suggestion was adduced before the Tribunal. It would be a serious matter to work for someone else on your employer'stime but there must be something more substantial than mere suspicion for an employer to proceed. The claimant was given a copy of the 2009 tracker report, which MS had reviewed over the weekend, and he was told to go away and consider it. He was placed on "gardening leave" for a week and told not to contact any of the directors during that time. It was the respondent's evidence that, at the meeting on 19th April, it was suggested to the claimant that hemight want to consider having representation as things were getting serious. It is clear that hewas not formally given this advice. MS told the Tribunal that MK made the suggestion at themeeting. It was MK's evidence that he had a clear recollection of MS giving the advice. Theclaimant told the Tribunal that he was never so advised. Given the contradiction in the respondent's evidence, the Tribunal cannot be satisfied that the advice was given, either then orin the subsequent days as also suggested by MK.

There was a further meeting on 26th April. The claimant was asked for his explanation. He said that before he dealt with the tracker reports that he wanted to know where he stood with the Board. The respondent's evidence was to the effect that they understood the claimant to meanthat he wanted to know whether the Board intended to dismiss him. The claimant told the Tribunal that the merely wanted to know what was the Board's view of the proposal made theprevious week. Given his evidence that he did not know that these were disciplinary meetings,it would be unusual for him to raise the topic of dismissal.

The other directors were all nearby and MS convened a Board meeting. He told the Tribunal that, as far as he could see, their most senior employee was going off and doing his own thing and would provide no explanation. As noted above, no evidence to substantiate this suspicion was adduced before the Tribunal, nor any evidence of any attempt to substantiate it during the

disciplinary process, such as it was. MS explained to the Board that very little had gone on at the meeting, that the claimant had refused to give an explanation of the 2009 tracker report and that he wanted a decision from the Board before he would give an explanation. He explained to the Board that he felt that the relationship between the parties had broken down. The Board decided that the employment should come to an end and that an exit should be negotiated.

There does not appear to have been any procedure adopted by the respondent. At no time was the claimant formally advised that he was in the midst of a disciplinary process. The Tribunal is not satisfied that he was even informally advised. Given that one of the respondent's directors did not think that the process could end with the claimant's dismissal it is hardly unreasonable that the claimant did not consider it. Nor is the Tribunal satisfied that the claimant was ever advised of the severity of the situation or that he was advised to seek representation.

No note or record was made of any of the meetings held with the claimant. The Board meeting where the decision to dismiss was taken was not minuted. It would have been advisable for some record to have been kept.

Other than an examination of tracking reports, no investigation appears to have been undertaken by the respondent.

Determination

This is a case where the claimant was unaware that he was involved in a disciplinary process. It was, at best, a series of meetings dealing with performance issues. While the claimant was not forthcoming with an explanation about the 2009 tracker report, the Tribunal is satisfied that he had given an explanation of his concentration around the Kilmainham area and that it was not unreasonable for him to seek to know how his proposal had been received by the Board. He was given no opportunity to make representations to the Board before it made a decision to dismiss him.

The Tribunal is not satisfied that the perceived refusal of the claimant to answer questions formed a basis for dismissal in this case. This was a storm in a teacup that escalated out of control. The claimant was suspected of improper activity for which there was no substantiation. The respondent was not entitled to jump to conclusions and dismiss the claimant without any vestige of procedure, fair or otherwise. The claimant ought, perhaps, to have been more forthcoming. The imponderable is whether he would have been so had he been made aware of

the fact of a disciplinary process and the risk of dismissal that he faced. He was denied that opportunity by the failure of the respondent to adopt any procedure, never mind a fair one.

The claimant has had a limited amount of work since his dismissal and is now on jobseekers' allowance. While the Tribunal is not satisfied with his efforts to mitigate his loss, it was accepted in evidence on behalf of the respondent that, in the current climate, a general managerin his fifties would not find it easy to secure further employment. The Tribunal is satisfied thatcompensation is the appropriate remedy in this case and awards the claimant €120,000 as beingjust and equitable in the circumstances, pursuant to his claim under the Unfair Dismissals Acts,1977 to 2007. The claimant was notified by letter on the 30th April 2010 that his employmentcontract would be terminated on the 13th May 2010 therefore the claim under the MinimumNotice and Terms of Employment, 1973 to 2005 is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)