EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF: CASE NO.
EMPLOYEE - *claimant* UD1316/2011

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: Ms M. McAveety

Members: Mr P. Pierson
Mr O. Nulty

heard this appeal at Longford on 10th May 2012 and 27th August 2012 and 28th August 2012

Representation:

Claimant: Ms. Collette Egan BL instructed by Byrne Carolan Cunningham, Solicitors, Main Street, Moate, Co Westmeath

Respondent: Mr Tiernan Doherty, IBEC, Confederation House, 84/86 Lower Baggot Street, Dublin 2

This case came before the Tribunal by way of an appeal by the employee (claimant) against the recommendation of the Rights Commissioner (r-095129-ud-10/SR) under the Unfair Dismissals Acts, 1977 to 2007.

Respondent's Case

PG gave evidence that he has been employed with the respondent for four years. Currently he holds the position of general manager but at the time of the commencement of his employment he was employed in the role of operations manager. The respondent's conditions of employment, disciplinary procedure and grievance procedure were opened to the Tribunal.

The respondent manufactures pet food and as part of this process blocks of frozen meat at a temperature of -20 are fed into the mincer machine by the operator and it is then pulverized by the machine. The claimant worked as part of a four person team on the mincer machines. A number of documents in relation to the use of the machines were opened to the Tribunal and a health and safety induction programme checklist signed by the claimant. A number of training documents were also opened to the Tribunal in addition to the work instructions manual for the

claimant's position of meat prep batch prep operator. In August 2009 an employee had lost part of his finger in the machine and as a result the company were served with two improvement notices by the Health & Safety Authority. A safety alert was placed on all notice boards and the safety officer spoke with the employees. This was the only incident in 19 years. The improvement notices were acted upon and were incorporated into additional training provided to employees and a risk assessment manual on the mincer issued in September 2009.

In March 2010 a number of photographs were brought to the attention of the witness by a supervisor in the company. The photographs which had been taken three months earlier showed an employee bent over and reaching down into the machine. This action was a serious breach of health & safety practices and the witness acted on the photographic evidence. The actions of the employee in the photograph were highly dangerous and the witness had to act when presented with the factual data. The respondent posted the photographs on a notice board and commenced an investigation. From the dates and times of the photographs, clock in records and the particular machine involved, the investigation was narrowed down to the four person team which included the claimant. The respondent interviewed each of the four employees separately as part of the investigation on 12 March 2010. Three of the employees stated that it was not them in the photograph and of these three; two identified the person in the photograph as the claimant. The third employee stated that he would prefer not to say who it was in case he was wrong as he could not see the person's face. The claimant denied that it was him in the photograph and could not identify the person.

The claimant was invited to attend a disciplinary meeting on 22 March 2010 to discuss a serious breach of safety. The minutes of the meeting were opened to the Tribunal. The claimant stated at this meeting that he wanted to know the identity of the person who had taken the photographs. The cleaning supervisor made a declaration on 22 March 2010 stating that he had taken the photographs and confirmed that it was the claimant in the photographs. This was confirmed to the claimant at a further disciplinary hearing on 26 March 2010. The claimant was suspended with pay until Monday, 29 March 2010. The decision to dismiss was communicated to the claimant at the final disciplinary meeting on that date. He was informed that he was dismissed for serious breaches of safety regulations. A letter of dismissal was subsequently issued to the claimant informing him of his right to appeal. The claimant subsequently lodged an appeal.

The next witness gave evidence that he has been a Health & Safety advisor to the respondent company since 1995. He provides training and advice to the company on safety management systems. He outlined in detail to the Tribunal instances of training that he provided to employees. In particular following an accident where an employee had lost part of his finger while operating the mincer machine he delivered a presentation on the operation of the machine. He used a number of picture slides/illustrations as part of that process. It was company policy that all operatives were trained in the use of the mincing machines. He drafted a safe work practice manual and this was distributed to all supervisory staff. These safe work practices were also covered at employee' s induction courses. He gave evidence that the claimant was fully trained in the operation of the machines and details of training courses attended by the claimant were opened to the Tribunal. These records, signed by the claimant stated he (the claimant) understood the safety, hygiene and quality rules when operating and maintaining mincing and grinding machines and understood the content of the risk assessment and guidance instructions on the safe use of mincing and grinding machines. The witness believed that he conveyed the information clearly and unambiguously. He emphasised at the training course that serious breaches of Health & Safety practices could lead to dismissal. He is

satisfied that all employees received training to the required level and did not recall the claimant raising any questions at the training courses.

He gave further evidence to the Tribunal of the procedures to be followed in the event of meat becoming bridged/blocked in the mincer machine. He gave evidence that a toggle switch is used to unblock the machine and this switch is successful in unblocking 99% of the blockages. If the toggle switch does not free the blockage a T-bar is used to dislodge the blocks of meat which may become lodged in the machine. This T-bar is designed to free the blocks of meat and is used like a push stick. It is a well-established practice and should be used by the operator in an upright position. It is not necessary to lean into the machine when using the T-bar. This T-bar has not been modified since the termination of the claimant's employment. If neither the toggle switch nor T-bar unblocks the machine it must then be examined. This involves a lock-off situation and is carried out by a craftsperson and the power to that machine is isolated. This cannot be done by a machine operator.

He confirmed to the Tribunal that an examination did not take place at the conclusion of the training courses that he delivered. Polish leaflets were not distributed at the courses as he believed that the illustrations used were sufficient. He stated that the company does provide conditions of employment in polish. He believed that the company acted properly when an unsafe practice was brought to their attention and does not accept that the claimant was using the T-bar when leaning into the machine.

The next witness, the group operations director gave evidence that the claimant appealed his dismissal by way of letter dated 6 April 2010. The witness conducted the appeal hearing on 13 May 2010 and the grounds of the appeal were opened to the Tribunal. He concluded inter alia that the training provided to the claimant by the company's senior safety officer was adequate; a lot of effort went into the training material including pictures and graphics. The claimant had denied initially that he had received the training but once the training records were produced he agreed that he had received the training. This raised concerns for him regarding the credibility of the information provided by the claimant. He was satisfied that the management of the company had acted as soon as the issue was brought to their attention. He was satisfied that the claimant was the individual in the photographs and believed this to be a reasonable conclusion by management. He believed that the company had an obligation to act on the photographic evidence as the safety of the workforce was a key issue. He considered all the points of appeal and decided to uphold the decision to dismiss the claimant. This decision was conveyed to the claimant by way of letter dated 1 June 2010. He gave further evidence to the Tribunal that terms and conditions of employment are translated into the polish language. Some training notices are also delivered in polish but this is not done on a widespread basis.

Claimant's Case

The claimant gave evidence with the assistance of an independent interpreter that he commenced working for the respondent in February 2007. Initially he worked with boxes in the factory and subsequently moved to work as a machine operator because that job paid better wages. He attended an induction course, a manual handling course and a forklift course. He required translation at the forklift course. He attended a number of subsequent courses and recalled attending a safety training course in August 2009 which was presented by the aforementioned Health & Safety advisor. He understood from this course that you could not put your hands into the machine. He does not recall receiving any training at that course concerning unblocking blockages in the machine. The training had no impact on how he felt at unblocking

the machine. He did not feel that he understood everything that was done at that training. He does not remember anything being said about employees being dismissed for breaches of safety.

He told the Tribunal that when the machine became blocked he used the toggle switch to unblock the machine and if that did not work he turned off the machine and used the bar to free the blockage. He learned how to do this by observing other employees and would have carried out this action in front of supervisors. He did not get any training into how to use the machine. He never used the isolation switch. When using the bar you had to use force and it was not possible to clear the blockage without leaning into the machine. He believed that bending over the machine was permitted as production was most important. He does not remember ever being told not to lean over the machine. He gave further evidence that he was called to a meeting on 12 March 2010 and was shown the photographs and asked if it was him in the photographs. He believed that the person in the photographs could be anyone and he said so. He had no recollection of being photographed at work and requested to see the original photographs but was never provided with them. He attended a disciplinary hearing on 25 March 2010 accompanied by his friend as translator and his union representative. Following that meeting he was suspended on full pay pending a follow up disciplinary hearing. This hearing took place on 29 March 2010 and he subsequently received his letter of dismissal dated 30 March 2010. He appealed this decision and raised a number of points in his appeal. He believed that he should not have been dismissed. He had worked 16 hours per day for the respondent and also worked overtime without any problems. He had never heard that it was a problem to lean over the machine and his manager was always happy when production went smoothly. He told the Tribunal that he taken the Health & Safety training seriously and had never caused any accidents in the workplace.

The Tribunal heard further evidence in relation to the claimant's loss and his efforts to secure alternative employment.

He accepted that he had previously received two verbal warnings from the company concerning his work performance. He confirmed that he had received training in the operation of mincing and grinding machines and had signed off on that training. He signed the document because everyone was signing it and he wanted to keep his job. He accepted that it was a dangerous machine but believed it was safe to lean over the machine when the power was switched off. He accepted that three of the four people interviewed by the company had identified him as the person in the photographs.

A forensic engineer gave evidence that he inspected the company plant following the incident which led to the claimant's dismissal. As part of his investigation he photographed the area around the mincer machine. He concluded that there were grey areas in the surrounding area. In particular the area around the control panel was fuzzy. He requested that the company provide him with the original photographs taken by the supervisor. This request was refused. He gave evidence that the machine involved is potentially a dangerous piece of machinery. He gave evidence of how blockages in the machine can be unblocked. He did not view the T-bar used to unblock the machine as it was not presented to him for inspection. He told the Tribunal that the T-bar is used to re-configure slabs of meat to allow them drop through the channel of the machine. It was necessary to lean into the machine to some degree when using the T-bar. He stated that there is no standard operating procedure in place and believes there should be as there is a risk involved in operating the machine. He believes that the illustrations used in the training programme should have included a demonstration on how to unblock the machine. It

was his view that the illustrations used were not adequate and the guidelines should have been clearer.

Determination

The Tribunal carefully considered the evidence adduced and the documentation provided at the hearing. It is clear that the Respondent undertook rigorous health and safety training for all personnel, consequent on an accident that occurred in August, 2009.

The Tribunal accept that the claimant attended such training courses and had the benefit of visual aids at those training sessions. The Tribunal does not accept that the claimant did not fully understand the extent of the safety requirements as laid down in those courses. In particular, the Tribunal does not accept that the claimant was not familiar with the correct procedure to be followed in clearing blockages in using the mincer machine. The Tribunal does not accept that the claimant was not aware of the consequences arising for ones employment in the event of a breach of those procedures.

The Tribunal accept that it was reasonable for the Respondent to act in the manner in which it did, when made aware of the breach which had occurred. The Tribunal find that in all probability, it was the claimant who was photographed in the picture with his torso half in to the mincer machine. The Tribunal find the investigation conducted by the Respondent was fair and reasonable in the circumstances.

Accordingly the Tribunal dismisses the claimant's appeal under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)