

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:  
EMPLOYEE  
- *claimant*

CASE NO.  
UD1310/2008  
MN1211/2008  
WT531/2008

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: Mr P. Hurley

Members: Mr P. Pierson  
Ms H. Murphy

heard this claim at Loughrea on 11th March 2010  
and 12th March 2010

#### **Representation:**

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Claimant: Tony McGinty & Co., Solicitors, Unit 3 Howley Court, Oranmore, Co. Galway.

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

The determination of the Tribunal was as follows: -

The claim under the Organisation of Working Time Act 1997 was withdrawn.

#### **Respondent's Case**

The respondent is a large manufacturing operation containing several different areas of production within the premises. Each area has specific staff, a team leader and a HR generalist that looks after the area. The respondent has Works Manager's that look after a few areas and an overall HR Manager.

A process operator (NK) worked for the respondent until he accepted redundancy in March 2009. NK was familiar with the claimant and they had often socialised together. NK had difficulties with

his next-door neighbour concerning noise levels of the dogs that concluded with court proceedings, this was commonly known among the staff at the respondent. In January 2008 newspaper clippings were posted on the notice board insinuating the content of the clippings were regarding NK's court proceedings.

The Works Manager (JmCH) approached NK and informed him of the incident regarding the newspaper clippings. The claimant admitted he had put the news clippings on the notice board. The incident occurred on a Saturday during overtime when all the separate shifts overlapped. The respondent conducted an investigation into the incident.

The claimant taunted NK when he approached NK in a tool shed and made 'barking' noises at him. The claimant also slowed his car down while NK was walking through the car park and made 'barking' noises out his window.

On the 7<sup>th</sup> of June following the taunting in the car park NK clocked in and went to his workstation. Taped to his workstation NK found a photocopy of the original newspaper clippings that had been displayed on the notice board. NK approached the security guard on duty and requested that he witness the incident. The security guard (DL) advised NK to make a note of the event. NK felt agitated by the incident. NK took the clippings to his team leader (JG) and asked for a copy of them, NK had not received a copy of the original clippings from the first incident.

The respondent conducted an investigation into the clippings placed on NK's workstation. NK was interviewed as part of the investigation on the 11<sup>th</sup> of June 2008. NK felt the respondent was not taking action to resolve the issues quickly so instructed his solicitor to request the respondent to resolve the issues in a timely manner, stating that NK wished to attend work without being 'harassed or bullied.' The investigation into the first newspaper clippings incident took two months to complete. NK had a second interview on the 19<sup>th</sup> of June 2008. This second interview concluded NK's role in the process.

### *Cross Examination*

NK went to his solicitor on two occasions, the first for advice and the second time to instruct them to send the letter to the respondent. NK bumped into the claimant in a pub in Galway several months after the incident and said he regretted the claimant's dismissal. NK does not recall telling the claimant that his dispute was with the company and not the claimant personally. NK did not inform the claimant that he was a 'hostile witness.'

The security guard (DL) on duty was approached by NK on the 7<sup>th</sup> of June 2008 and asked to follow him to his workstation. NK showed DL the newspaper clippings taped to his workstation. DL advised NK to write a note of the incident and go to his team leader. DL saw the claimant pass his security desk but does not know where he went after that. DL works for a security company contracted to the respondent and is therefore is not an employee of the respondent.

The Team Leader (JG) was responsible for the area NK and the claimant worked in. JG was on holidays in January when the first newspaper clippings were found. On his return JG was asked to investigate the incident by his manager JmCH.

JG interviewed the claimant who admitted he had posted the newspaper clippings to the notice board. The claimant told JG that it had been a practical joke. As a result of the investigation the claimant was given a written warning that stated,

*“It also has to be made absolutely clear that should there be any further incidents of a similar nature the company may move straight to the dismissal stage of the disciplinary procedure.”*

During this investigation the claimant was given a photocopy of the newspaper clippings he placed on the notice board.

On the 7<sup>th</sup> of June the second incident concerning newspaper clippings occurred. JG wrote an e-mail to JmcH and the HR Manager (DoB) outlining the events of the day. The claimant denied having anything to do with the second incident. In this e-mail JG made it clear that he did not believe the claimant would be involved considering the lengths he went to explaining the severity of the consequences should anything like the first incident occur again.

NK was upset and anxious and questioned why this had happened again. JG had informed him the first incident had been resolved but had neglected to inform him of this prior to the second incident. NK gave the newspaper clippings found on his workstation to JG and asked him for a copy.

On the 12<sup>th</sup> of June 2008 the investigation meeting took place with the claimant. The claimant was asked if he still had the photocopy of the clipping he had been given during the first investigation. The claimant replied that *“I should do, they are at home I think under my coffee table with everything else. I may have thrown them out.”* The claimant denied both of the taunting incidents.

Based on all the evidence available the findings of the investigation absolved all the other staff investigated except the claimant. Based on three interviews with the claimant and the CCTV footage the investigation found that;

- No other copies of the original newspaper clippings were made except the one given to the claimant.
- CCTV evidence shows the claimant entering the building on the morning of the incident carrying a piece of A4 paper.

The conclusion was that the claimant was the only member of staff with the opportunity and means to place the newspaper clipping on NK's workstation. When staff enter the respondent building security camera's pick up the direction they are travelling except for one direction that is a blind spot. All staff were checked and the claimant is the only staff member that went in the direction that would allow him to place the clippings on NK's desk. The CCTV footage showing the claimant entering the building, going in the direction of NK's desk, then the next time he was picked up on CCTV it was without the piece of paper in his hand and travelling in a direction that meant he could only have been coming from the direction of NK's desk. The CCTV and a premises map including the camera locations were submitted to the Tribunal.

The claimant was given an opportunity to produce his copy of the clippings but was unable to do so. The claimant said the paper seen in his hand was a holiday sheet he was bringing in, in order to speak to JG about any annual leave he had yet to take, the claimant never approached JG regarding his holidays the day of the incident.

The claimant was sent a letter on the 22<sup>nd</sup> of June 2008 requesting he come to a disciplinary hearing regarding his failure to comply with the respondent's 'Dignity at Work Policy and Bullying and Harassment Policy.' The issues outlined for the claimant were,

- *“The placing of a photocopy of a newspaper clipping on (NK’s Workstation), the original of which caused distress to a fellow employee in a previous incident in January 2008.”*
- *“A breach of the trust in the relationship between yourself and (the respondent) based on evidence discovered by the company,”*

The letter outlined to the claimant that he would be given an opportunity to explain his version of events and would be entitled to be accompanied to the meeting by a colleague.

At the disciplinary meeting the claimant was given a copy of the investigation report. The claimant believes that NK had a copy of the newspaper clippings as he was told this by the HR generalist (SC) handling the investigation. SC and JG verified that NK did not have a photocopy of the newspaper clippings. The claimant did not produce any evidence to contradict the findings of the investigation. The conclusion of the disciplinary meeting was that;

*“(the claimant) was the only individual who had both the means and the opportunity to place the photocopy newspaper clipping on (NK’s desk)”*

The recommendation made following the disciplinary hearing was to dismiss the claimant. The claimant was sent a letter dated the 25<sup>th</sup> of June 2008 informing him that following the investigation the decision was taken to terminate his employment on the grounds of Gross Misconduct.

#### *Cross Examination*

The morning of the second incident the claimant clocked in at 7.56am and NK clocked in at 7.57am. The claimant knew the CCTV evidence would be looked at as it was mentioned in the interview of the 19<sup>th</sup> of June but the claimant was never shown the CCTV. There were no other days checked to identify the direction the claimant normally walked when he entered the respondent premises. The only difference between the original newspaper clipping and the photocopy is, the sticker with the name of where the claimant lives that was on the original fell off and was stuck back on by SC in a different location before the photocopy was taken and given to the claimant.

The HR generalist (KS) took over from SC for the disciplinary meeting as SC was on annual leave. The claimant was the only person with the means and opportunity to place the photocopy of the newspaper clippings on NK’s desk. There was only one photocopy of the newspaper clippings made which was given to the claimant during the investigation into the first incident. The HR staff with access to the original clipping were all interviewed. Following the disciplinary hearing and after receiving the investigation report and reviewing all the evidence including the CCTV footage KS came to the conclusion that the claimant was guilty of Gross Misconduct and recommended he should be dismissed. There was no alternative to dismissal as the claimant had no explanation or anything to say regarding the incident. The claimant availed of his right to appeal this decision but the appeal upheld the decision to dismiss the claimant.

#### *Cross Examination*

The CCTV was not offered for viewing to the claimant but he never expressed a wish to see it, the CCTV was described to the claimant. The letter requesting the claimant to attend the disciplinary hearing and the letter sent to the claimant with the results contain the same issues.

The HR Manager (DoB) for the respondent heard the claimant's appeal of the decision to terminate his employment. DoB upheld the decision to dismiss the claimant as he objected to the procedures employed in his dismissal but no new evidence came to light.

#### *Cross Examination*

When the claimant requested an appeal DoB asked him for any new evidence in order to hear the appeal. As there was no new evidence the appeal request was initially turned down. DoB disputes that she asked, "is there anything else you want," in the context of re-instatement not being a viable option.

The HR generalist SC that undertook the original investigation verified that the original newspaper clippings were the ones submitted to the Tribunal. SC gave a photocopy of those newspaper clippings to the claimant as part of the investigation into the first incident. The sticker with the location of NK's residence that was on the top of the original newspaper clippings fell off so SC taped it back on in a different location. Other than the sticker there is no difference between the original and the photocopy.

#### *Cross Examination*

The newspaper clippings from the first incident were taken down from the notice board at 8.00 by (IN) who worked the evening shift. The CCTV footage showed the claimant coming in the main entrance with a folded piece of paper in his hand the morning of the second incident. SC did not check to see if the photocopy of the newspaper clippings found on NK's desk had a fold mark on it.

#### **Claimant's Case**

The claimant worked as an equipment maintenance technician for the respondent. On the 19<sup>th</sup> of January the claimant put newspaper clippings suggesting NK was the subject of the article, on the notice board beside the clocking machine. This was a practical joke, never intended to cause offence. The claimant admitted to JmCH he had put the newspaper clippings on the notice board. An investigation into the incident led to the claimant receiving a written warning and losing 50% of his bonus. As part of that investigation the claimant was given a photocopy of the newspaper clippings. The claimant was upset with this warning, as it was the first disciplinary issue he has had in his career. Previous to this incident the claimant and NK were on friendly terms and often socialised together. After the incident the claimant stayed out of NK's way and avoided all contact with him. The claimant disputes 'barking' at the claimant or taunting him in any way.

On the 7<sup>th</sup> of June 2008 the claimant came into work carrying a holiday tracker sheet in order to compare the leave he had left to take with the leave left according to the clocking system. The claimant planned on speaking to JG regarding his remaining leave. The claimant was so busy repairing a broken machine he put the holiday tracker sheet in his toolbox and did not get the opportunity to speak to JG that day but did speak to him regarding his holidays a few days later.

On entering the respondent premises the claimant turned left and went directly to his workstation as he always did before going to the canteen. The claimant forgot his glasses so had to leave the respondent premises to return to his car to collect them. From the claimant's workstation it was a faster route to travel by the water fountain in order to leave the premises. A colleague of the claimant's informed him that NK had found newspaper clippings on his desk similar to the ones posted on the notice board. The claimant was surprised and worried about this incident as he

already had a warning for the first incident regarding the newspaper clippings. JG approached the claimant at his workstation and the claimant informed JG that he had nothing to do with the latest incident regarding the news clippings and he would co-operate with any investigation that would ensue. When the claimant left for the evening he had folded the holiday tracker sheet and put it in his trouser pocket.

The first investigation meeting took place on the 12<sup>th</sup> of June. The claimant was not accused of anything but was asked to outline his movements the morning of the incident. The claimant was asked if he still had his photocopy of the newspaper clippings. The claimant kept the written warnings but burnt all other documentation pertaining to the investigation into the first incident, possibly around Easter.

At the next investigation meeting the claimant was informed that there was evidence of him coming into work carrying a piece of paper, to which the claimant informed them it was his holiday tracker sheet. The claimant was never informed there was CCTV footage and was never given the opportunity to view it. Following this meeting the claimant felt that he had co-operated fully and answered all questions.

The claimant was then called to a disciplinary meeting. The claimant declined representation for the disciplinary hearing, as he did not have any part in the incident and believed he had explained his position fully. Following the disciplinary hearing the claimant received a letter delivered by taxi to his house dismissing him. The letter arrived on Wednesday evening before the claimant was due into work on Thursday morning. The claimant was so shocked as he never thought the outcome would be his dismissal.

The claimant was approached in a pub in Galway by NK, who said, 'I'm sorry you got the sack, I never intended that, my grievance is with the company because they had been cutting my overtime.' NK also informed the claimant that he would be appearing at the hearing as a 'hostile witness.'

The claimant appealed the decision to dismiss him but was informed by DoB that there was no need for an appeal. The claimant's solicitor had to write to the respondent in order to secure an appeal. After the appeal meeting had concluded DoB asked the claimant if he couldn't get re-instatement, 'what are you looking for?' The claimant has not been employed since his dismissal, as any new employer would require a reference form from the respondent.

### *Cross Examination*

The claimant only had the photocopy of the newspaper clippings for a day or two before he burnt them. In the investigation meeting of the 12<sup>th</sup> of June where the claimant stated in regard to the newspaper clipping photocopy, "*I should do, they are at home I think under my coffee table with everything else. I may have thrown them out*" he was not sure it was definitely gone. The claimant often brought his holiday tracker sheet to work with him and requested the holiday print out from JG a few days later.

The first thing the claimant does every morning is go directly to his workstation to meet with the technician before he goes home, in order to establish if there are any problems with the machine, then he might go and get a cup of water. The claimant told JG immediately he didn't place the newspaper clippings on NK's workstation, as he was so concerned about being suspected after the first incident. The claimant did not place as much importance as he should

have on the letter requesting him to attend the disciplinary hearing as he, “*had not done anything wrong.*” The claimant was never accused of anything that’s why his dismissal came as such a shock to him.

## **Determination**

It falls to the Tribunal in deciding whether or not the dismissal of the claimant was fair to examine the nature and extent of the enquiry carried out by the respondent and to examine the reasonableness of the conclusion arrived at by the respondent on the basis of information resulting from such enquiry.

In this respect the Tribunal is assisted by a prior Determination of the Tribunal *Looney & Co Ltd v Looney* UD843/84 where it was stated

*It is not for the Tribunal to seek to establish the guilt or innocence of the claimant nor is it for the Tribunal to indicate or consider whether we in the employer’s position would have acted as he did in his investigation or concluded as he did or decided as he did. To so would be to substitute our own mind and decision for that of the employer. Our responsibility is to consider against the facts what a reasonable employer in his position and circumstances would have done and decided and to set this up as a standard against which his actions and decisions might be judged.*

The claimant in the view of the Tribunal was afforded fair procedures in the conduct of the disciplinary procedure. The Tribunal is unanimously of the view that the claimant has not identified any procedural defects in the termination of his employment with the Respondent.

In assessing the divergence of evidence between the claimant and the witness for the respondent, relating to the incident regarding the newspaper clippings, the Tribunal is influenced by the contradictions in the claimant’s evidence regarding the disposal by burning of the newspaper clippings after the first incident in January. In particular the Tribunal would refer to the claimant’s interview of the 12<sup>th</sup> of June when the claimant stated that he believed the newspaper clippings could be in his possession and also stated that he may have “thrown them out” there is no explicit reference to burning the clippings in this interview.

The Tribunal viewed the CCTV footage relating to events on the morning of the 7<sup>th</sup> of July which clearly shows the claimant entering the respondent premises with a document in his hand. If, as the claimant alleges this document related to the claimant’s holiday entitlements it remains the case that the claimant did not use this document to discuss his holiday entitlements with his team leader (JG) on the day. The Tribunal therefore is of the view that this tends to detract from the explanation given by the claimant in relation to this document.

In all the circumstances the Tribunal finds that the claim under the Unfair Dismissals Acts, 1977 to 2007 fails. The Tribunal also find that the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 fails.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

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