EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.

EMPLOYEE - **appellant** UD1177/2008

against

EMPLOYER - **respondent**

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms R. O'Flynn

Members: Mr. P. Casey
Mr J. McDonnell

heard this claim at Cork on 25th June 2009

Representation:

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Claimant :
Mr Paul Depuis, SIPTU, Connolly Hall, Lapps Quay, Cork

Respondent :
Mr David Gaffney, Coakley Moloney, Solicitors, 49 South Mall, Cork

The determination of the Tribunal was as follows:-

Respondent's case:

The Tribunal heard evidence from an Occupational Health Nurse who was on contract to the respondent. She came in routinely on a monthly basis and if any issues the Plant Manager would contact her. On 21st May 2008 she received a telephone call from the Plant Manager seeking her advice in relation to an alleged assault, where a headlock manoeuvre was used on an employee, hereinafter referred to as the injured party, by a colleague the previous day. She spoke with the injured party on the telephone and he complained of a headache and neck pain and had not slept the previous night. Witness set up an appointment with an Emergency cover doctor and she informed the Plant Manager. The injured party was assessed before going home. She would usually get a telephone call from the doctor and he had sent the injured party home. The doctor found soft tissue injury to the neck and found him unfit for work and to return for review on Monday 26th May 2008. The injured party was not doing very well he was in pain and not sleeping. The doctor contacted

her again and she referred the injured party for an Occupational Health Assessment on Wednesday 28th May 2008. The Tribunal was shown a copy of the medication prescribed. Witness offered counselling to the injured party and she felt he was rather traumatised and gave him on-going telephone support. The injured party went through physiotherapy and counselling sessions and he was certified fit for work on 1st July 2008.

In answer to questions from Tribunal members in relation to the scale of pain judging from the medication prescribed, witness would rate the degree of pain as 8 out of 10. It is more targeted than over the counter pain relief when taken in combination with the other two medications prescribed.

The Tribunal also heard evidence from a work colleague G. There was a comment about the injured party from the claimant on the day in question. The two shifts have different names. Witness was over by the fume hood and the usual banter was going on. The claimant put the injured party in a headlock and lifted him out of the chair. The injured party tapped the claimant on the arm to let him go. Witness was not being bullied prior to this incident but after the incident he felt intimidated and bullied. After the incident the Plant Manager called him to the office and asked if he was being bullied.

In cross-examination witness was asked about the type of banter that went on in the workplace. There might have been some comment about his, the witness ears, they sticking out a small bit, but he would not take it to heart. He was never made to feel bullied and harassed but after this incident he was made to feel part of it even though he was just a witness.

It was like as if witness caused what happened. He always got on well with the claimant and they worked together for two years. This was the first such incident. This was out of character for theclaimant. The incident happened between 8 – 8.30am and he started at 6.50am. Everyone else startsat the same time. They all work closely together. The claimant had to travel only a short distance toput the injured party in the headlock. He lifted him out of the chair and it lasted a few seconds. Theclaimant caught him in the headlock to a standing position. Nobody tried to restrain the claimant.

The next witness to give evidence was another work colleague F. The injured party was having banter with G slagging him about his ears**.** The claimant said to G that he did not have to take that from him. The injured party said to go away and join the "fanny shift". Witness swung around on his chair and the claimant had the injured party in a headlock in front of him. The injured party was in distress and witness was in shock. The banter is commonplace but it never got serious. Witness used to get the banter too but he gave it back. If G was being bullied he could look after himself and it was all taken in good faith. It happened in a split second. They did not discuss it later and thebanter had stopped.

In cross-examination witness stated that injured party was in distress for the remainder of the day.

In answer to questions from Tribunal members the claimant felt that G should not have to be taking the slagging from the injured party. He never noticed if there was a history between the claimant and the injured party.

Another work colleague R gave evidence and mentioned to the Tribunal about the "fanny shift". It was just a term and could be derogatory. He and three others including the claimant were on thatshift. He saw the claimant put the injured party in a headlock. The claimant came from behind himwithout warning. He took exception to the term "fanny shift". He lifted the injured party out of thechair in the headlock. The room went very quiet after the incident and the banter stopped. BetweenG and the injured party it happened every day and it was all good-natured banter. None of it wasmalicious. Witness has been twenty-three years with the company and he worked with the claimant.

In cross-examination witness stated that in the course of the banter reference could be made to girls and some people could take offence. He felt the incident was out of character for the claimant.

In answer to questions from Tribunal members witness stated that the atmosphere was less cordial after the incident.

The next witness to give evidence was the injured party. In his evidence he told the Tribunal that he has been working with the respondent for nine years. On the morning of 20th May 2008 he started work at 6.50am. The incident happened between 8 – 8.30am. He was sitting in the lab near the cabinet and two of the lads G and R were working in the lab. There was a lull and they were havinga bit of banter. Witness and G started at the banter re his/G's ears. Witness said why not go awayand join the "fanny shift". The claimant commented that he might say that to G and get away with itbut not so with him (the claimant). One shift was known as the "fanny shift" and the second shifthad no name. The claimant came from his right from behind and he remembers being lifted in aheadlock. He felt a tightness and tapped the claimant on the hand to let witness down. After theincident he remembers going out the back for air. He was physically okay. He and the claimant hadworked together for seven or eight years. He had no difficulty with the claimant. Some more thanothers were involved in the banter. He did not take a lunch break that day. He was in a mentalshock that something like this should happen. He did not think that he (witness) is a bully. Witnessis involved in the GAA and he knew G from the area. He went home at the end of his ten hour shiftat around 4.30/5pm. When he got home he sat down and felt his body cold. He had a headache anddid not feel well. He went to bed at 10pm and did not sleep very well. His body was reacting in away it never did before. He was in shock.

The next day he felt well when he got out of bed. He went to work and after half an hour he went to TO'C and told him he had to get out, he was weak and wanted to lie down. He told him what had happened the previous day. He was waiting for the Plant Manager to come in. When the PlantManager came in he asked witness and the engineering manager to go upstairs and make a statement. The Occupational Health Nurse was also summoned. He could not recall speaking withthe nurse that morning but he saw he doctor around 2pm. The claimant went home and he was toldthe respondent would contact him when Dr D was available. Dr D subsequently examined witnessand he had a pain in his neck and had a headache. The doctor prescribed medication which witnesstook but he had difficulty in sleeping and gave him a cert. He also went to his own doctor. ThePlant Manager offered him the services of the company doctor and he also saw Dr H. He was out ofwork for six weeks and returned on 1st July 2008. He also went for physiotherapy which wasrecommended by his own doctor. When he returned to work a couple of the claimant's friends werecool with him. It was evident from the body language and they were not speaking to him.

In cross-examination witness was asked about his relationship with the claimant and he replied that they would not be going for a pint. The claimant acted for him as shop steward when there were

proposed redundancies and he saved everyone's job including witness's job. The claimant had no malice towards him. He was on the "fanny shift" and the (title) was not complimentary, it was more derogatory. He had never witnessed the claimant being aggressive towards anyone. After the incident the claimant left him down straight away and he could not remember if he asked was he okay. He avoided the canteen after that, he would not go there anyway and it was not as a result of the incident. The incident was not reported on the day as he felt he would be okay and he did not want to make a report. He came in at 6.50am and felt unwell at about 7.30am. He waited for the Plant Manager to come in as he felt he could not leave the premises. He did not expect the claimant would be dismissed. There had never been a similar incident at the plant.

In answer to questions from Tribunal members witness stated that the incident was out of character for the claimant. Witness has never been the subject of bullying and harassment. When the claimant caught him in the headlock he did not grapple or strike out and the reason being that it was probably trained that way. He is a referee with the GAA and he is not one to react. The tap on the hand was a signal to the claimant to let him down.

The Plant Manager in his evidence told the Tribunal that he has been with the company since 1998. As part of his investigation he tried to understand what the "fanny shift" meant. When you publish rosters it is usually shift 1,2,3. In April of 2008 he re-named the shifts "X" and "Y" and he deliberately went away from calling them "A" and "B" and someone referred to "X" and "Y" chromosomes. The plant has had many different shifts over the years and with less than fifteen employees working as general operatives there was very common movement between shifts so thatworkloads get balanced. Their system is that each employee is cross-skilled. On 21st May 2008 theinjured party came to him saying he was feeling unwell and wanted to go home. When he askedwhat was wrong he said he had a headache and pain in neck and shoulders. He then asked whatcaused the pain and he was reluctant to tell witness. He then said he was put in a headlock by theclaimant and witness was stunned at what he was hearing. Once they got beyond the reluctance theinjured party had to give him more information. The engineering manager witnessed all theinterviews. He then asked the injured party if he was happy to make a statement and witness toldhim he could not ignore an act of violence in the workplace. Statements were taken from all thewitnesses. The facts were consistent and there was no question but that an act of violence had takenplace.

The respondent's disciplinary policy was referred to and opened to the Tribunal. This policy hadbeen agreed by SIPTU and the current one issued in 2006. The injured party was the first to give astatement. Where there's been an accident their policy is to contact their medical people and theyasked the occupational health nurse to meet with the injured party and to take it from there. It wasdecided to send the claimant home. Witness did not want people to be asked to retract their statements and he did not want procedures to be muddied in any way. The claimant was suspendedwith pay but was told it was not a judgement of the situation. He consulted with HR, had a disciplinary hearing and the Manager Human Resources Europe/Africa became involved. Witnesshad only dealt with verbal abuse prior to this and that person was suspended, had to give a writtenapology and attended an anger management course.

In late June 2008 a letter was received which was signed by two employees who wished to being to the respondent's attention the fact that G had been harassed by the injured party over a prolonged period and that the claimant was the only one who did anything about it. Having spoken with G he did not feel he was the victim of bullying and harassment and he confirmed that he did not want to raise a grievance. By letter dated 11th July 2008 the Plant Manager confirmed the aforementioned to the two employees. Witness stated that there was possibly and element of people who worked with

the claimant and wanted to show their loyalty to him. Witness spoke with one of the employees who wrote the letter about the harassment of G. He told him he knew of the behaviour going on as he had been hearing this from more than one person and he assured him that the situation was not going to deteriorate.

In cross-examination witness stated that the claimant had been shop steward for a long time and he had not history of disciplinary issues with him. He had a good attendance record and he had a good employment record.

In answer to questions from Tribunal members in relation to the company's Disciplinary Policy under the heading "Gross Misconduct" states that where incidents are so serious that the first violation would probably result in dismissal for gross misconduct. Witness felt he could not ignorethe facts in this case. An act of violence had taken place. He was not involved in the actual decisionto dismiss the claimant. Witness went through the sequence of events on 21st May 2008 and theorder in which the statements were taken. The claimant was paid during his suspension. It was notto be seen as any judgement on the part of witness.

The Tribunal heard evidence from the Manager Human Resources Europe/Africa. She invited the claimant to a disciplinary hearing on 28th May 2008 and he was accompanied by his union official. The claimant confirmed that he had received all the relevant documentation and confirmed that the interview notes with witnesses reflect the situation correctly. The claimant admitted what he did. He felt provoked by the injured party. He fought for the injured party to keep his job when the respondent was thinking of redundancies. The claimant never behaved like this previously and he did not want to hurt the injured party and he asked for a second chance. The union official also spoke in defence of the claimant. Following this meeting the claimant and his union representative were sent copies of the notes for them to verify as a fair reflection of what had been said at the meeting.

In reaching her decision to dismiss the claimant she took into account the claimant's admission and his previous clean disciplinary record. The respondent could not condone a physical assault in the workplace which constituted gross misconduct. The company has a global policy of zero tolerance where workplace violence is concerned. She mentioned two cases in other plants where dismissals occurred and in one such case a plant manager was dismissed. She stated that they had to be consistent in applying their own policies. The formal decision to dismiss the claimant was conveyed by letter dated 30th May 2009. It was decided to pay the claimant eight weeks notice eventhough there was no obligation on them to do so. He was also told of his right of appeal within fiveworking days.

In cross-examination witness stated that the decision to dismiss was made on the basis of consistency. If she made a decision that was contradictory then it would be questioned.

In answer to questions from Tribunal members witness stated that there was no situation where a headlock was acceptable behaviour. She could not see any alternative sanction. Prior to making her decision she had a conversation with the Global HR Manager. While she took into account the mitigating circumstances she could not attach any weight as she had no way of knowing he would not do so again.

The last witness for the respondent was the European Financial Controller who conducted the appeal hearing. The previous witness transmitted all the documents to him. He was aware of the claimant's length of service and his unblemished record. The appeal hearing took place on 16th

June2008. During this hearing they went over the facts of the case and the claimant did not deny but thatthe offence had taken place. His father had passed away, this was once-off and he could notunderstand what had happened. The claimant felt the sanction was too severe. Witness also listenedto his mitigating circumstances and that he would find it difficult to get another job.

Witness consulted with his colleague in the US office and ultimately the severity of the violent behaviour had to be taken into account. The victim was out of work for six weeks and the company has zero tolerance. He took a couple of days to think about his decision. He would usually spend two/three days per month in the Cork office and he knew people to say hello to. He upheld the decision to dismiss on the basis that a violent assault had occurred causing actual bodily harm to a colleague. This decision was conveyed to the claimant by letter dated 20th June 2008. His decision today would be the same.

In cross-examination witness stated that he had the power to over-turn the decision. The incident was far too serious, physical violence in the workplace is beyond reasonableness.

Claimant's case:

The claimant in his evidence told the Tribunal that he had worked for the respondent for twenty-five years. He was classed as a process operator but did everything in addition to being a safety representative and shop steward. After twenty-five years he was in shock. He applied for a FAS course but it fell through. He got three weeks work experience and renewed his forklift licence. He does not have a reference and is fifty-two years old. He sent off his C.V. to agencies but got no reply. On the morning of the incident he was in the dispatch lab. The injured party started insulting G about his ears and he then moved to "fanny shift. The name thought up was to call the shifts "X and Y". The claimant took it as a personal insult. He was the only other person on that shift. The injured party would insult people up to their eyeballs. It was not banter. There are boundaries and the injured party was rubbing up against G and making inappropriate remarks about him and his sister together. It was insulting. He says some day somebody will hit him. If somebody spoke like that, there are other types of violence, it psychological violence. The claimant usually stays out of it. He usually picks on G.

A couple of weeks previous to this the claimant was in with the (HR) person in relation to redundancies and he had to convince the respondent to save the jobs. He did not want to bring in about his father who had died shortly before that. In relation to what triggered it, it was a combination of things. He knew what the injured party was capable of saying. What he getting away with it was blood to the claimant's head. He could not see his face and he thought it was just a tight squeeze. The injured party tapped his hand he let him down. An hour later the injured party was in the lab insulting again. The claimant accepts what he did was wrong and he spent a lot of time thinking on how he reacted. It could be a bit of stress. His previous record and people saying "how could I", why was he out of a job. The claimant felt he was being made an example of.

If they feel its normal behaviour, its not a factory. The claimant found out that the respondent knew about it and G had his food hidden. Day in day out it was psychological. The "fanny shift" pushed him over the edge and the claimant took it as insulting. The claimant says he can be kind of emotional. He thought there were other options. There was reference to a second chance. The claimant put his life's work into the company. They were afraid if they let me go the same madnesswould spread. The claimant was used as an example. They were looking for statutory redundancybut it was not paid. The claimant thought at the time maybe a period of suspension, anger management course, maybe a time without pay. The claimant felt it was

not "slagging" it was insulting behaviour.

In cross-examination witness stated he did not intend to hurt the injured party.

In answer to questions from Tribunal members witness stated that it was not normal behaviour for him.

The Tribunal also heard from a colleague who stated that there was no set procedure that one had to wait for the plant manager in order to leave the premises. The claimant is a very genuine person and would go out of his way to do a favour. His work was impeccable and he worked to the best of his ability. G's car was being targeted and his lunch was hidden on a number of occasions and it seemed like he was being bullied. He was shocked at the sanction given down to the claimant.

Another colleague also gave evidence as to the claimant's integrity.

Determination:

In the within case, dismissal occurred consequent upon an alleged act of gross misconduct, namely a headlock manoeuvre, perpetrated by the claimant on a co-worker.

The function of the Tribunal in cases of dismissal by reason of misconduct and gross misconduct, is well established 'It is not for this Tribunal to seek to establish the guilt or innocence of the claimant, nor is it for the Tribunal to indicate or consider whether we, in the employers position, would have acted as he did in his investigation, or concluded as he did or decided as he did, as to do so would substitute our mind and decision for that of the employer. Our responsibility is to consider against the facts what a reasonable employer in the same position and circumstances at that time would have done and decided and to set this up as a standard against which the employer's action and decision be judged', held by the Tribunal in the case of Looney & Co. Ltd v Looney (UD843/1984) and further recited and relied upon in Pacelli v Irish Distillers UD 571/2001.

In direct testimony, the claimant did not deny the incident, which gave rise to his dismissal. The claimant accepted that what he did was wrong. He stated that it was not normal behaviour for him, and further stated he had spent a lot of time post-incident, thinking about how he had reacted. The claimant in his evidence stated that he had put his life's work, namely twenty five or so years, into the respondent company and felt he was being used as an 'example'. In short, the claimant's contention is that the penalty of dismissal in the within case, was disproportionate, or excessive.

The Tribunal is cognisant that none of the witnesses tendered by the Respondent or the claimant spoke ill of the claimant. On the contrary, and on human level, there appeared to be genuine sympathy for the claimant and for the unfortunate circumstances such as transpired.

In her evidence to the Tribunal, the respondent's Manager of Human Resources Europe/Africa stated, that in reaching her decision to dismiss the claimant, she had regard to and took into account the claimant's admission and his previous clean disciplinary record. The witness also alluded to the company' s policy of zero tolerance where workplace violence is concerned and she cited two cases in other plants operated by the respondent, where dismissal had been the sanction appropriate to violence in the workplace. In one of the aforesaid incidents, it was a Plant Manager who had been dismissed. The Tribunal is satisfied that in deciding on the appropriate sanction and in arriving at a decision to dismiss, the witness gave due and reasonable consideration to mitigating factors.

It is noteworthy than the respondent's disciplinary procedure expressly cites 'behaving violently' as an example of gross misconduct and the following recital also appears therein, namely; 'Some incidents are so serious that the first violation will probably result in dismissal for gross conduct'.

In his evidence to the Tribunal, the European Financial Controller, who conducted the appeal also gave evidence of having given consideration to arguments advanced by the claimant in mitigation, namely a recent bereavement in the claimant's family, the incident giving rise to dismissal being the first such incident and a once-off incident, and the behaviour on the day in question being very far removed from the claimants normal range of conduct and behaviour. The Tribunal is satisfied that in hearing the appeal and affirming the decision to dismiss, the witness gave due and reasonable consideration to mitigating factors.

In McGee v Peamount Hospital UD 136/1984, the Tribunal considered the sanction of dismissal imposed by the employer arising from an assault and held, ' The Tribunal is very conscious that dismissal for a man of the claimant's age may be of the gravest consequence to him. They have asked themselves whether a sanction less far reaching in its consequences for the claimant than the dismissal might not have been more appropriate. But they recall that the task of the Tribunal is not to consider what sanctions the Tribunal might impose, but rather whether the reaction of the respondent and the sanction imposed lay within the range of reasonable responses'.

The Tribunal is satisfied that the response of the respondent and the sanction, namely dismissal, was reasonable, having regard to the facts disclosed and the evidence proffered.

The decision of the Tribunal is that the dismissal was fair, within the meaning of the Unfair Dismissals Acts 1977 to 2007.

Accordingly, the claim fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)