EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:	CASE NO.
EMPLOYEE	UD1133/2009

against the recommendation of the Rights Commissioner in the case of:
EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Hayes BL
Members: Ms. J. Winters
Mr. N. Dowling

heard this appeal in Navan on 31 March 2010

Representation:

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Appellant(s):
Mr. Marcin Szulc, Maguire McClafferty, Solicitors,
8 Ontario Terrace, Portobello Bridge, Dublin 6

Respondent(s):
Mr. Tiernan Lowey BL instructed by
Ms. Denise Fry, Solicitor, DAS Group,
12 Duke Street, Dublin 2

The determination of the Tribunal was as follows:-

This case came to the Tribunal as an appeal under the Unfair Dismissals Acts, 1977 to 2007, by an employee against Rights Commissioner Recommendation r-071861-ud-08/JW.

Opening the respondent's case, the respondent's representative submitted that the appellant had been justifiably dismissed as a result of his failure to comply with a lawful reasonable order to weld (given that welding was a task for which he was employed). It was argued that fair procedures had been applied in dismissing the appellant but that he might have had an agenda in orchestrating a dismissal to facilitate his working in his mother's shop.

Giving sworn testimony, the respondent's managing director (hereafter referred to as MD) said that on 2 October 2008 his foreman (hereafter referred to as FO) told him that the appellant was refusing to weld a locker saying that it was too heavy.

The Tribunal was now referred to a letter dated 10 July 2008 from JM to the appellant which stated that due to the appellant's "recurring back complaint" the respondent requested that the appellant "seek assistance in lifting or moving large or heavy objects". The letter added that if an injury occurred the respondent required the appellant to inform a member of management, clock out and present a doctor's letter.

Asked why this letter had been sent, MD replied that the appellant had complained about a sore back. He (the appellant) had left the factory, clocked out and said nothing but, when MD did not pay him, the appellant said that he had been hurt. The respondent had not known where the appellant was.

MD told the Tribunal that he and FO had explained to the appellant that he would not have to move a box and that any lifting needed assistance. Although the appellant was a non-national there had never been a problem with his English.

MD approached the appellant at his workstation and asked him what was the problem with welding the box. The appellant said that it was too heavy. MD replied that there was no lifting to be done but just to weld it. The appellant still refused to weld it saying that other employees could do it but that he would not and, getting agitated, shouted: "Dismiss me! Dismiss me!"

Not sure what to do, MD rang a friend in another company for advice and asked FO to find something else for the appellant to do. That afternoon, MD called the appellant into the office. The appellant had not changed his mind about his refusal. MD said that he had no choice, gave the appellant notice and told him that he could appeal within seven days. The appellant was a very good welder but MD had no alternative. He could not keep the appellant if there was no work for him.

The Tribunal was now referred to a report dated 13 October 2008 regarding an appeal which began at 9.30 a.m. by the appellant to MD's son and FO. The report stated that it was explained again that help would be provided in any lifting and moving of "large work pieces" and that this was standard practice in the respondent but that the appellant said that, even with three other people, this "work piece" was too heavy for him to lift. The report further stated that the appellant was told that he did not have to lift or move any components and that, when he asked about turning parts, he was told that he did not have to turn or move parts but rather just to weld.

The report continued:

"(The appellant) then said he would come back with a decision after tea break. His decision was to be put in writing and he would require a day to get help to write a reply.

(The appellant) later approached (MD's son) on the factory floor requesting written confirmation of not lifting or moving as per discussion.

(MD's son) agreed to do this.

2nd Meeting 12.00 p.m. approx 13/10/2008.

It was explained that written statement of work was not available as standard work practice in (the respondent) was to ask for help when required. (The appellant) then referred to previous letter

regarding seeking assistance with lifting due to his back problem. (The appellant) referred to another occasion when he was absent from work with torticollis and felt that we were unfair by not paying him while out sick. It is company policy not to pay employees when out sick. (The appellant) then decided he had no option but to leave. The meeting closed at 12.10 p.m. approx..”

MD referred the Tribunal to a photo of a box and said that all the appellant had to do was weld it but said that the appellant wanted to operate his mother’s shop and that a private investigator could give evidence about observations done on the appellant.

Giving sworn testimony with the aid of a Tribunal-appointed interpreter, the appellant said that his work for the respondent had involved lifting heavy or light objects every day but that he had received no manual lifting training. He and a friend had to lift or push boxes which in the case of a two hundred kilogram box would involve a load of one hundred kilograms per man. Asked if others helped, he said that there were three or four other people.

Asked about 2 October 2008, the appellant said that he was to start with a heavy box which had to be put in place for welding. He always needed help. His back pain was stronger and stronger each day. He said that he could not work with such boxes because they were too heavy. The appellant told the Tribunal that he had a heavier box than the type of box shown in the picture furnished to the Tribunal and that he had to both weld the box and push it to one side. It would have to be turned and clamped. It would need to be moved about ten times. The box that the appellant was working on was about four hundred kilograms in weight.

Asked how many people would be needed, the appellant said that he would need a maximum of four people. For welding, the box needed to be moved rather than just looked at. The appellant did not agree that there was no need to move the box. The respondent did not have a crane but the appellant felt that it should have one.

The appellant told the respondent to give him a different job because his job was the heaviest. After break they had a meeting. The appellant said that he did not want to work with this heavy object.

The appellant told the Tribunal that he had previously been promised sick pay by the respondent but had not received it and that this was why he had sought something in writing that he would not be lifting these heavy boxes. He was told that he would not be lifting them but he did not believe it. He denied to the Tribunal that he had said: “Dismiss me!” He had been asking the respondent to be moved to a lighter job.

Asked how he had received his dismissal, the appellant replied that, after the two meetings on that day (at about 10.00 a.m. and 1.00 p.m. on 2 October), he received his dismissal letter at about 4.00 p.m.. Asked if he was saying that it had not been 13 October, he replied that he was sure that it had been 2 October because he had had seven days to appeal.

Asked if anything had happened on 13 October, the appellant said: “No. I’m sure it was the second of October.” He added that he did not recall anything on 13 October.

Asked why he had refused to work on the box, the appellant replied: “Because of the pain in my back that got stronger and stronger.”

When it was put to the appellant that such boxes got moved on trolleys he replied that he did not know how this was done in practice and that the respondent did not use forklifts but trolleys. Asked if a forklift was ever used at all, he replied that this occurred just occasionally and that there was no room for any manoeuvres using a forklift.

Asked about the allegation that he had had a prior agenda and had provoked his dismissal to work in his mother's shop, the appellant denied this. He did not deny that he had helped his mother with bringing things from home to the shop, whenever she had asked, but stated that he had not been paid by her apart from the fact that she had sometimes given him money for petrol.

In a closing submission, the appellant's representative referred the Tribunal to health and safety legislation. He submitted that the appellant had acted lawfully in refusing to do a task he considered unsafe in that moving a two hundred kilo box involved a load of fifty kilograms for each of four people and that twenty-seven kilograms was the recommended maximum. Also, the appellant had had a back problem of which the respondent had been aware.

The respondent's representative submitted that it was now established that the respondent had not asked the appellant to carry out heavy lifting but that the appellant's case had "morphed" into a question of whether the appellant had acted reasonably in not believing that he would be excused from lifting. It came down to credibility and conduct in that the appellant had been dismissed for misconduct. It was submitted that the order to weld had been reasonable given that the appellant would not have been obliged to lift.

Determination:

The respondent is in the metal fabrication business. It was founded in 1982 and is based in Co. Meath. It employs eighteen people. The claimant commenced employment as a welder in September 2005. His employment came to an end in October 2008.

In July 2007 the claimant injured his back in the course of his work. After he returned to work in July 2008 he was given a letter which instructed him that:

> "Due to your recurring back complaint, we request that you seek assistance in lifting or moving large or heavy objects."

On 2nd October 2008, the claimant's foreman, RN, asked him to weld a large metal box. The box weighed approximately 200kg. The claimant refused to weld it. The Tribunal was told that that the claimant told RN that there were five other welders who could do it and that he was not going to. The claimant explained that the box was too heavy for him. RN told him that he was only beingasked to weld it and that he was not required to lift it. RN reported this refusal to JM, the owner. JM repeated the instruction and the claimant continued to refuse. Having taken some

time to consider the matter, JM gave the claimant two weeks' notice of his dismissal.

The claimant told the Tribunal that he simply wanted to be assigned to lighter duties. He agreed that he had declined to weld the box as instructed. He accepted that he had been assured that he did not need to lift the box but he did not believe this and wanted the assurance in writing.

The Tribunal is satisfied that the claimant was dismissed after, in the first instance, refusing to carry out a reasonable instruction from his foreman and refusing again when the instruction was repeated by his employer. The claimant was assured that he would not be required to lift the box in question. He did not accept this assurance. He said that he did not believe it. It might have been reasonable for the claimant to adopt the position that he did had he accepted the assurance, commenced the work in question and then it had turned out that, contrary to the assurance, he was, in fact, required to lift the box. It was not reasonable for him to refuse his employer's instruction either on the basis or at the time that he did.

The Tribunal is satisfied that, in the circumstances, the respondent was entitled to dismiss the claimant. The Tribunal is satisfied that the respondent used fair procedures both in the dismissal and in the appeal against dismissal.

This appeal against the recommendation of the Rights Commissioner is, therefore, dismissed and the recommendation is upheld.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)