EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF: **CASE NO.**
Employee UD1359/2005

against
Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. E. Kearney BL

Members: Mr. J. Redmond
Mr. T. Kennelly

heard this claim at Galway on 27th March 2007
and 21st May 2007

Representation:

Claimant(s) : Mr. Jarlath McInerney, McInerney, Solicitors, Cleggan House,
46 Eyre Square, Galway

Respondent(s) : Mr. John Brennan, I B E C, Ross House, Victoria Place, Galway

The determination of the Tribunal was as follows:-

Respondent's Case

The respondent (hereafter referred to as R) called to give evidence a HR executive (hereafter referred to as LM). LM said that R employed some three thousand people in the manufacture of medical devices for the human body. Product quality and integrity were crucial. R was heavily regulated by monitoring entities in many countries. Such monitoring entities could close down R. In 2005 R had less than twenty dismissals but the claimant (hereafter referred to as C) was dismissed with effect from 7 July 2005.

The Tribunal was furnished with a copy of a letter to C dated 19 July 2005. It contained the following:

"… **Having conducted a full and thorough investigation, we are left with no alternative but to terminate your employment due to an act of gross misconduct whereby you failed to comply with Company policies and procedures and you disregarded Company protocols.** …

On June 22, 2005 it was discovered that 2 units from **batch number 7759922** from the PTC 1 product family were damaged. The damage to these units consisted of the tip end of the units being pressed, and subsequently damaged between the lid and the tray of the unit. This product had been assembled on June

15, 2005.

On June 15, 2005 you were working on the Label reconciliation and Final Inspection step as per **Procedure 90031968**. The Operations Log shows that you worked on this step….

As per the procedure …, you are required to inspect the product to, **"…visually inspect each unit to ensure that the seal is uniform and continuous and the unit is secure in the pouch, SBS card or tray per the relevant pouch/tray seal procedure."** Your step is the last inspection before the unit leaves the cleanroom.

The 2 damaged units were brought to your attention on June 27 2005. This was the first opportunity to speak to you about the damaged units because you had been on holidays during the week of June 22, 2005."

The 19 July 2005 letter continued by saying that a supervisor had alerted C "to the fact that there had been an issue on the PTC 1 product" and that the said supervisor, together with a "Quality Engineer" then met with C to go through the "Quality Note" which outlined the product issue and C's role in it. The letter went on to say:

"At that meeting you said that you had seen the units and that it was clear that the units were rejects.

During the meeting in Human Resources on June 27, 2005 you admitted that the units were damaged and that it was obvious the units had not been properly picked up at the Final Inspection Step. You also said that you were aware that the situation would be a Quality Incident. You said you understood the seriousness of the issue….Due to the seriousness of the issue at hand you were suspended with pay until the outcome of the investigation."

The 19 July letter stated that the witness (LM), the supervisor and C met again on 6 July 2005. The letter continued:

"At this meeting you were given an opportunity to add further points that you wished to add before the Company took a final decision in the matter.

A final meeting took place on July 7, 2005 to inform you of the outcome of the investigation. The outcome of the investigation is that you clearly did not comply with the Procedures outlined above. No other possible explanation could be identified as a result of the investigation. If the procedures you were responsible for had been adhered to then the 2 damaged units would have been found during your inspection.

As you are aware, our finished products are used in the human body and, had any of these products made their way into general supply, the outcome could have been fatal.

You were advised that the company was left with no alternative but to terminate your employment with immediate effect taking into account the findings of the investigation. In this regard we have further noted that you are already on a Final Written Warning for Breach of Procedure and that dismissal is the next step in our Corrective Action Procedure. Notwithstanding this, however, given that the incident in question amounts to Gross Misconduct, you are not entitled to notice of termination of employment.

You were advised at our meeting that if you wished to appeal this decision, you may do so by writing … within two weeks of this letter, July 19, 2005, setting out the reasons for your appeal. Your P45, other documentation and all monies owing to you will follow by post."

LM told the Tribunal that R (the abovementioned respondent company) had met C to get C's "side of the story" and that C had said that she had told her supervisor that she felt uncomfortable working in that area of R's operation. However, C had not been able to recall when this had happened. C said that it had made her nervous that someone else had been terminated. Also, saying that she had had family in hospital, C spoke about her personal circumstances.

LM stated to the Tribunal that C had received written warnings for absenteeism and, in February 2007, had received a final written warning for a quality incident. LM did not believe that C had appealed the February warning which would be active for twelve months. When someone was on a final written warning the next step was to terminate. Asked if this was always the case, LM replied that sometimes people get extensions to warnings and that each case was taken on its own merits.

It was put to LM that C had said on her E.A.T. claim form that she had felt under pressure and had asked for a move. LM replied that she had not been told of any such discussion. At a meeting on 6 July 2007 C said that she had told her then supervisor (MG) that she had not been comfortable but when LM had probed C had made no reply. MG had since left the company and had been replaced by a new supervisor (FB).

LM told the Tribunal that another employee (ND), who was "previous" to C on the line and who had got a final written warning on 5 May 2005) had not been dismissed for the June incident but had got a second final written warning.

Asked what had distinguished C from ND, LM replied that the ND incidents had been within a month of each other and that it was R's ethos to give time to improve. C had had more time to improve (in that C's final written warning dated back to February 2005). Also ND had made some requests about retraining and reassignment. R accommodated ND's request. Although both C and ND had been on a final written warning C was dismissed and ND got an extension. ND had had seven weeks between the issues. It was four or five months in C's case as C's final written warning dated back to February 2005. Also C had been warned about timekeeping and attendance. ND had not. C had had a large amount of absenteeism between February 2005 and the June 2005 incident. C did not appeal internally saying that she would seek redress outside R. C had appealed internally about something else. C knew the system.

Under cross-examination, LM said that on 15 June 2005 C had been a production operative. It was put to LM that C had been a product builder but had not been doing that. LM replied that, in the role of product builder, inspecting quality was something one did. C had been at the end of the line as a final inspector of the finished item.

LM was asked if C had been a qualified quality controller. She replied that C would have been "trained up" on the procedure to inspect the product and that C had been qualified to the level that was needed.

It was put to LM that C had had a target of some 230 per day, that the amount done per hour went on a board, that an explanation was needed if the target was not met and that C had had to go in on a day off to meet the target. LM replied that she did not know.

It was put to LM that it would be C's case that R had wanted quantity rather than quality. LM replied that this was C's evidence.

LM was told that thousands of units had gone through C's hands without any difficulty and was asked if the final written warning incident had been the first time that C had come to LM's attention. LM replied: "In this way." LM conceded that she had no evidence that C had deliberately or recklessly failed in her

performance of her duties.

LM was asked if she believed that C had been guilty of gross incompetence given that C had done 230 units per day four days per week. LM did not reply.

Asked if R had had a policy of zero tolerance, LM replied: "Our products go into the human body." LM conceded that she had not been involved in C's day-to-day activities.

LM was asked, if the job could cause a risk, if C had been offered further training. LM replied that she did not know if C had sought or had been offered further training.

LM was referred to the five stages of R's disciplinary procedure and was asked if C had got counselling. LM replied that she did not know of C going through the first three stages.

It was put to LM that R had gone straight to the fourth and fifth stages and she was asked why the first three stages had not been considered. LM replied that the seriousness of the issues had warranted going straight to the fourth stage. It was put to LM that, as R was on the fourth stage, it had to go from there to the fifth stage. LM did not dispute this. Asked if C had been dismissed for gross misconduct or for misconduct, LM said it had been for gross misconduct.

It was put to LM that C had vehemently disputed her final written warning and had written to MG (her then supervisor) to that effect and that C would say that her final written warning had been unfair. LM did not reply to this but did say that C had been trained to see errors.

It was said to LM that, on the day in question, C had been working on all kinds of items and had been racing around all day. LM replied that she accepted that these were duties that product builders did.

Asked why C had not been given counselling, LM said that R had given C support and counselling regarding absenteeism.

In re-examination by R's representative, LM told the Tribunal that R could not afford slip-ups, that a slip-up could cause a fatality and that C had not disputed that there had been an issue with the products. She added that all employees were cross-trained to do different tasks at different times and that this was the process across different areas. C had got R's handbook and LM had not known of C questioning her final written warning until this Tribunal hearing.

In questioning by the Tribunal, LM was asked if R had any give for human error if one unit with a fault was not spotted among hundreds of others. LM replied that there was room for human error and that there was retraining. The level of corrective action would relate to the level of damage done. C had committed an obvious error that would have been difficult to miss. She would have got a final written warning if she had not already received one.

LM was asked if she regarded it as gross misconduct to miss two out of a thousand units per week. LM replied that she did.

Asked if all product builders were trained in product inspection, LM replied that there was cross-training, that people could be switched and that R would avoid a situation in which people would be checking their own work.

Giving evidence, the abovementioned quality engineer (hereafter referred to as Q) said that it had been "by accident that the mistake was found". She said: "Guys who just move product saw it. It's not their

job." Q corroborated LM's testimony that there was cross-training and said that employees were trained in different procedures so that R would have cover.

Under cross-examination, it was put to Q that targets went up and down. She replied that a customer could say that it wanted more or less of a product and that R would "change the line to meet that".

Asked if she had seen people under pressure on the line, Q said that she did not think that it was a particularly pressurised area. She had seen targets missed. A machine might break down but R would look at why production was falling short and might make up the target in the month.

Asked why she herself was not at the last line of inspection, Q replied that it was a visual inspection and that it was Q's job to see what defects were in the procedure and not to make or inspect the product. Asked if it was unacceptable to make an error about every six months, Q replied that all was taken on its own merits.

In questioning by the Tribunal Q was asked if the breaking of a seal was fairly basic. She replied that it should be correct and that this was an obvious defect. It was her job to determine the seriousness of a defect. R's personnel department was then informed.

Asked if missing two out of a thousand would be gross misconduct, Q replied that it would be a serious issue and that R "leave as little as possible to human detection"

Asked who determined targets, Q replied: "Customer demand. Then there's a line designed to meet that." Asked if the targets were agreed with people on the lines, Q replied: "They would be included in time studies."

Giving evidence, R's HR director at the time (hereafter referred to as B) said that it was a condition of operation that medical devices needed to be licensed and that R's Galway plant was certified in more than twenty-five regulatory bodies across the globe. He said that, if a product did not do its job, it could kill an individual or have serious consequences. In July 2004 R's Galway plant had launched a new product which was an open heart vent. Because of an issue R had voluntarily withdrew 100,000 units and the share price of the company had fallen by a third. However, no patient was compromised.

B said that R had to be continually recertified and that 99% accuracy was not good enough to have a licence. R needed medical devices which would not harm patients anywhere in the world. B said that R "places a high premium on processes" and that "training can be suggested". B added that there had been sixteen dismissals in 2005, five of which had been for quality issues and that R "places a high price" on a balance between rights in R and the rights of licensing bodies. Depending on the issues involved, R had used counselling, verbal warnings and written warnings.

Asked if he had been aware of C's case, B said that LM had consulted him, that LM would not make a decision to dismiss and that he had "felt it appropriate to terminate". He told the Tribunal that "this was an obvious mistake with potentially fatal impact". C had had previous issues and had been given time to rectify this. The sanction had been appropriate. There had been gross misconduct. R would not take this decision lightly but it had to follow good manufacturing processes. Training had been given on this but people of many different levels could be dismissed for quality issues and such dismissals had in fact occurred.

B was asked what correlation R made between quantity and quality. He replied that R's managing director had made it abundantly clear that quality was the "number one" focus. While efficiency and other issues were relevant, R did not seek profit at the expense of quality. R had an industrial

engineering unit which "deals with rest periods, break periods et cetera".

Concluding his direct evidence, B said: "We have to make the correct amount of product. We have to get quality and quantity. We don't make people work harder. We scale up or down for what's required."

Under cross-examination, B admitted that he had not met C regarding the final incident but said that he had met her regarding other matters. He said that he did not know that she had queried her final written warning.

B confirmed that he had been LM's boss and that LM had asked him what she should do. LM wrote the letter and signed it.

B said that millions of products had been shipped from the plant. Asked if 99% was not good enough, he replied: "Otherwise people die." He added that this was how tightly R was regulated.

Questioned by the Tribunal, B said that R did not use dismissal very often and that only five out of three thousand employees had been dismissed for quality issues in a year. The criterion was what the impact would be and whether it should have been caught. B told the Tribunal that a "licensing body would view this as gross misconduct".

Asked why there had not been a better system in place, B replied: "'Twas picked up in a quarantine area in the cleanroom." Asked if there had been any facility for human error, B said that C had got training but that C and another missed something which would have killed people.

It was put to B that C had done a myriad of jobs but had been sacked. B did not accept that it had not been a case of picking on the weakest link. B said that C had got training and retraining on a suite of tasks and that C had shown that she could do the job. He did not accept that R had "picked on the lowest of the low" but he confirmed that C had admitted that the product was defective when it was shown to her.

In re-examination by R's representative B denied that C had been dismissed "for other circumstances" saying that R had "looked at all the last circumstances including her ability to improve".

Further questioned by the Tribunal, B said that R felt that ND (C's abovementioned colleague) had not had enough time to prove that she could change but that C had had enough time to change. B added that ND had not had a series of issues "going back" but that R felt that C "had a history of poor performance". C had had a final written warning in February and had had time to "remediate". This had been "the straw that broke the camel's back". C "had gone on for a protracted period" and R "felt it appropriate to dismiss". ND had "had a far more recent issue" and "deserved time to improve".

When it was put to B that C had been a "problem file" B agreed and said that, if C had not got a final written warning in February 2005, she would have got one for the June 2005 incident. If C had lodged a grievance R would have had the option of bringing in an industrial engineer from another of R's work areas to examine the situation.

Asked if C would not have been considered a troublemaker if she had wanted that, B replied that he did not know of anybody being dismissed for a productivity issue.

Asked how that would have looked on C's file, B replied that R had appropriate machinery to raise this and that "management would have listened and, if warranted, would have amended the target".

On the **second** day of the hearing the claimant's Supervisor (MG), at the time of the claimant's employment, gave evidence. He was employed by the respondent as the Production Supervisor.

He stated that the claimant had been trained in other sections of the production line. When put to him, he stated that he had never before seen the undated letter from C relating to the fact that C was not signing the formal written warning she had been given on February 28th 2005. He stated that if he had seen it, it would have been put on the C's personal file. He had not received any request from C to move from her position on the production line. If she had, he would have acted in it. C had not appealed her final written warning.

On cross-examination the witness stated that he spent as much time as possible walking the production line to see everything was working correctly and to be a support to the staff. If there were any problems, staff could approach him. When asked, he stated that the quality of the products had precedent over quantity. There was a daily target of 230 units to be produced. C worked at the end of the line and was responsible for making sure all paperwork compiled with the units on the line.

When asked the witness said that there was "zero tolerance" in regard to mistakes but that if issues arose they were reviewed. If there was one incident a formal warning letter was issued, if there was a second incident, the person was dismissed.

When asked by the Tribunal, the witness stated that if an issue on-line needed to be rectified and the HR department needed to be notified, he was the person to inform them. He explained that he had notified the HR department of the incident with C and then they, HR, took over. He said that he had could be asked for his opinion on the matter but in the case of C, it was gross misconduct. When put to him, the witness said that no one had complained about the daily targets set.

The Production Supervisor (known as FG) gave evidence. He explained that at the time of the claimant's employment he was employed as the Training Supervisor and had not had direct one to one dealings with C. After the incident in January C was not given any specific training but all the staff on the production line had been re-trained as a group.

On cross-examination the witness stated that counselling could be initiated for staff members if needed.

When asked by the Tribunal he stated that he had no direct involvement in setting targets.

Claimant's Case:

The claimant gave evidence. She explained that she had been employed at the end of the production line. Her work involved checking the units against the paperwork and writing up the figures on the board a small distance from her workstation. While she did this the units coming down the line would back up. Also if there were a fault with one of the units she would have to go back to the area of the line involved. 230 units were to be produced daily and if the targets were not met, overtime on a Friday or Saturday was carried out to complete the work. The Production Supervisor (MG) did walk the line to make sure the work was carried out and targets were met. If there were problems on the line, production ceased. MG would ask questions but sometimes the reasons given were not accepted. She told the Tribunal that she had received training from another product builder when she started. She told the Tribunal that staff had complained about the targets set but she felt she had nowhere to raise her issues.

She accepted that there had been a defect in one of the units and asked to see the defective label but was never shown it. She met with HR but refused to sign the final written warning as she felt she had complied with the procedures set out. She typed a letter concerning the final written warning and handed

it personally to her Production Supervisor. She expressed her concern about working on the end of the production line. She told the Tribunal that it was a very stressful job but was never offered counselling. She had never received any previous verbal or written warnings. The claimant gave evidence of loss.

On cross-examination the claimant stated that quality was "built in" to the system. She agreed that the units produced had to be perfect or patients could suffer. When asked the witness said that she felt she had not been dealt with fairly in February 2005. She received no response to the letter she handed to her Supervisor. She had used the grievance procedure in the past. When asked, she said that she could not explain how the incident had occurred in January or June 2005.

When asked, she told the Tribunal that she was suspended for one week after receiving the final written warning. When asked, she said that she felt she did not have the confidence to go through the grievance procedure. She told the Tribunal that she had told her Supervisor and Human Resource Business Partner (LM) that she was not comfortable returning to that production line.

Determination:

The Tribunal in coming to it's determination in this matter is very conscious of the business that the Respondent is engaged in, and the reasons it demands the highest standards of quality production. On theevidence tendered, the Tribunal is of the opinion that the evidence in relation to the investigation processdid not show or prove to the Tribunals satisfaction that the Respondent company had no other option open in the particular circumstances. The company in the Tribunals opinion based its decision to dismisson the fact and not the substance of the existence of a final written warning, further, the entire reasons for the dismissal were not conveyed to the Claimant. The Tribunal is of the opinion that the investigationand consequent decision to dismiss was unfair in the premise.

Therefore the Tribunal awards the sum of €16,380 under the Unfair Dismissals Acts, 1977 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)