

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:  
EMPLOYEE - *Appellant*

CASE NO.  
UD2639/2009

against the recommendation of the Rights Commissioner in the case of:  
EMPLOYER - *Respondent*

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr N. Russell

Members: Mr J. Hennessy  
Mr F. Dorgan

heard this appeal at Carlow on 5th May 2011

#### **Representation:**

Appellant: Mr. John O'Connell B.L. instructed by Ms. Imelda Leahy, David Walsh & Company, Solicitors, Kilree Street, Bagenalstown, Co Carlow

Respondent: Mr. Tim O'Connell, I B E C, Confederation House, 84/86 Lower Baggot Street, Dublin 2

#### **The determination of the Tribunal was as follows:**

This case came before the Tribunal by way of an appeal by an employee (the appellant) against the recommendation of a Rights Commissioner under the Unfair Dismissals Acts, 1977 to 2007, reference: r-074046-ud-09/MMG.

Dismissal as a fact was not in dispute.

#### Respondent's Case:

Mr. K, a general operative with the respondent gave evidence that he was working in the preparation area of the respondent's factory on 8 October 2008. There were mincing machines in the preparation area and there were five people working in the preparation area. Another employee MM was working in the preparation area. The claimant walked past MM and thumped him. MM then followed the claimant, pushed him and the claimant fell over. The witness was certain this was what he had observed. Mr. K made a statement to this effect to the Department Manager when the matter was being investigated.

During cross-examination Mr. K confirmed that the work he was carrying out involved moving product from one container to another and this involved him moving from left to right every few seconds. Mr. K then said when he observed the claimant he had already passed MM. When questioned further on how he could then have seen the claimant hit MM, the witness replied that the first thing he had seen was the claimant hitting MM.

Giving evidence another employee MS stated that on 8 October 2008 he was working in all of the sections in the preparation area. He also made a statement as part of the investigation process. He observed the claimant going through the preparation area and moving towards one of the chill sections. There was some pushing between the claimant and MM and it was clear that there was some argument between them. MS did not see what happened next but when he next observed the claimant he was lying on the floor.

The Department Manager gave evidence that there are a number of mincing and chopping machines in the preparation area. The chopping machine has a number of blades and is in operation on an almost constant basis. Up to thirteen employees can be working in this area at any one time.

The incident on 8 October 2008 was reported to her on 9 October 2009. The two supervisors in the area first carried out a preliminary investigation into the incident. The claimant and MM were informed that they were suspended with pay pending the outcome of an investigation, which could ultimately lead to their dismissal. This was confirmed in writing to the claimant by letter dated 9 October 2008. The claimant was invited to attend a disciplinary investigation meeting on 10 October 2008. The Department Manager stated that the incident had to be taken seriously because of the physical contact that was made or allegedly made by one or both parties.

At the investigation meeting the supervisor was present as a note taker. When the Department Manager met with the claimant he stated that MM was swinging a shovel in the preparation area and as the claimant passed by MM he told him to be careful where he was swinging the shovel. The claimant claimed that as he returned from the opposite direction and walked past MM, he was pushed three times and fell to the floor. All of the witness statements enclosed in the respondent's booklet of documents were opened to the Tribunal.

A letter dated 13 October 2008 invited the claimant to attend a further disciplinary investigation meeting on 16 October 2008. At the meeting the claimant was furnished with copies of witness statements. The Department Manager confirmed that she had interviewed MM, MS and another employee who was a witness to the incident. There was a lot of conflicting evidence against what the claimant claimed had occurred. The claimant was unable to clarify as to why there was such disparity. Each of the witness statements was reviewed with the claimant.

The Department Manager felt that the statements needed to be examined again and the claimant was invited to attend a further meeting on 20 October 2008 to explain the disparity between what he claimed and what the witnesses claimed had occurred.

After the meeting a letter dated 20 October 2008 issued to the claimant to inform him that the Department Manager was in a position to conclude the matter and accordingly a meeting was proposed for 21 October 2008. This meeting was re-arranged at the claimant's request to allow him time to take legal advice.

When the meeting convened on 29 October 2008, the claimant submitted a statement. However, the Department Manager concluded that the claimant's version of what had occurred was not credible given the witness statements from other employees. Two of the witnesses had observed actual physical contact on the part of the claimant and MM and two of the witnesses had observed body language that was indicative of physical contact. Both the claimant and MM were dismissed because of the seriousness of the incident and the duty of care the respondent has to its other employees.

A letter dated 3 November 2008 informed the claimant in writing of the decision to terminate his employment. The claimant was informed that he could appeal this decision to the Factory Manager but the claimant chose not to appeal.

The Production Supervisor gave evidence that the incident was reported to his colleague, a fellow supervisor. The witness collated all of the evidence with the Department Manager and attended the meetings with her as a note taker. The witness was satisfied that the claimant was furnished with all of the evidence against him. The witness was not part of the decision-making process.

A Human Resources employee gave evidence that the role of her department is to support and advise department managers who bear the responsibility for disciplining employees as required. It is not the decision of the human resources department to dismiss an employee. After the decision to dismiss the claimant was made he had the option of appealing the decision to the General Manager and subsequently to the Factory Manager.

#### Claimant's Case:

The claimant gave evidence that the respondent employed him for some five years as a general operative. On the day of the incident he was walking towards the chill section. MM was swinging a shovel from side to side. The claimant told him to be careful with the shovel. The claimant was then pushed in the back three times and he turned around to see who was pushing him from behind. The claimant acknowledged that he did not have a good working relationship with MM but they had never fought before. The claimant stated that he did not use any violence towards MM -even in self-defence.

The claimant complained about the issue to another colleague who reported it to one of the supervisors. The supervisor met with the claimant and asked him what procedures he wanted to utilise.

After the disciplinary process had concluded the claimant decided not to appeal the decision to terminate his employment as he could see from the statements that it was certain he would still be dismissed. He noted that he had not been present in the same room as MM to challenge his version of events as part of the investigation process.

The claimant believes that in or around the time of his dismissal, the respondent company was considering implementing redundancies. He believes therefore that it suited the company to dismiss him. The claimant gave evidence pertaining to loss.

#### **Determination:**

The Tribunal carefully considered the oral and documentary evidence adduced at the hearing and concluded that the investigation process was fair in the procedures it adhered to. The respondent company was entitled to rely on the witness statements provided in the course of that investigation and conclude that the claimant was involved in the incident.

The claimant raises the issue that he was not present to challenge MM's version of events. However, the Tribunal notes that the claimant did not request to cross-examine any of the witnesses and he was legally represented in the final stages of the process. In addition the claimant did not exhaust the procedures afforded to him when he chose not to appeal the decision. In all of the circumstances the Tribunal is satisfied that the dismissal of the claimant was fair. The appeal under the Unfair Dismissal Acts, 1977 to 2007, fails. Accordingly, the Tribunal upholds the recommendation of a Rights Commissioner reference: r-074046-ud-09/MMG.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)