

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:

Employee

– *appellant*

CASE NO.

UD1235/2008

against the recommendation of the Rights Commissioner in the case of:

Employer

– *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. J. Fahy B.L.

Members: Mr. B. O'Carroll
Mr. J. Le Cumbre

heard this appeal at Athlone on 26th February 2009
and 2nd September 2009

Representation:

Appellant(s): Mr. Adrian Kane, SIPTU, Georges Street, Newbridge, Co. Kildare

Respondent(s): Mr. Gary O'Mahony, IBEC, Ross House, Victoria Place, Galway

This case came before the Tribunal by way of an employee (*hereinafter referred to as the appellant*) appealing against the recommendation of a rights commissioner (*reference r-056948-ud-07/JT dated 11 September 2008*) under the Unfair Dismissals Acts 1977 to 2007.

The determination of the Tribunal was as follows:-

Respondent's Case:

The first witness (*hereinafter referred to as RK*) gave sworn evidence that he had worked for the company for over fifteen years in various roles and was currently a quality manager.

Prior to the appellant's dismissal, RK had worked with him and had, on occasions found him difficult to deal with. The appellant had been employed as a team leader on the weekend shift and had responsibility for five employees. His duties included managing personnel, ensuring that production targets were achieved and were of the required quality. The appellant was manufacturing products for a French customer and it was important that there was no contamination of the products. The cosmetic appearance of the products was important and it was a demanding position.

When RK reported for work on 16 July 2007, he was told by a table-man on line 11 that there had

been a lot of contamination issues over the weekend. RK observed at least ten sheets that had visible contamination from the production line which was operating the weekend shift. The quality of the product was the worst he had ever seen and dirt marks were visible on the sheets. Serious issues would have been raised if the products had been dispatched to the customer. There was no evidence that the contaminated sheets had been segregated or cut up and there was no record of this problem on the exclusion record sheet. More than 70% of the products had to be rejected because of contamination and one of the pallets which had gone for dispatch had to be retrieved. It was the responsibility of the production line to carry out quality checks and it had been the responsibility of the appellant to check that this procedure was followed.

An investigation was carried out and a meeting took place on the 20 July 2007. This meeting was attended by RK, the appellant, a shop steward, the table-man who had worked with the appellant on 15 July (*hereinafter referred to as AC*), and the production manager (*hereinafter referred to as TC*). The respondent outlined the seriousness of the situation and found the appellant to be uncooperative. The contaminated products were shown to him but he refused to make any comment. AC had been instructed to pack the contaminated products for dispatch by the appellant and was not instructed to cut up the defective products.

The appellant proceeded to work the weekend of the 22 July 2007. He was off duty the following week and the respondent made a number of unsuccessful attempts by telephone and by letter to contact him during that week. However, the appellant was uncontactable that week. He reported for work on the 27 July 2007 but the respondent had made a decision to suspend him on full pay which was conveyed to him by letter of the 26 July 2007. This letter also requested that he be in attendance at a proposed disciplinary meeting to be held on the 15 August 2007.

Following this disciplinary meeting, the respondent concluded its investigations and a decision was made to dismiss the appellant for serious misconduct and negligence in relation to the quality and breach issues. The central issue in relation to the dismissal was the issue of defective products and the second issue was the inability of the respondent to contact the appellant to arrange a meeting during the week ending 28 July 2007. The appellant had initially informed the respondent that he had not been in the locality during that week but later informed them that he was not at his home residence.

In reply to questions from the Tribunal, RK confirmed that the reasons for dismissing the appellant were 70% based on quality issues and 30% based on him not being contactable for the week ending 28 July 2007. He agreed that the respondent's dismissal procedure did not make any reference to poor quality of products as this was agreed with the union. There were some performance issues including timekeeping and bullying involving the appellant in the previous six to twelve months, but these only had a small relevance in relation to the dismissal.

In cross-examination, RK confirmed that the respondent had hired a Private Investigator to work for them, as it had been their belief that the appellant was in the locality when he was uncontactable. He agreed that three to four letters had issued to the appellant by registered post and by taxi during that week.

There was a credibility issue in relation to the appellant as he had given different responses to questions about scrapping of products. He first stated that he had not scrapped products during the weekend shift of the 15 July 2007 but at a later meeting stated that he had scrapped products.

Disciplinary action was also taken against AC, the table-man who worked alongside the appellant on

the shift of 15 July. He was not dismissed but received a final written warning.

The second witness for the respondent gave evidence that he was a Private Investigator and was instructed by the respondent to conduct surveillance on the appellant. On the 27 July 2007, he observed the appellant driving his truck within the locality between the hours of 9.30am and 10am. The Private Investigator confirmed that he did not carry out any surveillance prior to the 26 July 2007.

In his sworn evidence, the General Manager (*hereinafter referred to as KO'B*) explained that he had nineteen years experience in the plastics industry, had been with the respondent for ten and a half years and was its general manager for five of those years.

KO'B was aware of the appellant prior to July 2007. The appellant was a team leader. A team leader's duty was to run the weekend shift which included managing people, processing the raw materials, achieving production targets and safety. A team consisted of five people. It was the most important role on a weekend shift and was a very responsible position.

The appellant would have been well trained in leadership, such training being ongoing. Every Friday afternoon, team leaders came into the plant for two hours and met managers with a view to focusing on quality, efficiency, etc. The function of the appellant on the weekend shift was to keep production going. He was the most senior person in the plant on the weekends and had access to all managers by telephone if he encountered a problem.

The product produced on the 15 July 2007 shift was for a customer in France and was substantial. This French customer was a growing customer and was important to the respondent. There had been a previous problem in relation to the quality of a product supplied to this customer, which was rejected by them at that time.

The morning of Monday 16 July 2007 was a hectic time as all lines were starting in to production. That morning at 8.00am, RK – *the quality manager* – brought it to the attention of KO'B that the product produced on the Sunday night shift had quality defects, in that there were black smudges on the white sheets. KO'B judged that this product was the worst he had seen in his career in plastics and if it had been shipped to the customer, same would have been rejected at a severe loss to the respondent. He requested RK to conduct an investigation into what was reported and recorded in relation to this product. The appellant had been the operator in relation to this production line and was responsible for that production. He had operated with AC – *the table-man* – who had packed the product.

The union were not informed of this event on the Monday, as KO'B had not yet known what sort of problem he was dealing with. The union were informed on the following week and a meeting was held on 20 July 2007. Following his investigation, RK had outlined to KO'B that not enough care had been taken during the production and no report had been made of the problem – *the defect* – on the extrusion report sheets. It was on foot of this that the meeting of 20 July was called. Managers of the respondent including KO'B, the appellant and the appellant's shop steward attended this meeting. KO'B put the allegation to the appellant that an amount of defective product had been produced and that the respondent was investigating same. When offered an opportunity to reply to this, the appellant said that he had no comment. When pushed by KO'B, the appellant still made no comment, nor did the shop steward. However, the appellant knew that there was a problem. When offered an opportunity to view the defective product, the appellant refused as, he said that he did not want to be intimidated by walking across the production room floor.

Accordingly, a different route was offered to him to get to the store. The appellant then went to the store where he saw twenty or thirty defective sheets. He did not want to see any more of the defective sheets despite the offer being made to him. As the respondent was only in investigatory mode subsequent to the weekend of the 15 July 2007, KO'B had no reason to stop the appellant working the following weekend.

AC had also attended the investigatory meeting on 20 July 2007. The allegation that a defective product had been produced was also put to him and he was asked for an explanation. It was KO'B's recollection that AC had also viewed the defective product. Initially, the problem had come to light when AC had pointed it out to the incoming table-man on the morning of 16 July 2007.

Following the meeting on 20 July 2007, the respondent attempted to contact the appellant for a follow-up meeting for Monday 23 July 2007 but was unsuccessful in making contact. The purpose of this proposed meeting was also investigatory. The attempted contact with the appellant had been delegated by KO'B to TC – *the production manager*. As the respondent was anxious to move the process along and having failed to make contact with the appellant on Monday and Tuesday, KO'B wrote to the appellant by registered post on 24 July 2007 requesting him to make contact urgently so as to deal with the matters of 15 July 2007. He also wrote in a similar vein on 25 July 2007 and had this letter delivered to the appellant by taxi. The lack of a response from the appellant was becoming a concern and he was not on annual leave. The appellant – who only worked the weekend shifts – appeared for work on the following weekend but by that stage, he had been suspended. Despite being off during the weekdays, the respondent still had an expectation that they would have been able to contact him. KO'B agreed that the appellant was effectively off from Monday 23 July 2007 until Saturday 28 July 2007. However, both the appellant and AC had been asked at the meeting on 20 July 2007 to be available for further meetings during the following week and neither of them had expressed a difficulty with this. AC had been available and had met with the respondent twice that week.

On the evening of 25 July 2007 at 8.45pm, KO'B received a telephone call from the appellant's wife. When he told her that the respondent was trying to organise a meeting with her husband, she replied that he was in Dublin working with his brother and that he had left his mobile telephone at home. When KO'B offered to travel anywhere in Ireland to meet the appellant, the appellant's wife said that neither he nor his brother could be contacted. It was KO'B's belief that the appellant was in the locality at the time, though he did not personally see the appellant there that week.

Having failed to make contact with the appellant, KO'B wrote to him again by letter of 26 July 2007. The respondent did not want the appellant working on the following weekend, as they were fearful of the type of product he would produce if he worked. The investigatory meeting on 20 July 2007 was all that the respondent had completed by that date. In his letter of 26 July 2007, KO'B set out to the appellant that: -

- the discussions at the meeting on 20 July 2007 had been in relation to the defective product that had been produced, which was shown to him and the contaminations thereon highlighted
- he was advised that further meetings were required and that this serious issue – the production of defective product – could lead to disciplinary action including dismissal
- having considered his response to the serious issue, the respondent remained dissatisfied and therefore wished to hold a disciplinary meeting [*at a given time, date in mid August and location*], the meeting to be conducted by KO'B, that other members of staff may attend and the appellant could be represented.
- by way of letters and telephone calls, the respondent had attempted to make

contact with him since Monday 23 July 2007 and that the only contact had been a telephone call which was received by him – KO'B – from the appellant's wife

- his failure to respond to reasonable requests to make contact with the respondent was a serious issue and would also be addressed at the disciplinary meeting
- the respondent was suspending the appellant on full pay until the disciplinary meeting, that the respondent was on shut down for the following two weeks so it was not possible to conduct the disciplinary meeting prior to the given date and that the appellant was not required to work on the following weekend (i.e. 28 and 29 July 2007)

This letter was delivered to the appellant by taxi on 27 July 2007. He had been due to work that weekend, commencing Saturday 28 July 2007 at 8.00am. Most of the plant had closed on the Friday for two weeks but the weekend shift was scheduled to continue until the Monday morning.

The disciplinary meeting occurred on 15 August 2007 and the appellant had two representatives at the meeting. KO'B, TC and RK attended the meeting on behalf of the respondent. The allegation was put to the appellant that he had produced a poor quality product. The appellant replied that he had told the table-man to cut up the poor product, to speak to him – *the table-man* – as it had nothing to do with him – *the appellant*. KO'B did not accept this answer as AC had already said during his meetings that the appellant had told him to pack the defective sheets. Furthermore, no problems had been reported in the production at the closeout of the shift nor had any problem been recorded on the extrusion record sheet. The order had been for 3.5 tonnes. As the team leader and operator, it was the appellant's responsibility to complete the extrusion record sheet and sign off on same. He had not recorded any problems. KO'B viewed these extrusion report sheets every day and if he had viewed this particular sheet, he would have assumed that there had been no problems with the product without actually viewing the product. In relation to his lack of response to the respondent's efforts to contact him during the week of 23 July 2007, the appellant said that he had been in Dublin that week, had mislaid his telephone and so was not contactable.

The claimant's employment was terminated by way of letter dated 17 August 2007 from KO'B. In the letter, it was stated in part that he was aware:-

- a disciplinary meeting was held on 15 August 2007 and the subsequent meeting held on that day – 17 August 2007 – who had attended same, the allegations against him discussed and his responses at both meetings
- the performance issue in relation to the quality of production on 15 July 2007, the investigatory meeting on 20 July 2007 and the disciplinary meetings on 15 and 17 August 2007 which allowed him the opportunity to reply to the allegations, and having considered his responses, the respondent remained dissatisfied, that the issues were considered extremely serious in light of his supervisory role
- in relation to his refusal to contact the respondent when requested and his response that he was not at home on the specific dates nor did he receive the respondent's letters or telephone calls, that he was in Dublin all week, the respondent was dissatisfied with these responses, that matters of trust were considered extremely serious, especially given his supervisory position
- that when asked at the meeting on that day if he wished to say anything further or if he required any further information or evidence in relation to the allegations before the respondent made its decision, he had replied that he did not.
- that the respondent regretfully takes the decision to dismiss him from employment "for serious misconduct and negligence in relation to the quality and breach of trust

issues”.

- That he could appeal against this decision in writing to the CEO within five days of this letter

It was KO’B’s opinion that the dismissal of the appellant was warranted based on two issues:-

1. he as the team leader was responsible for but highlighted no problems on the extrusion report forms or at the closeout meeting on the morning of 16 July 2007 in relation to the product that had been produced on that shift
2. his failure to make contact with the respondent during the week of 23 July 2007 when requested to do so.

The appellant had been fully aware of the allegations that had been made against him and he had been allowed to check the defective product, and he had been given the opportunity to reply to the allegations. The decision to dismiss the appellant had not been taken lightly but if KO’B was faced with the situation again, he would do the same thing. The penalty of dismissal had not been too severe. KO’B confirmed that, due to the nature of the relationship that now existed between the appellant and respondent, he would not re-hire the appellant.

When put to KO’B that one of the grounds highlighted by the appellant in his appeal to the Employment Appeals Tribunal was the existence of his final written warning which was incorrectly considered by the rights commissioner as same was disputed and was out of time by over a year, KO’B replied that the existence of this warning on the appellant file had not been considered by them in their decision to dismiss him. It had been raised only in the context of history as it related to an issue similar to this one, where colour checks had not been done during production. The respondent’s focus had been on the two core issues.

A team leader sets up the production lines and does the checks of the product. The appellant was the operator who had responsibility for production on 15 July 2007. He had made no reports of problems during that production. Any operator or team leader who experienced problems during production would stop that production, report the problem on the extrusion report sheet and tell the table-man to cease packing a defective product. The problem that arose with this production was detectable by way of a visible check. It had also been open to the appellant to report the problem to TC – *the production manager* – at the closeout meeting on the Monday morning or he could have contacted any of the managers including KO’B by telephone during the weekend.

The value of the lost product in terms of its sale value was roughly €5,000.00 and involved 485 sheets on two pallets. Its recovered value on being recycled was €1,000.00, thus amounting to a sales loss of €4,000.00.

In cross-examination, KO’B confirmed that per his letter of 17 August 2007, the appellant had been dismissed for serious misconduct and negligence in relation to the quality and breach of trust issues. The existence of a final written warning on the appellant’s file had not been considered in the dismissal decision. KO’B did not accept that the breach of trust issue only was the appellant’s failure to make contact with the respondent during the week of 23 July 2007. His failure to make contact and his failure to produce a quality product, and report the problem on the extrusion report sheet, were all trust issues.

The disciplinary action imposed on AC arising out of the defective production of 15 July 2007 had been the issue of a final written warning and a period of one week’s intensive training from Monday to Friday. Thereafter he had been allowed to return to the weekend shift. The issue in question for

AC had been that he had packed defective product. He had no previous warnings on his record and he had made himself available for meetings during the week of 23 July 2007.

KO'B agreed that the appellant had probably not received a contract or terms and conditions of employment from the respondent. However, as a manager/supervisor, he would have been expected to be available for meeting during the week of 23 July 2007, and especially so due to the incident of 15 July 2007. The appellant worked a weekend shift of twenty-four hours but was paid for thirty-nine hours. Despite only working at weekends, KO'B maintained that it was not unusual to have disciplinary issued dealt with during a week, and if a disciplinary issue was serious enough, it could be dealt with at any time. Because of the severity of this incident, the respondent did not want the appellant involved in any further production without the disciplinary meeting being held. They had wanted to hold it during the week of 23 July 2007, if it had been possible.

RK was the person who had brought the existence of a defective product to the attention of KO'B and it was KO'B, RK and TC who had attended most of the meetings, both investigatory and disciplinary. All three had played a role and had an input in the decision at the disciplinary meeting to dismiss the appellant. KO'B agreed that, in the main, it had been the investigation team and the disciplinary team who had made the dismissal decision.

KO'B and other managers dealt with personnel issues. KO'B agreed that he was familiar with the respondent's disciplinary code, which had served the respondent well. He confirmed that no time limits in relation to warnings existed in the code. However, it was his view that a final written warning would last for a period of twelve months. KO'B confirmed that he was now aware of S.I. No. 146/2000 — Industrial Relations Act, 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order, 2000.

Previously, similar defective production issues had arisen with people on the weekday shifts that occupy the same position as a weekend team leader. However, their defective product had not been as severe as that produced on 15 July 2007. KO'B confirmed that these people had been disciplined with verbal and written warnings at the time, and their defective product had been recycled. He could not recall if the employment of any of these people had been terminated.

KO'B agreed that it was true that, at the disciplinary meeting, the appellant had said that he had told the table-man to break-up the defective product. Also, though the respondent provided no formal training courses, there was a lot of in-house training.

KO'B did not agree that the respondent's efforts to contact the appellant during the week of 23 July 2007 were overzealous. They had concerns that a defective product had been going to a customer where no reports of a problem with same had been reported on the extrusion report sheet or at the closeout meeting on the morning of 16 July 2007. It was the worst product he had ever seen in his experience. He had been desperate to contact the appellant and did not think that his efforts in doing this had been over the top.

KO'B described his relationship with the appellant prior to 15 July 2007, as been a difficult person to deal with. However, he did not hold this against him and had tried to concentrate on the issues during the disciplinary process.

Replying to the Tribunal, KO'B confirmed that time had been crucial to the investigation and he had wanted same concluded by the end of that week, the week of 23 July 2007. On Friday, it was decided to suspend the appellant on full pay. It had not been possible to have a meeting on the

Saturday or Monday as, by then, the plant was closed for a period of two weeks for annual leave and managers were not available. It was taken as a given in the company that supervisors would be available if required. It was the culture of the respondent that they could be contacted.

The appellant had been appointed as a team leader in June 2000. KO'B did not recall if this position had been imposed on him. However, there had been discussions with interested parties at that time. The difficulties that KO'B experienced with the appellant were post his appointment as a team leader.

KO'B confirmed again that the appellant had been dismissed for gross misconduct in the production of a defective product in his supervisory role, for not reporting the problem on the extrusion report sheet or at the closeout meeting and breach of trust in his failure to contact the respondent, when requested to do so. The deciding factors in his dismissal had been the quality issue and his role as a supervisor, which had been crucial. An alternative job had not been considered for the appellant. The written warning that the appellant had previously been issued with had been raised in the context of history but it had not been considered in the dismissal decision. KO'B confirmed that he would not now consider re-hiring the appellant for any job, but denied that, as plant manager, he had issues with the appellant.

KO'B was aware that the claimant's final written warning was out of date by the time of the incident on the weekend shift of 15 July 2007. This final written warning related to a similar issue of not checking production as required. At the rights commissioners hearing, this final written warning was referred to because it was out of date. It had not formed part of the basis of the decision to dismiss the appellant. The respondent had looked at the issues in relation to the production of defective product on 15 July 2007 and not at the appellant's final written warning.

In his sworn evidence, the CEO (*hereinafter referred to as JMcG*) confirmed that he had been with the respondent for thirty seven years. He had known the appellant throughout the entire period of his employment, as he knew all the respondent's employees, which at that time numbered about one hundred and thirty four.

JMcG – who had also dealt with the appeal of AC – met the appellant in a local hotel on 3 September for an appeal hearing. His secretary accompanied him. The appellant had no representative on that day. JMcG asked the appellant if he wanted a representative as he was entitled to one but the appellant indicated that he was happy and comfortable to proceed without one.

At the appeal meeting, JMcG and the appellant talked through the appellant's appeal letter of 21 August 2007 in detail, focusing on the reasons for his dismissal. JMcG's understanding had been that the appellant had been dismissed for negligence in his job in the production of a defective product and for loss of trust. JMcG had seen the defective product on 16 July 2007, it having been referred to him by KO'B, and it was of poor quality. It had been a product that was going to a very large customer and the defects on it were very visible.

The purpose of the meeting on 3 September 2007 had been to deal fairly with the appellant. At the meeting, the appellant stated that the product had been poor. He also said that he had told AC not to put the defective product on a pallet but to scrap it. However, JMcG did not accept this.

JMcG also dealt with the appellant's unavailability to the respondent during the week of 23 July 2007. The appellant's excuse for his unavailability was not credible, as JMcG had seen him in a store in the locality on a particular day that week. When JMcG highlighted this to the appellant, he

confirmed that he had been in the locality. He should have been contactable by telephone and the respondent would have been prepared to travel anywhere to meet him provided they knew that he was not trying to avoid them.

By letter dated 6 September 2007, JMcG upheld the decision to dismiss the appellant. He had heard the appellant's side to the story in relation to what had happened on 15 July 2007 in a non biased way and had then formed his own judgement on whether the dismissal had been fair and warranted. He decided that the decision had been fair and he would take the same decision again in the same circumstances.

In cross-examination, JMcG confirmed that it had been KO'B's decision as the general manager to use taxis to deliver letters to the appellant and to instruct a Private Investigator. JMcG did not get involved in this after KO'B had brought it to his attention that the appellant could not be contacted, though he did try and make contact with the appellant on his telephone. He did not just accept that contact could not be made and left a message for the appellant.

JMcG agreed that his letter of 6 September 2007 mirrored the dismissal letter of 17 August 2007 in referring to a serious case of negligence on the part of the appellant in his failure to deal with the issue of a defective product after it had been brought of his attention by a co-worker and a breach of trust and confidence in him in relation to his failure to contact the respondent when reasonably requested to do so and his alleged absence from the locality at the time. This latter reason was particularly serious given the appellant supervisory position. JMcG felt that the appellant had not told the truth in relation to why had had been unavailable and this had formed part of his decision to uphold the dismissal decision. The appellant had subsequently accepted that he had been in the locality when previously, he said that he had not, thus this had not been an issue for JMcG. JMcG's issues with the appellant had been his failure in producing a quality product for a customer and trust within the company.

Replying to Tribunal questions, JMcG confirmed that he received a copy of the appellant's letter of dismissal of 17 August 2007, and the appellant's letter of appeal of 21 August 2007 against his dismissal decision. JMcG could not recall if he received a written report of the claimant dismissal from KO'B but he would have spoken to KO'B about the dismissal. He was aware that KO'B was on the investigatory team and the disciplinary team and that he was one of those who took the decision to dismiss the claimant. He also acknowledged that the claimant had said that he felt he was being picked-on by KO'B.

JMcG confirmed that he saw the defective product on the morning of 16 July 2007 when it was brought to his attention. He walked the production floor every morning and spoke to the employees. When asked if it was a good policy to hear the claimant's appeal despite having seen the product and formed a view that same was defective, JMcG replied that he felt he had been fair and balanced in this instance. The decision to uphold the claimant's dismissal was a difficult decision and had not been taken lightly by JMcG, as the claimant's twenty years of service with the respondent had been extremely well considered. However, trust was a big issue for JMcG and if that trust was broken, he took it seriously and found it hard to forgive. He had to make a personal judgement and he felt that in all instances in this matter, the claimant had not told him the truth. JMcG had no issue with the whereabouts of the claimant during the week of 23 July 2007, as he did not deny that he was in the locality.

Though other issues (i.e. forklift charging, raw materials, etc.) had been referred to by the management team who made the decision to dismiss the claimant and same had been raised by the

claimant at the appeal meeting, these issues were not discussed in depth as a third party was dealing with them. The issues for JMcG at the appeal meeting were ones of the defective production and trust and he did not take the other issues into account. The breakdown of trust was the bigger issue for JMcG. These breakdowns of trust related to the claimant's supervisory role and his failure to report and record the defective product, and not just his failure to respond to the respondent when they tried to contact him. Trust was paramount and JMcG's decision to uphold the claimant's dismissal was based on the breakdown of trust.

Appellant's case:

In his sworn evidence, FM told the Tribunal that he was employed by the respondent and had worked as a table-man for thirteen years. He had been responsible for the production of defective product in the past and had received a warning about same.

In his sworn evidence, the appellant confirmed that he had twenty years service with the respondent, commencing employment in 1988 as a table-man. In 2000, he had taken on the position as team leader, which was then known as charge hand. Up to that time, he had worked a weekly three-cycle shift. He responded to an advertisement for a position as an ordinary operator on the weekend shift but was approached by KO'B with the job as team leader on that shift. He had said that he would do the job for a while. He never received training for this job.

The appellant described his relationship with KO'B as "very poor". KO'B was very aggressive with the appellant over housekeeping standards and other incidents. The appellant maintained that had time keeping had been very good and that he had no problem with the other managers.

The appellant commenced the relevant shift at 8.00pm on Sunday 15 July 2007, and the work order 8098901 commenced production at 3.30am when 485 sheets were produced. During this production, the table-man – AC – came to the appellant and said that odd sheets were coming out with blackspots on them. The appellant told AC that he was not to let these sheets go but to break them up. While AC was on break, the appellant worked the line and during this time, he saw a few sheets being produced with some spots on them. AC came again to the appellant at 7.40am and said that the production had gotten bad. The appellant was cleaning up and told AC to chop up these bad sheets, which was standard practice. This was not logged on the extrusion report sheet because there had been no difficulties. However, AC had not followed instructions and had not broken up the contaminated sheets. That morning as the appellant was doing the finishing sheet before going home, the contaminated sheets were brought to his attention. He had gone with RK to view the defective product and had seen thirty to forty sheets which were particularly poor, though the appellant had seen worse.

The appellant confirmed that he had not received a contract of employment, though he had asked for one during his time when employed as an operator.

At the hearing before the rights commissioner, the appellant had admitted that he had been at home during the week of 23 July 2007 when the respondent had been trying to make contact with him. Up to that point, the appellant had not admitted to this, and he agreed that he had not told the truth to the respondent in this regard. The reason he had not told the truth to the respondent about his whereabouts during the week of 23 July 2007 was because he had panicked. He felt the KO'B was after him and there had been a barrage of telephone calls and taxis delivering letters. Up to that point, the respondent had not dismissed people. He should have responded during that week but did not. He had told a lie about his whereabouts but had owned up to it at the rights commissioners

hearing.

In cross-examination, it was put to the appellant that despite his claim that the relationship between himself and KO'B was very poor, he was seeking the remedy of reinstatement, the appellant replied that with the job situation as it is in the current market, he had no choice. He did not know how a future relationship with KO'B would work out but said that he could probably not work with KO'B again if he were reinstated.

Despite saying that he had received no formal training, the appellant admitted that he came into the factory every Friday for two hours over a period of six years, though this had laterally been cut to every second weekend. The purpose of this Friday visit was to get instruction on what to do on the weekend shift from the production manager – *TC* – the quality manager – *RK* – and colour person. He would also have been told how to handle problems. After getting this instruction, the appellant clocked out and went home. When put to the appellant that this instruction was also training, the appellant replied that he knew how to do his job. He maintained that that he was not trained as a supervisor.

In relation to the production on 15 July 2007, the appellant maintained that he gave an instruction to the table-man and he obviously did not do it. It was the table-man's responsibility to put the sheets that were produced on to the pallet. The appellant admitted that he had responsibility for the quality of the product that was produced but it was the responsibility of the table-man to check on what was being produced, that this was what he was paid for. The appellant also conducted checks on the product during the shift. There was no record on contaminated sheets on the extrusion record sheet, as odd contaminated sheets would not be recorded. An odd sheet could be one in twenty or one in forty and on the night, the odd contaminated sheet that was produced was not more than ordinarily produced.

The appellant confirmed that he viewed the product that had been produced on the shift of 15 July 2007 the next morning and his view of same was that it was very bad. There were thirty to forty sheets on one pallet. He checked the other pallet the following weekend. He did not know how many sheets on this pallet were bad, except that *RK* had said that 20% were bad. For the twenty minutes that he had been working on the production line, he could have broken up one or two sheets. However, the major problem was the twenty or thirty sheets that were produced and were on the last pallet. When put to him that he was blaming *AC* for this, the appellant replied that he was blaming no one. However, he gave an instruction to *AC* to break up the contaminated sheets and *AC* obviously did not follow it. He had done "everything possible" to deal with the problem by telling *AC* to break up the bad product. He had done his checks of what was being produced.

The appellant was given the opportunity to check the product that had been produced on the weekend shift of 15 July 2007. While agreeing that he probably should have checked the entire product that had been produced, this check would have taken a few hours. He had taken the word of *RK* on how much of it was bad and *RK* had said that 20% to 30% of the product had been bad. It was put to the appellant that *RK*'s report had said that the entire product had to be recycled. The appellant replied that he had done his job, had told *AC* to break up the bad product and *AC* had not done this. However, the appellant did not believe that the entire product had to be scrapped, except for maybe thirty to forty sheets.

The reason the appellant had not made himself available to meet the respondent during the week of 23 July 2007 was because KO'B was out to nail him and he panicked. Though his relationship with *JMcG* was fine, the appellant still did not admit to him at the appeal meeting on 3 September 2007

that he was in the locality because the lie was the road he had taken.

The appellant did not agree that the trust between himself and the respondent was broken. The incident of 15 July 2007 was one incident in twenty years of service and was minor when compared to other incidents. The amount of defective product that was produced was small and so was not recorded on the extrusion record sheet. When put to him that the defective product amounted to 1.725 tonnes, the appellant denied that this was the amount.

The difference in the rate of pay between a table-man and a team leader was about 20%. That difference meant that some responsibility rested with the appellant. However it did not mean that he had more responsibility than AC. AC had been the last person to put the sheets that had been produced on the pallets. If he were to supervise AC in doing this job, he would have to see each sheet as it was produced, and to do this, he would have to do the job of putting the sheets on the pallet himself. It was the fault of AC that defective product had been put on the pallets, as AC was the last person to see the sheets going on the pallets.

On being examined on his loss, the appellant confirmed that he had secured a job in April 2008 as a gardener and earned €80.00 per day. His days of work varied and when not working, he claimed social welfare. He had also applied for other jobs during that period but had not been successful.

Replying to the Tribunal, the appellant confirmed that he had been AC's supervisor. AC had come to him and said that defective products were being produced, had been told to break up this defective product but AC had ignored this instruction.

Sheets of product came off the production line and are put on to a pallet and the table-man rejects a defective sheet as it is produced. The last forty sheets on the last pallet were very dirty. While the appellant was upstairs doing his final checks before the end of the shift, AC had gone out to the yard for twenty minutes. He was not at his position for those twenty minutes. When AC was challenged in the yard, he had gone back in and put the last of the sheets on the pallet and had then gone home. It was the last of these thirty to forty sheets that were bad. The appellant could not believe the black lumps on these sheets. At the end of the shift, he was asked to go and check the product, which he did. He did not refuse to go.

Determination:

Having heard all the evidence from both the appellant and respondent, the Tribunal finds that the appellant was a dedicated employee of the respondent with twenty years service, which was marked by promotion to the position of team leader in 2000. This was an onerous position which included responsibility for other employees and for the quality of the product produced.

The Tribunal is satisfied that an investigation into the allegation of defective product was not carried out by the respondent. Furthermore, it determines that investigating team members also attended the disciplinary hearing and recommended the dismissal of the appellant. Evidence before the Tribunal also showed that a member of the investigating team who attended the disciplinary hearing and recommended dismissal had previous unresolved issues with the appellant.

The Tribunal is also satisfied that the decision to dismiss the appellant was coloured in some way by a previous incident relating to quality issues, which was more than a year old.

The evidence before the Tribunal shows conflicting reasons as to why the dismissal was effected. The CEO said the dismissal was for reasons of breach of trust whereas the General Manager said the dismissal was for failing to report the defective product on the extrusion report sheet, and also for failing to contact the respondent company.

The Tribunal is satisfied that the CEO, who was appraised of the allegations of defective product on 16 July 2007 should not have heard or adjudicated on the appeal against the dismissal decision due to his prior knowledge of the allegations. There was no evidence presented to the Tribunal that the General Manager had been delegated the authority to dismiss the appellant.

The Tribunal further determines that the appellant was less than frank and open with the investigation, and does not find credible the reasons given by him for failing to make himself available for the investigation. However, the Tribunal determines that the respondent acted in a disproportionate manner given the nature of the allegations and also, in that a fellow employee, although in a less responsible position, received a punishment of a mere written warning and a recommendation of further training.

Accordingly, the Tribunal varies the recommendation of the rights commissioner and awards the appellant compensation in the sum of €40,000.00 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)