EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.

Employee –**Claimant** UD1383/2008

against

Employer - **Respondent**

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. B. Glynn

Members: Mr. B. O'Carroll
Mr. J. LeCumbre

heard this appeal at Athlone on 11 June
and 1 October 2009

Representation:

Claimant:
Ms. Niamh McLynn, T & N McLynn Solicitors,
7 Pearse Court, Athlone, Co. Westmeath
Respondent:
XXXX

The determination of the Tribunal was as follows:

The claimant was employed as an auxiliary postal sorter from 6 January 2003 in the respondents Athlone mail centre. Over the next four years the claimant received nine verbal warnings and three written warnings for a variety of minor disciplinary offences relating to unsatisfactory work performance, poor conduct and attendance issues. On the evening of 8 September 2006 the claimant was involved in a verbal altercation with the floor operations manager (OM1) which had begun when the claimant had been instructed to go to OM1 by the process area supervisor (AS) following an argument about break times. There was a further verbal altercation between the claimant and OM1 on the evening of 11 September 2006. At a meeting held on 12 September 2006 between the claimant, the plant manager (PM) and the human resource manager (HR) the claimant, who declined the right to have anyone accompany him at the meeting and refused to discuss the allegations against him, was suspended on full pay pending further investigation into the allegations against him of gross misconduct due to insubordination in regard to the incidents of 8 and 11 September 2006. Following a disciplinary hearing held on 21 September 2006 and subsequent correspondence when the claimant again continued to refuse to discuss the allegations against him the claimant was issued with a final written warning of dismissal including a reduction in pay of

two increments on 5 December 2006. Under the MacNeil procedures, which cover grievances and disputes in the respondent, such warning remains on file for four years. The claimant did not exercise his right of appeal against the final written warning.

On the evening of 1 May 2007 the claimant was one of 29 people working in the video coding room. This room is arranged with eight workstations in a group and, apart from one other worker, all the other workers were female. The claimant instigated a conversation with one of his colleagues (FC1) in which he was suggesting that he was going to bring a gun to work and shoot her and her colleagues along the lines of a contemporary incident at Virginia Tech. FC1 did not take it seriously and neither did another colleague (FC2) who had also heard the conversation. FC1 then went on a break and told some other workers about this conversation and one of these (FC3) took it seriously. After the break when the claimant revived the conversation FC3 asked the claimant to stop but he did not. The claimant was also asked to stop by the male colleague (MC). The claimant's position is that the conversation lasted five or ten minutes whereas the respondent's position is that before and after the break the conversation went on for 25 or 30 minutes.

The incident was reported to the floor operations manager (OM2) following a complaint by FC3. On 2 May 2007 OM2 spoke to FC1, 2&3, MC and various other workers from the coding room. FC1, 2&3 and another female worker undertook to provide written statements. The claimant was then asked to leave the premises pending further investigation and further asked to attend a meeting on 3 May 2007 with HR. This investigative meeting was attended by the claimant, his union representative (UR), PM and HR. PM put to the claimant that some of his colleagues had felt threatened by his comments and were concerned for their safety. The claimant insisted that the matter was a joke and had been taken out of context. Initially he denied saying that he would kill anyone but later accepted that he had mentioned taking a gun into the building and killing people. The claimant was then suspended with pay pending the respondent's investigation of the incident.

On 4 May 2007 PM wrote to the human resource executive in head office (HRE) to inform him of the incident confirming that written statements had been obtained from OM2, the claimant's supervisor (CS) and six female workers from the coding room including FC1, 2&3. In conclusion PM recommended that the claimant be dismissed. Also on 4 May 2007 HR wrote to the claimant with a copy of the notes of the meeting of the previous day seeking the claimant's acceptance of their accuracy. The claimant replied on 9 May 2007 accepting the accuracy of the notes, apart from a few typographical errors, which were later accepted by the respondent, but again insisting it had all been a joke, not meant to be taken seriously. He also sought to see the statements made against him.

On 17 May 2007 HRE wrote to the claimant that following the investigation into the incident of 1 May 2007 the respondent was satisfied that the respondent had stated that he would bring a gun to work and shoot employees. The respondent did not accept that he was joking. The respondent did not agree to provide the claimant with the statements made by his colleagues in support of the allegations against him on the grounds that this was privileged information. Some of the testees had been unwilling to make statements if they were to be shown to the claimant. In conclusion the respondent made clear that the incident was regarded as gross misconduct and in light of his prior disciplinary record consideration be given to recommending his dismissal. The claimant was given until 31 May 2007 to furnish any explanation or make any representation. He was given the option of an oral hearing. On 24 May 2007 UR wrote to HR requesting a copy of CS's report on the incident suggesting that CS was in earshot of the incident. On 28 May 2007 HRE wrote to the national officer (NO) of the claimant's union to confirm that in his report CS stated that he did not hear the conversation complained of. HRE further stated that a female staff member who had not

heard the conversation had indicated that she was fearful of the claimant. The request to see CS's statement was again denied on grounds that it was privileged information. On 30 May 2007 UR made a further request to HRE for access to the statements made against the claimant. On 6 June 2007 NO wrote to HRE to state that the union reserved its right to respond to the matter at a later stage.

HRE then wrote to all 28 employees in the coding room on 1 May 2007 apart from the claimant seeking their assistance in the respondent's enquiry into the incident. 26 of the 28 people in the coding room at the time of the incident were interviewed as part of the investigation. On 28 June 2007 HRE wrote to UR to confirm that following the enquiries undertaken with the video coders the respondent's position remained unchanged from 17 May 2007 and that it was appropriate to advance matters through the disciplinary process and that a recommendation was to be made to the Head of Employee Relations (HE) for dismissal. On 29 June 2007 UR wrote to HRE requesting copies of all the statements taken in regard to this complaints against the claimant. On 15 October 2007 a human resource officer (HRO) of the respondent wrote to UR explaining that the statements were being denied to the claimant under section 2.3.1 of MacNeil, which deals with incivility.

On 18 October 2007 HRE sent a comprehensive memorandum to HE recommending the claimant's dismissal. This recommendation to dismiss was approved by HE on 31 October 2007. HRE wrote to the claimant on 2 November 2007 confirming the decision to dismiss him. He was advised of his right of appeal against the decision to dismiss. The claimant submitted a six-page letter of appeal on 7 November 2007 in which he raised a litany of complaints against the respondent. On 9 November 2007 HRE sent an internal memorandum to the respondent's Director of Human Resources (DH) forwarding the file on the matter along with the claimant's appeal. On 13 November 2007 UR wrote to HRE to advise that the respondent's interpretation of 2.3.1 of MacNeil had been sent to union headquarters with a view to possible referral to arbitration. Also on 13 November 2007 the claimant again wrote to HRE to appeal the decision to dismiss him.

On 10 April 2008 the appeal officer sent an internal memorandum to HE in which he rejected the grounds of appeal raised by the claimant. HE rejected the appeal on 9 May 2008 and on the same day HRE wrote to the claimant confirming rejection of his appeal against dismissal. The claimant's employment ceased on 16 May 2008.

Determination:

Conduct is one of the "defences" in the Unfair Dismissals Acts to a claim for unfair dismissal. However, there is no definition of conduct given in those Acts. Rather is it left to the Tribunal to decide whether the conduct in question, in each case, justified a dismissal. This, in turn, will depend on the facts of each case, as it is not possible to write a list of the type of conduct which will be judged by the Tribunal as being so serious as to justify a dismissal.

The general approach of the Tribunal to a case of dismissal in respect of conduct is to apply a test of reasonableness to: -

1. The nature and extent of the enquiry carried out by the respondent prior to the decision to dismiss the claimant; and
2. The conclusion arrived at by the respondent on the basis of the information resulting from such enquiry that the claimant should be dismissed.

Before we look at these matters in detail we must first look at the conduct of the claimant in this case, which was that on 1 May 2007 he was one of 29 people working in the respondent's video coding room. At some point the claimant instigated conversation with one of his colleagues suggesting that he was going to bring a gun to work and shoot all of his colleagues. Graphic details were given in respect of the methods of how some of his colleagues would die and towards the end of the conversation the claimant enquired as to the number of employees working in the building as he wanted to ensure that he had enough ammunition. While the evidence given as to the timeframe over which this conversation took place differed, it is clear that it was not a brief conversation but continued over 20 – 30 minutes and the claimant was taken seriously by his co-workers, all of whom were female apart from one co-worker. Evidence was also given that he was asked to refrain from the conversation on several occasions by some of his colleagues, including the male co-worker, but refrained from so doing. Evidence was given by several of his co-workers who said that they were extremely frightened by the conversation, took the threat seriously and feared for their safety. While one or two co-workers refuted same and put the conversation down to attention seeking on behalf of the claimant, it is clear from the evidence furnished to the Tribunal that the majority of the workers, the majority of which were female, were frightened and upset by the conversation. It must also be remembered that at the time the conversation took place, the shooting of colleagues by a student in a Virginia Technical College in America had just occurred, and was fresh in everyone's mind. Added to this was the fact that the claimant's personality, details of which were given by co-workers at the hearing, lent credence to his claims.

Let us now look at the nature and extend of the enquiry carried out by the respondent prior to making the decision to dismiss the claimant. After a co-worker complained of the conduct the following day, the respondent spoke to other co-workers and took statements from them and given the content of same, the claimant was then asked to leave the premises pending further investigation. On 3 May, he was asked to attend a meeting with HR, which he did, together with his union representative, during which the content of the statements made by his co-workers were put to him, and while he initially claimed that the conversation was a joke, he subsequently accepted that he had mentioned taking a gun into the building and killing people. At this point the claimant was then suspended with pay pending further investigation. On 4 May the Plant Manager wrote to the Human Resources Executive informing them of the incident and confirming that written statements had been obtained from several co-workers, and recommended that the claimant be dismissed. On the same day Human Resources wrote to the claimant enclosing a copy of the notes of the meeting of the previous day, the contents of which the claimant accepted apart from a few typographical errors. On 17 May the Human Resources Executive again wrote to the claimant pointing out that they had investigated the incident, which they considered to be gross misconduct, and recommended dismissal in light of his prior disciplinary record. The claimant was given until 31 May to make representation in respect of the recommendation and/or furnish further explanation. The claimant was also given the option of an oral hearing. The claimant's union representative wrote to Human Resources seeking a copy of the statements made which was refused on the grounds of privilege and on the basis that some of the co-workers did not want their statements released to the claimant as they were fearful of him. A further request was made by the claimant's union representative for sight of the documentation but this was again refused. By way of reply the union representative wrote to the Human Resources Executive saying they were reserving their right to respond at a later stage. Thereafter Human Resources interviewed 26 of the 28 people in the coding room on the night of the incident. On 28 June they wrote to the claimant's union representative confirming that enquiries were undertaken and pointing out that it was now appropriate to advance matters to the disciplinary process, but their recommendation would be for a dismissal. The union representative again wrote seeking a copy of the statements made which was again denied due to the reasons already stated. On 18 October Human Resources Executive sent a

memo recommending the claimant's dismissal. The claimant was advised of this in a letter from the respondent in addition to being advised of his right of appeal. The claimant replied on 7 November raising a litany of complaints against the respondent and again wrote to the respondent on 13 November indicating his decision to appeal the decision to dismiss him. On 10 April 2008 the Appeal Officer rejected the grounds of appeal and the claimant was made aware of this in a letter from the respondent on 9 May.

It is clear from the action taken by the respondent that a very comprehensive and detailed enquiry was undertaken in relation to the incident, which lasted over several months. 26 of the 28 employees were interviewed, the matter was referred from Human Resources to a Human Resources Executive and was thereafter appealed, and at each stage of the process the claimant was given ample opportunity to present his case through himself and/or his union representative.

We must now apply the test of reasonableness to the conclusion arrived at, based on the result of the enquiry which resulted in the claimant being dismissed. Under this heading we must remember that an employer owes a specific duty of care to his employees, both under statute and common law, which duty includes the provision of a safe place of work, a safe system of work, and the provision of competent staff and proper equipment. This duty can only be discharged if he does what a reasonable or prudent employer would have done in the circumstances in which he finds himself. It is clear from the result of the inquiry that many of the claimant's co-workers were fearful for their safety, as they clearly believed the claimant was capable of carrying out his threats. In the circumstances it is clear from the evidence given at the hearing that the only course of action open to the respondent, after the finalisation of the inquiry, and. acting as a prudent and reasonable employer, was to dismiss the claimant. Indeed the Tribunal is of the opinion this incident alone, without more, would have justified a dismissal. However, allied to this is the claimant's prior disciplinary record which showed that over a four year period he had received nine verbal warnings and three written warnings for a variety of disciplinary offences such as unsatisfactory work performance, poor conduct and attendance issues. In actual fact on the date of the incident the claimant was on a final written warning.

In these circumstances, it is clear from the evidence furnished that the respondent was entitled and indeed justified in the dismissal of the claimant, accordingly the claim under the Unfair Dismissals Acts, 1977 to 2007 must fail.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)