EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	CASE NO.
EMPLOYEE – *claimant*	MN1906/2009 UD2029/2009

Against

EMPLOYER
- *respondent*

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J Flanagan BL
Members: Mr J Reid
Mr F Barry

heard this claim at Dublin on 29th November 2010
and 3rd May 2011
and 6th May 2011
13th September 2011
14th September 2011

Representation

Claimant(s): Mr Tom Mallon BL instructed by Ms Ruth A O'Connor, O'Connor, Solicitors, 8 Clare Street, Dublin 2

Respondent(s): Mr Ercus Stewart SC instructed by Alisdair Purdy, Purdy Fitzgerald, Solicitors, Kiltartan House, Forster Street, Galway

The determination of the Tribunal was as follows:-

Opening statements

The legal representative for the respondent advised the Tribunal that fact of dismissal was in dispute. The respondent considered the parting of ways between the parties to be amicable and by mutual agreement and not amounting to a dismissal. It was the respondent's case that it had acted reasonably by trying to resolve issues the claimant had with a fellow pilot but the claimant did not respond to offers put to him by the respondent. The claimant brought about the termination of his employment.

The legal representative for the claimant said that it was his case that the claimant had been dismissed the respondent. He brought to the attention of the Tribunal the form T2 filed by the respondent, which makes it clear that the respondent regards the claimant as having been dismissed. No reference is made in this form to an amicable parting of ways. The respondent fired the claimant on 13th May 2009.

The claimant had worked for a period of time since his dismissal but is currently unemployed. The claimant estimated that his gross financial loss to date is €193,780.00.

Claimant's Case

The claimant gave evidence of his extensive experience and of the training he had undertaken since 1993 and prior to taking up employment with the respondent in February 2003. The claimant flew a Lear Jet 31A and he had to go to the USA for training. The claimant was on call twenty-four hours a day seven days a week and he took his holidays around LG's free time. Every six months the claimant went to the USA for training. The claimant was given two days notice of a flight. The respondent had a freelance co-pilot and he was a full time employee and was paid a per diem allowance. The claimant paid PRSI and PAYE. While working on the Lear Jet he received €70.00per diem. When LG bought the Citation 10 the per diem rate was increased to €100.00. When the claimant was away from home the respondent paid the cost of his hotel. The claimant flew the LearJet 31A for more than a year and then LG upgraded to a Citation 10. The Lear jet required a pilotand co-pilot. TS was the co-pilot at the time and he worked when needed.

As well as flying the jet the claimant had to co-ordinate everything. Among other things, the claimant tried to buy the cheapest fuel. The respondent had an employee who looked after the cleaning and maintenance. The jet did not have cabin crew. Seven to eight passengers could fit in a Lear Jet. The claimant was sent to Kansas for training in 2004. TS and the claimant were the only pilots at this time and TS undertook the course ahead of him. The claimant then undertook training and was qualified on the Citation. The respondent needed another pilot if the pilot or co-pilot were on simulator training. Originally JB was hired and then PQ. JB was the backup pilot and paid on a per diem rate. PQ was based in Dublin airport. The claimant continued as a full time pilot available on a twenty-four seven basis. In October 2008 Falcon replaced the Citation and the claimant was the only full time pilot. JB did not fly the Lear Jet and when JB discontinued flying PQ replaced him. LC was LG's personal assistant who co-ordinated and obtained approval from LG. The Citation X could fly to USA non-stop and he flew to the USA and to Australia many times. One could fly to South Africa or Mexico non-stop on the Falcon 2000 but it was not as fast as the Citation X. The purchaser decided on the fit out of the plane. The claimant decided what was needed up front on the Falcon. Dassault was working with a new product, which was called LX, the only difference was that it had winglets and there was a delay in obtaining the winglets. LG gave instructions to purchase it without winglets. LG decided to sell the Citation X and this was sold before the delivery of the Falcon. It was in a hanger in Dublin for six eight weeks.

The claimant flew the Citation to Switzerland to the new customer who was a Russian. He was still employed by LG at this time. The claimant flew the plane to Moscow with RD who had replaced TS. As far as the claimant could recall RD was on a salary. The claimant flew from the UK to Moscow to deliver the aircraft with the approval of LG. The claimant thought he took time off work around the time he and RD flew the Citation to Moscow. RD parted company with LG and went to work elsewhere. The claimant was asked to fly the Citation in Russia. He was still an employee of LG but the new owners paid for his hotel. His salary was still paid in Ireland. The claimant remained in Moscow for two or three weeks. He had to leave Moscow quickly to go to Basle at the

end of October 2008. The claimant was not aware of an agreement between LG and J regarding his salary. The claimant was in Basle for a week to nine days and he ensured there were no glitches. He undertook a few test flights and he ensured that all spares were on board. DD flew with him and LG hired him on a daily rate on the claimant's recommendation. Both the claimant and DD were trained on the Falcon. The claimant had qualified to fly the Falcon in June 2008. PQ was not type rated before then. SQ's pilot was available at a per diem rate and he was type rated for Falcon. The claimant undertook his training in the USA. The manufacturer provided HZ to give training. A ceremony took place and LG and his wife came over and the claimant flew the plane back to Dublin.

It was while he was in Moscow that S, the purchaser of the Citation X, asked the claimant to become his pilot. The claimant told S he could not do so as he was committed to LG and he could not just up and quit. The claimant sent a text message to LG from Moscow. The claimant did not know when LG was due to take delivery of the airplane. S wanted the claimant to work for him full time. The claimant made a proposal to LG of an arrangement such that he could fly both planes. The claimant could not recall receiving a text on 25th October some minutes after he had sent the previous text. When the claimant arrived in Dublin LG asked him to go with him to the lounge. LG brought up the text and he told the claimant that he would have to look into it. The matter was not discussed further and the claimant did not think that LG was annoyed. On 31st October the claimant flew from Basle to Dublin. The claimant's next discussion with LG about this matter occurred one and a half months later. He recalled LG mentioning being "orphaned". On 23rd December 2009 he met LG in Ardee. LG told him that he had hired PQ as a pilot and he thought that the claimant was going to leave him. The claimant told LG that he was absolutely not going to leave him. The claimant told LG he wanted to discuss a 50/50 schedule that would also allow him to fly for S in Russia. From October to December 2009 he had not flown for anyone else other than LG. The claimant had flown to various locations during the time including Cape Town, Mexico, Ghana and Switzerland. Throughout this period LG did not say anything to the claimant about terminating his employment. DD was flying with him and they had a back up pilot if they needed it. The Mexican trip was for training and RH and HZ were with him.

On 23rd December 2009 the claimant attended a meeting with LG at his head office. It was an amicable meeting. LG told him that PQ was going to be recruited. PQ was in a simulator in January after they were trained. On 11th February 2009 while PQ was undergoing training there were three on the flight. In February or March 2009 LG did not make any comment about the claimant quitting. The claimant was working three weeks on and one week off and his per diem was reducedfrom €100 to €55 and he had no idea why this was so. In Jan uary or February there was nosuggestion that the claimant was going to work any alternative arrangement. In March 2009 theclaimant flew to the USA and he remained in New York for three days. On 5th April 2009 PQ flewwith the claimant to New York. The claimant flew to Augusta and he left there on 13th April 2009and he flew to New York and then on to Dublin. The claimant had some issues with PQ's flyingduring the trip. The claimant accepted that LG's sister-in-law had sat in the pilot's seat and said thiswas not an issue with LG. There was no danger in permitting her sitting there while the aircraft wasflying straight and level. There was a danger if the plane was descending or ascending. The claimant had an issue with PQ on departure. The claimant told PQ to increase speed by twenty knots and PQ had reduced it by 20 knots. They had experienced strong turbulence. As far as theclaimant was concerned these were professional issues and not personal issues.

The role of the co-pilot is to offer support and assistance to the pilot. DD was the backup pilot and the claimant spoke to DD about PQ's flying. The claimant was in South Africa for two weeks and

during that time DD had issues with PQ. The claimant and DD compiled a letter on 14th April 2009 and the claimant signed it and sent it to LG. The claimant was critical of PQ regarding flight safety and he requested that LG keep the letter confidential. He had a meeting with LC and he believed that DD was at the meeting. He met SB prior to the commencement of the meeting. SB interviewed him and then interviewed DD and PQ. SB asked him for the sequence of events. This meeting took place in the office in the Board Room. SB questioned him and LC was present. After interviewing him they left the room and DD was interviewed. LC did not provide him with copies of notes. He never saw a report and he was never informed that there was a report. The allegations he made against PQ were serious. He had expected a full investigation would take place after making these allegations. The claimant and DD refused to fly with PQ and this was based on professional concerns. The claimant last flew with DD on 15th or 16th April 2009 to Birmingham and back. As far as he knew that was the end of it and whether the claimant undertook further flying duties was entirely up to LG. Under his old regime the claimant was not required to report in on a daily basis. The claimant did not meet B and LF in one room together. After the 14th April 2009 The claimant had no more contact with SB.

The claimant did not accept that at a meeting on 29th April 2009 his employment had terminated. At the meeting a very nice lunch was laid on and they had a general discussion. The meeting concluded by saying that it was to clear the air and resolve the issue; there was no mention of being fired. There was no note after the meeting and no notification of termination. The claimant did not resign from his employment. The claimant thought he was paid for April 2009. The claimant never received a letter to inform him that his employment had ended. The claimant was not paid in lieu of notice. He could not remember if he was paid expenses. The claimant did not think that it was appropriate that he fly under protest and he declined to return to work.

The claimant sought alternative employment immediately. He almost obtained a job on a similar Falcon. The claimant had asked LG to send him on a training course but LG did not want to spend money on it. Had the claimant done recurring training he would have been employed. The claimant applied to AMC and was successful. He underwent training in Orlando at his own expense of €14,500 in August 2009. He obtained work in July 2009 with a company in Dubai and he flew to Paris, Jordan, Oman and Turkey. They agreed to pay him €15,000 for this and he received cash of €7,000.00. It was more advantageous as it kept him current. The next work he obtained was in the UK for two or three months. He was paid on a daily rate and would claim by way of invoices. There was no possibility of getting work in Ireland and so it became necessary for the claimant to work overseas. He undertook freelance work for which he earned €6,000.00. He had a full time position with AF until end of November 2010. He is still flying and will probably have to go to the Middle East and work in Saudi Arabia or the United Arab Emirates. Since his dismissal he has filed all of his tax returns. His total earnings were €181,000 and he spent approximately €43,650.00 on outgoings and the costs of recurrent training were factored into this amount.

At no time was the claimant informed by his employer about the outcome of his complaints. LC and LG did not advise him of a reason for ending his employment. He was not offered any alternative. He was not involved in an amicable termination of his employment; he did not agree to be dismissed. He believed that he was to be given three months notice in the event of his employment being terminated.

On the 6th May 2011 examination in chief continued. The claimant did not receive a witness subpoena prior to 11.15am on 6th May 2011.

He did not have his logbook for the last couple of years, as he had lost it in Russia. A technical log

showed details of his flights. Some employers required a logbook. The technical log showed the company he worked for and the flight times. If someone wanted to check details the technical log was more beneficial. His salary in later years was €100,000 per annum. He received €100.00 per day when he flew and he received a cheque for this. On average he received approximately €1,500 in per diems. He undertook recurrent training once or twice a year and the requirement was for once a year. His current salary is €81,683 and he receives €75 per diem.

In cross-examination the claimant accepted that he had a personal responsibility to have a flight log but that once he had a record that was sufficient. He has been flying commercially since December 1993 and he is a pilot since the late 1980's. He could not recall if he issued a letter to his solicitor in November stating he was unemployed. He said that he was never dismissed; he thought he was employed by LG and no one told him he was dismissed. When he did not hear from LG he looked for alternative work. Later that year he commenced work in Dubai but he did not get paid. Not every employer would look for his logbook and five employers did not ask for his logbook. LG never asked him for his logbook. The year before he had applied to CJ, an airline, for a position and his father was a shareholder in CJ. The company his father owned had a private jet in 2009. He felt that it was best not to apply to his father's company for a job. Between 23rd November 2010 and 7th December 2010 he undertook freelance work.

The claimant said €85,000 was a fair amount to claim for the loss which he had incurred. After he stopped working for LG he decided that he would not go to work for an airline again. His preference was to work with whoever paid him well. He earned €181.683.92 and he had numerous outgoings. The claimant had six or seven logbooks in total. The last logbook he had was for 1999. He lost a logbook six months ago in Russia before the last Tribunal date while he was on an airline going to Moscow. He did not report the loss of the logbook, as he was scheduled to catch a plane. He lost a uniform at that time as well as the logbook. The claimant had been in Dublin since Tuesday. He did not report the loss last November as he had his back up on file and he could view the back up on computer. He had possibly more details on his computer and when he had the time he could reconstitute his logbook. If he was able to provide the logbook the registration of the plane would be recorded on it. He would know the plane he was on. His logbooks up to 2008 were missing. He stated that logbooks were not that important. He was obliged to keep a logbook, but he had records of all flights for every time he flew.

His per diem rate of €55 was never documented in a contract. He could not remember if his per diem rate in February 2009 was €55. He included per diems as earnings. He received a cheque in respect of per diems. When asked about the text message of 25th October 2008 he stated that the text was for LC on that date. He sent the text while he was in a hotel in Moscow. He had been in Basle for over a week. While there he received a call to do a quick flight to Moscow as the new owners S and D needed the plane.

The claimant said that he was in the process of taking care of his taxes. The business pays him from his bank account in Lichtenstein. None of the jobs he applied for requested him to have a logbook. He did not apply to CJ. When he came to work with the respondent he was doing freelance work with a company in the UK and he did not have a permanent job. CA owned a lease jet and he was capable of flying for CA. When he was in the hotel in Moscow he was helping out with the plane. He possibly was paid per diem between 21st October and 31st October. While he was staying in Moscow he had to do a trip. He flew to Switzerland on the 21st October. LG sold the airplane for a substantial amount of money and LG asked him to co-operate with the new owners. On 19th October 2008 he flew from Moscow to Zurich and on 23rd October he flew from Zurich to Moscow and JC paid for the flight. He was not given cash for this flight. He could not recall if he was being

paid a per diem while he was in Moscow.

The claimant agreed that he had made serious allegations against PQ. The letter dated 14th April was typed. The letter was a joint letter, which was compiled by the claimant and DD. He did not ask P an employee anything specific about PQ who was a pilot for twenty five years. The claimant was a pilot with C and when he flew with PQ he was employed with the respondent. He disagreed that LG went to huge expense to improve safety and standards of safety. He did not know how many times he flew with PQ and he was unsure of the dates he flew with PQ. An incident occurred with PQ on 5th March 2009. As a result of the incident he wanted an internal investigation undertaken. The claimant wrote a confidential letter to LG. He was of the view that his letter was for LG and that it should not be made known to PQ.

The claimant accepted that if there was an incident with a pilot he was obliged to report it to the relevant authority but not at that stage. The claimant took no action on the 5th or 6th March as either he and DD would be flying and they could keep an eye on PQ. In his view the incident was serious enough. After this incident the claimant went on holidays for two weeks to South Africa. DD was a training captain with the airline AL for many years and he was very experienced. When he flew to the USA with PQ, PQ told him that he was not very happy with DD's flying. The claimant telephoned DD. DD told him that there were problems with PQ and PQ told him that there wereproblems with DD. Both the claimant and DD had safety concerns regarding PQ. The claimant saidit was not up to the claimant to determine whether PQ should be dismissed or not. He wanted tobring his concerns to LG's attention. He accepted that he did not bring it to LG's attention for fortydays. He did not agree that he recommended PQ for the job. He knew PQ a long time and he neverknew PQ was hired until LG told him at a meeting in December. He did not welcome PQ's appointment.

The claimant may have said to LG that he had been offered another job. He had a lot of days off while he was on standby. The claimant was asked if at the time when PQ joined that there were no standards of any kind and no structure in the operating procedures he replied there was. The claimant said PQ did not try to reorganise things and he was not aware that PQ had concerns with the way he flew. PQ did not speak to him about his flying. LG was concerned when he received the letter from the claimant on 14th April. A meeting was arranged after the letter. The claimant had raised his concerns before writing the letter dated 14th April. The claimant was asked if SB was an appropriate person to carry out an investigation ant the claimant replied that he had a lot of admiration for SB. When it was put to him that LG honoured his demand to maintain the confidentiality of the letter he replied that certain contents might have been disclosed.

The claimant went on trips to San Antonio because his dentist was there. He was told that he had to stay not too far away from the aircraft. PQ was three hours away from the aircraft. It was not unsafe to allow a passenger sit in the pilot's seat. LG's son sat in the pilot's seat in flight and nothing was said to him. It was put to the claimant that PQ took issue with him when he put a passenger in his seat while he was in the toilet. The claimant explained that a flight takeoff was aborted because a very large flock of birds was on the New York runway. The checklist was compliant. The APU,which is a small door, was part of the checklist and it had to be closed. The claimant had recommended PQ in 2003 as LG wanted a cheap solution. The claimant did his line training withD. He completed the full course in Texas. He could not recall if he spent time talking to his brotheron the telephone on 5th April. He had to have the telephone switched on as LG could tell him hewas arriving late. On 5th March PQ was the pilot, the claimant was in the jump seat, and PQ wouldnot take their advice and he nearly stalled the aeroplane. The claimant had not been in this situationbefore. The claimant knew that LG was concerned about his letter of 14th

April.

At the end of 2008 and early 2009 he did not think he was employed by LG. He was committed to the Falcon. That is why he sent a text to LG. He was now working for Russians as a slot had opened up. He could not recall if he rejected options at a meeting on 29th October. He did not recall saying it was him or me in relation to the dismissal of PQ. The claimant was asked if LG had asked him to contact LC to tidy up matters and he replied that LG was a bit vague when he said that. At the meeting on 29th April he met LG and he left the meeting on good terms. The claimant agreed that he never indicated to LG he was going to take proceedings against him. He was confused with everything that was going on. He was then actively seeking work. He believed that should not be rostered with PQ.

Counsel for the claimant estimated that the claimant's losses to date were €85,087.82 and counsel for the respondent estimated that the claimant had a nil loss.

Submissions of Counsel

The representative for the respondent submitted that the claimant had not been dismissed. The claimant had stated he was still employed by the respondent in September 2009. On 29th April the claimant did not receive a notice of termination of his employment when he had lunch with LG. The claimant told LG that he did not feel safe flying with PQ. LG told him they needed to resolve the issues. The conflict was not resolved and the claimant no longer wanted to work with PQ.

The claimant had been asked what other options had been suggested. It was put to the claimant that LG had asked him to try to resolve the issues and the claimant agreed that he had been asked. It was clear that working with PQ under protest was not acceptable to the claimant. The claimant refused to return to work. Counsel for the respondent stated that the claimant was not dismissed; LG had asked him to go back to work and the claimant told him that he was not going back. The claimant chose not to accept offers by LG. The claimant and his colleague both said they would not work with PQ. LG had tried to resolve the matter and had offered three options to the claimant.

The representative for the respondent asserted that the Tribunal has to determine if there was a dismissal. If there was no dismissal then the other issues raised by the claimant are superfluous. The claimant had made a claim for three months notice but that is not the issue. The issue is that there was no dismissal. He requested the Tribunal to dismiss the claim at the close of the claimant's case as on the claimant's evidence it was clear that the claimant was not dismissed.

In response, the legal representative for the claimant made a submission that dismissing the claim at the close of the claimant's case was something the Tribunal should not and could not do in the circumstances. On the first day of the hearing both representatives had debated whether the respondent should give evidence first. The Tribunal then allowed the respondent to file a second Form T2. The evidence of the claimant was that LG did not tell him he was fired. There was no resignation. The Tribunal has to decide whether the claimant was (1) dismissed *simpliciter* or (2)resigned *simpliciter* or (3) resigned for reasons amounting to a constructive dismissal. Counsel forthe respondent did not say this was a constructive dismissal. The claimant did not say that he walked away because of a dispute with PQ. It is an absolute denial of justice to rule on the case before the Tribunal has heard from LG and to make a ruling on the case without hearing the employer's evidence. Working under protest is irrelevant to this argument. The claimant either hadresigned on 29th April 209 or he was dismissed on the 29th April

2009. Dismissal on the 29th April2009 is ultimately a matter of fact for the Tribunal and it was not appropriate for the Tribunal todismiss the claimant's case at this stage.

The Memorex case and unfair dismissal case number UD203/03 were handed in to the Tribunal.

The claimant's representative noted that in the course of cross-examining the claimant counsel for the respondent had stated that LG would give relevant evidence. This indicates that the Tribunal needs to hear the respondent's evidence in order to determine if there was a dismissal.

In his response to the submissions from counsel for the claimant, counsel for the respondent stated that he was fully cognisant of the Memorex case. He said that LG had been in attendance at the Tribunal for four days. Counsel for the respondent was making an application on his behalf for thedismissal of the claimant's case. He submitted that the Tribunal must determine the case on the basis of sworn testimony. The claimant had conceded three to four times that he was not dismissed.The letter of the 17th June 2009 is important in the context of the claimant's testimony. In this letterthe respondent offered to hold the claimant's job open until the end of the week and to allow theclaimant to return to work on the basis that the claimant would not be rostered to work with PQuntil the claimant's concerns had been addressed through the disciplinary or grievance proceduresand these issues would be dealt with speedily. Counsel for the respondent did not think that LGcould do any more. It was his submission that the Tribunal's jurisdiction to hear all the evidencearises where the claimant has discharged the burden of proof which lies upon the claimant to provethe fact of dismissal. Counsel for the respondent asked the Tribunal to dismiss the claim at the conclusion of the claimant's case. If this case is appealed he will raise the same issues before theCircuit Court and he would make a similar application.

Oral Determination

The Tribunal retired to consider the submissions made by both parties and then returned to give a brief oral determination. The Tribunal stated that it had found that the claimant had not been dismissed and therefore it was not necessary to hear further evidence. The Tribunal stated that a written decision would issue later.

Conclusion

At the outset of this case an issue arose as to whether the employer or the employee should proceed first. In the normal course, where the fact of dismissal is in dispute the employee proceeds first as the burden of proof is upon the employee to prove the fact of dismissal. Where the fact of dismissal is not in dispute but admitted then the respondent proceeds first as the burden of proof is upon the respondent to prove that the dismissal was not unfair. The respondent had initially filed a Form T2 stating *inter alia* that "The Respondent was left with no alternative but to terminate the Claimant's Contract of Employment following his refusal to fly with the Respondent's "new" Aircraft Captain". It also stated that the claimant had been paid his Minimum Notice. This Form T2 wasreceived on 22nd December 2009. A second Form T2 was filed by the respondent and received on 6th May 2011 in which it was stated that "The Claimant was not dismissed either unfairly or at all."

The Tribunal carefully considered whether the respondent ought to be permitted to change its defence and run a case denying the fact of dismissal after having admitted in its first Form T1A that it had dismissed the claimant. The Tribunal is conscious of its obligation to be a less formal forum for the resolution of disputes than the courts. A respondent is required to file a Form T2 but many

respondents do not file a Form T2 within the required time. Notwithstanding this failure, the Tribunal permits such respondents to defend themselves, as to do otherwise would be wholly disproportionate to the failure and generally unjust. In circumstances where a respondent appears before the Tribunal without having filed a Form T2 it has become a practice of the Tribunal to permit the respondent to proceed with its defence subject to the giving of an undertaking that a Form T2 will be filed in order to regularise the situation. In the Form T2 the respondent is asked to state if it is disputing the claims being made and to set out the reasons for doing so. In the form it is stated that the respondent will not be confined to the reasons given in the form. It is extremely common for respondents to fill in their forms in a most rudimentary and minimally informative way. Frequently the form merely contains the assertion that the claimant was not unfairly dismissed without further detail as to why this might be so. The Tribunal does not regard itself as akin to a court of pleading and there is no sanction levied against a respondent who fails to particularise its defence.

In this case the respondent altered its defence at the outset of the hearing (and filed a second Form T2 well after the commencement of the hearing) stating that it was denying it had dismissed the claimant. The Tribunal decided to permit the respondent to do so as the change was raised at the outset of the hearing and the Tribunal believed it unlikely that much greater prejudice was caused to the claimant than if no Form T2 had been filed or if a minimally informative T2 had been filed. The Tribunal stated that if any particular prejudice or disadvantage was caused to the claimant then that matter could be brought to the attention of the Tribunal and the Tribunal would endeavour to address that issue. Cases before the Tribunal are normally set down initially for a half day and where such a difficulty arises the parties usually have a period of months in which to adapt themselves prior to the next hearing (which in this case occurred some 5 months later) such that any sense of surprise or ambush has plenty of time to dissipate.

On many occasions throughout his evidence, the claimant stated on oath that he was not dismissed by the respondent. A submission was made by counsel for the respondent, in reference to these statements that the Tribunal must decide the case on the sworn evidence before it. It is not uncommon for witnesses before the Tribunal to deny they were dismissed when what was clearly intended is that the dismissal was constructive in nature. The Tribunal finds that the claimant herein so intended his evidence to be understood. The Tribunal understands the case before it to be one in which the claimant was claiming to be constructively dismissal and does not interpret this evidence of the claimant as an admission fatal to his case.

The essential fact of this case is that the claimant would no longer work for the respondent unless the respondent would terminate the employment of PQ.

The claimant wrote a confidential letter dated 14th April 2009 to LG. This letter described three alleged incidents involving PQ. It claimed that "these issues have come to threaten all our safety" and that "we cannot in good conscience say you are safe with" PQ. It was made clear that this letter was for LG and that its contents or existence should not be made known to PQ.

The claimant sent an email to LC dated 21st April 2009 stating "I may not have mentioned in our meeting last Wednesday that I no longer wish to fly with PQ, but I figured it would be implied given both [DD]'s and my serious concerns about him as discussed."

The claimant sent an email to LC dated 11th May 2009 stating "Following on from our meeting today, I just want to again confirm that there was no agreement or suggestion that I was intending to finish working for [LG]. I remain completely committed to my position at all times."

The claimant sent an email to LC dated 17th May 2009 stating "This is extremely confusing. Please confirm that I am still employed by [the respondent/LG] as I was a bit taken aback at your suggestion on the 11th of May that I might be finishing up with [LG] as this has never been suggested either to me or by me. I continue to be on call as always."

On 29th May 2009 solicitors for the claimant wrote to the respondent stating that the claimant had met LC on 11th May 2009 and that LC had indicated his belief that LG and the claimant had come to some mutual agreement to part company. On behalf of the claimant the solicitors denied that there had been any discussion in relation to part company. This letter referred to a meeting between LG and the claimant on 29th April 2009.

The solicitors for the respondent replied on 4th June 2009 at length. They referred to the meeting of 29th April 2009 stating that at that meeting "[the respondent] made it clear – and it was accepted at that time by [the claimant] – that given [the claimant's] refusal to fly with [the respondent's] 'new' Captain, ... , that [the respondent] was left with no alternative but to terminate [the claimant's] contract."

In this letter solicitors for the respondent went on to say that the main issue was the claimant's "refusal to work alongside and in subordination to [the respondent's] 'new' Captain." The solicitors for the respondent suggested that "this matter could be resolved by [the claimant] accepting the authority of the new working arrangements ..., under protest if necessary, whilst any grievances [the claimant] may have are dealt with in a structured way through the company's grievance procedure. This may entail [the respondent] re-opening and further investigating the complaints made by [the claimant]."

On 9th June 2009 the solicitors for the claimant responded at similar length and detail. The following excerpts seem to be of particular pertinence:

"The fact that [the claimant] is unwilling to fly with [PQ] is undoubtedly a matter of some importance however [the respondent] decided that [the claimant's] concerns about safety should be met with [the claimant's] dismissal ..."

"[The claimant] ... will not, even under protest, fly with [PQ] ..."

On 17th June 2009 solicitors for the respondent wrote to the claimant's solicitors stating that "[the respondent] is willing to hold [the claimant's] job open for him until the end of this week should [the claimant] decide to return. Further in this regard [the respondent] re-iterates his commitment to deal with any Grievance/ Disciplinary issue in as speedy a manner as possible. Also, to further assuage any concerns your client may have in returning to work [the respondent] is prepared not to roster [the claimant] with PQ until such time as matters are either resolved and/or concluded. [The respondent] would ask that [the claimant] again reconsider his position in this matter."

On 22nd June 2009 solicitors for the claimant replied stating that the claimant was "not prepared to reconsider his position in the circumstances".

On 30th September 2009 solicitors for the claimant posted a copy of the Form T1A which had been lodged with the Employment Appeals Tribunal.

The Tribunal finds that the claimant had decided that he would no longer continue in employment with the respondent unless the employment of PQ was terminated. This finding is based on the documents quoted above and which were admitted into evidence by both parties as well as the sworn evidence of the claimant himself.

The claimant had made what might appear to be serious allegations relating to the safety and competence of his co-worker PQ and the claimant had threatened to resign unless the employment of PQ was terminated. The respondent declined to terminate the employment of PQ and the respondent accepted the resignation of the claimant instead. Perhaps this may not have been outcome which the claimant expected or intended. The issue which the Tribunal must now decide is whether the respondent was justified in accepting the claimant's resignation or did the resignation amount to a constructive dismissal.

The Tribunal has formed no view as to whether or not the allegations against PQ were fairly or reasonably made by the claimant, or were true or of sufficient gravity to merit the termination of PQ's employment.

The Tribunal finds that the claimant sought to bring about the termination PQ's employment in circumstances in which PQ was not even to know that a letter of complaint had been sent to his employer the respondent, or that the claimant and DD had made any complaints against PQ, or what those complaints were. Had the claimant's demands been met PQ would have had his employment terminated without any chance to defend himself against the allegations made in confidence to his employer the respondent.

Essentially the claimant gave the respondent employer an ultimatum; to terminate the employment of PQ without fair procedures or accept the claimant's resignation. The Tribunal finds that the respondent made the correct choice and refused to terminate the employment of PQ without fair procedures.

The Tribunal notes that the respondent employer sought to deal with the claimant's concerns about the safety of PQ's flying and competence while at the same time respecting the confidentiality of the complaint by retaining the services of an expert who assessed the seriousness of the allegations. It is not clear to the Tribunal how the respondent could have gone much further in investigating the matter without breaching the claimant's own request for confidentiality.

The Tribunal therefore finds that the claims under the Unfair Dismissals Acts 1977 to 2007 and the Minimum Notice and Terms of Employment Acts 1973 to 2005 fail.

A number of cases were mentioned to the Tribunal. In Memorex World Trade Corporation v The Employment Appeals Tribunal [1998 No. 230 JR] the High Court refused an application for *certiorari*. The respondent made no appearance. The claimant appeared as a notice party. Carroll J held that the error complained of was an error within the jurisdiction and therefore the matter was to be resolved upon appeal. Carroll J considered the argument that as the applicant had been affected and was an aggrieved person then *certiorari* should issue *ex debito justitiae.* Carroll J held that the appeals procedure to the Circuit Court by way of a full rehearing was an adequate remedy and therefore exercised the discretion of the High Court to refuse to grant *certiorari.*

In Memorex the Employment Appeals Tribunal had heard from the employer's witnesses first and they had been cross-examined. The Tribunal then reached a conclusion at the end of the employer's case and found against the employer without hearing any evidence given in chief by any witness for

the employee and without any witness for the employee being cross-examined. In reaching its conclusion the Tribunal found against one of the employer's witnesses on credibility and additionally found that the claimant employee was unaware of certain facts. Carroll J held that the Tribunal erred in reaching a conclusion on the basis of the credibility of an employer witness without hearing from the employee witnesses and that in doing so there was a lack of balance between the parties which was contrary to natural justice. In this case this division of the Tribunal comes to no adverse conclusion as to the credibility of the claimant in order to base its conclusions and so the Memorex case is distinguishable to that extent. Furthermore, the Tribunal relies upon no claims merely put in cross-examination but bases its conclusions upon those uncontroverted elements of the claimant's evidence and the documentation which was admitted into evidence by both parties.

In Memorex, Carroll J stated that the Tribunal had breached its statutory duty to form a view based on all the circumstances and that discharging this duty involves hearing all available evidence including evidence relating to contribution and not merely evidence relating to mitigation. The precise wording in the statute is that "... the Tribunal shall hear the parties and any evidence relevant to the claim tendered by them ..." as per section 8(1) Unfair Dismissals Act 1977 [No.10/1977]. The Memorex case may also be distinguished from the facts of this case in that inMemorex the fact of dismissal was not in dispute but in this case that is the only issue which isbeing decided by this division and therefore evidence relating to contribution and mitigation is notrelevant evidence where the Tribunal finds that there was no dismissal.

The Tribunal is satisfied that it heard all relevant evidence which the claimant chose to adduce in his attempt to discharge the burden of proof concerning the fact of dismissal. The Tribunal has reached a finding that the claimant was not dismissed based upon the Tribunal's application of the relevant legal principles to the claimant's evidence.

In circumstances where the party proceeding first fails to discharge the burden of proof upon it the Tribunal considers it appropriate to reach a determination at the conclusion of that party's case as to do otherwise would impose unnecessary (and usually irrecoverable) costs upon the other party and subject the other party's witnesses to a superfluous examination in chief and cross-examination as well as waste the resources of the Tribunal itself.

Courtney v The Chartered Institute of Certified Accountants UD396/1988 and Kirwan v Primark UD270/2003 are both cases of the Employment Appeals Tribunal where the Tribunal found that the claimant had not been dismissed and determined the case at the conclusion of the claimant's case and without hearing evidence from the respondent.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)