EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:		CASE NO.
Employee	– claimant	UD656/2008, MN595/2008

Against

Employer - respondent

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 D. Mahon BL

Members: Mr L. Tobin
Mr A. Butler

heard this claim at Wicklow on 6th November 2008 and 7th January 2009

Representation:

Claimant: Mr Thomas E Honan, Thomas E. Honan & Co, Solicitors,
Ferrybank, Arklow, Co. Wicklow

Respondent: Ms Ger Moriarty, Local Government Management Services Board,
35-37 Ushers Quay, Dublin 8

The determination of the Tribunal was as follows:

Respondent's case:

The facility manager and person in charge of a recycling centre in Ballymurtagh, County Wicklow under the control of the respondent was alerted by phone in the late afternoon of 6 September 2007 that an incident, which required his attention, had occurred there some time earlier. While he was on the premises the witness was nevertheless some distance from the location of this reported incident. When he came upon the scene he met two colleagues, one a fulltime employee, and the other a student and part-time worker. The witness was told by those two men of the circumstances that led to the phone call. The student was suffering from an ankle wound and the witness felt obliged to document that injury.

Based on the two employees version of events the witness compiled an incident report statement. That statement was put into evidence. He also phoned another colleague and recommended that the claimant be suspended. He felt he had no choice in this case but to act. The witness described the

reported behaviour as not normal and this was his first experience in thirty years of dealing with an alleged physical altercation between two working colleagues. Up to that time there had been no issues or difficulties between the claimant and the student employee. He also accepted the other worker's statement that the claimant's reported behaviour that day was not in his character.

The witness was not made aware at that time of an incident between the claimant and the part-time employee over the issue of a light switch. However he accepted this employee had been driving a forklift around the premises prior to this reported incident and in the course of doing so had contributed to a dislodging of some of its load causing unwelcome distress to the claimant. He conceded that allowing that student to drive the forklift was not legally correct.

The senior executive officer (also referred to as SEO) for water and environmental services was asked by the director of services to investigate this incident. On 10 September 2007 he wrote to the claimant formally placing him on suspension and invited him to a disciplinary hearing later that month. The claimant was reminded of his right to representation. That letter advised the claimant that he was not to discuss the nature of the incident with other named relevant parties. This was done to avoid possible interference with other witnesses. A copy of the respondent's grievance and disciplinary procedures was enclosed in that letter. Between the 17 September and 11 October the witness together with a retired former colleague met the claimant and the two other employees. Their version of the actual events of this incident under investigation was broadly similar, albeit with different emphasis and reasoning. By the time the witness met the claimant on 17 September both parties had a copy of the incident report as submitted by the facility manager.

At that meeting the claimant raised the issue of the forklift incident. He also stated that the student had switched off a light in the canteen while he was reading. The claimant's reaction was to pick up a claw hammer and throw it in the direction of the doorway where the student was standing. He denied throwing that implement at the part-time worker but did accept there was contact between the hammer and the student. In response the injured student used offensive language to the claimant who in turn grabbed him by the lapels of his upper clothing and forced him against a sink unit. Soon afterwards the claimant apologised to the student.

Following the completion of those meetings the claimant was furnished with copies of the meeting notes. By that stage the student had ceased employment with the respondent, his date of termination being 7 September. The witness in turn received a handwritten letter from the claimant dated 22 October 2007 in response to the furnishing of those copies. He clarified that he did not suffer from breathing problems and that he grabbed the lapels of the student's shirt.

On 21 December 2007 the witness told the claimant that on the basis of the respondent's investigations he was recommending his dismissal as the disciplinary sanction to the director of services. That day he despatched a memorandum containing that recommendation to that director outlining the case and the investigations into the incident. While the claimant said little in response a letter from the claimant's legal representatives concerning the matter was received by the respondent in late January 2008. The witness told the Tribunal that there was no evidence of a personality clash between the student and the claimant. He regarded the forklift incident as unrelated and of "no great relevance". The witness continued and stated that the claimant's health status was not an issue in this case.

In reaching that recommendation the witness took into account the claimant's length of service, the

belief that this incident went beyond "normal horseplay", and that the aggression amounted to gross misconduct. He also took into consideration a previous incident involving the claimant that was resolved informally. He was satisfied that the investigation was conducted properly and viewed the recommended sanction as fair and appropriate. This was the first time he made such a recommendation and it was not taken lightly. It was the witness's opinion that the claimant acted recklessly in throwing the hammer and in his follow-up action. He was aware of the light switch incident and the offensive remark directed at the claimant but maintained this was not sufficient provocation for the claimant to react the way he did. No investigation took place into the forklift incident.

The director of services in turn supported the recommendation to dismiss the claimant. That recommendation was forwarded to the county manager who had the authority to dismiss employees.

The county manager of the respondent who described himself as the chief executive officer has the responsibility for ensuring all employees have a safe working environment. He told the Tribunal that he became aware of this investigation in early 2008 and reviewed the file with all its statements and correspondence. There was no evidence that the claimant intended to hit the student with the claw hammer. He regarded the claimant's representative's letter of January as an appeal against the recommendation to dismiss. That representative and his client met the witness on 25 April and commented that the submitted notes on that meetings was an accurate reflection of what transpired during that encounter. The meeting ended when all discussions were exhausted.

In a letter dated 2 May 2008 to the claimant the county manager informed him that his employment was being terminated with immediate effect. While he was aware of other disciplinary options the witness felt the claimant had not only assaulted another member of staff he had also breached health and safety regulations. Mitigating circumstances were not sufficient enough to alleviate that sanction. The witness however stated that in the circumstances the respondent made "an appropriate gesture" and paid the claimant six weeks notice at the time of his dismissal.

Claimant's case:

The Tribunal heard evidence as to the Claimant's loss. The Respondent told the Tribunal that the Claimant would be paid a pension lump sum that he was due and the annual amount that he is due.

The Tribunal heard evidence from the Claimant.

The Claimant told the Tribunal that he got a letter dated 10 September 2007, which stated that he was suspended. He and his representative met the SEO on 17 September. There was a further meeting. On December 21 a report recommended his dismissal. He subsequently appealed this and this was heard on 25th April 2008. He then received his dismissal notice by letter dated 02 May 2008.

The Claimant described the incident with the forklift that happened shortly before the main incident.

The Claimant explained the events of 6 September 2007. He was in the canteen and he was looking at a photograph of his granddaughter in a newspaper. The student employee arrived and stood in the doorway and switched off the light. He told the student to get out of the doorway. He then saw a hammer and "threw it in" the direction of the student. The student ran and the hammer hit the

student. The student returned and called him a (expletive). The claimant than grabbed the student. Another person (VK) arrived and told them to "cut it out lads" and "you had better make it up". The Claimant then "made it up".

Subsequently a supervisor told him that he did not know if he would be suspended. The Claimant told the Tribunal that the supervisor did not seem to think that the incident was a serious incident. He told the supervisor that he had "made up" with the student.

Cross-examination:

The Claimant explained that the student switched off the light in the canteen. He did not throw the hammer directly at the student. The student was in the yard when he threw the hammer. He did not throw the hammer to hit the student.

The Tribunal heard closing statements from the representatives.

Determination:
The members of the Tribunal very carefully considered the evidence adduced, statements submitted and documents put forward during the two day hearing. The claimant's work record and the good service is acknowledged. However, it is the considered conclusion of the Tribunal that the investigation process was reasonably satisfactory and that there can be no compromise in relation to the important matter of health, safety and welfare at work. Having regard to all of the circumstances the Tribunal finds that the dismissal was fair. Therefore it is the unanimous determination of the Tribunal that the claim under the Unfair Dismissals Acts, 1977 to 2001, and the Minimum Notice and Terms Of Employment Acts, 1973 to 2001, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sad.) _____
(CHAIRMAN)