

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

Employee

WT268/2007  
UD791/2007

Against

Employer

Under

### ORGANISATION OF WORKING TIME ACT, 1997 UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms P. McGrath BL

Members: Mr M. Noone  
Ms M. Finnerty

heard this claim at Dublin on 5th December 2007

Representation:

\_\_\_\_\_

Claimant(s) Mr Michael Finnegan, 11 Hillcrest Avenue, Lucan, Co Dublin  
Mr. Jimmy Jordan SIPTU, Liberty Hall, Dublin 1

Respondent(s): Mr. Peter Ward BL instructed by Mr. Kevin Barry, O'Shea Barry, Solicitors,  
4 Wellington Road, Dublin 4

The determination of the Tribunal was as follows:-

### **Background**

Counsel for the respondent told the Tribunal that in May 2007 the claimant struck and assaulted a fellow employee Mr. G. This incident was taken in the context of earlier warnings. This warranted dismissal for gross misconduct. Assault is without question a ground, which warranted dismissal. The claimant received eight weeks notice and was paid in recognition of his service.

The claimant's representative told the Tribunal that the claimant had twenty-nine years loyal service with the respondent. On the 21 May 2007 the claimant reported for work and was involved in an altercation with a fellow employee Mr. G who asked him to clean out a stable. Mr. G became very agitated and put his head to the claimant and clenched his fists, the claimant returned to work and was summoned to the office and sent home. On 23 May 2007 the claimant went to the proprietor's office and he was informed later on that day that he was dismissed.

## **Respondent's Case**

Mr. G told the Tribunal that he is from France and he came to Ireland four years ago. He commenced work in July 2006 with the respondent. His tasks included cleaning the boxes and he undertook whatever work the manager asked him to do. He let the mares out in the morning, he mucked out the boxes/stables and in the evening he brought the mares in. Three employees and the claimant were at his level and they undertook more work than the claimant. Mr. G cleaned three to four boxes while the claimant cleaned one box.

On 21 May 2007 he started to clean out the boxes. The manager Mr. K asked the claimant to bring the tractor to load up the muckheap. There was a complete clear out to the central heap of muck and straw and this usually took all morning. The claimant told Mr. G that there was one more box to be cleaned. Mr. G asked the claimant what he was doing and he told the claimant that he was a lazy man. He did not understand why some employees did not have to work. Mr. G had cleaned five or six boxes and his colleagues had all done their fair share. The claimant had not done anything other than bring up the tractor and he stood beside Mr. G. Mr. G asked the claimant to help him and he refused. The claimant told Mr. G that he was not his manager and he did not use bad language when addressing the claimant. The claimant tried to fight with him but Mr. G told him that he did not want to fight him. The claimant scratched him and as a result he had a mark on his nose. An employee went to the claimant's assistance and another employee went to assist Mr. G and separated them. He went to the office and explained to his manager Mr. K what had happened. Mr. G was nervous and he spoke to Mr. H the proprietor. Mr. G continued with his work and he has not seen the claimant since the fight. He did not consider asking the claimant for help was provocation. The claimant was never particularly friendly to him.

In cross-examination he stated all he did was ask the claimant for help. He accepted that he was not the claimant's manager and everyone else did more work than the claimant. He tried to be nice to the claimant but the claimant never greeted him. He was not sent home or suspended after he made a complaint. All his colleagues did the same job. He did not receive medical attention after the altercation. He had worked with the respondent for ten months and the claimant was employed for almost thirty years.

In answer to questions from the Tribunal he stated that the claimant got on well with his colleagues. He did not make a complaint regarding the claimant's behaviour to anyone prior to the 21 May and he did not document his complaint in writing. The tractor was usually brought to the yard when the mucking was completed.

The second witness for the respondent the manager Mr. K told the Tribunal that he commenced employment with the respondent in 1981 and was manager since 1991. The claimant was employed with the respondent prior to him taking up employment. Up to February 2007 he was a good friend of the claimant's. He stated that on one occasion in February 2007 as he and the claimant were walking to the paddock the claimant told him he was a bully and that he used bullyboy tactics. They brought the mares out of the paddock and put them into the stables.

Mr. K the manager spoke to Mr. S the general manager and the proprietor Mr. H about the matter and he was very upset that the claimant had described him as a bully. The claimant was summoned to the proprietor's office. Later the claimant and the proprietor came to the yard and the claimant and the manager shook hands. The claimant apologised for calling the manager a bully and he then told him that he was still a bully. He told the claimant not to call him that and they shook hands

again. He was angry but he was happy to let it go as the claimant was a good friend of his. The respondent had three big yards, the main yard, the yard for in foal mares and H block. On some occasions he could not find the claimant. The claimant did not have a mobile telephone.

On or around 16 May 2007 he asked the claimant and two other employees to go to H block to muck out and tidy up. He was informed that the claimant had left at 12.30 to go home for his lunch, the claimant's lunch hour was from 1p.m. to 2p.m. Later that day he went to the cattle crush, as he needed to dose some cattle. He had told the claimant to wait at the cattle crush. He went across the avenue to the field and when he returned the claimant had left the cattle crush. On an earlier date the claimant and another employee went to clear up a felled tree. The manager told them to remain until 4.30p.m. as it was a quiet time of the year. He heard the tractor come in after 3p.m. and he found the claimant and the other employee reclining in the bales of hay. He was very angry about this and sent them back to complete the job until 4.30pm. He believed that the claimant had gone up on the bales many times previously. The manager had enough of this and the claimant was issued with a warning on 29 March 2007. On another occasion the manager was in Kilcock and he asked the claimant to help him. At 4p.m. the proprietor met the claimant going out the gate to collect his dry cleaning. The claimant did not seek permission to leave early and the claimant received a verbal warning.

On 21 May 2007 a vet was present in H block. When the manager returned to the office he received a text message from Mr. G who requested to see him about the claimant. He showed the text message to the proprietor. Mr. G who was agitated told the manager that there had been an altercation in the yard. The claimant had a role in mucking out and there was no favouritism. The claimant asked the manager was he not getting his wages and he told the claimant his wages were in the drawer. The claimant had been absent on Friday and Saturday and he had a day off on Sunday. He got the claimant's wages for him and he then received a telephone call from the proprietor to bring the claimant to the office. The claimant told the manager that he started the ball rolling and the manager did not respond to this.

In cross-examination the general manager stated that in general there were no complaints about the claimant's work up to 2006.

The proprietor of the stud Mr. H told the Tribunal it was his decision to dismiss the claimant. He notified him by letter dated 25 May 2007. On 21 May he received a text from an employee Mr. G that he wanted to see him. He contacted the manager and asked him to bring Mr. G. to the office. Mr. G was quite distressed and relayed to him what occurred when he mucked out the stables. Mr. G told him that he asked the claimant to help him and the claimant told Mr. G that he was not the manager and he would not listen to him. The claimant went for Mr. G and he tried to hold the claimant off with his hands. This happened three or four times. Two colleagues separated both the claimant and Mr. G. Mr. G did not want to fight and the claimant left a mark on his nose. Mr. G was very upset and the proprietor asked him if he wanted to have a rest but he returned to work. Mr. G had never complained about the claimant prior to this. He took a note during the meeting and he typed it later. He wanted to know if the manager had anything to say about the incident and the manager informed the proprietor that in the last week the claimant did not carry out his duties. He summoned the claimant to the office and he could see that the claimant was quite agitated. He had three questions to ask the claimant about the account that Mr. G gave him. He told the claimant the best thing to do was to go home and return on Wednesday. On Wednesday he asked the claimant what happened in H Block and why he left early. The claimant told him that he was made do all the shitty work. He thought all the tasks were finished and he did not think he told his colleague that he was leaving. In relation to the cattle crush the claimant told him he was going to

check mares and he told him it would take a half hour. At 3.45p.m. he stated he did not know what he was doing. Regarding the allegations that Mr. G made the claimant said he wanted to bring the tractor-trailer up. The claimant told him that Mr. G called him a lazy fecker. The claimant admitted he had a temper and that he should see someone about it and that he stood there and watched employees work. The proprietor came to the conclusion that the claimant physically abused Mr. G. He discussed the matter with his mother and the general manager. During the last eight months the claimant was bored with the job. He was unable to locate the claimant on numerous occasions. He was abroad when the claimant received a written warning on 29 March 2007.

He told the claimant if he left the premises he should have told his manager. The manager was upset that the claimant had called him a bully. The claimant's standard of work was not as it should be and the claimant was missing on a few occasions. All employees on the farm undertook similar work. The manager would not ask an employee to do something that he would not do himself and he would not consider the manager a bully. The claimant was apologetic and he told the proprietor that he was under stress at home. He told the claimant that the matter was very serious and that he could not call someone a bully. He felt that he had to make a decision and he went back over the events of the past eight months. During the season it was very busy. The claimant stated that he was not getting his proper overtime. The claimant had become aggressive and he felt it was the right decision to dismiss the claimant. The claimant was not a member of a union.

In cross-examination when asked if he read the note of the minutes to the claimant he responded no he did not. He did not tell the claimant he could have a representative present at the meeting. He spoke to the employees who were present when the altercation took place. He looked at close circuit TV but it did not reveal anything about the altercation.

### **Claimant's Case**

The claimant told the Tribunal that he never had any difficulties in work between 1978 and 2006. He felt pressure in work after 2007. An incident occurred on 19 January 2007 and the claimant was given a verbal warning for leaving the premises without permission. Mr. K the manager asked him to help with the horses and he could not go home at lunchtime to collect his dry cleaning. At 3.30p.m. he went to locate the manager and he could not locate him. On his way home he met the proprietor, Mr. H. He stopped and told the proprietor that he had to collect his dry cleaning and that he was unable to locate the manager. The proprietor told the claimant to go ahead. Another occasion he told the manager that he felt he was being bullied and the proprietor requested to see him in his office. The claimant told him that it was bullying tactics. He tried to diffuse the situation with the manager. The proprietor insisted that he apologise to the manager. The general manager pointed a finger at him and told him not to do it again. He felt he was being used and abused.

On one occasion the claimant was asked to go and fill a trailer with sticks with his colleague at 3.30p.m. There was not a lot to do prior to bringing in the mares and he filled in the time in the hay barn. On 16 May 2007 he went to H Block and he did not leave until the work was finished. He was asked to be in attendance at the cattle crush, he waited there for fifteen to twenty minutes and he thought it disrespectful to have been left there. He checked the mares.

On 21 May 2007 the manager asked him to bring a tractor to the yard. A colleague Mr. G asked

him would he muck out a box and he told Mr. G that he should do his job and he told him that he would do his. Mr. G turned to him and pushed him against the wall. Two employees pulled them apart and diffused the situation, the claimant then went home for breakfast. On his return the manager told him that the proprietor wanted to see him in his office. The claimant told the manager that he had got the ball rolling. The claimant went to the proprietor's office and he was suspended for two days. He told the proprietor that Mr. G had gone after him in a threatening manner. The claimant was asked to return after two days and then they would decide what to do. The claimant returned on Wednesday 23 May and he met with the proprietor and the general manager and he was not advised that he should have a representative. If he had been advised he felt that he would have sought representation. He felt it was getting serious and he felt that people were trying to get at him. The meeting lasted for forty-five minutes. The claimant admitted that he had a temper. The general manager asked him if he had sought medical help. Prior to this the claimant was never in trouble in work and he would let someone hit him before he would hit them. The general manager informed him at 12.30pm that his employment was being terminated. He got on well with his colleagues and there was never a time he refused to undertake duties.

In cross-examination he stated that on 19 January he went to look for the manager and he could not find him. He thought that the manager reprimanded him. He made it clear to the manager that he perceived him as a bully. When asked on what grounds he was abused in the workplace he responded that on one occasion he was accused of damaging a tractor, which he did not do. He had been an employee for twenty-nine years and the manager had no respect for him. He did not like the manner in which the manager asked him to go to the office. After he called the manager a bully the manager took umbrage at that. He felt abused by the manager over a period of time. It was unfair to call the apology mealy mouthed. The claimant stated that the manager was not laid back and relaxed all the time. Employees often used the hay barn to have a chat and this was not a manifestation of being used and abused in the workplace.

On 16 May 2007 he walked back from H Block as he felt like the exercise. He was told to wait at the cattle crush and he waited there for twenty minutes, he could not remember the manager telling him to remain on there. He greeted Mr. G in the mornings. When asked if he said that he did not muck out he responded he took his orders from the manager. When asked if it was part of his job on 21 May to muck out boxes he responded that he was not asked to. When asked after twenty-nine years that he did not know mucking out was not part of his job he responded it was part of his job. When asked why he did not do it he said that he was going to drive the tractor. It was not Mr. G's place to tell him what to do and it was Mr. G's tone of voice that upset him. Mr. G put his hands in the claimant's face and the claimant's nails must have caught him. When asked if he hit Mr. G three or four blows he responded it did not happen and he pushed him with his hands. When asked that his sense of grievance meant that he lost his cool he responded it was not true. He reiterated that he did not strike Mr. G. The claimant felt he was the victim, he felt the manager was a bully; he tried to discuss it with his manager and tried to clear the air. He was nervous about asking the manager for his wages and the manager told him that he would get the wages for him when he was ready.

When asked that he admitted that he had a temper he responded that it was suggested to him by the general manager that he had a temper and he did not think his temper was as bad as anyone else. He was trying to calm things down. He did not lose his temper and he felt a pain in his back. The claimant obtained alternative employment on 7<sup>th</sup> August 2007 at the rate of €528.00 per week. He received eight weeks notice when his employment terminated.

## **Determination**

The Tribunal has carefully considered the evidence adduced in the course of this one-day hearing.

It is common case between the parties that something untoward occurred in the stable yard on the morning of the 21 of May 2007. The incident has been described as variously an “altercation” an “attack” and a “fight”. What is clear is that more evidence was given at the Employment Appeals hearing than was gathered at the time of the incident and this is something, which cannot be ignored.

There is no doubt that misconduct can, from time to time, justify a summary dismissal. An inexplicable ‘assault’ or ‘attack’ on a fellow employee would certainly constitute misconduct that would attract instant dismissal. However, in the absence of witnessing such an event in person, the employer must conduct a full and comprehensive examination or investigation into such an allegation. This need not necessarily take days to complete but some deliberation must be called for when a man’s very livelihood hangs in the balance.

Unfortunately, no proper investigation was followed here. There were three to four other people in the yard who were not questioned about the incident. It seems Mr. G’s version was taken at face value without any allowance made for the degree of provocation and on the concept that one was as much to blame as the other.

The investigation was fundamentally flawed at the point where the claimant was sent home and Mr. G returned to work. The failure to allow or encourage representation is also seen as a flaw. Lastly, the introduction of those other earlier incidents of failure to perform duties only served to muddy the waters. This was either gross misconduct or it wasn’t. If this incident was being used as the final stage of the disciplinary procedure this should have been clear to the claimant.

The Tribunal accepts that the claimant had not been pulling his weight in the workplace for some period prior to the dismissal. His immediate manager describes the claimant as having gone “stale”, which after twenty-nine years is not surprising. Certainly an employee cannot be expected to condone or carry on with one of its employees slacking off, disappearing or not pulling his weight. This simply leads to a discontentment amongst the balance of the workforce.

However unless proper procedures are followed this cannot of itself amount to an entitlement to dismiss and some confusion seems to have arisen about this.

Having considered all the evidence, the Tribunal finds this dismissal to have been unfair. The Tribunal notes that the losses are not enormous and the Tribunal awards the claimant compensation in the amount of €2,700 under the Unfair Dismissals Acts, 1977 to 2001. No award is being made under the Organisation of Working Time Act, 1997.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)

