

EMPLOYMENT APPEALS TRIBUNAL

Claim of:
Employee

Case No.
UD1416/2005

against

Employee

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr L. Ó Catháin

Members: Ms M. Sweeney
Mr J. McDonnell

heard this claim at Waterford on 14th February 2007

Representation:

Claimant: Mr. Kenneth Cunningham, Newell Quinn Gillen, Solicitors,
Parade House, South Parade, Waterford

Respondent: Ms Helen Barry, IBEC, Confederation House, Cork Road, Waterford

The determination of the Tribunal was as follows:

Respondent's Case:

Giving evidence Mr. M told the Tribunal the claimant handed in his phone and keys to him at 5.50pm on the 9 August 2005. The claimant's shift had started at 5.30pm that day. Mr. M interrupted a meeting to let management know another driver was needed as the claimant had thrown in his keys.

During cross-examination Mr. P stated he had not seen the claimant in bad humour like that before.

Giving evidence Ms. R told the Tribunal Mr. M had informed her the claimant had left the premises. Ms. R telephoned the claimant. When she rang she used words to the effect of "what's wrong" and called the claimant by name. The claimant said he was "f...ing packing it in" and he referred to a memo that had been issued that day. He said he was sick of the c**t in the office and that Ms. R could shove the job up her a**e." The claimant used obscene language when he spoke to her. Ms. R told the Tribunal that she had issued a memo but it was just a normal memo. Memo dated 9 August 2005 was opened to the Tribunal. Ms. R was in a management meeting at the

time of the telephone call. She could not believe what she was hearing so she put the claimant on loudspeaker so the others in the room could hear him. The telephone call ended with the claimant hanging up abruptly.

Ms. R phoned the claimant the following day 10 August 2005. The claimant told her he would not speak to her on his own time but he would speak to her on Sunday when he was due in to work. He again used obscene language when talking about a client of the company. He referred to the client again as an "f..ing c**t." He told Ms. R that she could "shove her job." Ms. R told the claimant that she was accepting his resignation. The claimant said he was not resigning.

On the 15 August 2005 a disciplinary hearing was held. Present were Ms. R, the Operations Manager, Mr. G (the claimant's supervisor), the claimant and his representative. At the meeting the claimant's abusive language was discussed. There was no remorse on the part of the claimant. Ms. R felt like "the bad guy" as if she had done everything wrong. The claimant referred to what happened on the 9 August 2005 as a blip. He did not accept that his language was inappropriate. He did not apologise nor did he want to. The claimant was told that the company had to consider its position. The respondent considered the claimant's behaviour to be gross misconduct for two reasons; the claimant had walked off the job and he had used abusive language. This was gross misconduct but the claimant did not accept this. He was told at the meeting and in a letter that he could appeal the decision.

During cross-examination Ms. R stated she was the General Manager of the respondent. She is now self-employed. Ms. R accepted that she had a good working relationship with the claimant. It was put to Ms. R that report sheets are passed from the administration section in the company to the client and that the claimant's reportsheets had not been checked. Ms. R replied that she was not responsible for checking them. The Operations Manager had only recently started work with the respondent on the 4 August 2005. It was put to Ms. R that something might have been missed during the changeover. Ms. R replied "possibly." It was put to Ms. R the claimant's position was that he was not abusive and that he had not specifically mentioned the client. Ms. R stated the claimant was abusive and that he had specifically mentioned the client. Ms. R stated there were witnesses to this. It was put to Ms. R that the claimant had indicated when she spoke to him that he was returning to work on Sunday, 14 August 2005. Ms. R accepted this. It was then put to Ms. R that the respondent's position was to accept the claimant's resignation notwithstanding that he had mentioned that he was returning to work on 14 August 2005. Ms. R stated the company needed to know what was going on, they wanted the claimant to come in and speak to them. The company did not want to accept his resignation. Ms. R was not available some of the remaining days of that week as her son was in hospital. The Operations Manager took over from her and he sought advice on the matter.

It was put to Ms. R that on Saturday, 13 August 2005 the position of the respondent changed and the claimant was now suspended on full pay. This was detailed in letter dated 13 August 2005 to the claimant. Ms. R said she was aware the Operations Manager had taken advice as the change of position had been discussed. It was put to Ms. R that until the 13 August 2005 it was a case of resignation but after that it was suspension with pay. Ms. R replied, "yes."

At the meeting on the 15 August 2005 Ms. R believed the company followed the procedures of their disciplinary policy. The claimant was not given verbal warnings as he was being dismissed for gross misconduct. The company had advised him in a letter why they wished to meet with him. Ms. R stated the reason the company took action was because there was no apology from the claimant. As there was no apology from the claimant the company could not risk a similar incident. It was put to Ms. R that there had been no problems with the claimant since he commenced employment over two years previously. Ms. R replied, "exactly, there was no warnings of how he behaved." The company took a hard decision because there was no apology. If the claimant had apologised it would have been accepted.

Answering questions from the Tribunal Ms. R stated the first stages of the disciplinary procedures had not been invoked as the company were dealing with gross misconduct.

Ms. R was asked where the company's disciplinary policy made reference to what constitutes misconduct and gross misconduct. Ms. R stated those procedures did not have to be followed as the company were dealing with an instance of gross misconduct. The claimant did not appeal the decision to dismiss him.

Giving evidence Mr. C told the Tribunal he was present at the management meeting and he heard the claimant on loudspeaker. The claimant referred to the respondent's client in an obscene manner. Mr. C heard the claimant refer to the respondent's client as "that f..ing b****h up there." The claimant used a lot of bad language and he was abusive. Mr. C phoned the claimant that day to see how he was. Mr. C did not empathise with the claimant about the office. Mr. C is responsible as a back up to the patrol drivers. Mr. C was the person who took over the claimant's duties when he walked off the job. He had to do the claimant's duties until the company could find a relief driver.

During cross-examination Mr. C told the Tribunal he often had communication with the claimant prior to the incident. The claimant would carry out duties but might swear. The drivers have to complete timesheets and report sheets. Mr. C was not responsible for checking the previous nights' timesheets. Mr. C could not recall who was to check the sheets. It was put to Mr. C that he had told the claimant to go home. Mr. C denied this stating that he was the least likely person who would say that to the claimant.

Giving evidence Mr. G confirmed that he had accompanied the Operations Manager to the claimant's house to deliver the letter of suspension to the claimant. When they gave him the letter the claimant accepted it, read it and then gave it back to them. The claimant told them that he would not accept the word "vulgar" in the letter.

During cross-examination Mr. G confirmed he was the claimant's supervisor from the time the claimant started work with the respondent. Mr. G stated the claimant was no better or worse than other employees.

Giving evidence the Operations Manager (hereafter referred to as OM) told the Tribunal that he was present at the management meeting. Ms. R made a telephone call to the claimant because he had walked off the job. The telephone call was only a matter of seconds old when Ms. R was in shock and put the claimant on

speakerphone. OM told the Tribunal that what he heard was a foul-mouthed attack. The content of what was said was vulgar and obscene. OM felt a mixture of disbelief and shock and he found it unacceptable. He felt there was no need for such language.

OM telephoned the claimant twice on Saturday, 13 August 2005. In the first telephone call OM's understanding was that the claimant had resigned. The words and actions of the claimant in the previous days suggested this. In the second telephone call the claimant corrected OM stating he had not resigned. OM received advice on the matter. He told the claimant that the company would be following the disciplinary procedures, that he was suspended with pay and that a meeting would be held on Monday, 15 April 2005 at which the claimant could set out his case. OM told the claimant he was suspended and that there was no need for him to show for work on Sunday, 14 August 2005. When Mr. G and OM delivered the letter of suspension to the claimant on 13 August 2005 the claimant said he would not accept the word "vulgar" in the letter. The claimant returned the letter to them after he had read it even though he was told it was his right to keep the letter.

At the meeting on Monday, 15 August 2005 the claimant had a representative at the meeting. A number of allegations were put to the claimant; that he had left his position, that he had walked off the job and that he had used language during the telephone call to Ms. R that was totally unacceptable to the company and to the client.

The claimant gave his account of what had happened but he did not give an explanation for his outburst or for walking away from his job nor did he apologise.

OM told the Tribunal that long consideration was given to the different points after the meeting. When the decision to dismiss had been reached the claimant was advised of his right of appeal. He was advised of this both verbally and in writing.

During cross-examination OM stated he was the person responsible for checking the timesheets and the report sheets of the patrol drivers. It was put to OM that claimant's sheets had not been checked. OM stated this was incorrect, the work was checked.

OM confirmed that he was familiar with the disciplinary policy. Due to the nature of the incident the company considered it to be gross misconduct. The company did not instantly dismiss the claimant. He was afforded several days to come and talk to the company.

If the claimant wanted to appeal, the appeal would have been to the management of the company. It was put to OM that the claimant would, in that case, have had to appeal to those that had dismissed him. OM replied "yes, but there may be other items or something new that may arise."

Claimant's Case:

On Tuesday, 9 August 2005 the claimant reported for work at 5.20pm. He went into the office and collected keys, mobile phone and his folder. When he returned to the car Mr. M told him that an alarm had been activated on a client's premises. The claimant told Mr. M the premises had probably been falsely alarmed by one of the client's employees. When the claimant checked out the client's premises he found this to be the case.

The claimant returned to his car at 5.45pm to do his paperwork. He opened his folder and saw a memo regarding another client. The claimant then saw that his previous night's report and checklist were still in the folder when they should have been filed in the office. The claimant was stressed on the day in question and the temperatures were the highest on record. The claimant telephoned the office and Mr. M told him that there was no one in the office as they were in a management meeting. The claimant said "to hell with this" and threw in his keys and walked off.

Following this Ms. R telephoned him. The claimant could not recall what he had said to her but he was "ballistic". Mr. C then telephoned the claimant and the claimant complained to Mr. C about an employee of the client company that the memo had related to. He made comments regarding this person also. The claimant told Mr. C that the woman was "...an awful b***h who needs a r**e." The claimant told the Tribunal that he knew what he said was awful. Mr. C told the claimant that he knew she was an awful customer and he praised the claimant.

Ms. R telephoned the claimant on Wednesday, 10 August 2005. She wanted to know what the claimant's outburst was about. Resignation was not mentioned in this phone call. The claimant told her that he did not want to talk about it on his time off but that he would be in on Sunday, 14 August 2005.

Mr. S telephoned the claimant on Thursday, 11 August 2005. The claimant said to him that what he had said was wrong and he told Mr. S that he would see him on Sunday. The same day, Ms. R telephoned the claimant stating that she was accepting the claimant's resignation. The claimant replied, "no, I'll be in on Sunday."

The claimant attempted to contact Ms. R on Friday, 12 August 2005 but she was at the hospital. The claimant spoke to Mr. S and told him that he was not resigning.

On Saturday, 13 August 2005 OM contacted the claimant and told the claimant about his resignation. The claimant said that he was not resigning. The same day Mr. G telephoned the claimant looking for directions to his house, to deliver a letter. He told the claimant that he was being suspended on pay until a meeting on Monday, 15 August 2005. The claimant told Mr. G there was no need to deliver the letter but it was still delivered. The claimant read the letter when OM and Mr. G delivered it. He told them if they removed the word "vulgar" he would accept the letter. The claimant did not go to work on the Sunday as he was suspended.

The claimant did not think the meeting of Monday, 15 August 2005 was about remorse, he thought it was about outlining all that had happened during the week. The claimant outlined all the conversations at the meeting.

During cross-examination the claimant stated he was stressed before he started work on the 9 August 2005. The weather temperatures were high and he had not slept the previous night. What had irritated him about the memo was that it meant extra work.

The claimant could not remember what he had said to Ms. R on the 9 August 2005 but he knew he was "ballistic". The claimant did not apologise to Ms. R. The claimant stated that Mr. C does not remember the conversation he had with the claimant about

the customer.

The claimant had not said or written that he wished to resign. It was put to the claimant that he had used the words “ you can shove your job.” The claimant replied that at the meeting on Monday, 15 August 2005 the last thing he had said to the OM was that he wanted his job.

The claimant established loss.

Answering questions from the Tribunal the claimant explained the importance of the report sheets. Each client was listed on the sheets. The claimant had to visit 50 – 55 clients a night and he recorded any issues concerning the clients’ sites on these sheets.

Determination:

The Tribunal finds that the procedures of the company were flawed. The claimant’s option of appeal was to the same people that had taken the decision to dismiss him. However, the Tribunal also find that the claimant substantially contributed to his own dismissal. Also, he should have attended at work to discuss matters rather than say that he would not discuss them on his own time.

The Tribunal in considering all the evidence awards the claimant compensation in the amount of €2,500.00 for his successful claim under the Unfair Dismissals Acts, 1977 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

