

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:  
Employee

CASE NO.  
UD108/2005

against the recommendation of the Rights Commissioner in the case of:

Employer

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr. M. Forde  
Mr. K. O'Connor

heard this appeal at Killarney on 22nd November 2005, 19th June 2006 and 20th September 2006.

#### **Representation:**

Appellant: Mr. Michael Kelly, Solicitor, Patrick Mann & Company, Solicitors,  
25/26/27 Ashe Street, Tralee, Co. Kerry

Respondent: Mr. Michael Dowling, Solicitor, Michael Dowling & Co., Solicitors,  
Church Street, Tralee, Co. Kerry

The determination of the Tribunal was as follows:

This case came before the Tribunal by way of the employee appealing against the Rights Commissioner Recommendation (ref: UD19652/04/LM.)

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

The owner of the company (MD) told the Tribunal that the company supplies catering equipment to hotels and bars. The claimant had been employed by the respondent for ten years. Mr. B, who was employed by the respondent for fifteen years, drove the delivery van and installed the equipment and the claimant was the van helper with him. There had been no problems with the claimant over the course of first nine years of his employment. The claimant was dismissed for his involvement in a number of incidents that occurred in the final year of his employment.

In early August 2003 the manager of a hotel, to which Mr. B and the claimant had delivered equipment, telephoned the respondent to report that while Mr. B had been helping with the equipment the claimant was seen putting boxes of soap into the back of the van. When MD confronted the claimant about the complaint he denied it and said someone had told him to throw the stuff away. MD told the claimant that it was wrong to take it and to never again let it happen.

The following week, the manager of the hotel telephoned again to complain that as he parked in a

petrol yard the claimant popped out of the van next to his vehicle and in an angry mood abused him. The manager told MD that he had been afraid and that he never again wanted the claimant delivering goods to his hotel. MD spoke to the claimant again and while he admitted that there had been an altercation he denied that he was aggressive. MD suspended the claimant without pay for two weeks.

In January 2004 another customer to whom the claimant and Mr. B were delivering equipment telephoned MD to complain that the claimant had been aggressive and abusive towards him and that he did not want him delivering equipment to him. MD spoke to the claimant and told him if this continued he couldn't continue in employment.

The respondent had to repossess equipment, including a stainless steel shelf, from a restaurant as it had not been paid for. The repossessed equipment was stored in an area of the warehouse for resale. Some time later the shelf could not be found for another customer and on inquiring, the claimant informed him that he thought it had been thrown out. At a later date SM noticed the shelf in the premises of one of the respondent's regular customers (customer M). About one week later, with M's permission SM measured the particular shelf and from the location of the holes drilled in it and from a dent on it (which was caused when it was being removed from the previous premises) SM was "100% certain" that it was the respondent's shelf. MD had neither sold nor given the shelf to M.

While investigating the shelf incident it also came to the respondent's attention that the claimant had been involved in ordering a bain-marie from the respondent's supplier (hereafter S) and selling it to M, using the respondent's time and van to deliver it. S confirmed to the Tribunal that Mr. B and the claimant had ordered a bain-marie for a friend of theirs around March or April 2004. He had agreed a price with them for it and did not know for whom it was ordered. Mr. B admitted the transaction to MD and only received a reprimand as this was his first disciplinary incident in his fifteen years' employment with the respondent. When MD confronted the claimant he denied it at first but then admitted it. MD told the claimant that he had "lost faith" in him, that he could not work with him anymore and would prefer him to leave. MD gave the claimant a week to think about it and told him that he would give him a reference.

They spoke again a week later on 29 April the claimant told MD that he had a medical certificate and would be absent from work for three or four weeks with an injured shoulder and arm. MD had a delivery for Tipperary the following day and the claimant agreed to his request to attend work for the day to assist as the driver did not know the area to which the delivery had to be made but the claimant said he would be off sick before and afterwards. However, hearing that the claimant had played soccer the following Sunday, 2 May 2004, was the last straw. MD dismissed the claimant the following Monday or Tuesday (although he had agreed earlier that he had dismissed him on the 1 May and the letter of dismissal was dated May). The claimant played soccer over the next few Sundays and also continued to submit medical certificates. Approximately four weeks later, the claimant asked for his job back.

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

M, the owner of a fast food restaurant and a good customer of the respondent, enquired of the claimant and Mr. B as to where he could get a stainless steel bain-marie in a particular size. They informed him that S would make it. M ordered it from S and the claimant and Mr. B delivered it to M when it was made. M gave Mr. B a cheque for S which was made payable to cash for the

equipment.

Regarding the shelf, the witness' brother had acquired four shelves when a hotel was closing down. M did not purchase them from the claimant, nor did the claimant deliver them. SM had come to his premises and asked to look at the shelf and for permission to measure it. He claimed that it was his property. They had a "heated" debate as SM accused him of having stolen property on his premises. Both of them got agitated. The witness then heard that the claimant had been dismissed.

The claimant was employed by the respondent for over ten years and had an excellent relationship with his employer. The claimant denied taking the soap from the hotel or verbally abusing the hotel owner a week later; he had just said to the owner, "You phoned my boss and told him I took goods from your hotel when I had moved your rubbish." The claimant was irate but he did not threaten the hotel owner. After the latter incident with the hotel owner he had been suspended for one week, not two.

When the claimant and Mr. B went to make a delivery in Fermoy a man on a digger was blocking their way. They did not know at this time that the person on the digger was the customer to whom they were to deliver the equipment. Although Mr. B flashed the lights and beeped the horn twice at him the person did not move the digger. When the claimant approached him and asked him if they could get past, the man told him that they were not meant to be delivering that day and that he had not got a telephone to inform him there would be a delivery. They left and the claimant reported the incident to the respondent.

The claimant confirmed M's evidence as to the purchase and payment for the bain-marie. He had no other involvement in the deal. They did it as a favour and did not get paid for it.

He did not give the shelf to M. He had never taken anything from the company. He had the keys of the company's premises for three months after his employment ended and he never removed anything from it.

The claimant received his first medical certificate (for one week) on Thursday, 29 April 2004 due to a shoulder problem and handed it to MD on Friday, 30 April 2004. MD asked him would he mind travelling with Mr. B to an area in Co. Tipperary as Mr. B was not familiar with the area. The claimant agreed to do so as long as he did not have to do any lifting. On Saturday, 1 May 2004 MD telephoned the claimant and summoned him to his office. When he went in MD told him he would prefer if he left and offered him a €1,000 and a good reference. The claimant was shocked. He wanted to know why he was being asked to leave. MD then made a final offer of €4,000 and gave him until the end of the day to accept this offer. The claimant asked for an explanation as to why his employment was being ended. No explanation was offered. The claimant had not received any warning prior to this. The claimant believed his employment was terminated because of the delivery of the two units to Mr. M but he noted that Mr. B's employment had not ended although he had also been involved in the delivery. He also believed that there was a personality clash between SM and himself. SM had alleged that he was guilty of the theft of the shelf.

The claimant did not accept the €4,000 and the reference. His employment was terminated on 1 May 2004. No explanation for his dismissal was given to him. He submitted a number of certificates after this. The claimant said he would not have accepted the offer of money and thereference even if he had been offered an explanation. On Sunday, the day after he was dismissed, he came on as a substitute on the soccer team.

## **Determination**

The Tribunal is satisfied that the date of dismissal was 1 May 2004. The claimant was dismissed for a number of incidents of which playing soccer on 2 May 2004 was “the last straw”. The respondent cannot rely on an incident that occurred subsequent to the dismissal to justify the dismissal.

In relation to the earlier incidents the Tribunal did not have the benefit of the evidence of the other employee who has present at those incidents and the respondent sought to rely on hearsay evidence as to what had occurred on those occasions. Accordingly, the Tribunal finds that the respondent failed to discharge the onus of proof under the Unfair Dismissal Acts. There was a failure to apply fair procedures to the dismissal. For these reasons the dismissal is unfair and the appeal under the Unfair Dismissal Acts, 1977 to 2001 succeeds. The Tribunal finds that the claimant contributed to his own dismissal and having taken that contribution into account it awards the claimant compensation in the amount of €14,000 under the Unfair Dismissals Acts 1977 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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