

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

Employee

UD1369/2005

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. A. Halpin BL

Members: Mr. B. Kealy
Mr. O. Nulty

heard this claim in Monaghan on 3rd May 2006
and 19th December 2006

Representation:

Claimant(s) : Ms. Maureen McManus BL instructed by
Brendan Larney & Co., Solicitors, Farney Street, Carrickmacross, Co. Monaghan

Respondent(s) : Mr. Aidan Grogan, IBEC, Confederation House, 84/86 Lower Baggot Street,
Dublin 2

The determination of the Tribunal was as follows:-

Claimant's Case

The claimant gave evidence. He explained that he commenced employment with the respondent in October 2003 as a packer and was promoted after eight months to the position of material handler. He received a €35 rise in wages and his job involved moving goods to the stores area. He explained that the respondent's business involved the production of plastic trays for ready-made meals.

The claimant said that he had no problems with his supervisor (known as Mr. M) until August 2004. He explained that there were a lot of duties to be carried out and a schedule had to be adhered to. He said that if all his duties were not carried out Mr. M would be upset and felt Mr. M singled him out, and "picked" on him from time to time. He spoke to the HR manager (known as Mr. C) who, in turn, spoke to Mr. M. The claimant told the Tribunal that Mr. C took a written account of what the claimant had said to him but he had not seen a copy of

these notes. Mr. M apologised to the claimant but the claimant felt that he had only apologised because Mr. C told him to.

The situation deteriorated again and the claimant said Mr. M was again “on his back”. The claimant said that he began hating the idea of going to work. In 2004 he experienced a personal family loss and the respondent company were very sympathetic and he was given some financial assistance.

On one occasion the claimant said he was working when some materials were spilt nearby. Mr. M asked him to clean it up. A colleague asked the claimant to cover the break and therefore could not clean up the spillage. Mr. M was not happy. The claimant said that Mr. M often referred to him as a cleaner. He said that he did not mind cleaning up but felt it demeaning to be categorised as a cleaner and had sought clarification of his job title.

The claimant said that Mr. M swore on numerous occasions, which he felt, was not necessary. Some of his colleagues told him to speak to a manager but he decided not to. On another occasion he was asked by a member of the maintenance team to move a bin. He used a fork-truck to move it and on his return was sworn at by Mr. M for moving the bin. The claimant told Mr. C that he'd had enough. Both were very angry. The claimant went to the canteen and then to his car. Mr. C followed the claimant to his car and asked could he speak to the claimant. The claimant said that he told Mr. M that he was fed up talking and was going home. The following day Mr. C rang him and he asked Mr. C to be relocated within the respondent's premises. He could not be facilitated. He gave evidence of loss to the Tribunal.

On cross-examination he agreed that he had been given terms and conditions of his employment including the grievance procedure. In June 2005 he had lodged a grievance against Mr. M. When put to him, he said that he was not aware that Mr. M had recommended him for a position in material handling. He agreed that it was part of his job to clean up his area but said that he could not be expected to do three or four jobs at once.

He said that he had not been trained in changing the dye colour in the machines but had performed the duty one evening under supervision. Mr. M had told him to do it. The following day another supervisor reprimanded him because boxes had not been moved the previous evening.

He explained that he would not have much close contact with the respondent's products. Although while working in the packaging department gloves, hairnets and special boots had to be worn. There could be no cross contamination. On one occasion his hairnet slipped above his ear and Mr. M swore at him but no one else was present. When put to him, the claimant said that he could have used a fork truck in the wrong area. He said that he could have sworn at Mr. M on his last day at work. He said that when Mr. C had spoken to him at his car, Mr. C seemed to have calmed down but the claimant had not.

When asked by the Tribunal he explained that the company was not unionised and that he had no problem carrying out any tasks asked of him.

Respondent's Case

Giving evidence, the respondent's managing director (hereafter referred to as MD) said that a human hair in a ready meal could clear shelves. Tidiness was paramount. Hairnets were a prerequisite. Hair and ears had to be covered to the required standard and equipment had to be clean. The respondent (hereafter referred to as R) was subject to audit.

MD said that the respondent had not previously had a bullying or harassment case and described the abovementioned Mr. M as a mature, sensible individual with whom MD had had no issue. MD had not encountered any complaints against Mr. M and thought Mr. M a good supervisor.

MD told the Tribunal that he had become aware of the claimant (hereafter referred to as P) at one incident and when P left. MD became aware that P had had family difficulties. R was conscious of this, was compassionate towards P and was careful not to upset him. MD knew that P had been out sick for the first three weeks of August 2005. On 19 August 2005 P got a salary advance.

The Tribunal was furnished with a copy of a typed report of the investigation into an accident which had occurred on 17 December 2004. No injury resulted from the accident but there was damage to the plasterboard of a door to the production area when a blue forklift (which was hard to manoeuvre and big at the back) was reversing when positioning a pallet of polypropylene. P was involved in the accident. The corrective action specified in the report was: "Material handler will not use blue forks for that such (sic) of works again. Also will not be using forks again in production area."

MD told the Tribunal that accidents happen but that he had had a concern about the use of forklifts. He considered pallet trucks to be much safer. There was a health and safety meeting on 2 February 2005. A resulting document contained the following:

"As team leaders, you are completely responsible for health and safety on your individual shifts. You must ensure that health and safety guidelines and rules are adhered to in so far as is reasonably practical.

You must make employees on your shift aware of their responsibilities- the main one being to take reasonable care of his/her own safety, health and welfare and that of any other person affected by his/her acts.

1. Responsibility- Team Leaders are fully responsible for health and safety on their shifts and must demonstrate this to their teams.
2. Forklifts- are NOT permitted on floor in production area from now on.
 - A. Pallet truck to be used instead
 - B. Forklift may only be used on floor for changeovers, lifting tools, green (purge) bin and yellow cage.

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NB: PLEASE COMMUNICATE THE ABOVE TO YOUR SHIFTS WITH IMMEDIATE EFFECT, SIGN AND RETURN SIGNED COPY TO HR DEPT."

The above document was signed by Mr. M as a team leader for a particular shift. MD told the Tribunal that he had not been aware of other issues regarding P until P left. At that point P refused to come in when called and was not interested in talking to R.

Giving evidence, R's personnel manager (heretofore and hereafter referred to as Mr. C) said that his role had become part-time. He worked Tuesday and Wednesday each week. He was flexible and available on the phone. When needed he had changed days to suit R. Asked about his relationship with P, Mr. C said that he had had little contact with P but that he would like to think that he and P had got on well.

The Tribunal was referred to a R document titled "Concern Resolution Policy and Procedure". The said document was described as a grievance procedure under another name. On 22 June 2005 P invoked the procedure. At 8.00 a.m. P had finished a night shift. P said that for the previous two nights he felt he could not get to finish his job because Mr. M was victimising him and making him feel vulnerable. Mr. C empathised and jotted bullet point notes into his diary. The conversation lasted about five minutes. P felt that he had had to neglect his own work because he had been told to do other work.

Mr. C told P that Mr. M had acted under instructions. P felt that this had not been made clear. Mr. C opened the R handbook and said that this matter could be formal or informal. P said that he did not want to make a written complaint against Mr. M but that he (P) felt vulnerable and wanted the matter sorted out.

Mr. C subsequently told Mr. M what P had said. Mr. C suggested that they meet P and resolve the issue. Reacting very positively, Mr. M was keen to do so. After some investigation it was clear to Mr. C that P was not being singled out.

P was due back on the Saturday and Sunday night but was absent. Mr. C did not get a chance to organise a meeting but on 29 June he met P in the canteen. He had not known that P had been absent on Saturday and Sunday night. P had not said that. Mr. C asked P how he was. P said that he (P) and Mr. M had resolved the issue to P's satisfaction. Mr. C told P that he could use the formal procedure if any issue persisted. This was 29 June 2005. Mr. C admitted that this and his conversation with Mr. M were not in his diary.

Asked if there had been any further incidents, Mr. C replied that P had been absent from 2 to 20 August. P did not tell R about this. On 19 August P called R for a salary advance. P asked for holiday money. R's financial controller advanced him a cheque.

The Tribunal was referred to a letter (headed **RE: RECORDED VERBAL WARNING**) dated 25 August 2005 from Mr. C to P. This warning related to P's absence from work during the period August 2 to August 24 and to P's failure to follow company absence rules. The letter went on to specify what R required of P in the future with particular regard to any future absences.

Mr. C chaired a meeting with Mr. M., P and an employee representing P. They spoke to P to get the background to the previous couple of weeks. P said that his brother had had a serious car accident and that he (P) had been with his brother in hospital. P did not mention Mr. M.

On the morning of 14 September Mr. C was told that P had left at 8.30 p.m. after arriving at 8.00 p.m.. P had been driving a forklift in a restricted area. When Mr. M spoke to P, P had jumped off while the forklift was still moving. Mr. C, having discussed this with Mr. M, left a message on P's phone. P rang back within an hour. Mr. C told P that there was a procedure to deal with this. P kept repeating that he had had enough of R. They only spoke for three or four minutes. Mr. C asked P to come in and go through proper procedure. This was 14 September. P sought a P45 later that week.

On 20 September 2005 Mr. C contacted P. P said that he had a new job. Mr. C asked him if he would reconsider. P said he wanted a P45. It was agreed that Mr. C would present a P45 to P. This was not in Mr. C's diary either.

At 9.11 a.m. on 20 September Mr. C e-mailed Mr. M asking him to document the details of what happened the night P had walked out so that these details could be kept on file. In an e-mail reply Mr. M wrote that he had had to challenge P about driving a forklift in the production area whereupon P had become highly abusive and had stormed out.

Subsequently, by letter dated 21 September 2005, Mr. C wrote to P enclosing a final payslip and a P45. P was paid for hours worked and for an additional fifty hours in lieu of notice. P was also paid for outstanding holidays. Asked at the Tribunal hearing why he had paid notice, Mr. C said that, given P's circumstances, he thought it was the right thing to do.

Giving evidence, Mr. M said that he had been a supervisor for many years, had had some sixty people reporting to him in a previous company, had been with R since 2002 and that he had never had a complaint made about him before.

Mr. M said that P had moved to Mr. M's shift as a packer. P was very good. There was a vacancy for a materials handler. Mr. M knew that P had a forklift licence. Mr. M gave him the materials handler job. This would be more pay for P.

As well as the moving of R products, the materials handler job involved noting temperatures and the cleaning of the production area. It was a varied post. P's remit was right across the factory. This job was very different from that of a packer. A materials handler needed to have his own initiative. There was a lot of forklift work. It could be very busy at times.

Mr. M had an input into P's training. All materials handlers were closely supervised at first. Mr. M's relationship with P was good.

On 17 December 2004 there was an incident when P, driving a big blue forklift, hit a door and some damage was done. It was "fixed up". An accident investigation report was written. The blue forklift was not to be used in the production area again.

Asked if P had been ticked off, Mr. M said: "Not really but it was an incident. The blue forklift had a large turning circle. You would not hear a forklift coming. Somebody could break a leg." Asked at the Tribunal hearing if there had been notices around the place, Mr. M said that he could not say for sure if there were notices up about forklifts.

Mr. M's first problem with P was about a hairnet. It was necessary to wear gloves when handling R product. No chewing gum was allowed. Hairnets had to be worn even by Mr. M and MD (the aforementioned managing director). R had audits and could have a visit on any given day. Mr. M pulled P up a number of times about his hairnet. Once, P made no effort to pull his hairnet over his ears after a break. Mr. M regretted that he had used abusive language to P. He (Mr. M) had been annoyed. A person could forget to put a hairnet on but P had put it on in a manner that did not cover his ears. Mr. M admitted to the Tribunal that he certainly was "miffed and annoyed" but denied having used the word "f**king" or the language that P had attributed

to him in P's written unfair dismissal claim. Perhaps six times Mr. M pulled up P about the hairnet. Usually P said that he was sorry. It had annoyed Mr. M to see P coming out of the canteen with his hairnet wrong but he did not feel that he had been bad to P in his manner.

The Tribunal was referred to an e-mail sent to Mr. M on 22 June 2005. It was headed "Clean down tonight – Line 50". It asked Mr. M to make sure that his materials handler understood the cleanout procedure as all material handlers would "own this going forward". Stating that he had thirty years' experience in the plastics industry, Mr. M admitted to the Tribunal that the cleanout was a dirty job and that this was one of the first times it had been done in R's factory. Mr. M told the Tribunal that he had not been picking on P. He had felt resistance from P. P had reacted and asked who would bring pallets down to the warehouse. Mr. M knew that P had not done it before but told the Tribunal that there was "a first time for us all". The task took about twenty-four hours. If not done right it had to be done again. They would sometimes use airhoses.

After Mr. M explained the job P was highly resistant. Nobody was looking forward to this job. P was with two people who had done the job before. Mr. M did not allege that P was unfit for the job. He did not single P out. Mr. M told P that he (Mr. M) would cover by bringing the pallets down to the stores. There were six or seven people in the team.

Subsequently, Mr. M told P that there was a leak and asked P to clean it. It was a two-minute job. P said that he would do it but headed towards the canteen. Five to ten minutes later Mr. M saw that it had not been done and asked P why he had not done it. P went out and cleaned it up.

Mr. M told the Tribunal that he had not used the language alleged by P. Mr. M said that P did storm out of the canteen but Mr. M acknowledged that P did clean up the spillage. It would have been easy to slip on. There had been plastic granules on the floor. Mr. M spoke to P later after P had cleaned up the spillage. It was known to R that P had suffered bereavement in his family. R made allowances. Mr. M "bent over backwards" for P. There were three breaks. P would take numerous breaks and would go out for a smoke.

Mr. M did not recall ever shouting at P or singling him out to do cleaning. P was a "floater" who "came into the firing line" for these jobs. It was "nothing out of the ordinary". Mr. M "did not desire to single out" P. It was part of P's job to clean. P "was like a free person". Others had specific tasks. Mr. M would not ask anyone to do something he or she was not trained to do. Mr. M told the Tribunal that the clean-out "was a green field for all of us" and that he supervised it very closely.

Later in June 2005 Mr. C approached Mr. M with a complaint from P. Mr. C said that it related to Mr. M's asking for a clean-up and Mr. M's approach to P in the canteen in front of others.

Subsequently, Mr. M met P in the canteen and said that he (Mr. M) had to make requests, would still be making requests and would expect completion.

Asked about the period from June to September, Mr. M told the Tribunal that there had been no further incidents but that there had been "a constant battle" with P about the forklift. A forklift was easier than a pallet truck. Mr. M was using a pallet truck himself. P had no real reason to be "up there with a forklift".

From 2 August on P was on sick leave. An employee (hereafter referred to as K) tried to contact him. K was his friend. They took breaks and smoked together. K came to Mr. M and said that she would go with a colleague to P's house to see if P was all right. They did this on company

time.

Mr. M told the Tribunal that he knew that P had got a salary advance on 19 August i.e. during his sick leave.

Regarding the letter dated 25 August 2005 (headed RE: VERBAL WARNING) from Mr. C to P, Mr. M said that K had attended the related meeting at P's request and that Mr. C had rung in. Asked what had been the purpose of the meeting, Mr. M replied that it had been to give P a verbal warning and to have a chat with him about unexplained absence. P did not say anything about Mr. M bullying him. At the meeting Mr. M said that there were reasons for the company rules and that the said rules applied to everyone including Mr. M and MD. The meeting was very positive.

On 13 September 2005 Mr. M met P coming down from Line One with a pallet of trays on a forklift. He told P that he should not use a forklift up there. Mr. M told the Tribunal that he (Mr. M) did not use bad language but probably slightly raised his voice. P jumped off the forklift and bluntly told him what he could do with his job. Mr. M tried to follow him but he was gone. P had been highly abusive and "not far away from hitting" him. It was over "in a flash" but Mr. M "was a bit shocked after it". That was the last he saw of P. There was no accident on 13 September but people had crashed into things before. There was a risk to company personnel and machines.

Asked if there was a written record, Mr. M replied that no report was filled out when there had not been any accident. Mr. M did, however, tell Mr. C that P had driven a forklift in a prohibited area, that Mr. M had tackled P and that P had been highly abusive.

At this point on the second Tribunal hearing day Mr. M was asked if he thought that P had painted an accurate picture of him on the first hearing day. Mr. M replied that P had painted him as an ogre but that he had been too soft with P and that he could have had P out in a week.

Mr. M was asked if he had turned a blind eye to breaks. Mr. M replied: "Yes but if something happened I was out of a job." Mr. M added that P could have got a written warning or a final written warning for his conduct.

Giving evidence, R's manufacturing manager (hereafter referred to as Mr. W) said that he had been with R since 2002. Referring to 22 June 2005 Mr. W said that R was changing from black trays to white trays. He wanted to make sure that all was "fully right". It was "quite dirty in materials handling". Mr. W wanted to make sure that everyone was "lending a hand". On 22 June Mr. W would have been there until 7.00 p.m. but was not there for the cleaning.

Giving evidence, K (the abovementioned friend and colleague of P) said that she and P had been "close colleagues" and that P had been one of her best friends. She told the Tribunal that P had had a problem with Mr. M and had referred to Mr. M as a "freak". This was out in the smoke-break hut.

K told the Tribunal that Mr. M was not a hard taskmaster and that she had no problem with Mr.

M but that P “did not really get on, always had something to say and did not give the working relationship a chance”. P would stand on the lines with K and others but had never said that he was being bullied by Mr. M.

K confirmed that there had been signs on the walls about hairnets. She always kept her hairnet over her ear protection but P “always rolled his hairnet halfway up”.

Asked about 22 June, K said that she had gone for a cigarette and, although she did see P and Mr. M go down the floor, she saw no more. P told K that he had gone to Mr. C and P was talking about what might happen if Mr. M did not stop. P was “all annoyed”.

In August P was out for a period. K went with a colleague to see if P was all right. The colleague knocked on P’s door. K had a cup of tea with P who said that, if Mr. M said something to him, he (P) would leave the job. P said that his sister worked in a hospital. They all enjoyed the “craic” together. P kept saying that he would go.

K went to the meeting. It was a very easy-going meeting. Mr. M said that he was sorry about P’s problems.

Regarding 13 September 2005 K said that she had not been with P at all but that she subsequently saw him in a rage. She asked him what was wrong. He said: “I’m not f**king staying here.” K ran and asked him to come back. She subsequently rang him. He said that he had got a job in Nobber and that he would be on €5k more in Nobber.

Asked for her opinion of Mr. M, K said to the Tribunal that she was there four years and that she “never had a cross word with him”. She felt that the system was there if she had a problem. She had had no intention to leave due to circumstances involving P.

Giving evidence, a R witness (hereafter referred to as B) was asked about 13 September 2005. B said that she and K worked on a line. B saw P very angry. He kicked boxes and a bin. He went home. K followed him.

The next day, B rang P and asked what had happened. P said that he would not go back to R. B asked why not. P said that it was because of Mr. M and that he did not like Mr. M.

On 19 September B met P and again asked him why he did not want to go back to R. P said that he had a better job. This job had better money and no night shifts. The next day, P texted B that the new job was very good and that he would never go back to R. (This text message was shown to P’s representative).

Giving evidence, a R witness (hereafter referred to as Mr. A) said that he was a quality controller and had been with R since 2002. Mr. A told the Tribunal that P had been a persistent offender when it came to hairnets and that P had said that he would leave if Mr. M asked him to do one more thing. Mr. A confirmed that P had referred to Mr. M as “Freak”.

Mr. A told the Tribunal that P, prior to walking out, had said that he (P) had gone for an interview in a dogfood factory. Mr. A added that P had not liked doing anything bar the driving of a forklift and that, in Mr. A’s opinion, P had not been bullied by Mr. M. Mr. A found Mr. M’s

supervision to be fair and not excessive.

Giving evidence, a R witness (hereafter referred to as Mr. O) said that he was a machine operator and that he had been with R since 2002. It was put to Mr. O that P had said that Mr. O had said that he (Mr. O) would leave R due to Mr. M. Mr. O replied that this was untrue.

Mr. O added that he had met P after P had left R. They had a chat. P said that he was getting on well in his new job. P did not mention Mr. M.

Determination:

The Tribunal, having considered all of the evidence, is satisfied that the failure of the claimant to exhaust the grievance procedure renders the alleged constructive dismissal unproven. Accordingly, his claim under the Unfair Dismissals Acts, 1977 to 2001, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)