EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	**CASE NO.**
EMPLOYEE	UD1083/2008
- *claimant*	MN996/2008

against

EMPLOYER
- *respondent*

under

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

I certify that the Tribunal
(Division of Tribunal)

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

Members: Mr T. Gill
Mr T. Kelly

heard this claim at Nenagh on 27th April 2010
28th April 2010

Representation:

Claimant: Mr. Blazej Nowak, Polish Consultancy Enterprise, 19 Talbot Street, Dublin 1

Respondent: Mr. Ambrose Downey, Ir/Hr Executive, Ibec, Gardner House, Bank Place, Charlotte Quay, Limerick

The determination of the Tribunal was as follows:-

The claimant was employed from March 2004 in the respondent's agricultural machinery manufacturing business. He commenced as a welder but later went to the painting line where he was team leader. His dismissal occurred as a result of an incident that occurred on the 23 July 2008. Whilst there had been no previous formal disciplinary procedures involving the claimant a number of incidents concerning the claimant's behaviour had been brought to the respondent's attention.

At the time of the incident the production manager (PM), was relatively new to this position. He had noticed the claimant was very visible in areas of the factory other than his own. On occasions he found the claimant giving instructions to other employees on the fabrication line. He had to put a lot of emphasis on the paint line and had a lot of pressure trying to get the claimant to stay in the paint line. The claimant began to complain about his working conditions once PM started to look at the painting process. PM explained that he had followed up on these issues but they were not dealt with as fast, as the claimant would have liked. The claimant admitted in evidence that from time to time there was tension between him and PM. Whenever he approached PM with a request PM, would over-react and would not want to talk to him. PM was trying to give them specific timeframes to finish jobs but PM did not take into account the nature of the machine. From time to time he and PM would have differences of opinion in respect of the painting process. The claimant accepted that he did not always remain at his work-station, PM might have encountered him on the factory floor on numerous occasions but the felt that he had good reasons to be away from his station, for instance following a manager's instruction to check machines.

On the 23 July 2008, just before the annual holiday shutdown, an AP900 machine was damaged during the painting process. A customer had ordered the AP900 machine in late June 2008 and during the week of 23 July 2008 requested to have mudguards fitted to it. This had to be done as a matter of urgency because the machine had to be shipped, before the summer shutdown on Friday 25 July to the purchaser in Scotland PM instructed two employees (K and M) to mask and prepare the machine so the claimant could paint the newly fitted mudguards. The respondent's position was that the claimant wanted to paint the whole machine. It was the claimant's responsibility to check the masking on the machine before he commenced the painting process. The spray painting is done in an enclosed booth and then the machine is transferred to the oven for drying.

When the machine came out of the oven PM saw the claimant taking the newspapers off the machine. He saw the imprint of newspapers and drag marks on the mudguards; in some places you could see right down to the metal. The mudguards had to be stripped down and re-painted. On the day of the incident PM took photographs of the damaged machine.

He was very upset as he was under pressure to dispatch the machine to Scotland. In the event the machine was shipped on time. PM's evidence was that, at the time, the claimant told him that the masking paper had fallen onto the mudguards. The claimant's evidence to the Tribunal was that the masking on the machine was insufficient and that he had mentioned this at the time to K who had told him he had done it to the best of his ability and said there was nothing he could do; so he chanced painting the mudguards and took extra care. K disputed this conversation and denied that the claimant had ever brought any inadequacy in the masking of the machine to his attention. Further, it was K's evidence that the masking paper had never come off before.

It was PM's evidence to the Tribunal that on the day of the incident K informed him that the damage to the machine was deliberate, as the claimant had told him that morning that the machine would not be finished to schedule; that he would damage

the machine. The claimant denied this.

The investigation into the incident was delayed until 18 August 2008 due to the holiday shutdown. The operations manager (OM) interviewed all the witnesses separately and PM took notes. This was the first time that OM spoke to the claimant about the incident. He advised the claimant that it was an investigation meeting. He also met with K, M and D (another worker who has since returned to Poland). He put a list of prepared question to each of them in relation to the events of 23 July. This list was produced in evidence. The three witnesses K, M and D signed their responses when typed up. The claimant's response to these questions was that he had done nothing. At this stage the claimant did not raise any issue about the insufficiency of the masking of the machine on 23 July. K maintained that the claimant had said that the machine would not be finished "out of spite".

Replication painting tests were carried out as part of the investigation process. Photographs produced in evidence showed that while some of the paper lifted and the masking tape had curled, none had fallen off. Both K and M, who masked the machine on the day of the incident, also prepared the machines for the replication tests. Photographs taken before and after the machine had gone through the process were produced in evidence.

Following the investigation process, the claimant was invited to attend a "Disciplinary Investigatory Meeting" on the 21 August 2008 and he was advised in the letter 18 August 2008 that this meeting could lead to a sanction up to and including dismissal. He was suspended from work on full pay. This letter advised him of the right to be represented and referred to SI 146 of 2000 Code of Practise and Disciplinary Procedures, a copy of which was enclosed with the letter.

OM, PM, the claimant and an independent interpreter were present at the meeting. The claimant had no representation with him but was happy to proceed with the meeting. OM explained to the claimant that during the course of the investigation three employees had identified him as causing the damage and another two had come forward saying they were also aware of his comments in relation to damaging the machine. The claimant maintained that he was only afforded the right to cross-examine the witnesses when he had threatened to terminate the meeting. The respondent disputed this. The claimant was given the opportunity to cross-examine the witnesses. The claimant maintained that he had not caused the damage deliberately.

On considering all the evidence including the replication tests OM concluded that the damage to the paint on the mudguards had been deliberately caused. It was the claimant's responsibility to sign off on the preparation of the machine for the spray painting. In the replication tests some of the masking tape had curled and some of the paper had become loose but it had not become detached. As regards the incident on 23 July, OM was satisfied that the paper had not just dropped onto the newly painted mudguards but that it had been deliberately pushed into the mudguards and dragged through the paint exposing the metal in places. OM considered this to be gross misconduct warranting dismissal. The respondent had never dismissed an employee for making a mistake but OM believed it was deliberate damage caused by the claimant. The claimant was informed of the decision to dismiss him at a further

meeting on 25 August 2008. The claimant again was not represented at this meeting but had indicated he had been happy to proceed.

The claimant appealed the decision to dismiss him to the managing director (MD) of the company by letter of the 27 August 2008. MD did not interview any of the witnesses until after he had spoken with the claimant on the 2 September 2008. The claimant raised three issues with him.

1. He had not worked on this machine on the day in question but had done it in June
2. The company had no proof of the incident
3. To check to see if the job was on the work lists for the day in question.

Subsequent to this meeting, MD looked at the evidence and investigated these complaints. He felt the replication tests had not been done on a machine identical to the one painted on 23 July so he arranged for a replication test to be done on an AP900 with mudguards on. Photographic evidence of this test was produced. These photographs showed the machine throughout the process, priming, painting and drying. At one stage the papers lifted slightly during the drying process, but they settled back after it came out of the oven. MD observed the machine going into and coming out of the booth and was fully satisfied that the masking would not have fallen off without intervention. MD had the witness statements and met with all the witnesses, with the exception of D who had returned to Poland. MD was able to confirm that the job was carried out on 23 July 2008, the order for the AP900 came in on 30 June and a call came in early on the week of 23 July requesting the addition of mudguards. The work records could not be found for 23 July 2008. In the course of his evidence the claimant denied he had said the incident had not happened. What he had meant by this comment was he had not caused the damage, he was maintaining his innocence.

MD concluded that the damage to the machine was neither due to a mistake on theclaimant's part nor to his being under pressure but it had been deliberately caused andhe upheld the decision to dismiss. MD met with the claimant on 11 September 2008and informed him of his decision. When the note taker left the room the claimantagain stated he had not deliberately damaged the machine and indicated that theperson who had masked the machine was at fault. The respondent maintained thatthis was the first time the claimant had proffered this explanation and it had not beenmentioned in his appeal letter. In evidence the claimant accepted he was responsiblefor overseeing the masking but he would not point to another individual to blame. Healso accepted in evidence that at the initial investigation stage he did not raise theinadequacy of the masking with OM.

The respondent's position is that they carried out a thorough investigation, all witnesses for the respondent maintained that the damage to the machine could only have been caused deliberately. The claimant was responsible for checking the masking and had been told previously if he had any issues with masking he should bring it to the attention of the manager. The claimant had painted the machine on the day in question.

The claimant is adamant that he did not cause the damage to the AP900 and he had relayed this to OM, PM and the managing director. He was strongly aggrieved that the replication tests had been carried out in his absence. He was shocked that the incident led to his dismissal as the damage done to the machine cost the respondent j ust around €100.00. He had nothing to reproach the managing director about, as he had a good working relationship with him and the company and he was sorry that it had come to an end. His two brothers remain in the respondent's employment.

Determination

The Tribunal is satisfied that it was reasonable for the respondent to conclude that the damage to the machine was deliberate.

It is not the Tribunal's function to establish the innocence or guilt of the parties before it. The test in cases of alleged misconduct is well established. This test is whether the employer had a genuine belief based on reasonable grounds following a fair investigation that the claimant was guilty of the alleged misconduct. The Tribunal is satisfied that the respondent carried out a thorough investigation and that it was reasonable for the employer in the circumstances to conclude that the claimant had damaged the machine. The Tribunal notes that the monetary cost of the damage to the respondent was small. However, in circumstances where the respondent was operating under a very tight schedule before the annual shutdown and the machine had to be prepared for shipping the Tribunal are satisfied that such behaviour amounted to gross misconduct.

The claimant was afforded a fair process albeit refusing the offer of representation at the meetings. Accordingly the Tribunal finds that the dismissal was not unfair and the claim under the Unfair Dismissals Acts, 1977 to 2007 fails. The claim under the Minimum Notice and Terms of Employment Acts 1973 – 2005 also fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)