

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee

UD1117/2007

Against

Employer

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. K.T. O'Mahony BL

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

heard this claim in Cork on 10 July 2008 and 19 November 2008

Representation:

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Claimant(s) :

Mr. Liam Allen, SIPTU, Fair Street, Mallow, Co. Cork

Respondent(s) :

Conor O'Connell, Construction Industry Federation,  
Construction House, 4 Eastgate Avenue, Little Island, Cork

The determination of the Tribunal was as follows:-

#### **Respondent's Case:**

The respondent inter alia installs, services and maintains air conditioning systems. Nine employees were working in this side of the business. An apprentice fitter (AP) commenced on six month's probation with the respondent in October 2006. He mostly worked with the claimant because they were both from Cork. While the claimant did occasionally call AP by his name he more regularly referred to him as "boy", telling him, "Do this, boy" or "Get that, boy". The claimant would ask him to get a tool and then ask him to get another although it would have been easier to get them all together. The claimant used foul and abusive language to him on a daily basis. AP was not accustomed to this and it upset him. There was a lot of "f...ing this" and "f...ing that". If AP's work was not "up to scratch" the claimant told him it was "s..t". The claimant gave him very little help and guidance and was negative rather than encouraging about his work.

In early July 2007 the claimant and AP were working on a contract in Templemore. When they were finishing-up work on the second day, 10 July, AP asked the claimant if there was anything he could do to help. The claimant replied, "Show some f...ing initiative and find something to do". The claimant explained that he was only an apprentice and needed some guidance. The claimant lost his temper with him, became very aggressive and told him that he never did his work or showed initiative. When the claimant told him that he was his boss and that he should do whatever the "f..." he told him to do, AP replied that he was his senior work colleague and not his boss and added that there was no need to be aggressive and speak to him like that. The claimant became more aggressive, raised his fist and standing face to face with the him said, "I should f...ing hit you, boy".

AP was shocked and felt he could no longer work with the claimant. On his father's advice he telephoned the senior fitter (SF) and informed him of the situation. When SF asked if there was any chance that he would stay and finish the job he told him that he could not, that he had had enough. After this the claimant, also having spoken to SF, tried to get AP to stay. While AP was waiting for his father to come from Cork to collect him he accepted the claimant's offer of a lift to Thurles; it would lessen his father's journey to collect him.

While working in Mallow the following day the Financial Controller (FC), who along with the Managing Director formed the senior management in the respondent, asked him about the incident and on his suggestion AP provided a written statement. This statement, dated 11 July 2007, was adduced in evidence. AP did not know what the consequences of his statement would be. He had received a copy of the company rules when he started with the respondent. While the rules state that threatening to hit someone is grounds for dismissal, AP was not thinking of something he had read nine months previously when he was making his statement.

AP accepted that he was accountable to the claimant as his senior colleague and that bad language is commonly used but he would not accept the aggressive manner in which the claimant confronted him and the language he used when issuing instructions to him; it was disrespectful.

AP had not previously made a complaint to his superiors because this was his first full-time job and furthermore he felt that it would be easier to get rid of him than a fully qualified fitter. However, he reported the claimant's behaviour on 10 July because things got out of hand and he was threatened with physical violence. AP could not say that he had ever had a good working relationship with the claimant but some times were bearable. AP agreed that he was much taller than the claimant.

The respondent's administrator (RA) organises the work programmes and work crews and informs the workers of their schedules for the coming week. The claimant did not like to listen to her. When she attempted to ascertain how long he would be on a job his reply always was, "It depends". His every second word was "f..." and when she objected to such language he would hang up on her. Dealing with him was stressful for her and she dreaded having to telephone him. She never had a run-in with any of the other employees. The claimant was always aggressive with her and roaring on the telephone except when he telephoned asking her to do something. Sometimes "her blood was boiling" when she came off the telephone but she did not make a complaint, even though she was tempted to, because she would still have to work with him. She only gave evidence at the Tribunal hearing because the claimant was no longer with the respondent.

On the night of their Christmas event she bought the claimant a drink. Later that night he approached her in the smoking area and asked if she had a problem with him. She told him that she did not but that it was her job to telephone him about the service and maintenance jobs. He told her

that she was only a secretary and that she should be listening to him. When she told him that he was not her boss he became aggressive and raised his voice. She did not want to have an argument and when she went to walk away he grabbed her wrist to say his piece. Another girl intervened on her behalf and when they went to leave he continued shouting after them. RA went home at that stage because of the claimant. She was tempted to make a complaint about the incident but she thought he would just get a warning and she did not think her name would be kept out of it. In cross-examination she accepted that the claimant had grabbed her wrist to get her to stay there and listen to him. She did not think that the claimant was inebriated because they had a meal earlier in the evening.

Following the incident of 10 July PC, an engineer with the respondent, asked her to make a statement about her experience with the claimant. She made it on a private and confidential basis and it was typed up. She asked that it would not be passed on because if the claimant read it she feared it would make life working with him even more difficult and it was hard enough as it was. The fact that English was not the claimant's first language did not pose a problem in her communication with the claimant. She accepted that, if the claimant was roaring she would raise her to be heard.

FC (the Financial Controller) spoke to the claimant on 16 July and gave him a copy of AP's statement. The claimant's initial response was that it was not a big deal, he and the claimant could work together and there should be no fuss. FC gave him three days to respond to AP's statement and suspended him with pay pending the completion of the investigation. On even date the Managing Director (MD) wrote to the claimant informing him that they intended to complete the investigation by 20 July and that he was entitled to have a trade union representative or colleague at the hearing, which would be held in due course. In the letter MD also informed him that his job was at risk.

On 17 July the claimant responded to the claimant's statement. According to the claimant it was AP who had been the aggressor on 10 July. He stated :

*I was working outside on my own. I watched [the claimant], over 30 minutes, on purpose, waiting around. Suddenly he asked me what he could do in an aggressive manner. I answered him that, for example, he could tidy up the tools and the material or run a cable from inside the building to outside while I was finishing my job. I asked him to show some initiative to help me to do the job and that after nine months working for the company I was expecting more interest and specially a different behaviour, like other apprentices.*

In this letter the claimant further stated that AP was answering him in a sarcastic and arrogant manner and that he was not paying any attention to him and becoming even more aggressive. In his letter the claimant did not refer to the allegation of the threat of physical violence.

FC discussed the claimant's version of the events with him at a meeting on 19 July 2007. At this meeting the claimant denied that the incident happened as outlined by AP, stated that AP was a poor apprentice and that there were no witnesses to the incident. FC thought that it was unusual behaviour for a fitter with a tight schedule to spend 30 minutes watching an apprentice.

On FC's instructions PC, who worked on the other/ventilation side of the respondent's business, took statements from the other workers, mostly apprentices, about their working experience with the claimant. The statements were given on a private and confidential basis and corroborated AP's experience as regards the bullying type behaviour of the claimant and his use of foul and abusive

language. These statements were not provided to the claimant or his trade union representative and the allegations contained therein were not put to the claimant.

On 20 July 2007, FC and Ms S, on behalf of the respondent, met the claimant and his colleague. FC told the claimant that the respondent preferred AP's version of the incident and afforded the claimant a further opportunity to explain the incident. The claimant reiterated his responses of 16 July and provided no further explanation. His demeanour was defensive. The claimant's suspension was extended by a further three days while the respondent considered the appropriate sanction.

MD, who owns the company became involved at this stage. He read the evidence over the weekend. Apprentices are young and vulnerable. MD thinks it is important that there is relationship of trust between the apprentices and the fitters because they sometimes work together up to days a week and on occasions they live together away from base. MD believed AP's version of the event of 10 July. AP had been so upset that his father had to drive from Cork to collect him. In the past MD had dismissed a fitter for harassing and intimidating an apprentice. The company prides itself in the training, including training on how to relate to customers, which it gives to its employees.

Both MD and FC believe AP's version of the incident of 10 July was the more plausible. The claimant had threatened a young apprentice with physical violence and this constitutes gross misconduct under the claimant's terms and conditions of employment, a copy of which the claimant had received when he commenced employment with the respondent. Both FC and MD based their decision to dismiss the claimant on the incident that occurred on 10 July. The claimant was notified of his dismissal by letter dated 24 July 2007. The respondent had not been aware of any issues about the claimant prior to 10 July. His work was of good standard and he was diligent and finished all his files on time.

The respondent did not rely on the statements made by the other apprentices in reaching its decision to dismiss the claimant. It was FC's evidence that it was a huge temptation to rely on these statements as they would strengthen the grounds for their decision to dismiss the claimant but they did not want to destroy the trust of their employees who had made confidential statements and in any event irrespective of the statements the claimant's behaviour on 10 July constituted gross misconduct. These statements corroborated AP's experience as regards the bullying type behaviour of the claimant and his use of foul and abusive language but the threat of violence on 10 July was the reason for dismissing the claimant.

The respondent considered redeployment for the claimant but the only option open was to put the claimant with another apprentice and health and safety considerations prevailed; the respondent was conscious that should a violent incident occur in the future and it had not acted in this case the respondent would have no defence and could be found to have been negligent.

The decision to dismiss the claimant caused operational difficulties for the respondent. There were nine employees working on the air conditioning side of the business and only one other along with the claimant was a qualified fitter. It is difficult to get a qualified person because most fitters prefer to work on the refrigeration rather than the air conditioning side of the business. The respondent was worried that the one remaining qualified fitter would leave since he would be picking up the slack following the claimant's dismissal. It took three months to get a replacement.

Subsequent to the dismissal, at the request of the claimant's trade union representative MD and GC met them on around 4 August 2007. The issues were further discussed. At this meeting the

respondent accepted the claimant's argument that he had not abandoned the claimant in Templemore on 10 July. For the first time the statements made by the other employees were mentioned to the claimant and his representative. The respondent refused to furnish these statements to the claimant and his trade union representative. The claimant said he was appealing his dismissal and set out his reasons for his appeal. The Managing Director told him that it would take a week to assess these. On 14 August MD wrote to the claimant informing him that on the basis of the nature of the complaint and the size of the company, he was confirming the respondent's decision to dismiss. In his reply dated 17 August 2007 the trade union representative communicated his disappointment at his response, referred to their right to reply to the statements of the other employees (of which they had not heard until 4 August) and concluded, stating: "Finally I am again requesting that you reconsider your decision and reinstate [the claimant] to his job....".

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

The claimant and AP were in Templemore on a three/four day job and staying in a hotel in Thurles. On 10 July 2007, their second day on the contract, they started at 7.00 a.m. and everything was going fine but in the afternoon they lost a two to three hours drilling through a very thick wall which meant he was under pressure to finish by 8.00 or 9.00 p.m. He gave AP a job to do but shortly after he saw AP chatting with other staff. The claimant was a bit upset and took it personally. About half an hour later AP came out and in an aggressive manner asked what could he do. AP had had been with the respondent nine months, working mostly with the claimant, and he knew exactly what to do but he expected to be shown what to do every ten minutes. The claimant explained to AP that he needed to change his behaviour and show more interest but AP told him that he did not care. The claimant felt that AP should take his job more seriously but he neither paid attention nor cared. He directed AP to do some small tasks until he (the claimant) had finished his work but AP refused and kept arguing and laughing at him. The claimant finished what he was doing to calm himself, he found himself in a new situation and was demoralised. AP went to make a telephone call to his father.

The claimant sought advice from SF. When AP returned he tried to convince him to stay and finish the job with him; he explained that he needed to listen to him as he was in charge of him and the company had entrusted him with the job on hands but AP started to laugh again and told the claimant that he was not his boss and that he did not have to take advice from him. At this stage the claimant had been working eleven to twelve hours and he was emotionally and physically tired so he stopped work and tidied his tools. He offered AP a lift to Thurles. In cross-examination the claimant told the Tribunal that he did so because he was responsible for AP and not out of any sense of guilt or regret. Neither of the two of them spoke on the journey to Thurles.

Prior to 10 July they had got on well together. AP was a bit lazy at times. When FC enquired about AP's work the claimant told him that he was lazy and lacked motivation but recommended that he should be kept on for one to two years. The claimant denied that he was aggressive to the claimant on 10 July or on other occasions but he became upset on 10 July when AP laughed at him when he was explaining his role to him; one needs to respect some rules. There had been an argument between AP and himself but he did not raise his fist to AP who was nearly double his size. He did not use foul or abusive language to him. He did not lose his temper. He got on well with the other apprentices and workers except for RA. The first he heard about workers having issues with him was at the meeting on 4 August. There had been no complaints about him during his time with the respondent. He was surprised and shocked that the respondent preferred AP's version of events to his.

**Determination:**

In cases of misconduct the respondent does not have to show beyond reasonable doubt that the appellant is guilty of the alleged misconduct. The well-established test, although variously stated, is whether the respondent had a genuine belief based on a full and fair investigation that the appellant is guilty of the conduct alleged. In this case the respondent was given conflicting versions as to what occurred between the claimant and the apprentice on 10 July. There were no witnesses to the incident. The respondent obtained written statements from the two people involved and interviewed them. Having considered the evidence the Tribunal finds that it was reasonable for the respondent to believe the apprentice’s version of the events of that day.

The respondent’s contract of employment provides that *provoking or threatening behaviour or instigating a fight* is gross misconduct, which may lead to instant dismissal. Having regard to the high premium the respondent places on the existence of trust between apprentices and fitters and the respondent’s concern that inaction on its part would leave it with no defence should a violent incident occur in the future the Tribunal finds that the decision to dismiss was reasonable in the circumstances.

The failure by the respondent to provide the statements made by the other apprentices during the course of the investigation to the claimant or his representative or to put the allegations therein to the claimant was not fatal in this case. These statements corroborated AP’s experience as regards the bullying type behaviour of the claimant and his use of foul and abusive language. The Tribunal accepts the evidence of both the Managing Director and the Financial Controller that they did not rely on these statements and that the reason for the claimant’s dismissal was the threat of violence, which is characterised in the respondent’s policy as gross misconduct. The Tribunal finds support for its conclusion in this regard in the evidence of the Financial Controller where he stated that irrespective of the statements the respondent could rely on the fact that the threat of violence constitutes gross misconduct and further where he stated that it was a huge temptation to rely on the statements as they would strengthen the grounds for their decision to dismiss the claimant but they did not want to destroy the trust of their employees.

The Tribunal feels that the events of 4 August constituted a request to the respondent to review its decision. It bases its conclusion on the facts that the trade union representative requested to meet the Managing Director and subsequent to the Managing Director’s decision on the claimant’s “appeal” the former again requested him, in his letter dated 17 August, “to reconsider” his decision and re-instate the claimant.

For the reasons outlined the dismissal was fair and the claim under the Unfair Dismissals Acts 1977 to 2001 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

(CHAIRMAN)