

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE
- **claimant**

UD1121/2010
MN1090/2010
WT467/2010

against

EMPLOYER -**respondent**

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005 ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Dr. A-M Courell BL

Members: Mr. T. L. Gill
Mr. M. McGarry

heard these claims at Galway on 7 July 2011

Representation:

Claimant: Ms. Audrey Coen BL, instructed by Ms. Rachel Liston,
Augustus Cullen Law, Solicitors,
7 Wentworth Place, Wicklow

Respondent: Mr. John Brennan, IBEC West Regional Office,
Ross House, Victoria Place, Galway

The determination of the Tribunal was as follows:

The respondent is a contract medical device company supplying sub assemblies, typically plastic injection mouldings, to medical device manufacturers. It has over 1,300 employees worldwide with in excess of 50% of these employed locally. The claimant had been employed by a predecessor of the respondent from August 2004, initially as a trainee mould/setter tooling technician and later as an engineering technician. In 2006 the respondent took over the predecessor and in 2007 the claimant relocated to the respondent's premises. The employment was uneventful, with the claimant being actively considered for further technical training in injection moulding techniques, before an incident in October 2009, which led to his dismissal.

There is a very strict requirement on the respondent to show compliance with various regulatory

authorities. Among these requirements is that of traceability of all individual items manufactured. As part of the procedures with which the respondent has to comply it is necessary for validation of the production of all sub-assemblies supplied. Validation involves operating the machinery used to manufacture product under the supervision of a member of the engineering staff.

The respondent's position is that for the weekend of 8 & 9 October 2009 the claimant had been designated by the Lead Engineer (LE) as the member of the engineering staff responsible for this particular validation. The requirement was to complete two Operational Qualification (OQ) runs and the first of three Process Qualification (PQ) runs on Saturday 8 October 2009. In the event only the two OQ's were completed on the Saturday before the validation was called off at the claimant's request. The claimant was in attendance for the OQ's. It was then arranged for the five general operatives or product builders (PB's) to return at 10-00am on Sunday 9 October to commence the PQ's. The claimant did not attend work at 10-00am on 9 October 2009. His position is that he cannot remember whether he was on call, that is available on the phone and to attend if he could not fix any problem over the phone, or actually required to be in attendance for the PQ's.

The machinery in question has some 40 parameters, which are available to control a particular process. In the case of this product's validation around 30 of these parameters are relevant. There is a specification for the product which provides the level at which each parameter is to be set. Approximately half of the parameters are a fixed setting with the other half having a range in which to operate. The two OQ's are run with those parameters for which there is a range set firstly at the lowest level of the range and then at the highest level of the range. The OQ's are conducted to see if the product is viable. The product of OQ's is not supplied to the customer. The PQ's are run with the parameters at nominal levels, set at the middle of the range. The product of PQ's is supplied to the customer.

The PB operating the machinery completes an injection moulding run sheet by writing up the actual settings for the parameters against the specified level for each qualification run. The member of the engineering staff responsible for the validation then fills out the nominal process setting sheet where the actual settings for each run are recorded. The engineering staff member and the relevant PB then sign it.

By 10-40am on 9 October PB attempted to phone the claimant and after several attempts managed to make contact with him. PB informed the claimant that the settings were wrong. The respondent's position is that PB told the claimant that the parameter settings were at the OQ level. The claimant's position is that PB told him that some of the fixed settings were wrong but he, the claimant, knew these settings were in fact correct and the sheet was wrong.

It is common case that the claimant instructed PB to proceed with PQ1. Before commencing PQ1 PB again telephoned the claimant, who accepts he was not in possession of a sheet bearing the specification settings, and was again instructed to carry on. PQ1 was then run and the requisite 300 pieces produced.

The claimant attended the workplace at around 2-00pm on 9 October 2009 and reset the range parameters from the high OQ to the PQ settings. He then completed the setting sheet for PQ1 and recorded the settings as those at which he just reset them rather than the OQ settings at which PQ1 was run. The claimant and a different operator from PB both signed the nominal process setting sheet. The claimant then left the workplace at around 2-20pm before PQ2 was run during the afternoon of 9 October 2009. The claimant's report then took engineering responsibility for PQ3, which was run the following day. There is no question as to the veracity of the recording of both

PQ2 and PQ3.

As part of routine checking of the validation process the quality engineer (QE) noticed the discrepancies between PB's injection moulding run sheet and the setting sheet filled out by the claimant for PQ1. This was brought to LE's attention and an investigation was begun into the discrepancies. QE spoke to both PB who verified the setting sheet for PQ2 and his colleague who had verified PQ1. They gave their version of the events surrounding PQ1. A check was then made of when the settings on the machine were adjusted and this revealed that twelve settings were changed at 2-05pm and a thirteenth at 2-14pm.

This information was available to LE by Thursday morning 15 October 2009 and when the claimant arrived for his shift at 4-00pm that day he was met by LE and the production manager (PM). The facts and accompanying documentation of what had occurred on 9 October 2009 in relation to PQ1 were put to the claimant and whilst he did not disagree with the statement of the facts he insisted that he had made a terrible mistake. It is common case that both LE and PM informed the claimant that he was facing a serious situation. The claimant was then sent home, effectively suspended with pay, and instructed to report for a meeting with the human resource manager (HR) at 1-00pm the following day.

On 16 October 2009 the claimant met HR, LE and PM. He declined the offer of being accompanied by a colleague at the meeting. All the documentation relating to the events of the validation were again put to the claimant. The claimant again did not challenge the account of what had happened but described it as a stupid mistake. The claimant was again warned of the seriousness of the allegation being made against him but he was not told at this stage that the respondent regarded the matter as gross misconduct.

The claimant met HR, LE and PM on 19 October 2009 and again declined the offer of being accompanied by a colleague at the meeting. At this meeting HR told the claimant that the respondent regarded the allegation being made against him as amounting to gross misconduct for which he was facing the sanction of dismissal.

At a final meeting on 20 October 2009 with the same parties in attendance HR told the claimant that he was to be dismissed on grounds of gross misconduct. HR offered the claimant the opportunity to resign rather than be dismissed. The claimant declined this offer and on 23 October HR sent the claimant a letter of dismissal for gross misconduct in regard to the falsification of quality controlled validation documents. The claimant was given the opportunity to appeal the decision to the operations manager by 29 October 2009. In the event no appeal was lodged until mid-December 2009 at which stage the respondent declined to process the appeal on the grounds that it was out of time.

Determination

The procedures adopted by the respondent in this matter are open to question. There was general agreement between the parties as to what happened, what was in doubt was why it happened. While there was no written correspondence from the respondent to the claimant setting out the allegation against him the claimant was in no doubt what the allegation against him was from the first meeting at which he was suspended on 15 October 2009. There are no notes of the various meetings that took place; again there is very little dispute between the parties about those meetings. The

respondent's view was that the claimant's actions were malicious and the claimant's view was that he had made a stupid mistake. In the Tribunal's view the deficiencies in the respondent's procedures are not such as to be fatal to their case.

The Tribunal does not accept that the claimant's actions were malicious rather they were designed, misguidedly, to hide from the respondent his non-attendance for the PQ. The Tribunal is satisfied that there was no intent on the part of the claimant to do harm to the respondent. There is absolutely no doubt as to the possible serious consequences for the respondent had his actions not been discovered.

At the core of this case is the issue of whether the claimant was required to be in attendance at the workplace while the validation was being run. Having considered all the evidence the Tribunal is satisfied that it was necessary for a member of the engineering staff to be in attendance during the validation process and that the claimant was that person on this occasion. The claimant accepted that he was in work on Saturday 10 October 2009 when the OQ's were run. The Tribunal is in no doubt that he was required to be at work on the following day for the PQ's. It is common case that the claimant was not in attendance when PQ1 was run, the settings at which PQ1 was run were in fact the high OQ settings and that the claimant altered the machine settings after PQ1 to the correct levels and then produced a document which purported to show that PQ1 was run at the correct settings. The Tribunal is satisfied that these actions on the part of the claimant in the falsification of a document amount to gross misconduct such as to justify dismissal. It follows that the dismissal was not unfair and the claim under the Unfair Dismissals Acts, 1977 to 2007 must fail.

The claimant having been dismissed for gross misconduct a claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 does not arise. No evidence having been adduced in this regard the claim under the Organisation of Working Time Act, 1997 must fail

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)