**EMPLOYMENT APPEALS TRIBUNAL**

CLAIMS OF: CASE NO.
UD220/2011
EMPLOYEE – ***claimant*** MN220/2011
WT58/2011 against

EMPLOYER – ***first named respondent***

EMPLOYER – ***second named 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: Ms K. T. O'Mahony BL
Members: Mr. B. O'Carroll
Mr. F. Dorgan

heard this claim at Nenagh on 5 October &12 December 2012
and 11 March 2013

**Representation:**

Claimant: Mr William O' Brien BL instructed by O'Meara & Co, Solicitors
Clare Street, Nenagh, Co Tipperary

Respondents: David Hodgins & Co., Solicitors, 11 Summerhill, Nenagh,
Co Tipperary

The correct identity of the claimant's employer and the fact of dismissal were in dispute in this case.

**Summary of Evidence**

The first named respondent (RA) was involved in the haulage business for several years and at the relevant time had around 14 trucks on the road. He operated as a sole trader for a number of years but got into financial difficulties and on the advice of his accountant set up a limited company (APT Ltd) which later amalgamated with (APC Ltd) of which RA is a director and employee. APC Ltd has 14 employees.

The claimant, who has thirty years' experience as a truck driver, commenced employment with

RA in October 2008. His duties were the transport of goods between Ireland and the UK. In late 2009 RA set up operations in the UK and purchased a small rigid truck for deliveries to sites in London. The claimant, having volunteered for the role, transferred to the UK in December 2009, where he was to organise the unloading and distribution of the goods and drive the rigid truck. Accommodation had not been organised for the claimant and on his suggestion RA bought a caravan on the site in which the claimant initially lived. The claimant took his instructions from RA over the phone and during RA's frequent visits. RA had no complaints with the claimant's performance at that time.

Glass insulation/processing began in the UK warehouse in or around late February 2010 and two other employees were taken on for that work. It was RA's position that, when the claimant accepted his offer to transfer from driver to warehouse manager in February 2010, he was transferred to the employment of the second named respondent and that this was explained to the claimant at the time. The second named respondent had been incorporated in September 2009. RA's wife and sister were its directors and while RA was neither a director nor employee of the second named respondent he helped with the running of the company.

The claimant's position was that he was never told that his employment with RA was being terminated and that he was being transferred to the second defendant. RA did not issue him with a P45. When he noticed the name of the second defendant on his pay cheque he contacted TM (the transport manager and accounts officer for the second defendant, who worked in the office back in Ireland) and she told him he had been transferred to the second defendant. The claimant's position was that the name on the trucks did not change. Once the glass fabrication commenced in the warehouse RA called over on a weekly basis as did EL who was from the glass company in Ireland. The claimant had no dealings with anyone purporting to be from the second defendant. TM's evidence was that on receiving the claimant's P45 from RA's accountants she commenced paying him from the second defendant's account.

RA's evidence was that the claimant's work performance deteriorated from February 2010:glass was missing and broken; customers were complaining about breakages. He had spoken tothe claimant on three or four occasions about his work performance/breakages but had notgiven him a written warning. The claimant denied receiving warnings.

On 27 July 2010 when the claimant was in the course of unloading a large unit sheet of glass by forklift, while being guided by another worker, the forklift rolled and the glass smashed against a van. The claimant informed the glass company and re-ordered the glass. RA phoned him, cursing and shouting down the phone at him and told him to get out of there and get on the next truck and to return to Ireland. The claimant understood that he had been fired over the phone. Another employee (AE) advised him to let RA calm down for a day or two. The claimant was hoping that RA would change his mind. A few days later RA phoned AE to ask if the claimant was still there and told him to tell the claimant to get out and get the next available transport back to Ireland. The claimant returned to Ireland that weekend.

RA accepted that he had contacted the claimant in late July 2010 and told him to get out and to get on the next truck home. His biggest client had just phoned him threatening to take the contract elsewhere and this would have had serious consequences for his business. RA was annoyed. He did not want the claimant working at the warehouse anymore. He intended returning the claimant to working as a truck driver.

A couple of weeks later the claimant contacted RA and when he subsequently met RA the

claimant requested payment for diesel and other expenses he had incurred relating to work in the UK. RA wanted him to pay for the damage to the glass, which amounted to £1,195.00. There was a dispute as to whether RA had asked the claimant for a letter of resignation and as to whether the claimant had demanded his P45 at that meeting. Dismissal was not discussed and RA did not enquire of the claimant why he had not returned to work. As far as RA was concerned the claimant wanted to leave. He was not dismissed. The claimant terminated his own employment.

The claimant disputed the assertion that he came to work under the influence of drink and pointed to the fact that he has been driving for 30 years.

A heavy goods vehicle driver (HD) who had worked for RA for some ten years told the Tribunal that he had worked for APC Ltd, of which RA is both a director and operator, since early 2012. Prior to this he had worked for around 10 years for RA when he operated as a sole trader. It had been explained to him in 2012 that he was changing from RA to APC Ltd and that there would be no change to his job or to his terms and conditions of employment. HD delivered glass to the UK warehouse 2/3 times per week and generally arrived at the warehouse at 9/9.30am. HD confirmed that a glass breakage occurred on 27 July 2010 when the claimant was unloading it by forklift and that the claimant suggested that they say the breakage occurred in transit. HD noticed a strong smell of alcohol from the claimant on a few occasions when he visited the warehouse but he had not reported this to RA.

TM's evidence was that both RA and the claimant told her in February 2010 that the claimant was transferred from RA (the sole trader) to the second defendant. The claimant phoned her asking about his pay 'now that he was working for' the second defendant. Subsequent to the claimant's commencement in the UK warehouse, a number of men had been employed to work there by RA; all employees in the UK warehouse, apart from the claimant, were employed by RA. Payslips were only issued if requested by the employees.

TM was aware that the claimant was responsible for a significant breakage in the UK in July 2010 and that he had been asked to return to Ireland as a result. About a month later the claimant rang her and requested his P45. When she asked him if he had 'left', the claimant confirmed that he had left and that he and RA had had an argument. TM prepared his P45 with a cessation date of 29 July 2010 in accordance with his instructions.

**Determination:**

There was a dispute as to who was the claimant's employer at the time of his alleged dismissal. The claimant's position was that RA, the first named respondent, was his employer and that he dismissed him in July 2010. RA's position was that the claimant's employment had been transferred to the second defendant, in February 2010. Having considered all the evidence adduced the Tribunal notes that there had not been any discussion with the claimant, nor had any prior explanation or notification been given to him of his purported transfer from RA to the second defendant, the directors of the latter being RA's wife and sister. The claimant was not furnished with a P45 at the time of the purported transfer albeit the respondent's evidence was that one was lodged with the Revenue. The claimant did not have any dealings with either of the directors of the second defendant. It was RA who told the claimant on 27 July 'to get out' and it was he who signed the respondents' appearance to the claimant's unfair dismissal claim. All the other employees working in the warehouse in the UK were employed by RA. The Tribunal finds that there was no reality to the claimant's

employment having been transferred tothe second defendant and is satisfied that the claimant was employed at all times by RA.Accordingly, the claimant has the requisite service to make a claim under the Unfair DismissalsActs 1977-2007.

The Tribunal must determine whether there was a dismissal on 27 July 2010. It is common case that RA phoned the claimant on 27 July and shouted at him to 'get out of there and get the first truck back to Ireland'. The claimant understood these words to constitute a dismissal and didnot report for work when he returned to Ireland a few days later. When words used areambiguous the Tribunal will look to surrounding circumstances to determine whether theconstruction put by the employee on the words used by the employer is reasonable. Followingthe claimant's return to Ireland RA did not make any contact with him when he did not showfor work and when they eventually met, which was at the claimant's instigation, no issue wasraised by the respondent about his not having returned to work. The Tribunal finds that RA dismissed the claimant. This finding is supported by the contents of RA's solicitor's letter dated28 September 2012, some two months later wherein, having set out the reasons, it is stated thatthe respondent had no option but 'to terminate his employment'. Having found that the claimantwas dismissed it must follow that the dismissal was unfair being without any or fair procedure.The Tribunal awards the claimant the sum of €50,000.00 in compensation under the UnfairDismissals Acts, 1977 to 2007.

The claimant was dismissed without notice. The Tribunal awards him €1,200.00, being one week's pay in lieu of notice under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

No evidence having been adduced on the claim under the Organisation of Working Time Act, 1997, that claim is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)