EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF: **CASE NO.**

EMPLOYEE - ***Claimant*** UD2086/2010

Against

EMPLOYER - ***Respondent***

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan
Members: Mr. A. O'Mara
Mr J. Maher

heard this claim at Trim on 22 March 2012 and 22 May 2012

Representation:

Claimant(s) : Ms. Mary Smith, Navan Citizens Information Centre, Floor 2, 1 Cannon Row, Navan, Co Meath

Respondent(s) : Mr Brian Rennick, Solicitor, Main St, Dunboyne, Co Meath

Respondent's Case

The respondent company is a chocolate manufacturer operating a production plant and employing 200 employees. (RP), Operations Manager at the time the claimant was dismissed gave evidence of being informed by two employees of dangerous behaviour in the chocolate room. He told the Tribunal that both employees witnessed the claimant climbing on to a trolley and travelling across the chocolate room at speed on the 8 October 2009. On 9 October 2009 the claimant was called to a meeting and admitted the allegation levelled against him. At that stage (RP) decided that the matter warranted further investigation and suspended the claimant on full pay advising him that it was a disciplinary matter. He told the Tribunal that the Health and Safety of employees is an important matter for the respondent and this kind of behaviour put the claimant and others at risk. He said that the trolley involved in the incident is used for transporting chocolate buttons and weighs between 5kg and 7kg when empty. Having questioned witnesses as part of the investigation it was reported to him that the trolley was used like a skate board, and propelled at speed between areas on the factory floor. The investigation undertaken by (RP) was a structured process and witnesses in their statements said that the claimant's action was highly dangerous. On a scale of 1 to 10 witnesses stated that they considered it to be 8- 9 in terms of levels of danger. He told the Tribunal that the claimant

considered it to be 1 in terms of levels of danger.

(RP) told the Tribunal that he was responsible for the health and safety of 200 employees in a production plant and the respondent company considered health and safety as paramount. (RP) met with the claimant again on 12 October 2009 advising him that the incident was considered to be gross misconduct. Under cross examination he stated that he considered any activity which would cause damage to employees or oneself to be gross misconduct. He said if another employee had walked into the path of the trolley being propelled at speed, serious injury could have been caused. He dismissed the claimant for gross misconduct.

He agreed that there were no previous issues with the claimant. He told the Tribunal that an appeal of the dismissal was offered verbally to the claimant. He had no minutes or notes of either meeting of 9 and 12 October 2009. He said he did consider issuing a written warning to the claimant but decided the incident was too serious and took the decision to dismiss the claimant.

Employee (EK) gave evidence that she witnessed the claimant travelling on the trolley across the production room. She was standing a few yards away from it at the time. She considered the claimant's actions to be very dangerous. She has worked for the respondent for 11 years and never witnessed anything as dangerous in her time working for the respondent. She was interviewed by (RP) as part of the investigation and informed him that on a scale of 1 to 10, she felt it warranted a score of 8 in terms of danger. She was shocked and felt afraid when she witnessed the incident.

Employee (PB) gave evidence she has worked for the respondent for 25 years. She is also a trade union shop steward. She gave evidence that she witnessed the incident on 8 October 2009. She gave evidence that the claimant skated across the room and then kicked the trolley back. She told the Tribunal that there are mix machines and various other machines in the production room. Employees also regularly carry buckets of chocolates and mixes through the room. She had never witnessed anything as dangerous before and reported the incident immediately to (RP). In terms of danger she rated it as 8 or 9 on a scale of 1 to 10. She could not recall if a supervisor was present at the time of the incident. She did not seek a supervisor, she reported the incident directly to (RP) as she deemed the act to be highly dangerous. She gave evidence that there were approximately 15 employees in the room at the time of the incident.

The Managing Director of the respondent company gave evidence that the company employs up to 250 employees and has a turnover of €19 million. All employees wear protective clothing and the Health & Safety record of the company is exceptional. There is a culture of Health & Safety within the company and Health & Safety notices are posted throughout the building. It is not uncommon to have customers visit the factory floor. The company also has a Health & Safety policy and there is an obligation on employees to report incidents. There is a culture of zero tolerance in respect of breaches of Health & Safety. He gave evidence that the claimant had attended a number of training courses in relation to Health & Safety and the company's training booklet was opened to the Tribunal. He told the Tribunal that he was not involved in the investigation or the dismissal and only became aware of the dismissal one week later. He became involved when the claimant lodged his claim with the Tribunal. He believes that the incident involving the claimant was not a minor incident and told the Tribunal that (RP) was correct in his decision to dismiss the claimant. He told the Tribunal that if the incident was not Health & Safety related the company would have taken a lighter view of the incident. He gave evidence that a camera is located in the area where the incident occurred but it is a false camera.

Employee (AZ) gave evidence that he was working as a supervisor on the day of the incident but he did not witness the incident. He accompanied the claimant when he was interviewed by (RP) in relation to the incident. He gave evidence that the claimant did not dispute the facts but he (the claimant) did not consider his actions to be dangerous. The witness was also present at the meeting on 12 October 2009 when the claimant was dismissed. He gave evidence that (RP) told the claimant that he had the right to appeal the decision. He told the Tribunal that the claimant appeared shocked and could not understand why he was not being given a second chance.

Claimant's Case

The claimant gave evidence that he commenced working for the respondent company in 2006. He enjoyed a good working relationship and had never received any warnings. On 8 October 2009 he was using the trolley to transport chocolate. He accepted that he stood on the trolley and skated across the room. He did not realize that it was a dangerous action and gave evidence that he could have stopped the trolley at any time if he needed to do so by putting his foot on the floor. He could not provide the Tribunal with an explanation as to why he carried out the action, he did so without thinking.

He accepted that he attended a Health & Safety course, a manual handling course and a chemicals training course. He accepted that employee (AZ) attended the meeting on 8 October 2009 as a witness and translator. He was also given the opportunity of having (AZ) present at the meeting on 12 October 2009 but chose not to do so as he did not think it was a serious matter. He felt that he could explain his actions himself. He was again advised of the allegations against him at the meeting on 12 October 2009 and given an opportunity to explain his actions. He could not explain his actions. He was shocked to be dismissed and (RP) gave him his P45. He was told by (AZ) that he could appeal the decision but did not do so. He could not provide an explanation to the Tribunal as to why he did not appeal the decision. He rated the incident as 1 out 10 in terms of level of danger and had never carried out a similar action previously.

Since the termination of his employment he has sought alternative employment but has not been successful. He has been in receipt of job seekers allowance since his dismissal and has also completed a number of courses.

Determination

The Claimant was dismissed for skating on a trolley across the factory floor which the Respondent considered highly dangerous. The trolley weighs between 5kg and 7kg when empty. A number of witnesses rated the incident high on a scale of 1-10 in terms of levels of danger. The respondent place huge emphasis on Health and Safety and considered the claimant's actions to be a serious breach of its Health and Safety Policy. Meetings were held with the claimant on the 8th October and the 12th of October. The Tribunal considers it unhelpful that there were no minutes or notes available from the meetings of the 8th or 12th October 2009.

Subsequent to the meeting on the 12th October the claimant was dismissed for skating on the trolley which the respondent considered Gross Misconduct. The respondent gave evidence that if another employee had walked into the path of the trolley being propelled at speed serious

injury could have been caused. The Claimant was given the opportunity to Appeal but decided not to.

Evidence was given that there were no previous disciplinary issues with the claimant and he had a blemish free record.

The Tribunal had to consider if the dismissal was proportionate to the alleged misconduct. Does the punishment fit the crime? In considering this question the fact that the Tribunal itself would have taken a different view in a particular case is not relevant. The task of the Tribunal is not to consider what sanctions the Tribunal might impose but rather whether the reaction of the Respondent and the sanction imposed lay within the range of reasonable responses. The proportionality of the response is key and that even where proper procedures are followed in effecting a dismissal, if the sanction is disproportionate, the dismissal will be rendered unfair.

The Tribunal must also consider if the employer complied with Section 5 of the Unfair Dismissals (Amendment) Act 1993 which provides that the reasonableness of the employer's conduct is now an essential factor to be considered in the context of all dismissals. Section 5 ,inter alia, stipulates that:

".....in determining if a dismissal is an unfair dismissal, regard may be had……to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal"

Having considered the totality of the evidence the Tribunal find, by majority decision, that the dismissal was unfair. The Tribunal considers compensation the most appropriate remedy, taking the contribution of the claimant to his dismissal into consideration, and the fact that he didn't appeal the dismissal, awards the Claimant €6,000.00 under the Unfair Dismissals Acts, 1977 to 2007. In reaching its decision the Tribunal was mindful of the fact that the claimant had a blemish free record.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)