EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF: CASE NO.

Employee MN540/2006

UD820/2006

against

Employer

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr. M. Forde
Mr. J. McDonnell

heard this claim at Waterford on 30th June 2008
and 6th November 2008

Representation:

Claimant:
Mr Conor Roberts B.L., instructed by Mr. David Burke, David Burke & Co., Solicitors, 24 Mary Street, Dungarvan, Co. Waterford

Respondent:
Mr. Eamonn Moloney, Daly Derham Donnelly, Solicitors,

Florence Buildings, 1a Washington Street West, 3 & 4 Hanover Place, Cork

The determination of the Tribunal was as follows: -

Respondent's case:

The respondent fabricates agricultural items including gates and feeders. On 25 May 2006 two employees (ET and EV) were talking to one another in the shed, EV was facing the back wall when a piece of steel piping (100 mm in diameter, 10 mm in length and 3.35 mm thick) passed by his right shoulder and hit ET on the chest. Both men saw the claimant standing by the bandsaw from which direction the projectile had come and there was nobody else in the vicinity at the time. EV, had previously been subjected to intimidation by the claimant and believing the projectile had been thrown at him, reported the incident to the Managing Director's father (FD), who although retired from the business still comes to work. EV did not identify the alleged perpetrator to FD. The Managing Director (MD) was absent from the premises on the day of the incident but FD informed him about the incident.

While EV was with FD the claimant approached ET and told him that the object had flown off the machine and he took it away. A few minutes later the claimant again approached ET and said, "It was not meant to hit you." ET's overalls broke the impact and he did not have to go to the doctor. Nor did he report the incident to the gardai. When EV returned to the shed the claimant told him that he had not thrown anything at him and after an exchange of words the claimant apologised to EV for accusing him of reporting him. EV took the matter seriously because it was not the first time it had happened. He has worked for the respondent for thirty-seven years. (A piece of steel piping, similar to that which had hit ET but somewhat smaller in diameter was shown to the Tribunal.)

On the following day, 26 May, MD interviewed ET and EV. He committed their statements to writing and both men read and signed them when they were typed up. In his statement EV identified the claimant as being the person who had thrown the piece of steel piping. Both employees (ET and EV) confirmed to the Tribunal that the statements produced to the Tribunal were an accurate account of the events that occurred on 25 May. The claimant was not asked to make a statement. Later that day MD apprised the claimant of the evidence and suspended him on full pay. The letter of suspension was as follows:

> *We write to advise you that we have received allegations relating to an assault which occurred in the workplace during work hours. The Management of the Company are under an obligation to investigate the matter fully, and have decided that it is in it's [sic] best interest to suspend you with pay pending a complete investigation into the allegations.*
>
> *In accordance with fair procedure we are informing you that you have a right to seek legal or other representation as you see fit, and your representative if you so choose to attend any disciplinary hearing to be held*

at the conclusion of the investigation if it is found on the facts that such a hearing is necessary.

The distance from the banding machine to where ET was working was six metres. MD spoke to the suppliers of the machine who informed him that the machine could not propel a piece of steel six metres. A letter to that effect from the suppliers of the machine was produced in evidence. The respondent uses piping of two dimensions, one of 114 mm and the other 102 mm in diameter.

Another employee (AE) told MD that the claimant was putting pressure on him to say that he had been with him (the claimant) throughout the day of the incident and that he had not seen him throw the piece of steel. It was AE's evidence that the claimant had spoken to him a number of times in this regard, both personally and over the phone and he had also asked him to go to his solicitor with him. AE refused to do the claimant's bidding. AE had only spent about two minutes with the claimant that day and had not seen the incident. ET told him what had happened.

The claimant was invited to a meeting in early June. A friend attended the meeting with him. MD again informed him of the allegation that had been made against him. The claimant was adamant that he had not thrown the piece of steel. The claimant told MD that it had come off the machine and insisted that AE would verify this but AE had already spoken to MD about the matter.

There had been other incidents of intimidation against EV during the previous twelve months. MD had spoken informally to the claimant about these and asked him to leave EV alone but he had never issued a written warning to the claimant. The respondent is a small company and MD tries to resolve issues informally. However, inthis instance the claimant had thrown a sharp object, which could have caused seriousinjury if it had struck an employee in the face or head. It was fortunate that no injuryhad been sustained on the occasion in question. Safety is paramount in the respondent's business and as far as MD was concerned this was a step too far. Therespondent considered the statement given by ET where it stated that the claimant hadsaid the piece of steel had flown off the machine and that it was not meant for him. MD took the decision to dismiss the claimant. The previous incidents did not formpart of reason for the dismissal. It was his responsibility to protect his employees. As a matter of courtesy, MD passed the decision by his father, who had founded thebusiness. It was FD's evidence that he concurred with MD's decision to dismiss theclaimant but he had neither participated in the investigation nor the decision makingprocess. MD informed the claimant of his dismissal by letter dated 9 June 2006; hehad unsuccessfully tried to contact the claimant by telephone.

MD agreed that the claimant was a good worker and never missed a day from work. While the respondent did not have a grievance procedure it is a small company and MD informally resolves any issues that arise. MD recalled that the claimant raised an issue about the pay of a particular worker but he had no recollection of his raising an issue about pay and conditions in May 2006 or any other time. While he did not take a statement from the claimant he had heard his version of the incident. He had not shown the two statements to the claimant but he had put the contents thereof to the claimant. MD had not informed the claimant at the time of the meeting on 2 June that

he had written statements from EV and ET.

Claimant's case:

The claimant had worked six years with the respondent. He had no problem with management. He did not receive a written contract of employment or disciplinary procedures. On Friday, 25 May, he went to the office as usual to get his wages and MD gave him a letter saying he was suspended with pay for a serious assault on a fellow worker and was told to read the letter. He read the letter when he went outside. He was wondering if it was about the incident in the shed.

The claimant was not asked to make a statement. The first time he saw the statements of the two other employees was on the first day of the Tribunal hearing. He was called to a meeting with MD at 2.00 p.m. on Friday, 2 June. A friend attended with him. When MD asked him to tell him about the assault the claimant told MD to tell him about it. MD told him that it was alleged that he had assaulted ET with a piece of steel piping. He then questioned MD why was it ET who had gone to the office and not EV, if that was the case. MD told him that EV had felt that the piece of piping was meant for him. In reply to MD's questions the claimant denied throwing the piece of piping at EV or picking it up. In reply to his question MD told him that the doctor had not been called. The claimant maintained that he was not told of his rights or given an opportunity to address management or a chance to reply. MD's father did not contact him. The meeting lasted about ten minutes. He just walked out of the meeting. He was told they would let him know (the result) in a week. When he collected his wages the following week his P45 was included with them. On the day of the incident he spoke to ET and told him that the piece of piping had left his hand accidentally. He did not agree that the men were standing six metres from the bandsaw. EV and the claimant did not see eye to eye but ET and himself were the best of friends. He did not interfere with any witness. AE lives near his partner's daughter. MD did not tell him it was gross misconduct.

He had a few rows with MD in relation to wages, one being in December 2005 when he discovered that a Polish worker, who had been with the company only seven or eight months, was receiving a higher wage than he was but it was not a serious row. He did not think that there was a link between their rows and his dismissal. Other employees got letters about their conduct but he had never received any warnings. He was shocked at being dismissed. He had never in his life been accused of assault.

The claimant's evidence to the Tribunal was that he was twirling the piece of pipe in his hand and it flew off his hand by accident. He denied throwing the piece of piping, approaching ET, apologising to him or picking up the piece of piping. It was not an assault with intent. He had been standing about seven or eight feet away from ET and EV at the time and not six metres as alleged by the respondent. There was often some messing in the shed and employees threw soft gloves at one another. He asked EV on 25 May if he had complained him because he had a reputation for making complaints. He never asked AE to be a witness. His solicitor asked him to invite AE to his office because he was standing beside him at the time of the incident. He did not threaten AE. While he was told in his letter of suspension that he could have a representative

with him he had not been told this in person. After the meeting he wrote a statement at home and contacted his solicitor. This statement was produced at the hearing.

The friend who attended the meeting with the claimant on 2 June worked for a different company and was a member of a trade union. He confirmed that the claimant was asked to tell about the assault and that he was told that he was supposed to have assaulted ET. He also confirmed that the two statements were not shown to the claimant and that he was not asked to give a statement. An appeal was neither granted nor sought.

Determination:

Barrington J. in the Supreme Court in *Mooney v An Post* [1998] 4 I.R 288 at p. 298 stated:

> "Certainly the employee is entitled to the benefit of fair procedures but what these demand will depend upon the terms of his employment and the circumstances surrounding his proposed dismissal. Certainly the minimum he is entitled to is to be informed of the charge against him and to be given an opportunity to answer it and to make submissions."

Laffoy J. in the High Court in *Maher v Irish Permanent plc* [1998] 4 I.R 302 at p. 298 interpreting Barrington J. in *Mooney v An Post* stated:

> "It was pointed out by Barrington J. in *Mooney v An Post* [1998] 4 I.R 288 that what the justice of a particular case will require will vary with the circumstances of the case, for example, in a case involving a contract of employment, whether it stipulates the procedure to be followed when dismissing an employee for misconduct or not. If no procedure is stipulated the employee is entitled to the benefit of fair procedures but what these demand will depend upon the terms of his employment and the circumstances surrounding his proposed dismissal. The minimum an employee is entitled to is to be informed of the charge against him and to be afforded an adequate opportunity to rebut or attempt to rebut them."

The respondent's failure to interview the claimant as part of its investigation and to provide him with the written statement made by the two other men in the shed at the time of the incident is a flaw in the procedures adopted by the respondent. However the Tribunal finds that this potentially serious flaw was not fatal in this case. The day following the incident the claimant was suspended on full pay at which time the respondent apprised him of the reason for his suspension *viz* the assault in the workplace. The allegation was put to the claimant at the meeting on 2 June and he was afforded the opportunity to respond to it. At that meeting the claimant also had the opportunity to address the respondent/to make submissions but it was the claimant's own evidence that he walked out of that meeting. The Tribunal finds that in all the circumstances the claimant was afforded the minimum of fair procedures as outlined by Barrington J. in *Mooney v An Post*. The Tribunal finds support for its decision on this issue in *Elstone v C.I.E. (* 13 March 1987 unreported) CC where Judge stated:

> "That the mere fact of some failing in due or agreed procedures is not a final and decisive matter for the Court on appeal is clear from the provision of section 6 (1) [of the 1977 Act], that regard must be had "to all the circumstances" and not to one circumstance to the exclusion of all others."

The Tribunal finds that following the meeting of 2 June it was reasonable for the respondent to believe the version of the incident as put forward by the two employees in the shed at the time and to disregard the claimant's version. Whilst the piece of piping which hit ET was thinner in diameter than the piece produced in evidence, the Tribunal accepts the respondent's evidence of its potentiality to cause serious injury. Although MD had spoken to the claimant on a number of occasions about his treatment of his fellow worker (EV) he had not issued him with any warnings. However, in this instance it was reasonable for the respondent, for whom health and safety are of paramount importance, to regard the incident to be of a much more serious nature warranting dismissal.

Accordingly, the claim under the Unfair Dismissals Acts 1977 to 2001 fails.

The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 was withdrawn.

Sealed with the Seal of the

Employment Appeals Tribunal

This ________________________

(Sgd.) ________________________
(CHAIRMAN)