

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE

- claimant

RP132/10

MN92/10

UD944/09

Against

EMPLOYER

- respondent

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005 REDUNDANCY PAYMENTS ACTS, 1967 TO 2007 UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. McGrath BL

Members: Mr J. Horan
Mr J. Jordan

heard this claim at Naas on 30th March 2010, 12th July 2010 and 13th July 2010.

Representation:

Claimant: Ms Audrey Coen B.L., instructed by Mr Bryan Coen, Coonan Cawley, Solicitors,
Wolfe Tone House, Naas Town Centre, Naas, Co Kildare

Respondent: Mr. Conor O'Toole, Coughlan White O'Toole, Moorefield Road, Newbridge,
Co. Kildare

The determination of the Tribunal was as follows:-

At the outset of the hearing the claim under the Redundancy Payments Acts, 1967 to 2007 was withdrawn.

Respondent's Case:

The respondent is engaged in the processing of beef. At approximately 12.55 pm on 11th March 2009 employee J reported an incident to TH, the Boning Hall Manager/Production Manager. J alleged that the claimant had struck him. J was in shock, upset and seemed scared. At

approximately 13.20 pm TH asked the claimant together with a fellow employee X to come into his office. TH informed the claimant that an allegation had been made against him and that he deemed it to be a serious matter. He asked the claimant if he had struck J and he responded that he had. The claimant became very angry and banged his fists on the table and said he was going to kill J. X asked the claimant to calm down. TH also asked him to calm down and relax and to go home. The claimant wanted to speak to J but TH would not allow him. The claimant was suspended with pay that day and was asked to report to work at 10.00 am the next day 12 March 2009 to attend an investigatory meeting and to give his account of the alleged incident. TH then escorted him off the premises.

The claimant, TH and the HR Manager, BN attended an investigatory meeting at 10.00 am on 12th March 2009. The claimant declined the offer of an interpreter or colleague. He said he could speak for himself. BN explained that the meeting was investigatory. The claimant was still angry and apologised for his actions the previous day. He admitted assaulting J and was sorry for what he did. He wanted to speak to J but TH thought it best to keep the two apart. The claimant said that J had provoked him and that J was always giving orders to other employees. TH contended that it was a dangerous environment that contained many knives. He was worried for the safety of the employees. He was surprised that the claimant assaulted J. TH explained that there could be serious consequences and that it was not acceptable to strike another employee. Prior to the incident there had been no issues with the claimant. The claimant was not furnished with the company handbook during this meeting. At the conclusion of the meeting TH said that he would be speaking to J and other witnesses to the incident. TH escorted him off the premises then.

Between 12th and 18th March 2009 both J and witnesses were interviewed.

J was interviewed and said that TH had asked him to separate the trims and flanks. The claimant had gone to get trays. There was a pile up and J put the flanks back on the belt to be separated. Upon the claimant's return he took the flanks and passed them back to J but there was no room for them. The flanks had to be separated and J put them back on the belt and returned to his own work. After that the claimant hit him on the back with an empty tray and he thought the claimant was messing at the time. As he turned to face the claimant, the claimant pushed him with an open hand on his head. There followed a lot of swearing. J said that two employees had witnessed the incident. J had subsequently been given a verbal warning.

JM who had been named as a witness had not in fact witnessed the incident and had heard from others at lunch time about it.

GP had worked in the boning hall with the claimant for approximately three months. GP overheard J telling the claimant to separate meat and J asking the claimant why he had hit his back. The claimant said he did not care. Both of them were angry. The claimant did not want to take instructions from J but only his supervisor. The claimant had been standing behind J. GP saw the claimant pushing J's head with an open hand.

Discussions followed between TH and BN, notes and statements were reviewed and it was decided to ask the claimant to attend a disciplinary meeting on 19th March 2009. X was asked by the respondent to hand deliver a letter dated 18th March 2009 to the claimant, one version being in English and a second version translated into Slovakian, asking him to attend a disciplinary meeting at 10 am the following day, 19th March 2009. The letter was headed 'disorderly conduct'. X did as he was requested.

TH, BN, the claimant and his daughter NP attended the disciplinary meeting on 19th March 2009. The claimant was again asked for his version of what had happened on 11th March 2009. NP assisted with the translation. The claimant was very angry and wanted to speak to J. BN was apprehensive about what the claimant would do if he was confronted. He apologised a few times. He was informed that other employees had been interviewed and that he had been seen striking J. The claimant again said that he did not mean to do it.

NP said that the claimant was sorry for what happened and regretted it. BN was concerned that not controlling one's temper was a very serious issue especially in the boning hall and that employees work with knives. The meeting lasted about 20 minutes.

The conduct of the claimant was in serious breach of the respondent's policies and procedures and was considered to be gross misconduct. A decision was taken to dismiss the claimant and this was communicated to him at 12 noon that day. A letter dated 19th March 2009 had been drafted in advance by BN and was translated to Slovakian, which formally dismissed the claimant with immediate effect. He was offered a right of appeal within five working days. His outstanding pay, outstanding holiday pay and his P45 subsequently issued to him.

The claimant appealed the decision to dismiss him. JG conducted the appeal hearing on 2nd April 2009. His colleague SG was also present. The claimant attended with his son in law. The claimant was calm at the meeting. The incident that had occurred was discussed at length. The claimant conceded that he had pushed J's head. JG said he took it very seriously especially so in the working environment. He deemed it to be gross misconduct. He had known the claimant for a longtime and it was so unlike him. He said if the claimant had come to him while he felt he was under pressure the incident may not have occurred. The claimant said that J had touched him with his shoulder and that he retaliated by pushing J on the head. JG then said that he needed to investigate this. The claimant said he did not want this investigated but JG insisted that it had to be. The claimant asked for CCTV footage of the area but cameras did not cover that area. The meeting concluded and JG said he would communicate his decision to the claimant.

Following the appeal hearing JG spoke to J. He denied hitting the claimant. JG spoke at length with SG and the claimant's dismissal was upheld. This was communicated to the claimant by letter dated 6th April 2009.

Claimant's Case:

The claimant commenced employment in 2002. He worked in the packaging area for seven years tying up packages. He had no problems at work prior to the incident on 11 March 2009. He worked a three-day week in the months January to March of each year, as work was slack at that time.

On 11th March 2009 he was working where the meats were assembled behind J. He was asked to go into TH's office after lunch and X was called into the office also as an interpreter. He was asked about the incident. J had been giving out to him and was being bossy as he always was. J worked at the same level as the claimant. The claimant contended that J was always pushing him and that he would have reported this to TH but had decided not to make a big deal. J had been offensive and the claimant lost his temper and pushed J's head with an open hand. The claimant said he was ready to apologise. He never banged the table that day. The claimant contended that bigger incidents had occurred in the workplace prior to the incident he was involved in. He was not angry at that meeting. He was never informed that he was being suspended from work. TH asked him to go home, calm down and relax and to come back to work the following day. He thought

everything would be normal.

The next day, 12th March 2009 the claimant went to the canteen and TH asked him to go to the office. BN was already present and he was very surprised to see her. When he sat down he was told there was to be an investigation. X was offered to translate for him but as X's level of English was at the same level as his he chose not to have X present. BN told him it was a very serious matter and he understood these words and he wanted to apologise to J. The claimant said that he could have complained about J many times but chose not to. He demanded that J be brought into the meeting so that he could apologise to him. BN said it was never going to happen. He was completely calm at the meeting. He understood that they were going to talk to J. At the conclusion of the meeting he was told to go home and was never told he was being suspended.

X delivered a letter to him between 4 and 5 pm on 18th March 2009 inviting him to a disciplinary meeting on 19th March 2009. He brought the letter to his daughter's house and she translated it for him. He knew he did something wrong. He was unaware that the quote in the letter 'disorderly conduct' was extracted from the employee handbook. He had received the employee handbook some years after he commenced employment but not a version in his own language.

His daughter attended the disciplinary meeting with him on 19th March 2009 scheduled for 10 am. She acted as his translator. The employee handbook was not produced at the meeting. It was mentioned that GP and JM were witnesses to the incident. He was never provided with any statements. BN said that it was a very serious matter and could have huge consequences. He was never told that he could be dismissed. The claimant contended that J had offended him and that he had pushed J. If he had struck J he would have fallen. The claimant requested to see CCTV footage but this was not made available to him. BN had said she would check the CCTV footage and get back to him but she did not. They informed the claimant that they would get back to him at 12 noon with a decision. The meeting lasted approximately twenty minutes.

He was very surprised at the outcome of the meeting that he was being dismissed. He had never been in trouble before. He appealed the decision to dismiss him. His son in law (G) attended the appeal hearing with him. He again asked for witness statements. No reference was made to the employee handbook. G asked if the claimant could be given a second chance, as he had never been in trouble before. The claimant said that J had pushed him first. JG said he would talk to J. JG said if he had been there it would not have happened.

Since the claimant's dismissal he applied for 80/90 jobs but was unsuccessful in securing employment. He has been in receipt of the job seekers allowance.

X told the Tribunal that the language at the meeting on 11th March 2009 was informal and casual. The claimant did not bang the table at the meeting but he was angry and TH asked him to calm down. When the meeting concluded he returned to work. He was unsure if TH escorted the claimant off the premises. He was not asked to act as interpreter for the meeting of 12th March 2009.

At the conclusion of that meeting TH told the claimant to go home and come back to work the following day. He hand delivered the letter dated 19th March 2009 to the claimant between 4 and 4.30 pm on 18th March 2009.

The claimant's daughter (NP) translates correspondence etc. for the claimant. She heard about the claimant's incident at work at approximately 2 pm on 11th March 2009 when her father had been sent home from work. She said the claimant was not an aggressive person. He had been told to report for work at 10 am on 12th March 2009 and she could not understand why. The claimant's understanding of being at home between 12th and 19th March 2009 was that the company was trying to sort out matters and then he would go back to work.

The disciplinary meeting on 19th March 2009 was late commencing and possibly lasted twenty minutes. The names of those who had witnessed the incident were provided but no written statements were furnished to them. The claimant had never been told that he could be dismissed and no reference was made to the company handbook. Both she and the claimant went home around 11 am and returned at 12 noon. The claimant was informed of his dismissal at that time and she translated the dismissal letter for the claimant. She had felt the incident was not so serious as the claimant had never had a problem at work previously. She assisted the claimant with his appeal letter.

Determination:

The Tribunal has carefully considered the evidence adduced in the course of this three-day hearing.

The claimant was dismissed for gross misconduct, namely disorderly conduct after an investigation conducted by the respondent company.

At the outset the Tribunal confirms that it respects the entitlement of the company to treat as very serious any altercation in the workplace especially as there is scope for serious injury or harm arising out of the ready supply of knives, hooks and other dangerous implements in the workplace in question.

However, for the purposes of reaching a determination the Tribunal must also look at the actual facts of the case before it and the incident complained of here is variously described as an "open handed" push to the head. This was the physical contact between the two men who were certainly and audibly expressing a difference of opinion. The Tribunal is satisfied that the witnesses, the victim and the perpetrator were unanimous in downplaying the nature of the impact. They all agreed that heated words were being exchanged.

This is in marked contrast to the company's record of the incident wherein the stronger language of "struck" and "striking" was used.

The Tribunal must find that the respondent company appeared to be conducting an investigation into an incident that it perceived to be very serious by reason of the fact that it might have escalated into something very serious, but the Tribunal heard evidence of an incident that, whilst undesirable, was less serious than the image of potentially knife wielding employees being put forward by the respondent. The Tribunal does not necessarily criticise the respondent's "better safe than sorry" policy but a man's livelihood was at stake here and it was not fair to conduct an investigation into what might have happened as against what did in fact happen. In considering all the information to hand the company failed to adequately take into account an unblemished previous record and most importantly the fact that the claimant had acted so out of character a fact confirmed by the Factory Manager who conducted the appeal.

In conclusion, the Tribunal must find that the ultimate sanction of dismissal was disproportionate to

the incident in question. The possibility of a lesser sanction such as suspension without pay should have been given some consideration especially since same had been provided for in the employee's handbook.

Quite apart from the issue of disproportionality, the Tribunal finds that the investigative process initiated by the respondent was flawed from its commencement. In particular, the Tribunal finds that the claimant was given no real opportunity to defend his position and most importantly, had no indication that he was at risk of losing his job. There was a very real language barrier between the claimant and the respondent, that the respondent made insufficient effort to ameliorate. In addition, the respondent failed to ensure that the claimant understood what was meant by an investigative meeting, a disciplinary meeting, disorderly conduct, gross misconduct and the sanctions open to the respondent. There was nobody acting for and on behalf of the claimant with an adequate understanding of the implications of the disciplinary process. The Tribunal finds that the onus had to rest with the respondent to ensure that every opportunity be given to the claimant to make his case and defend his rights. It was clear to the Tribunal that the claimant had no comprehension of what his rights were within the process. He was, for example, refused witness statements, which is a fundamental entitlement in any investigative process. Additionally, the language in the written statements changed in the typed summaries and there was no contemporaneous note of the appeal at all.

In conclusion, the Tribunal finds that the respondent company appeared to rush this process along at an inexplicable pace, which demonstrated a lack of reflection and perspective.

The Tribunal had regard to the findings of the Labour Court in Campbell Catering Limited –v- Aderonke Rasaan insofar as the obligation of the respondent company to a non-national employee pertains.

The Tribunal finds that the claimant was unfairly dismissed. The Tribunal awards the claimant €25,000.00 under the Unfair Dismissals Acts, 1977 to 2007 and also awards the claimant €1360.00 being the equivalent of four weeks pay under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)