EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:	CASE NO.
Employee	UD1170/2006 MN767/2006
Against	
Employer	
Under	

UNFAIR DISMISSALS ACTS, 1977 TO 2001
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K.T. O'Mahony B.L.

Members: Mr. G. Phelan
Mr. T. Kennelly

heard this claim at Limerick on 4 February and 1 May 2008

Representation:

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Claimant:
Mr. James St. John Dundon, Dundon Callanan Solicitors,
17 The Crescent, Limerick

Respondent:
Mr. Peter Clein B.L. instructed by Ms. Caitriona Carmody,
Carmody and Company Solicitors,
Peach House, Shannon, Co. Clare

The determination of the Tribunal was as follows: -

The claimant was employed from July 1998 as a service engineer for the respondent which provides washroom and pest control services. The claimant was provided with a company car and his territory included Limerick, Clare and Tipperary with some work in Kerry. The claimant was involved in similar work with a larger multi-national company prior to joining the respondent.

The claimant's position is that before joining the respondent he made the managing director (MD) aware that he had a history of back problems. MD has no recollection of this. The claimant's first absence because of back problems was about a year and a half into his employment. When the claimant was absent from 25 April 2005 until 23 May 2005 the respondent asked if the problem was seasonal because it seemed to occur at the same time each year. The earlier absences were not

a problem for the respondent because the business was growing at that time and the other service engineers could fill in for the claimant in the free time available to them. However, as the business grew and the claimant's absences became more protracted the respondent had to employ part-time staff to cover his route. The claimant worked until 17 August 2005 and was then off until 25 June 2006, a period of over ten months. By letter dated 20 June 2006 the claimant was certified fit to resume work. In the letter his medical advisor recommended "non-operative management with physiotherapy using a core exercise stability programme". No qualification or limitation was put on the claimant's ability to work and the claimant returned to his normal duties on 25 June 2006. The claimant was off work due to his back problem from 25 to 31 July 2006 and then from 15 August 2006 until his employment was terminated in mid October 2006. The claimant had taken annual leave during the periods of his return to work. MD had met the claimant to discuss his future employment with the company sometime during the summer. MD could not remember whether this meeting was before or after the claimant's return to work in June but he remembered that the claimant was not walking in an upright manner when they met. It was the claimant's case that this meeting took place after the claimant's return to work in June.

Towards the end of September 2006 MD met the claimant and took his company car as another employee needed it; cars were sometimes borrowed from employees while they were on sick leave. On this occasion they discussed the claimant's return to work and his future with company. The claimant could not give a date for his return to work and was concerned that driving might cause a reaction with his back condition. He informed MD that he would be visiting an orthopaedic consultant in January 2007. MD raised the issue whether the claimant should consider disability. MD informed the claimant that two of the larger customers in his area were complaining about the lack of continuity in the service being provided to them; in-house training was necessary in those two cases. MD told him that he would be making a decision in the near future. The claimant replied, "You have to do what you have to do".

The claimant was called to a meeting with MD with a human resource consultant (HR) on 6 October 2006 and advised to bring a representative. The claimant's wife accompanied him. At themeeting the claimant was asked when he would return to work. The claimant had a medical certificate covering him until 16 October 2006 and an appointment had been arranged with an orthopaedic surgeon for January 2007 but he indicated that he might not be able to return then either. The claimant's position is that he offered to return to work the Monday following the meeting; the respondent's position is that the claimant was certified sick until 16 October 2006 andthe claimant's remark about returning to work was a throwaway line to the effect that he would return to work if he could but he could not. MD explained the difficulties his absence was causingfor the business and informed the claimant that dismissal was a possibility. The claimant did not contradict MD when MD referred to having told him at earlier meetings that his job was at risk. Itwas the claimant's case that it was during this meeting that he became aware for the first time thathis job was at risk. The claimant asked about the possibility of a redundancy package. He alsoenquired about the possibility of alternative work including that of supervisor. There was novacancy in the company at the time and in any event a supervisory position would involve moredriving. MD told the claimant that he would consider the matter and contact him. The claimant feltcertain that his job was gone.

Following this meeting MD knew that the claimant was unable to return to work. Neither the claimant nor his medical adviser could give a return-to-work date. MD established that a redundancy situation did not exist in the company. He took the decision to dismiss the claimant. The respondent's position was that MD accepted the medical certificates provided by the claimant and never felt the need to look behind them. Whilst the letter indicated the dismissal was to have

effect from 16 October 2006 the claimant did not receive this letter until 19 October 2006. MD offered the claimant an ex-gratia payment, equivalent to the employer's contribution to a statutory redundancy payment, on condition that he would sign a severance agreement. The claimant received the letter on 19 October 2006 and did not sign the severance agreement. In the meantime, around 12 October 2006 the claimant, having responded to a newspaper advertisement, found alternative employment as a handyman. While the annual mileage in this job was about 5,000 miles the work involved the full use of his back. He told the employer he could not start until 30 October 2006 because he would have to give two weeks notice to his employer. The claimant commenced with his new employer on 30 October 2006.

Determination

In general there is an onus on the employer in cases such as this, where the capability of the claimant to perform his work on medical grounds is under question, to obtain their own medical opinion on the issue. The claimant sought to rely on this point. However, the Tribunal must take allthe circumstances of the case into account. The fact in this case is that between 16 August 2005 andthe meeting of 6 October 2006 the claimant had only attended at work for about four weeks. On 6October 2006 the claimant, who was providing monthly medical certificates, was certified unfit forwork until 16 October 2006 and was scheduled to see an orthopaedic surgeon in January 2007. TheTribunal is not satisfied that the claimant offered to return on the Monday following the meeting of6 October 2006. It is satisfied that it was reasonable for MD to conclude, from his discussions withthe claimant, that he would not return to work before seeing the consultant in January 2007, even ifthen. The Tribunal accepts MD's position that he was relying on the claimant's medical advice. Inlight of the claimant's prolonged absence and his inability to provide a return-to-work date the Tribunal finds that the decision to dismiss the claimant was reasonable. The Tribunal notes that theclaimant had secured alternative employment before his dismissal. Neither side canvassed whetherthe claimant, given his evidence that the driving for the respondent exacerbated his back problem,would have resigned in any event.

Whilst the respondent's procedures fell short of best practice, in particular the failure to specifically inform the claimant that his position was under threat prior to the meeting on 6 October 2006, the Tribunal is satisfied that the claimant was aware that his job was under threat, particularly in circumstances where the problem of his absence was the subject matter of the two earlier meetingsbetween them and from the claimant's comment to the Managing Director at end of their meeting inSeptember 2006: "You have to do what you have to do". Having considered these facts the Tribunal finds the aforementioned failure was not fatal in this case. In all the circumstances of thecase, the Tribunal finds that the dismissal was not unfair and the claim under the Unfair DismissalsActs, 1977 to 2001 fails. The evidence having shown that the claimant was paid in excess of hisstatutory entitlement the claim under the Minimum Notice and Terms of Employment Acts, 1973 to2001 also fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)