EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.
EMPLOYEE

UD835/2011

against
EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr T. Ryan

Members: Mr T. O'Sullivan
Ms A. Moore

heard this claim at Monaghan on 10th May 2012 and 9th October 2012

Representation:

Claimant:

Respondent:

The determination of the Tribunal was as follows:-

Respondent's case:
The respondent is a chicken processing and packing plant. EM the evening shift production manager gave evidence of an incident which occurred on the factory floor in October 2010. He was in his office when the claimant came in and said he was after hitting D. Asked why he had done so he said "look at my ear", there was a mark on it. EM asked the claimant to wait in the canteen while he went to speak with D.

D had a mark under his eye and said that he had asked the claimant to pick up some paper and put it in the bin. The claimant had told him to f… off. D put his arm around him (not in a threateningway) and the claimant had hit him. Both parties were suspended with pay and the matter wasinvestigated.

EM was aware of previous issues between both parties (they were complaining about each other). At that time, EM had told them to stop complaining, that everybody was there to earn a living. EM thought that things had been sorted between them, he said they were both good lads.

There is zero tolerance of fighting in the respondent factory as knives and instruments used on the

floor could cause a serious injury. EM told the Tribunal that a person had lost his life after being stabbed in another similar facility. The claimant was not Irish but had not asked for an interpreter. He had worked in the factory for eight years and EM felt he fully understood the serious situation he found himself in.

Under cross examination EM confirmed that the claimant stated that he had “hit” D.
He was aware that previous incidents had been reported but both parties shook hands as far as he could remember. EM later found out about an incident on the previous night but was not aware of it when the claimant came to him to report the fight. The incident occurred between 9pm and 9.30 pm on the night in question. It would not have been D’s job to give direction to the claimant at the time of the incident.

LC, assistant production manager on the night shift gave evidence that he did not witness the incident and was not aware of anything from the previous evening. He did see that the claimant had a red ear and that D had a black mark under his eye. The claimant told him he was after hitting D and that D had hit him also.

PG, was a union representative on duty the night in question. EM told her there was a problem and she met both parties. The claimant was distraught and had been told that the incident was serious. D was very cocky and said he had “done nothing”. Both were suspended for 3 days, the claimant did not ask for an interpreter but PG felt he didn’t fully understand what was happening.

JB, the production manager, gave evidence that he received a telephone call from EM at 10pm on the night in question. Both employees were asked to meet with him the next morning. He interviewed D first and suspended him pending further investigation. The claimant’s version of events was that he dropped some papers on the floor and D told him to pick them up. He didn’thave time and told D so. On walking away D followed him and grabbed his coat. The claimant hada scanner in his hand and may or may not, have hit him with it in his struggles to free himself. JBmade a decision to dismiss both parties because of the respondents zero tolerance policy. Both weregiven leave to appeal the decision to the general manager.

Under cross examination JB stated that while D was a supervisor he was not the claimant’s direct supervisor. He felt that the claimant had very good English and understood fully what was goingon, noting had to be repeated to him. A trade union representative was present at all times.
He stated that the respondent has to have high standards in cleanliness, you should clean as you go. He felt the claimant should have picked up the paper as it was a reasonable request by a supervisor. JB felt the claimant had instigated the incident by not responding to the request. Asked if the claimant had previously been taunted or goaded by D he stated that you can’t take the law into your own hands and hit a fellow employee regardless of the circumstances. JB did accept that the claimant reported an incident in 2008, EM dealt with it and both parties and they shook hands afterwards.

Claimant’s case:
The claimant MM gave evidence, through an interpreter, that on the night in question he was printing a shipment order and then moved to a table to bind it at all together. He was aware that D was standing in the door. MM tossed some left over paper into the bin, some may have fallen on the floor. D shouted at him to pick up “all that s**t”. He told D he was too busy for all this andagain D shouted “ I told you, pick up all that s**t”. Again MM said he didn’t have time to argueand continued to load the pallet for shipment. He didn’t realise that D had followed him,

suddenlyhis jacket was pulled and he was punched on the ear. The claimant tried to pull back and asked D "why he had done that?" D grabbed him by his coat and lifted him up again, his face was red andhe was shouting, the claimant struggled with D and, when he let go, the claimant put the scannerand papers on a table and went to report the incident to EM. He told EM what had happened andalso said that D was always bullying him. Both were sent home and had to report to JB the nextday. The claimant was so worried and confused he didn't sleep at all. He went to the office the nextday to give a statement and told his side of the story, including previous incidents, but never reallyunderstood what was going on, he couldn't think straight.

At a further meeting with JB his statement was re-read to him. An employee/ translator was present at that meeting, he didn't even know he was dismissed until she told him. The claimant cried and pleaded for his job. An appeal meeting was held, again the claimant didn't understand what was being said, but again he pleaded for his job. The employee/translator and his union were present. The translator wasn't involved, just listening. He lost the appeal.

Under cross examination MM stated that he did not hit D. Asked why he said so on the night in question he said that he wasn't fluent in English, he was upset and what he was trying to say may have been put badly. He did struggle to get away from D and maybe the scanner hit off him. PGwas there but he didn't know what she and EM were talking about. D was saying it was a bear-hugbut it wasn't, he grabbed him by his coat, lifted him up and was shouting at him. D started theargument and forced him to react. His job was to scan and ship, when it wasn't busy he would thenclean- up. There was a previous incident with D in 2008 which he hadn't reported to EM but acolleague NF did report it.

LM, Trade Union representative gave evidence that the morning after the incident JB telephoned her to meet with both parties. The claimant was all over the place and wasn't making sense. JB asked him if he was ok and he replied "yes" to everything he was asked. In her opinion he was not in any state of mind to be questioned. No adjournment was sought as she was trying to get her head around what was going on.

NF, a supervisor, gave evidence that he nicknamed the claimant "broken English". He felt that the claimant had a reasonable command of the language for his general day to day activities. He did hear D saying derogatory things about the claimant. One incident he recalled D saying something like "filthy pig probably not used to cleaning up". The claimant did not report the incident but NF did mention it to AK the plant manager.

AP gave evidence that she was in the loading bay at the time of the incident. She didn't realise what was going on and was a distance away from the computer area. She did see that MM was trying to release himself from the other man and thought they might have been messing. MM was holding a scanner and papers in his hands, she didn't see him strike anyone.

Determination:

The respondent had to deal with a physical altercation between the claimant and a supervisor (D). After investigating the matter the company decided that both parties were equally culpable and in keeping with its "zero tolerance" approach to violence in the workplace both employees were dismissed.

The general approach of the Tribunal to cases of dismissals for "conduct" was set out in Hennessy v Read & Write Shop Ltd. 192/1978 and several other cases.

In deciding whether or not the dismissal of the claimant was unfair the Tribunal applies the test of reasonableness to:

1. the nature and extent of the investigation carried out by the respondent prior to the decision to dismiss the claimant, and,
2. whether the procedures adopted were fair and reasonable and
3. the reasonableness of the conclusion arrived at by the respondent.

The Investigation:
In all cases of dismissal for conduct, an investigation by the employer is required. The precise requirements of each investigation will be determined by the facts of the case, but the onus will be on the employer to show at it was "fair" in the sense of being open-minded and "full" in the sense that no issue which might reasonably have a bearing on the decision was left unexplored.
The employer will be expected to show that the investigation fulfilled the following general conditions:

1 that the employee was aware of all allegations and complaints that formed the basis of the proposed dismissal.
2 that the employee had an adequate opportunity to deny the allegations or explain the circumstances of the incident before the decision to dismiss was taken. This includes a right to be represented in appropriate circumstances.
3 that the evidence of witnesses or other involved parties was sought where the allegations were denied or the facts were in dispute and
4 the right to be represented by a trade union official or a fellow employee;

The Tribunal is satisfied that there was a reasonably thorough investigation with statements being taken from a number staff but the Tribunal is not satisfied that the respondent's investigation was "open minded" and "full" as required. The Tribunal does not consider that the respondent took everything into consideration that might have reasonably had a bearing on the decision to dismiss. The statements of LM and NF were not taken fully into consideration by the respondent.

The Tribunal determines that the respondent did not approach the investigation with an open mind. Instead it had a pre conceived notion that because there was a physical altercation between the claimant and D and that there was only one outcome - dismiss both protagonists.

Fair Procedures:
A dismissal is deemed unfair under Section 6 (1) of the Unfair Dismissals Act 1977 "unless having regard to all the circumstances, there were substantial grounds justifying dismissal"
The lawful reasons for dismissal are set out in Section 6 (4) of the Unfair Dismissals Act 1977 which provides:
"Without Prejudice to the generality of subsection 1 of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, not to be an unfair dismissal, if it results wholly or mainly from one or more of the following:
(a) the capability, competence or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) the conduct of the employee,
(c). the redundancy of the employee, and
(d) the employee being unable to work or continue to work or continue to work in the position which he held without contravention (by him or by his employer) of a duty or restriction

imposed by or under any statute or instrument made under statute".

The Tribunal is not satisfied that the respondent acted fairly and reasonably in his dealings with the claimant.

The Tribunal is not satisfied that the claimant had sufficient understanding of the very serious position in which he found himself. LM said he was all over the place before the meeting on the 13th October 2010. The claimant just said "yes" to everything. He said maybe he did hit D. At the disciplinary meeting on 20th October 2010 LM gave evidence that the claimant was worse than he was at the meeting of 13th October 2010. Nothing was going in, and the claimant left crying.

The reasonableness of the conclusion:

The logic of the principle that each case of unfair dismissal must be judged on its merits rests on the fact that the standards of each employment situation will vary. What may justify dismissal in one context may not in another. Thus the role of the Tribunal is not to establish an objective standard but to ask whether the decision to dismiss came within the band of reasonable responses an employer might take having regard to the particular circumstances of the case.

The precise terms of the test to be applied have been variously stated by different divisions of the Tribunal but the essence of the test was set out in Noritake (Ireland) Ltd v Kenna UD88/1983 where the Tribunal considered the evidence in the light of three questions:

1. Did the company believe that the employee misconducted himself as alleged? If so,
2. Did the company have 'reasonable grounds to sustain that belief? If so,
3. Was the penalty of dismissal proportionate to the alleged misconduct?

The first question asked by the Tribunal serves to emphasise the fact that the belief of the employer in the guilt of the employee is crucial. There is no need for absolute proof or even proof beyond reasonable doubt. The only requirement is that the belief should be based on 'reasonable grounds'.

In asking this second question the Tribunal is addressing the issue of the adequacy of the investigation.

The third question is the one which is most problematic and which we will deal with below.

Having investigated all the facts the Tribunal does not accept that the employer acted as a reasonable employer would have acted.

The facts do not support the conclusion of the respondent that both parties were equally culpable. The respondent acting as a reasonable employer should have considered the matters set out below which emerged during the course of the respondents own investigation:

i) There were previous bad relations between the parties and the respondent was aware that there had been some bullying of the claimant by D two years previously.
ii) The statement from AP (a co-worker) who stated that "she also seen MM struggling to try and get away from D. It looked like the claimant was holding a scanner. I also seen [sic] MM walking away".
iii) Memo of attendance between JOB and D dated 20th October 2010 states D was willing to accept the claimant's apology and felt that he pushed the claimant too much (taunting him). He also confirmed that they had arguments in the past and that a friendly hug which was

done in anger was "too strong". D accepted that he was the aggressor.

iv) Statement of NF dated 1st December 2009 in which NF confirmed that D was the aggressor. He also stated that he reported to EM that D was speaking very poorly about the claimant. He mentioned an incident in which he came into work at about 10.15pm one evening and D started to speak to NF about an incident between D and the claimant the previous night. D was pointing at the claimant, who was in ear shot, and calling him a “filthy pig” and saying he was a lazy person. He stated that although D was speaking to him about the claimant he was fully aware that the claimant could hear what he was saying.

v) No witness placed the blame for the incident on the claimant.

vi) LM said he "was all over the place" before the meeting on the 13th October 2010.

vii) Meeting with LM on 20th October 2010 worse than at the meeting of 13th October 2010. The claimant just said “yes” to everything at the meeting on the 20th October 2010. Nothing was going in and the claimant left crying.

viii) AP stated that the “claimant was trying to release himself from the other man (D). Not sure what was happening. Claimant doing his work in the bay.

The Tribunal cannot see how an investigation, taking statements as outlined above into consideration, can come to the conclusion that the claimant was anything other than a victim of bullying and assault. Taken to its logical conclusion any employee who suffers an assault, and who understandably fends off the blows and in the process makes physical contact with the aggressor, is deemed equally guilty and should also be dismissed is harsh unreasonable and manifestly unfair.

At the conclusion of the hearing the respondent's representative handed in a determination concerning a claim brought by D against the company. This was strenuously objected to by the claimant's representative. The Tribunal pointed out that it would be considering the claim before us on an individual basis. The determination handed in, Dainius Rudanovas v Carton Bros, dated the 28th May 2012 held that D was fairly dismissed arising out of the same assault involving the claimant's claim before this division of the Tribunal. Interestingly the (D) determination clearly states that:

"The physical nature of the incident was instigated by the claimant (D) and the other party's (the claimant, the subject matter of this instant determination) response could be deemed to be a reaction to that action"

Zero tolerance policy in relation to violence/fighting in the workplace is understandable, appropriate and entirely reasonable in any work place and is even more understandable in a work environment which has ready access to knifes. However the zero tolerance policy cannot be used as a mechanism for dismissing any employee involved (in a physical confrontation) without fully investigating the entire circumstances surrounding the incident. To do otherwise would be blatantly unfair, unjust and unreasonable. While the investigation could be deemed adequate the conclusions reached by the respondent were not and could be considered perverse.

The Tribunal has to consider whether the punishment fits the crime. In considering that question, the fact that the Tribunal itself would have taken a different view in a particular case should not be relevant. In that regard, the statement of principle contained in McGee v Peamount Hospital UD136/1984, is instructive. The case concerned a dismissal for an alleged assault on a patient in care. Having reviewed the evidence, the Tribunal considered the sanctions imposed:

“The Tribunal is very conscious that dismissal for a man of the claimant’s age may be of the gravest consequences to him. They have asked themselves whether a sanction less far reaching in its consequences for the claimant might not have been more appropriate. But they recall that the task of the Tribunal is not to consider what sanctions the Tribunal might impose, but

rather whetherthe reaction of the respondent and the sanction imposed lay within the range of reasonable responses."

Consequently, only decisions which fall outside the 'band of reasonableness' will be found to beunfair. The Tribunal is not satisfied that the action taken by the respondent in dismissing the claimant was supported by the facts and most certainly the decision to dismiss the claimant did notfall within the band of reasonableness expected.

Having considered all the evidence the Tribunal determines that the claimant was unfairly dismissed. The Tribunal further determines that compensation is the most appropriate remedy and awards the claimant €65,000

Sealed with the Seal of the

Employment Appeals Tribunal

This ________________________

(Sgd.) ________________________
(CHAIRMAN)