

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIMS OF:

CASE NO.

Employee

MN134/2007  
UD211/2007

against

Employer

under

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

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. J. Sheedy

Members: Mr. D. Hegarty  
Mr. J. McDonnell

heard these claims in Bantry on 22<sup>nd</sup> January 2008 and 29<sup>th</sup>-30<sup>th</sup> April 2008

Representation:

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Claimant(s) :

Mr. Eddie Mullins, Branch Organiser, S.I.P.T.U., Cork No. 2 Branch,  
Connolly Hall, Lapps Quay, Cork

Respondent(s) :

Mr. Eugene Glendon, Coakley Moloney, Solicitors,  
49 South Mall, Cork

The determination of the Tribunal was as follows:-

Evidence was given with the assistance of an interpreter after the first hearing day.

**Respondent's case:**

On the first hearing day a witness for the respondent was sworn in. The witness said that he was a joint managing director (hereafter referred to as JMD1) of the respondent which was a seafood

processing company which employed about one hundred people. About sixty per cent of the workforce was non-national.

In November 2003 the claimant came to the respondent as a personal favour by JMD1 to the claimant's sister whom JMD1 knew as a translator for a well-known charity with which JMD1 and his wife had had dealings. The claimant's sister entreated JMD1 to give the claimant a job. The claimant arrived without funds and JMD1 put the claimant up in JMD1's own home for about three weeks to get the claimant started. JMD1 did not charge the claimant for rent or board. However, when the claimant left he did not express thanks.

Regarding the quality of the claimant's work, JMD1 told the Tribunal that it had been "initially okay" and that there had been a training period for everybody but that the claimant had had difficulty taking direction from supervisors many of whom were women. The claimant found this hard to take but the respondent persevered with him. There was no major problem with the claimant other than little discrepancies. No warnings were given to him.

Asked about mid-2006, JMD1 said that the claimant was having difficulty with taking direction and that the claimant ignored jobs that he had to do. The claimant was given verbal warnings. The respondent met him to discuss all these issues.

The Tribunal was furnished with a copy of a document dated 7<sup>th</sup> November 2006 signed by JMD1 and by the other joint managing director (JMD2). The document advised the claimant as follows:

"The pattern of your performance and conduct in recent times raises serious doubts about your attitude and commitment to the Company which could be construed as Gross Misconduct.

In order to investigate these matters fully, I wish to advise that you are being suspended with full pay pending the outcome of the investigation.

The investigation will commence on Friday 10<sup>th</sup> November 06 at ... (venue stated).... You are entitled, in accordance with our disciplinary procedure to be accompanied by a representative who may act as a witness.

The issues that will be the subject of the investigation are:

- Ø Unreliability
- Ø Misleading Reports
- Ø Not applying correct work process
- Ø Showing disregard for the role and communication responsibility of your supervisor and manager
- Ø Absenteeing (sic) yourself from the company without permission from your supervisor and manager
- Ø Not fully completing work assigned to you in accordance with the correct schedule

I look forward to meeting you on Friday so that these matters can be reviewed. I am enclosing a copy of our company Disciplinary Procedure that is being utilised in this investigation."

JMD1 told the Tribunal that the meeting was "handled" by JMD2 but that he (JMD1) had been in attendance. The respondent decided that it would issue the claimant with a final written warning.

The Tribunal was furnished with a copy of a final written warning dated 15<sup>th</sup> November 2006 signed by JMD2. It included the following paragraph:

“We hope that you will take the appropriate steps to avoid any repetition of the performance and conduct issues raised with you in the investigation. I want to emphasise that if you fail to change your performance and conduct, then it will result in your dismissal from the Company. However we are hopeful that this will not arise. We are therefore requesting you to resume work at 9.00 a.m. on Thursday, 16<sup>th</sup> November 06.”

JMD1 now told the Tribunal that the claimant did return on 16 November but that subsequently the respondent got a complaint from a co-worker of the claimant that the claimant had threatened her with physical harm.

The Tribunal was now referred to a note (in English) dated 16<sup>th</sup> November which was claimed to be an English-language report of an allegation that the claimant had threatened a co-worker.

JMD1 now told the Tribunal that he had taken a very serious view of receiving a report like that and that as MD he did not condone such actions.

The Tribunal was now furnished with a copy of a letter dated 16 November 2006 from JMD1 to the claimant which contained the following:

“We have received a report of harassment by you towards another employee of this Company. The Company takes matters of this kind very seriously and we intend to investigate this incident.

I wish to inform you that you are suspended with pay until further notice until this investigation is complete.”

The Tribunal was referred to another note (also in English) dated “23<sup>rd</sup>” (presumably of October 2006) which was claimed to be an English-language report of an allegation that the claimant had made a co-worker afraid for her own safety.

By letter to the claimant dated 21<sup>st</sup> November 2006 JMD1 stated:

“The Company has received another report of harassment by you towards a second member of its staff.

The Company now requests you to attend an oral hearing to give you an opportunity (sic) to answer these claims.

This hear (sic) will take place on Friday (24<sup>th</sup> November 2006) at 4.45 pm at...(venue stated).... You are entitled, in accordance with our disciplinary procedure, to be accompanied by a representative who may act as a witness.”

JMD1 now told the Tribunal that the said meeting proceeded and that the claimant was represented by the trade union official who now represented him at the Tribunal hearing. JMD1 told the Tribunal that, if he remembered correctly, the claimant had denied making the remarks which had

been attributed to him.

Asked at the Tribunal hearing by his own representative what further action had followed the 24<sup>th</sup> November meeting, JMD1 replied that a board meeting had been held, that the respondent had interviewed both witnesses again, that the board had reviewed the 24<sup>th</sup> November hearing in full and that the board came to the conclusion that it had no option but to dismiss the claimant.

JMD1 told the Tribunal that the respondent had feared for the safety of the two female employees and that as MD he “could not stand idly by when people are threatened”. Having decided to dismiss the claimant, the respondent wrote to him to that effect on 28<sup>th</sup> November 2006 and got no appeal of the dismissal. Neither had the respondent received any appeal of a verbal or written warning given to the claimant.

In cross-examination JMD1 was asked to show the respondent’s training records. He replied that no specific record was kept, that this was the seafood industry and that the respondent’s training method was that a worker would be shown a process by a trained worker. He said that he did not know if the respondent paid a training rate and that some workers learn more quickly than others.

It was put to JMD1 that the claimant had been paid a training rate rather than the minimum wage and that if the minimum wage was not paid there had to be certification at the end of the training period. JMD1 replied that he could not produce such records to the Tribunal on that hearing day but that the certification at the end of the training process would be a pay increase. When it was put to him that there had to be specific training he replied that it would be certified by a senior manager in the company.

When JMD1 was asked if he had copies of written warnings to the claimant apart from that from 16<sup>th</sup> November 2006 he replied that this was in his booklet for the Tribunal.

Asked when terms and conditions of employment had been issued to the claimant, JMD1 replied that the date in question was 4<sup>th</sup> November 2003.

It was put to JMD1 that deductions were being made for rent and canteen with no written agreement. He replied: “We did not deduct anything from employees without prior written consent.” He added that he had the claimant’s prior written agreement, that there had been an attempt to raise this issue with a Rights Commissioner (but that it had been out of time) and that the claimant was trying to raise it now.

JMD1 was now asked to give the dates of verbal warnings given to the claimant and to say what investigations had been held. He then gave a date in late 2006 when the claimant had been given a verbal warning for leaving work and getting a fellow worker to drive him to Castletownbere without his clocking out. He referred to a document from 28<sup>th</sup> September 2006. Asked when a full investigation had been held, he said that he imagined that it had been prior to 28<sup>th</sup> September 2006. When it was put to him that a record should have been kept JMD1 replied that he did not have the record and that, prior to 28<sup>th</sup> September 2006, there would have been a disciplinary hearing. He added that the claimant would have been offered a witness but that, as a result of the hearing (which would have been a day or two before 28<sup>th</sup> September 2006), the claimant had got a warning.

When it was put to JMD1 that the claimant had been given a warning in contravention of the respondent’s own procedure JMD1 disagreed. Asked what date of reappraisal had been set, he

conceded that no such date had been specified in writing but said that he imagined that it had been verbally conveyed to the claimant that he could appeal. Asked if an appeal had taken place, JMD1 said that he had no record of one. Asked if the respondent could act verbally whereas the claimant could not do so, JMD1 replied: "No. No appeal was requested."

It was put to JMD1 that the claimant would tell the Tribunal that he had sought to appeal and JMD1 was asked if the notes of this were on record. He replied: "I imagine so." JMD1 accepted that no date for reappraisal had been set in the claimant's final written warning. Asked what specified objectives had been set for the claimant, JMD1 accepted that there had been no specified objectives in the written warning but said that they would have been that the claimant would show improvement regarding all the issues involved. JMD1 referred the Tribunal to the 7<sup>th</sup> November 2006 letter. It was put to him that the claimant had been given permission for what he had done on that day. JMD1 replied: "I've no evidence of that."

It was put to JMD1 that the claimant had not been given a chance to appeal the 7<sup>th</sup> November 2006 letter. JMD1 did not dispute this and also accepted that a 30<sup>th</sup> November 2006 letter had not been answered.

JMD1 told the Tribunal that the respondent's anti-bullying policy applied to all employees. When he was asked if it also applied to management he replied: "Absolutely." Asked when it had been adopted, he said: "November 2001." Asked if it had been issued to all employees, he replied: "It's available to all employees. I don't know if it's issued to them all. It was available." Asked if it had been available in different languages, he said yes but when it was put to him that the claimant would say that he had never seen it, and that the claimant's representative had got it from the Labour Relations Commission Advisory Service, he did not reply.

When it was put to JMD1 that the claimant had made two complaints in 2004 he was asked if the complaints had been investigated. Regarding the first, he replied that he imagined so. Regarding the second, he said: "Again, I'm assuming it was." Asked if the claimant had been given a report, he said: "I assume it was given."

It was put to JMD1 that an employee had threatened to drown the claimant. He replied that he assumed that this had been investigated and that he would look into it. It was put to JMD1 that he had said that he would get back to the claimant and to the claimant's representative. He replied: "I can't be sure." It was put to him that he had said on the 24<sup>th</sup> that he would get back to them but that he had not done so. He replied: "I'll check that."

When it was put to JMD1 that the claimant had never had an outcome to his complaint about the drowning threat he replied: "The complaint was made months after it allegedly happened. The employee was gone." Although it had been in October 2004 that the claimant had complained, JMD1 said: "The first I heard about this was two years later."

When it was put to JMD1 that the matter had been raised with a respondent management member in October 2004 and in November 2004 but had never been investigated, he did not reply.

JMD1 was now referred to the 16<sup>th</sup> November 2006 letter and was asked if it indicated who had made the complaint against the claimant. He replied: "No. I was not going to name the employee for her safety."

It was now put to JMD1 that the claimant could not prepare for a meeting with the respondent

without knowing the allegation against him. He replied that this was dealt with at the disciplinary hearing.

It was put to JMD1 that the respondent had said that it would provide copies of the signed statements of complaint against the claimant, that no cross-examination of the complainants had been allowed and that it had subsequently been disclosed that the statements had been interpreted and written out by a management member. He admitted that he did not have the original statements in the native language of the complainants and that they had given their accounts to management through an interpreter.

JMD1 was now referred to stage four of the respondent's procedures regarding enabling an employee to prepare for a hearing. He replied that the claimant had been told that there were two allegations against him and that on 24<sup>th</sup> November the allegations had been disclosed.

When it was put to JMD1 that details had not been given to the claimant before the meeting he replied: "You did not ask for an adjournment."

It was put to JMD1 that the claimant's representative had left the meeting on the basis that the respondent was to provide more information but that, two days later, the respondent had dismissed the claimant. Asked if the claimant had been offered an appeal, JMD1 replied: "I don't recall. We felt there was no higher office in the company to appeal to."

JMD1 told the Tribunal that the respondent had considered the complaints against the claimant to be very serious but admitted that counselling had not been offered to the claimant despite the fact that the respondent's anti-bullying policy contained the following sentence:

"The appropriate manager must set up an investigation to establish whether there is a need to take disciplinary action and should consider offering specialist counselling support to any of those involved."

The respondent's joint MD (JMD1) was re-called on the second day of hearing. He confirmed that the claimant was given a copy of the terms and conditions of employment. The appeal letter dated 30<sup>th</sup> November 2006 wherein the SIPTU representative sought leave to appeal, on behalf of the claimant, a verbal warning issued in May and the final written warning issued on 15<sup>th</sup> November 2006, was out of date and did not state the basis for the appeal. It was company policy to investigate all allegations of bullying.

In cross-examination witness said that he did not acknowledge or respond to the appeal letter of 30<sup>th</sup> November as it was outside the time frame. In relation to the undated letter received by the claimant's union representative date stamped 26<sup>th</sup> May 2006 alleging verbal warnings, witness admitted that he could not be 100% sure if the claimant was advised of his right of appeal.

The Tribunal also heard evidence from the head of the human resources department. She said there were two complaints in respect of the claimant. She took a hand-written note of the statement from each of the ladies in question. One statement was dated the 16<sup>th</sup> November and the other was undated. Witness was present with the interpreter and the two ladies when they were giving their statements. The two ladies were visibly shaken. Witness did not receive a complaint either verbally

or in writing from the claimant.

In cross-examination witness said she was not aware that the claimant offered to translate into Russian for other employees. In relation to the undated letter addressed to the claimant in respect of verbal warnings witness could not recollect the actual dates on which she gave these warnings. This letter which was read by the union representative stated that the verbal warnings were in respect of his (the claimant's) "attitude and un-cooperation towards your supervisors" and, if the practice continued, the respondent would have no option "but to terminate your employment with this company". When asked how many warnings were given to the claimant she said there had been about two. Witness stated that she gave the claimant written confirmation of these warnings around April or early May 2006. She said she investigated the reasons for the verbal warnings in late April or early May. However, she did not have a record of such investigation at the hearing of this case. Neither was there a record of the claimant being invited to attend disciplinary hearings in respect of the warnings. In relation to the complaints by the two ladies regarding the claimant she did not ask either of the ladies or the interpreter to sign or date the statements as she did not feel it was necessary. Witness received the complaints written in Russian from the ladies. However, these were not furnished to the claimant or his union representative.

In answer to questions from Tribunal members, witness said that verbal warnings were not issued very often i.e. once in six months. The record of such warnings are placed on the individual's file.

The first of the two ladies who had made a complaint against the claimant gave evidence at the Tribunal hearing with the assistance of an interpreter. She told the Tribunal she has worked for three years with the respondent cleaning scampi. She likes working there and wishes to continue working for the respondent. She furnished a statement of complaint about the claimant to the human resources person, the previous witness. She still feels afraid of the claimant and she expected her employer to look after her when she made the complaint.

In cross-examination witness said she was aware of the anti-bullying policy in the respondent's workplace. She has read the policy which had been provided in English and not her native language. She can read English and speaks a little of the language. She made the complaint around the end of November 2006. She made the complaint in Russian to the human resources person. She did not know who wrote the complaint but a friend, who used to work in the factory, translated it for her. She gave the complaint in her own handwriting to the human resources person and she was not asked to sign it.

On the day she made the complaint the claimant refused to work on the scampi. The claimant did not like the fact that the scampi were different sizes. The respondent's representative explained how the sizes of the scampi would change the output on a production line. The large scampi made it easier for the employees to attain his/her target. The claimant said he would not do his work and walked away. In her statement she stated that the claimant was "sneering" at her and by this she meant that he was laughing at her. She said the claimant also used bad words, he was not kind and had not respect. She informed the floor manager. While she felt uncomfortable working with the claimant she did not ask to be transferred elsewhere. In relation to the anti-bullying policy she was asked if the respondent dealt with her case in the time-frame of two to four weeks as outlined and she did not know. She wrote the statement and did not know what happened after that. Once the statement was made she was not interested and she felt it was up to management to resolve the problem. The claimant's behaviour was inappropriate and she asked him to stop. On the day in

question she did not have to leave work and go home.

In answer to questions from Tribunal members she agreed that the statement represented the complaint she made.

The second lady who had made a complaint about the claimant also gave her evidence to the Tribunal with the assistance of an interpreter. She too has been working with the respondent for three years. She enjoys her work and would like to continue working for the respondent. She made a statement to the human resources person. She is still afraid of the claimant. After she made the statement she expected her employer to look after her. She has no English and made her statement in Russian. A colleague helped to translate it for the respondent.

In cross-examination witness said she also worked on the scampi. She would not call herself a friend of the claimant. She was aware that the claimant was returning from suspension on the 16<sup>th</sup> November 2006. She did not know much about the anti-bullying policy. She did not argue with the claimant but was upset by what he said to her. She just said good morning to the claimant on the 16<sup>th</sup> November and he answered by saying that she talked too much. She was not provoking the claimant. The original statement written in Russian she said she left with the respondent. On the day in question after the interaction with the claimant she went to the canteen for a while and then came back to work crying. She reported the incident to the human resources person in the scampia area. She did not think about signing the statement.

In answer to questions from Tribunal members witness said she was upset about a remark the claimant made inferring that she would be "sitting in a wheelchair" and she took this to mean that the claimant would be responsible for putting her in this situation. She started to write the statement in Russian and the human resources person and a colleague helped her to write it in English. Her command of the English language is poor. She has worked with the claimant for about a year and, while she had problems with him prior to 16<sup>th</sup> November 2006, she never paid any attention to them.

### **Claimant's case:**

The claimant in his evidence to the Tribunal said that he commenced his employment with the respondent in November 2003. Initially he lived in houses owned by the respondent prior to moving to a hostel. He worked in several sections of the company / factory and the head of the human resources department was his supervisor. He had a good relationship with management. He received a contract in English in 2006 from his supervisor. He was asked if he understood it and as far as he knows all the contracts were written in English. Other employees asked him to explain the contracts to them and he offered to translate the contracts into Russian but the supervisor was indifferent about his proposal. He read the disciplinary procedure. The only warning he received was the one date-stamped by SIPTU on 26<sup>th</sup> May 2006. He did not attend a disciplinary hearing. He asked to appeal the warning but was told that he could not do so as his supervisor did not agree. He was not aware of the warnings referred to by the respondent dated 28<sup>th</sup> September and 5<sup>th</sup> and 27<sup>th</sup> October 2006. Following a meeting with the respondent on 10<sup>th</sup> November 2006 he was suspended pending the outcome of an investigation. He was then issued with a final written warning dated 15<sup>th</sup> November 2006. While he was not advised of the steps in relation to appealing he did lodge an appeal but no hearing took place. The first time he saw a copy of the anti-bullying policy was at the first day of hearing this case. He made complaints of bullying by another



employee to his supervisor in October and November 2004 but she told him to forget about the incident.

On 16<sup>th</sup> and 21<sup>st</sup> November 2006 he was notified of the complaints from two employees. On 23<sup>rd</sup> October 2006 the complaints were made. However, no reference was made to such complaints at the meeting with the respondent on 10<sup>th</sup> November 2006. No member of management spoke to the claimant about the complaints. He received details of the complaints at the meeting on 24<sup>th</sup> November 2006. Referring to the complaints by the ladies he said that he never refused to do his work and he did not understand what one meant by sneering. He never made insulting remarks and did not say that bad things could happen to one of the ladies and he did not harass, bully or intimidate her. He did not make remarks about her state of health or that she would be in a wheelchair. When he returned from suspension on 16<sup>th</sup> November 2006 this lady asked him why he had been missing for several days and, feeling stressed, the claimant told her it was none of her business. It was probable that his reply had been an angry one.

The claimant was dismissed by letter dated 28<sup>th</sup> November 2006 and he was not afforded the opportunity to appeal this decision.

In cross-examination witness said that the statement made by the first lady was not true. Witness said that he never intimidated, bullied or threatened her. Neither did he refuse to do his work or sneer at her. He also denied that he was insulting to the lady. In relation to the statement given by the second lady he did not recall being angry with her or making a threat about her welfare. While he made complaints of bullying about another employee in 2004 his supervisor did not revert to him and his reason for not considering an appeal was that he had not been given the anti-bullying policy document.

In answer to questions from Tribunal members, witness said that his suspension in November 2006 was several days long. Prior to the meeting of 10<sup>th</sup> November he received only one letter in respect of a verbal warning.

**Determination:**

The Tribunal is unanimous that fair procedures were not invoked by the respondent in arriving at the decision to dismiss the claimant and, therefore, his dismissal is deemed to be unfair. However, the Tribunal is of the view that the claimant contributed in some measure to his dismissal and his award has been reduced accordingly. The Tribunal, therefore, awards the claimant the sum of €18,000.00 (eighteen thousand euro) under the Unfair Dismissals Acts, 1977 to 2001.

The claimant is also awarded €703.92 (which is the equivalent of two weeks' wages at a gross weekly pay of €351.96 per week) under the Minimum Notice and Terms of Employment Acts, 1973 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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