EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:	CASE NO.
EMPLOYEE, **- Claimant**	UD1688/2010 MN1643/2010

against

EMPLOYER - **Respondent**

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1967 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P. Hurley

Members: Mr T. L. Gill
Ms S. Kelly

heard these claims at Nenagh on 31 May
and 6 September 2012

Representation:

Claimant:
Respondent:

The determination of the Tribunal was as follows:

The claimant was employed as a mine operator on a fixed-term contract in the respondent's underground lead zinc mine from November 2005. In November 2006 the claimant was awarded a contract of indefinite duration.

Initially the claimant was engaged in shift work as a result of which he was remunerated for 90 hours per fortnight for 85 hours work. One hour per shift being paid as overtime at time and a half. The claimant, whose work initially was with the service crew, became responsible for underground stores, typically hoses and cables, from October 2006.

As a result of this move to underground stores the claimant switched from shift work to day work. All employees of the respondent are required to clock in and out on the respondent's time management system (TMS) for health and safety purposes in the event of an incident at the mine.Additionally hourly paid employees are required to get their timesheets signed by their shift boss(supervisor). In the claimant's case, as he did not report to a particular shift boss due

to his worktaking him to various parts of the mine, the arrangement for the claimant was for his timesheet to besigned by a mine captain (effectively the shift manager).

Once the claimant reverted to day work his time sheet codings would only entitle him to be paid for 85 hours per fortnight. It was common case that the claimant was entitled to be paid for 90 hours per fortnight despite his being on day work. This was an issue where other employees in the same position as the claimant had approached the payroll section and the anomaly had been rectified. It was again common case that the claimant had not approached payroll section about this matter.

On 5 October 2009 the assistant accountant payroll (AP) observed the claimant making alterations to his time sheet despite it already having been countersigned by a particular mine captain (MC). It is the respondent's position that, when challenged about this by AP, the claimant told her that hehad forgotten to claim for a Saturday. AP then checked TMS and found that there was no record ofthe claimant on TMS for the Saturday in question (26 September 2009). AP reported this to themine manager (MM) and he instructed her to begin an enquiry and report her findings to the minesuperintendent (MS).

AP's investigation revealed that the claimant was the only anomaly for 26 September 2009 but that there were 35 other Saturdays and one Sunday for which the claimant had submitted timesheets with no record on TMS going back to 28 October 2006. MC was one of four supervisors who had signed the claimant's time sheets containing the 37 days in question.

When MS conducted an investigation into the 37 days in question he was unable to find any stores requisitions signed by the claimant on any of those days in the preceding twelve months (the length of time requisitions are kept) but did find requisitions signed by the claimant on all but one of the Saturdays he was on TMS in the previous twelve months.

MS, MC and the Human Resource director (HR) met the claimant with two shop stewards on 6 October 2009 and put the allegations to the claimant that he had been claiming on his timesheets for time not spent at the mine. The claimant declined to offer any explanation for the discrepancies and was then suspended with pay pending further investigation.

A disciplinary hearing was held on 15 October 2009 it was conducted by MS, MC and HR with the claimant accompanied by two shop stewards and his representative at this Tribunal hearing (TR). At the hearing the claimant had no recollection of altering his timesheet on 5 October. He asserted that MC had authorised him to put the Saturdays on his clock card. This assertion was rejected by MC. The claimant further asserted that he was authorised to claw back 390 hours at time and a half. It is the claimant's position that this meeting ended with an agreement that there would be a further meeting to discuss the claimant's entitlement to be paid for 90 hours per fortnight.

On 16 October 2009 MC issued a memorandum in which he completely denied the claimant's assertion against him.

On 21 October 2009 MS wrote to the claimant to inform him that he was being dismissed as there was no basis for claiming overtime for days that he was not on site. His actions in this regard were considered to amount to gross misconduct and his employment was to terminate on 22 October 2009. The claimant was advised of his right of appeal of this decision to the General Manager (GM). This letter was sent by registered post to the claimant the same day.

On 29 October 2009 the claimant sent an email, to the CEO of the group of which the respondent

forms part, in which he stated that he was currently suspended. He then set out his grievances and in doing so made serious allegations against MC's professional competence which, whilst alluded to in MC's memo of 16 October, do not form part of the notes of the disciplinary meeting. Thisresulted in a further investigation which exonerated MC of any question against his professionalcompetence.

The appeal was heard on 9 December 2009 and was conducted by GM, MM and the Human Resource officer. The claimant was represented by a shop steward and TR. The claimant's position was that there had been a clear understanding that there would be a further meeting after the 15 October meeting. The claimant's appeal against dismissal was rejected.

Determination:

At the disciplinary meeting the claimant raised the issue of his being underpaid. It was common case that the claimant had not raised this issue earlier. The Tribunal is satisfied that, had the claimant not been dismissed over the issue of being paid for non-attendance, there would have been another meeting to rectify the claimant's pay situation. As far as MS was concerned the 90/85 issue was separate and distinct from the issue of pay for non-attendance. When the claimant was asked for an explanation as to why he was being paid for non-attendance on Saturdays he stated that this was on foot of an agreement with MC. It is common case that the claimant was entitled to be paid 90 hours per fortnight but was in fact paid 85 hours per fortnight. This means the claimant was underpaid to the extent of some ten hours per month. Over the 36 month period where the respondent alleged that the claimant was being paid for time not spent at work he was receiving some fifteen hours pay per month. Not alone was the claimant attempting to implicate MC in the issue, he was suggesting that MC was seeking to reward the claimant with more than his agreed entitlements. Whilst MM was the person who flicked the switch to start the investigation there was no suggestion that he played any part in that investigation or in the deliberations of the disciplinary meeting. The Tribunal is in no doubt that it was entirely reasonable for the respondent to conclude that the claimant was guilty of gross misconduct in claiming pay for non-attendance. Accordingly, the dismissal was not unfair and the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

This being a dismissal for conduct the claim under the Minimum Notice and Terms of Employment Acts, 1967 to 2005 also fails.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)