

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIM(S) OF:  
EMPLOYEE – *claimant*

CASE NO.  
UD1178/2011  
MN1262/2011  
WT476/2011

against

EMPLOYER – *respondent*

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007  
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005  
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr P O'Leary BL

Members: Mr R Murphy  
Mr J Dorney

heard this claim at Dublin on 1st October 2012 and 18th December 2012

Representation:

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Claimant(s): Mr Dean Kelly BL, instructed by:  
Ms. Ailbhe Murphy  
Daniel Spring & Co, Solicitors, 50 Fitzwilliam Square, Dublin 2

Respondent(s): Mr Rory White BL, instructed by:  
EMPLOYER

The determination of the Tribunal was as follows:-

**Preliminary issue:**

The claimant was summarily dismissed from his employment on 25 May 2010. He lodged a claim with the Tribunal on 25 May 2011 under the Unfair Dismissals Acts, 1977 to 2007, Minimum Notice and Terms of Employment Acts, 1973 to 2005, and the Organisation of Working Time Act 1997.

The claimant's representative contended that while the claimant had the benefit of legal advice from late 2009 and into 2010 his solicitor did not advise him of the avenues available to him under employment legislation. That solicitor made a payment to the claimant in recognition of this on the basis that any award made by the Tribunal would be refunded to the solicitor. The claimant was no longer represented by that solicitor.

The claimant's representative made an additional argument for the late filing of the claim. The claimant has suffered from depression since late 2009 and is on medication for this reason.

As the claimant was summarily dismissed he has made a claim under the Minimum Notice Acts. Should the claimant succeed in this claim it would bring the Unfair Dismissals claim within a year.

The claimant's representative made reference to previous relevant cases heard by the Tribunal.

The respondent's representative contended that as the claim was not lodged in time the claim should not proceed. The claimant had legal advice at the time. He contended that the company would refute that the claimant was suffering from depression. The company was aware that the claimant has made a personal injuries claim for bullying and harassment.

The claimant gave evidence on the preliminary issue only relating to the period after his dismissal. He had suffered a nervous breakdown. He was on constant medication. He suffered from panic attacks and nervous complaints. His family life was impacted. He attended a GP and a psychiatrist. He had the advice of a solicitor from 2009 to 2010, but was not advised of the remedies available to him. He did not ask his solicitor to lodge a complaint on his behalf as he was not aware that he could. The solicitor compensated him for this on the basis that if he won an award from the Tribunal he would return the amount to the solicitor.

During cross-examination he stated that he submitted sick certificates to the company which stated "work related stress". He did not recall if they stated depression. He sought legal advice after his dismissal in order to initiate legal proceedings. The company doctor certified that the claimant was fit to return to work. He returned to work on 13 May 2010 after being on suspension from December 2009. He made it clear at the return to work interview with the HR manager that he was on medication and had doctor's appointments. He continued to be certified ill by his own GP. The claimant was dismissed on 25 May 2010.

The Tribunal considered that it was necessary to hear the whole case in order to decide on the preliminary issue.

### **Respondent's Case:**

The HR Manager gave evidence. The respondent company operates a motor dealership. Due to the downturn in the economy there was a decline in the industry. The company made redundancies in early 2009. The majority of their business was in retail and aftersales. They also operate a motorbike section where the claimant worked. He held a dual role of sales assistant and service advisor.

During an annual audit a stock discrepancy of €20,000 was discovered in the motorbike boots and clothing area. Two people, one of whom was the claimant, were suspended on 10 December 2009 on foot of an investigation. The other employee returned money to the company and tendered his notice. The claimant did not appear at a scheduled meeting on 14 December 2009 and submitted an illness certificate. The claimant returned from sick leave on Thursday 13 May 2010.

On Wednesday 12 May 2010 the witness held a return to work interview with the claimant. The claimant seemed nervous and explained that he was on medication. He said he was not happy to return but that he had to. He used foul language in relation to two members of

management and called them “spineless b\*\*tards”. He said that “if they wanted him out they’d pay him what he was f\*\*king due and he’d leave”.

The following Monday the claimant failed to attend work. The claimant’s manager reported to the witness that the claimant had sent a text to a colleague which stated that he was in a hospital emergency department and would come to work later. The claimant’s manager later reported to her that the claimant had visited the workplace looking battered and bruised. There was no contact from the claimant the next day or the day after that. On Thursday 20 May 2010 the claimant’s manager received a call from the claimant to say that he would not be in that week and that he was going to attend a fracture clinic the following Monday.

The HR Manager wrote to the claimant on Friday 21 May 2010 to request a sick certificate as he was on unauthorised leave. On Monday 24 May 2010 she received a phone call from the claimant. He was very angry, ranted and used foul language. . She made a contemporaneous note of the call. He said that if he could drive he would come in and “punch the head off” his line manager. He also made threats against two senior managers and said they were “going to get it”. He said that he would be in the following day and “if they wanted him out they’d f\*\*king pay me”.

The HR Manager was shaking after the phone call. She went to the Managing Director and informed him of the phone call. He called a meeting with the HR Manager and two other managers. They were worried that the claimant would carry out his threats. It was decided to report the incident to the Gardaí.

When the claimant arrived the next day he was brought to a meeting and informed that his employment was terminated. The HR Manager typed the letter of dismissal which the Dealer Principal signed.

During cross-examination the HR Manager agreed that the claimant had not threatened her during the phone call but she was afraid of him afterwards. She believed that a full description of the claimant’s injuries had been passed onto her. She was aware that contact had been made, but no certificate had been provided. She asked the claimant’s manager if a certificate had been provided and he said no. There was no reason that the claimant could not have contacted her directly as he had done previously. The claimant’s manager was no longer with the company and neither was the Dealer Principal.

The HR Manager was not involved with the claimant’s suspension the previous year. She was not HR Manager at that time. The office furniture was rearranged during the claimant’s absence to facilitate the display. Everyone was moved. No one had keys to the company as there was a security company. Different departments had different fobs. She did not believe that the claimant had a fuel card as only department managers held them. There was no desire to reduce staff. Redundancies were made in early 2009. The company has a bullying and harassment policy. There are notices in staff areas regarding dignity at work.

The Group Managing Director of the respondent company gave evidence. He did not have any involvement in the investigation into the stock discrepancy in 2009 or the claimant’s suspension. He did not have any involvement concerning the claimant’s sick leave. He was not involved in day to day issues with employees. The HR Manager came to him after the telephone call from the claimant on Monday 24 May 2010. Her office was beside his. She

wasshaken. She explained what the claimant had said. He called a meeting with the HR Manager and two other managers. He deemed it serious enough to report it to the Gardaí.

During cross-examination he stated that he had no recollection of asking a named individual to carry out an investigation into the stock discrepancy. He recalled that the other individual investigated had resigned. He was not involved in the decision to dismiss. It was the Dealer Principal who took that decision.

A company manager gave evidence. He disputed that the claimant's conditions of employment changed on his return to work from sick leave. He would not have had a fuel card or keys. There was no need to take any fob/swipe card from him as only two of the swipe stations worked. He saw the claimant briefly during the week he was absent. He looked shook up and had marks on him. He attended the meeting following the claimant's phone call to the HR manager. It was decided to report the incident to the Gardaí and that was all.

He attended the meeting the following day with the claimant and the Dealer Principal. The Dealer Principal explained to the claimant that he was being dismissed for gross misconduct. The claimant asked for the dismissal in writing. He did not explain himself or withdraw the comments.

During cross-examination the witness explained that he was asked for his opinion but did not make the decision to dismiss.

In response to the Tribunal the witness explained that after the first meeting he spoke with the Dealer Principal who told him that they could not have the claimant in the building and he would have to be dismissed. The witness agreed. He went to the claimant to summon him to the meeting. He could not recall if he explained why. He did not know if the claimant knew about the meeting in advance.

### **Claimant's Case:**

The claimant's General Practitioner gave evidence. On 16 December 2009 the claimant visited him and complained of stress from working long hours. The claimant told him that the previous week he had been suspended due to funds having gone missing. The claimant had suffered an acute stress reaction to this event. He prescribed the claimant anti-anxiety medication and certified him unfit for work. The claimant had not complained of these symptoms prior to this visit.

Two days later the claimant returned complaining of chest pain. He referred him to a hospital emergency department. The claimant had non-cardiac chest pain which is often stress-related.

The claimant visited again on 4 February 2010. He continued to suffer with anxiety. On 5 March 2010 he reviewed the claimant and found his condition to have worsened to depression. He prescribed anti-depression medication. On 15 April 2010 he found that the claimant's condition had improved. The claimant indicated that he intended to return to work. He next saw the claimant in July 2010. He continued the claimant on his medication.

On 6 December 2010 the claimant came to him for a respiratory condition. The claimant had

discontinued his medication in October 2010 due to the expense. His condition had worsened. The witness prescribed a cheaper anti-depressant drug for him. The witness stated that the claimant's condition would impact on his day to day life, decision making and that he would probably put things off

During cross-examination the witness stated that the claimant's illness was the reason for his absence. It was his and the claimant's decision as to when he should return to work. He did not see the claimant in May 2010. He spoke to the claimant on the phone and provided a fit to work certificate. The claimant did not attend him when he was injured in May 2010. The claimant was a patient of his since 2001.

A former General Manager from a sister dealership gave evidence. He contended that the Group Managing Director requested that he oversee an investigation into the stock discrepancy in 2009. He was surprised about the other employee's involvement as he had been responsible for his initial employment. He looked through the reports with the claimant's line manager and discovered that the stock discrepancy was less than the initial figure of €20k. He reported poor administration and work practices. The other employee had used the stock and kept it on a 'work in progress' list. There was evidence of breach of practice in the manner in which stock was being moved but he could not see evidence of dishonesty. He recommended that both employees return to work and considered the sanction of suspension as excessive. The Group Managing Director dismissed the other employee against the witness's advice.

The claimant did not attend the meeting with him. He submitted a sick certificate. The Group Managing Director said that the claimant would not be returning to work for the company. The witness was later dismissed by the company.

The claimant gave evidence. He was employed as a service advisor in 2007 in the motorbike section. He was suspended in December 2009 pending an investigation into a stock discrepancy. He was not told the details of the discrepancy. He was escorted out of the building. He received a call on 16 December 2009 from his line manager who asked him to attend a meeting. He was not told if it was a disciplinary meeting. He had sought stock reports and other documents but this was refused. He did not attend the meeting as he did not think he would get any justice.

The claimant received a phone from his line manager later the same day that he had attended his GP. His line manager read a letter to him over the phone. The claimant was told that he was no longer on suspension and that he could return to work. He told his line manager that he had been to his doctor and had been certified unfit. He asked for the letter to be sent to him. His line manager said that as he had gone on sick leave he would have to check. The claimant never received the letter.

When the claimant returned to work the furniture had been rearranged. His desk was in front of his line manager's desk. His line manager said it was so he could keep an eye on him. A different manager asked for his keys, fuel card and security fob. He believed that they wanted to make things awkward for him at work. He held a key to a pedestrian door to facilitate early morning motorcycle customers. He also had keys for clocking machines for warranty work. He had a fuel card to fill motorcycles on loan. He had a security fob for accessing the accounts office, the parts storage and ramp access.

On Monday 17 May 2010 he attended a *Swiftcare* clinic for injuries he had sustained during a fall over the weekend. He texted to say he would not be in to his colleague as the reception was

not yet open and he did not have his line manager's number. He called to work later to show that he was not faking an illness. His line manager was not happy that the claimant had not contacted him directly. He had a certificate for the 17 – 24 May 2010, but he said that the dates might change as he was due to go to a fracture clinic on Wednesday and so he might return to work sooner. His line manager said that he would not submit the certificate he had if he was going to produce a shorter one later as their insurance would not cover it.

On Monday 24 May 2010 he went to a fracture clinic. He received a registered letter as he was leaving the house. He did not respond well to the letter. He was not feeling well. He was on pain and anti-depressant medication. He rang the HR Manager. She said she had to check what was in the letter. He did not intend to assault anyone. The only physical threat he made was that if he could drive he would come over and “box the head off” his line manager. He believed that they wanted to get rid of him so he said if they wanted him out they would have to pay him. He apologised profusely towards the end of the conversation.

When he got to his desk the following day his line manager told him to attend a meeting. He asked if he could bring someone with him but Dealer Principal told him that he was to listen and that he was not in a position to make demands. He said that he was entitled to bring someone but the DP said he was not entitled to anything. The DP said that the day before he had phoned and made threats of violence against several staff members and that the Gardaí had been informed. He was summarily dismissed. He was not allowed to ask any questions or state his case. He had to take his belongings and leave immediately.

During cross-examination he stated that by the end of the phone conversation he had calmed down. He believed that the HR Manager was aware of the medication he was on and his condition. She did not sound scared. She said that he was not to come in the following day and that she would phone him later. He made a threat against his line manager only. He had said “if he could drive”, not that he was going to. He believed that his line manager had not passed on all the necessary information about his absence.

On his return interview with the HR Manager he made it clear that his dispute over how he had been treated when he was suspended was not over.

In answer to the Tribunal the claimant stated that the only thing brought up at the dismissal meeting was the phone call. His solicitor wrote to appeal but nothing happened.

The claimant gave evidence of his loss.

### **Determination:**

The Tribunal determines that exceptional circumstances prevented the claimant from entering his application in time due to his illness. This was because his illness would have prevented him from giving adequate instructions to his legal advisors. The Tribunal also noted that the employer did not afford the claimant the opportunity of being accompanied by a work colleague to the meeting, as required by the disciplinary procedure, at which he was dismissed. It also transpired from the evidence that was given by the employer's witnesses, the decision to dismiss was made before they gave him an opportunity of being heard and of answering the allegations made against him, contrary to their own disciplinary procedure.

The Tribunal finds that he is entitled to two weeks' notice which brings his dismissal date to 8 June 2010.

The Tribunal awards the claimant €13,000 (thirteen thousand euro) under the Unfair Dismissals Acts 1977 to 2007. The Tribunal awards the claimant €1048.08 in respect of two weeks' pay under the Minimum Notice and Terms of Employment Acts, 1973 to 2005. The Tribunal dismisses the claim under the Organisation of Working Time Act, 1997, as no evidence was adduced under that Act.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)