

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee

UD707/2005

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. K. Buckley

Members: Ms. M. Sweeney
Mr. D. McEvoy

heard this claim at Cork on 13th July 2006, 12th October 2006 and 13th October 2006

Representation:

Claimant : Mr Tom Power B.L., instructed by Ms. Emer O'Callaghan,
Barry M. O'Meara & Son, 18 South Mall, Cork

Respondent : Mr. H. Pat Barriscale, Holmes O'Malley Sexton, Solicitors,
Bishopsgate, Henry Street, P.O. Box 146, Limerick
Company HR Manager

The determination of the Tribunal was as follows:-

Respondent's case:

The human resources manger for Ireland in her evidence told the Tribunal that the dismissal centred on damage to a clock i.e. for clocking in/out for work at Cork Airport. The repair to the clock cost €3K. Mr. K. was appointed under the company union agreement to carry out the investigation. All parties were written to and suspended on full pay as per the union agreement. As far as witness was aware the claimant was written to and attended a disciplinary hearing with his union representative and was questioned in relation to the incident. The statements taken by all parties were provided to the claimant and the union. The CCTV footage was shown to the claimant and his representative subsequent to the dismissal. The disciplinary hearing was concluded and the claimant was dismissed. An appeal procedure was in place to appeal in writing to the next senior manager, Mr. T. The claimant phoned Mr. T. and he was asked to send his appeal in writing and subsequently an appeal was lodged by the claimant's solicitor.

Witness went to the appeal hearing with Mr. T. and the parties had agreed a date to have the hearing in Cork. The claimant and his representative requested documentation and on the day of the appeal the claimant's solicitor was not satisfied with this documentation. It was agreed to follow up with documentation which was sent in subsequently. The Airport Police were in possession of the CCTV footage but they were afforded the opportunity to see it. It was not used at the disciplinary hearing. The respondent did not hear from the claimant's representative and witness wrote stating they

were willing to hear the appeal. This was followed by a letter from the claimant's solicitor stating that a claim was being lodged with the Employment Appeals Tribunal. The internal procedures for appeal had not been exhausted.

In cross-examination witness said she was not in the human resources area at the time the incident took place and she was not present at any of the hearings. The claimant was fully aware of procedures. This document is available to all the staff and up-dates are sent with the payslips. Witness could not say if she sent a copy of the union agreement to the claimant. The first hearing was on 18 March 2005. The CCTV footage was not used when making the decision to dismiss the claimant.

The Tribunal also heard evidence from the pass services manager at Cork Airport. She attended the disciplinary hearing for the purpose of witnessing the proceedings. She did not have any role as to the outcome of such proceedings. Statements were not requested at the first meeting. The second meeting was adjourned to give time to review the statements and there were objections as they were not given at the first meeting. Mr. K. put issues to the claimant relating to damage to the clock and there was a conflict as the claimant said he was not in the area where the damage was carried out. When Mr. K. said there were statements to say that he was in the area the claimant said okay. The claimant was given the identity of the people who made the statements. Witness was not aware of Mr. K.'s decision.

In cross-examination witness said that the claimant was told that if he was proven innocent then there would be no blemish on his employment record.

The third witness for the respondent was the ramp manager (Mr. K.). He told the Tribunal that he worked in Dublin and had been asked to conduct the investigation into the damaged clock a day or two after it had occurred. He conducted four interviews and all employees were represented by their shop steward. He gathered a number of statements and was assisted by the airport police. The statements collected were provided to the claimant and his representative. The claimant was asked for his views/observations on the statements and offered none.

The airport police gave Mr. K. the opportunity to view CCTV footage in the vicinity of the clock. The footage was not released as it was airport police property but the facility to view it was offered to the claimant and his representative. There was no material evidence on CCTV regarding damage to the clock and he communicated that fact to the claimant. He came to the conclusion over a series of meetings that the claimant had been in the vicinity of the clock when the damage occurred and may have had information in relation to it, but provided no information to the witness.

The claimant told Mr. K. that he had not been near the clock when the damage occurred but subsequent interviews by Mr. K. indicated otherwise. When Mr. K. put this to the claimant, the claimant admitted that he "must have been" in the area at the time. The claimant did not explain why he changed his story and offered no further co-operation. Initially when the airport police wished to interview the claimant, he declined as he "did not want to get anyone into trouble". The claimant was given the opportunity to respond to allegations and offer explanations over a series of meetings but had not done so to Mr. K.'s satisfaction.

The conclusion of Mr. K.'s investigation was that the claimant was in the vicinity of the clock when the damage occurred, that he had knowledge of the damage and that he offered no explanation or information. The claimant had been offered ample opportunity to give reasons and had not done so to Mr. K.'s satisfaction. Mr. K. made the decision that the claimant had lied to him and as a result was guilty of gross misconduct. He wrote a letter of dismissal to the claimant on 20 April 2005 outlining his findings and gave the claimant leave to appeal the decision. That ended Mr. K.'s involvement in the matter.

Under cross-examination, Mr. K. told the Tribunal that the machine had been broken at 17.32 on the 21 February 2005. According to statements, noise had been heard at 17.40 approximately. The CCTV

footage showed two employees (who submitted statements to the airport police) leaving the vicinity of the clock at 17.31. The claimant had exited the stairwell at 17.31. Mr. K. was unable to confirm that the clocks on the CCTV were accurate. One witness' statement put the claimant there at 17.40. Mr. K. did carry out "noise tests" in the stairwell with the witness who had given that information. The claimant was present at these tests. Mr. K. and the claimant's representative carried out three tests and determined that the noise was not continuous as reported by the witness.

Mr. K. was unaware if the clock had been damaged prior to this incident. The claimant was suspended on full pay while the investigation was carried out. All documents were made available to the claimant on request. The claimant and his representative had been un-co-operative to the point of being disruptive to the whole process. Mr. K.'s decision was that the claimant's presence in the vicinity was significant. The claimant was never accused of breaking the machine but Mr. K. concluded that he did have a part to play. There were two people identified by the witnesses as being in the vicinity at the time but the claimant was the only one identified as being at the bottom of the stairs when the noise occurred. Mr. K. was satisfied that the claimant was fully aware of the seriousness of the investigation and the fact that his job may be potentially "on the line".

The final witness for the respondent is a passenger services manager (Ms. C.). She verified the invoice that the respondent received in relation to repairs to the clock. Under cross-examination, she told the Tribunal that this was the third occasion that damage had been done to the clock and the respondent was going to move it to a new location.

Claimant's Case:

The first witness was a witness to the claimant being in the vicinity of the clock on the date in question. He confirmed his statement to the Tribunal. The statement of the second witness was accepted by both parties as the witness was unavailable to attend the hearing.

The second witness was the claimant. He told the Tribunal that he did not break the clock nor was he there when it was broken. He was working from 14.00 to 22.00 on the 21 February 2005. He worked as a baggage handler and outlined his regular duties. He needed information on flights on occasion and this would mean he would go into the building to the second floor to the operations office. The canteen was on the opposite side of the building to the operations office and he would often take the stairwell. He would go in and out of the building on a regular basis as sometimes his hand-held radio would need to be changed.

On the day in question, he needed to leave work to attend the hospital as a family member had been admitted in an emergency. At approximately 18.45 he went looking for his supervisor to approve his absence. He couldn't locate him and phoned his extension to get permission to leave which was granted. He didn't clock out and was gone for about an hour. He returned at 19.50pm. He had no idea that the clock machine had been broken.

Mr. K. interviewed him on the 8 March. He was aware that a few people on the shift had been interviewed. He got a phone call to attend a meeting but was not told what it was for. He was told it was informal. He was asked three questions and thought he was in trouble because he had left the premises without clocking out. The meeting lasted about five minutes. He said nothing because he did not want to "get anyone into trouble". The damage to the clock was not mentioned.

He did not recall being in the stairwell at the time in question but in hindsight, recalled being there with another colleague with whom he was working that day. He met the two witnesses at the bottom of the stairs. He met with another colleague at the top of the stairs who was known to be "a bit of an oddball". He departed the building with his colleague and did not notice the clock as he had no reason to go near it.

He was not present when the clock was broken and he did not see it being broken. He had no “hand, act or part” in damaging the machine. He received a letter dated 15 March 2005 on the 17 March when he attended work. It had been hand delivered to his locker. It detailed a hearing for the 18 March. He attended that meeting with an apprentice shop steward as the full-time shop steward was on leave. It became apparent at this meeting that the matter was under investigation but there was no documents proffered by Mr. K. The two shop stewards attended the second hearing and the statements were issued. The meeting was adjourned to review the statements and carry out the “noise tests”. He was aware that the clock had been damaged on previous occasions.

The claimant clocked in and out as normal that day but the hours didn’t go through. He didn’t hear any noise when he was in the stairwell and it was a commonly used passageway. Every time he went to a meeting he felt the burden of innocence was on him to prove and he felt that he did not get a fair hearing. The claimant established loss for the Tribunal.

Under cross-examination, the claimant told the Tribunal that the atmosphere between management and staff was stressful and that is why he thought the initial interview was in relation to his leaving the building. He had nothing to hide. He felt like he was on trial and on the “back foot” from the beginning. He was not obstructive to the investigation and told Mr. K. anything he knew that was relevant.

Determination:

Having carefully considered all of the evidence in this case, the Tribunal is of the opinion that the company’s procedures were adequate to deal with disciplinary issues. The claimant was not dismissed for breaking the clock machine as no proof existed that he did. Essentially he was dismissed for non-co-operation with the investigation set-up to establish the sequence of events and who was responsible for the damage. The Tribunal is satisfied that on the balance of probabilities, the claimant was directly involved or had direct knowledge of who was.

Given the claimant’s own obstructive behaviour throughout the investigation and his failure to follow the disciplinary procedure through to the end, the Tribunal feel that the claimant did contribute to his own dismissal. At no time did he give an account of his own time in the stairwell. However, the Tribunal is of the view that the sanction taken against the claimant was disproportionate to the offence, both in comparison to other colleagues investigated and in the absence of absolute proof.

Therefore the Tribunal determines that the dismissal was unfair and awards the claimant the amount of €1634.23, under the Unfair Dismissals Acts, 1977 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)