

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

Employee

MN877/2005
UD1154/2005
WT192/2006

against

Employer
under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001 ORGANISATION OF WORKING TIME ACT, 1997 UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K.T. O'Mahony BL

Members: Mr. P. O'Leary
Mr. D. McEvoy

heard this claim at Cork on 28th September 2006 and 23rd November 2006
and 29th January 2007

Representation:

Claimant: Mr Eamonn Fleming, Eamonn Fleming & Co, Solicitors, 66a
South Main Street, Bandon, Co Cork

Respondent: Mr. John Barry, Management Support Services (Ireland)
Limited, The Courtyard, Hill Street, Dublin 1

The determination of the Tribunal was as follows:-

Respondent's Case:

Giving evidence the respondent's Commercial Manager (CM) told the Tribunal that the respondent is involved in the security business and guards clients' premises. It provides services such as monitoring alarms, doing mobile patrols of clients' premises or sites and key holding. He has responsibility for the Cork and the Munster area.

The claimant was employed as a supervisor in the respondent and his duties included: supervising officers and ensuring they carried out their duties, responsibility for health and safety, carrying out mobile patrols of customers' premises (generally commercial premises, in the Cork area). The patrols were primarily done at night and involved patrolling the site and reporting any issues. The claimant was a very good employee. However, he was issued with a final written warning for gross

misconduct on 13 May 2005 for his refusal to carry out an instruction of the duty manager on the 25 April 2005. The claimant did not appeal this warning.

On the night of 24/25 August 2005 the respondent put a watch on XXXX premises in the Holyhill area. It was a large DIY premises with a number of industrial units and offices attached. CM described it as a small industrial estate with two entrances, one entrance was from the Blarney Road and the main entrance was from Holyhill.

This site is regarded as a risk area because people loiter around it. The claimant's duty was to drive slowly into the site and patrol it in order to act as a deterrent as well as ensuring that the premises was secure. The company's contract with the client requires three patrols per night.

CM made the decision to set up watch on the site from around 19.00 on 24 August to 07.00 on 25 August 2005 to ascertain if the premises was being patrolled. He and the newly appointed Operations Manager (OM) carried out the watch from a vantage point, overlooking XXXX premises, from which they could see all the movement of traffic entering the site and going around to the front day entrance and then going away from them towards the Blarney Road. The claimant came on duty at 18.30. Both CM and OM observed from 19.05 to 20.00. CM then observed on his own until 02.00 and during this time, when the gates to the site closed, changed the point of observation to across the road from the day entrance to the site. OM replaced him at 02.00 and observed the site until 07.00. The claimant's completed log sheet for that shift indicated that he had patrolled the site at 19.52, 00.23 and 05.20 but he had only been observed doing the 05.20 mobile patrol.

CM invited the claimant to a meeting and at that meeting on 25 August 2005 CM suspended the claimant with pay, pending an investigation, for his failure to properly carry out his duties as supervisor on 24/25 August 2005. The suspension and reason for it were confirmed to the claimant in a letter of even date. In this letter the claimant was informed that a disciplinary meeting would be held where he would have an opportunity to state his case. From the letter of suspension it was clear that the issue in question was his failure to carry out his duties as supervisor of Charlie 1 van on Wednesday night/Thursday morning, 24/25 August 2005.

The disciplinary meeting was held on 29 August 2005. CM, OM, the claimant (accompanied by his friend BS, who was also a supervisor with the company) attended the meeting. The claimant was given the log sheet and, in reply to a question from CM, affirmed to CM that he had made and completed the calls as indicated on the log sheet. CM informed the claimant that the respondent had carried out an overnight observation of the site and that the 19.52 and 00.23 calls had not been made. The claimant denied that he had not carried out his duties and said that the CCTV footage on the site would exonerate him. There was a break in the meeting at this stage to afford CM an opportunity to contact the chairman of the respondent company but he was unable to make contact. When the meeting resumed the claimant was informed that his suspension would continue and that they would meet again the following day to continue the meeting.

Because the claimant had raised the issue of the CCTV, CM spoke to GH (the company's contact in O'Sullivan Brothers). GH told CM that the camera was not working at the relevant time. CM explained the situation to GH and asked him for a letter confirming that the CCTV had not been working. GH did not want to write a letter as he did not want to involve O'Sullivan Brothers in the matter. Subsequent to the disciplinary meeting of 29 August the claimant retained a solicitor. The respondent deferred the resumption of the meeting to facilitate the claimant's solicitor and it was ultimately arranged for 1 September 2005 in the Maryborough House Hotel.

CM and OM attended for the meeting at the Maryborough House Hotel on 1 September 2005 but neither the claimant nor his solicitor attended. In a telephone conversation with the claimant's solicitor that day CM did not accept the claimant's solicitor's contention that he (CM) was to revert to him to confirm the availability of a room for the meeting in the hotel. CM's recollection was that they had a definite arrangement for the meeting on 1 September 2005 in the hotel. The solicitor informed him that he could not attend a meeting that day due to work commitments. The telephone conversation became heated and there was a general breakdown in communication between them.

As the claimant already had a final written warning CM took the decision to dismiss him. His letter of dismissal dated 1 September 2005 stated as follows: *"As a consequence of a failure to carry out your duties, in accordance with your instructions, namely failure to complete mobile calls and falsifying respondent documentation, I am to inform you that this neglect of your duties constitutes a Gross Misconduct, the decision of the respondent is that you are hereby dismissed with immediate effect..."* . CM took the decision to dismiss the claimant after the claimant's failure to turn up for the meeting on 1 September 2005.

In cross-examination CM was adamant that both corners of the premises could be seen from the first observation point. On 24 August 2005 the respondent's van was broken down so the claimant was driving a hired vehicle. CM did not recall speaking to the claimant about his union membership and denied dismissing the claimant because of union activity. The respondent does not negotiate with the union but CM has no problem with staff joining the union. Between 20 and 25 of its 110 or so employees in Cork are union members. CM could not name who were members of the union. Union subscriptions are not deducted from employees' pay. There is no shop steward in the company. He did not telephone the claimant while he was at union meetings in order to interfere with his union activities; he did not know the times of the union meetings. CM often phoned the claimant outside working hours.

There is an internal mechanism in the respondent for officers to air grievances. Employees can bring their grievances to the attention of the line manager, the operations manager or CM. The respondent has the usual "moans and groans" to deal with but the grievance mechanism works well. The respondent listens to employees. There is a high retention rate for staff in the company.

The claimant was issued with a final written warning earlier in 2005 for refusing to carry out an instruction of the duty manager on the 25 April 2005 to man a construction site in Cobh. Whilst he agreed that there is a policy to have two vans on the road and this meant taking one off, it had to be done; the Cobh site was a priority because children were climbing onto machinery there. CM had to make "a judgment call" and he instructed the claimant to cover the Cobh site. The claimant refused to go to the Cobh site. CM insisted that this refusal is what led to his final written warning and that it had nothing to do with the Sisk site, as alleged by the claimant. Whilst the claimant may have taken other steps regarding the Cobh site he had refused to obey an instruction. The claimant refused to sign the final written warning. Whilst the respondent has an appeal procedure the claimant neither appealed nor indicated any wish to appeal his final written warning. Dismissal was the only form of sanction considered by the respondent for the latest offence (August 2005). He considered that not carrying out his duties and falsifying the logbook constituted gross misconduct. As the claimant already had received a final written warning dismissal was the appropriate sanction. It was vital to the respondent's business that the respondent could rely on its guards and supervisors.

The Operations Manager (OM) in his evidence told the Tribunal that he was in his third week of employment with the respondent when he was involved in observation at the O'Sullivan Brothers'

premises. Checking that employees carried out their duties was part of OM's induction training.

He confirmed that he initially observed the site from a vantage point which overlooked the premises. He confirmed that he had been at the abovementioned observation point from around 19.05 to 20.00 on 24 August 2005. He did not see any patrol during this time. He had a clear view of the rear of the premises. The van is supposed to travel around the whole perimeter and if the claimant had done so he would have come into his (OM's) view when he would come around therear of the premises. OM left at about 20.00. He returned to observe from 02.00 until 07.00 and during this time he observed the patrol that was done at 05.20. He was aware that the claimant had a different vehicle that night and that he would be driving a Toyota Yaris.

He delivered the letter of dismissal to the claimant's home. The claimant introduced him to his wife and his children were also present. OM found the situation distressing. OM had not seen any patrol, either in a van or otherwise, during the earlier part of the observation on 24 August 2005. He did not tell the claimant that he had only been at an observation point for the last watch; he may have said that he only saw him during the last watch.

Prior to the Tribunal hearing, having failed to contact CM on the telephone, OM telephoned the claimant to ascertain if the Tribunal hearing was going ahead. He did not confirm to the claimant, in that conversation, that he had only been present for the last part of the observation. Whilst the claimant might have made a call to the premises he did not see him; if he came around the rear of the premises, as he should, he would have seen him. OM does not recall the claimant telling him that he made the three calls to the premises on the night. OM knew that the claimant would be driving a light-coloured Toyota Yaris on 24 October 2005.

Claimant's Case

The claimant told the Tribunal that he started with the respondent in September 1999, left in January 2000 and rejoined in March 2000. In April 2000 he became a supervisor.

Sisk Builders had their own in-house security but the respondent provided cover for them if one of their employees was out sick or on holidays. On 25 April 2005 when the claimant reported for his 19.00 shift another supervisor (SU) telephoned him to tell him that a man was required for the Sisk site and that a van was being taken off the road in order to cover the site. The claimant insisted that this was contrary to an agreed policy that the two vans were to remain on duty, one on the north and the other on the south of the river; this policy had been in force for a year. The two vans were required on duty, primarily for safety, in order to provide back-up to employees; the gardai had told them that they would not respond to an alarm activation unless they had confirmation of a break-in. The claimant suggested to CM that a man be taken out of the Cobh site and put into the Sisk site to allow both vans to run. The claimant arranged with the day-man on the Cobh site to stay on there until 22.00 and for the other man to do the Sisk site. Children were not at risk on the Cobh site because he (the claimant) had arranged cover for it up until 22.00hrs. When CM asked him if he was refusing to obey an instruction the claimant replied that he was refusing to do the work of two men as well as the key-holding duties the following morning. However, he argued with CM about it. The instruction was unreasonable. In cross-examination the claimant agreed that there could be occasions when a van driver was sick but said that on such occasions he tried to get someone to drive the other van.

Following a disciplinary hearing in late April 2005 the claimant had received a final written warning. When he indicated to EK that he intended appealing the warning he told him that it would

be a waste of time. When the claimant told EK that he still wanted to appeal it EK arranged for him to meet with CM who told him that he would be wasting his time appealing because he would be appealing to the chairman. The claimant just dropped the idea of appealing. The warning was on his file but he had not signed it as he had not accepted it.

The claimant maintained that he had made the three calls on 24 August 2005 as indicated on his log sheet: at 19.52, 00.23 and 05.20. He had not falsified the logbook. When OM delivered the letter of dismissal on 1 September 2005 he apologised for what was happening and said that he (OM) had only been present at the observation point for his last call. The claimant informed him (OM) that the three calls were done. OM told him that he had no doubt that they were.

Before the Tribunal hearing on 23 November 2006 OM rang the claimant to ask if the hearing was going ahead and to confirm details of time and venue. There was a discussion about the dismissal and when the claimant reminded OM that he (OM) had told him, when he delivered the letter of dismissal to him, that he had only been present for the last call of the night shift on 24/25 August 2005, OM agreed that this was correct. The claimant felt that it was possible that he had not been seen during his first visit to the O'Sullivan site as he had gone in by a different entrance.

The claimant had not been happy with the wage structure. For four years in a row security guards had got bigger pay rises than the supervisors got. The claimant had spoken to management about this but differences, including issues regarding bank holidays and shifts, were not resolved. In February 2005 the security guards got a bigger rise again. The workload of supervisors was getting greater and the pay differential was getting smaller. The claimant felt that the union was the way to resolve issues. The claimant was a member of SIPTU and had been at a union meeting in Connolly Hall in March 2005. In March 2005 many people joined the union. The claimant had no problems at work up to this but from then on he felt that he was being singled out. He had been called into CM's office three or four times and had got the impression that he was being viewed as the ringleader. He had not been trying to get employees to join the union. The respondent said that they had no problem with employees being in the union but that they would not recognise the union.

Giving evidence, EK said that he had worked as Operations Manager for the respondent until August 2005. From his recollection the claimant's version of events leading to the issuing of the final written warning in April 2005 was closer to his own. Based on the reports that had been given at the end of the shift, EK thought it was a case of the claimant pointing out the impossibility of covering both sides of the river rather than the claimant refusing to do it. There had been a change in operating procedures. The procedure had been to use vans to go into sites where security officers were not available. Given the amount of work expected from vans it became clear to EK that this was neither efficient nor safe. It became clear that it was better to keep vans on the road rather than to have sites covered. This procedure was "given out" by EK with CM's agreement. However, the duty manager had made a decision regarding covering a site on 25 April 2005 and it had to stand. He agreed that he had told the claimant that it was pointless to appeal because, technically, he had refused to obey an instruction. It would have been wiser for the claimant to obey the instruction and complain afterwards. The claimant was not happy with the final written warning.

EK had had no reason to doubt the claimant's integrity regarding responding to calls. EK had regularly done observations by going with the supervisors in vans. In the three years he had been with the respondent the observations had been overt rather than covert.

The respondent had a negative attitude to negotiating with unions. This attitude was being imposed by head office rather than the Cork office. Although the respondent recognised the right of employees to join a union, it preferred to deal with employees individually. Concern about pay and conditions were endemic in the security industry but the respondent was to progress the issue. CM gave EK a lot of support on this.

There had been occasions over the last months of his employment (May to August 2005) when there was only one van on the road because of expenses. If the respondent had only one van on the road it would not have been reasonable to expect that driver/officer to cover all sites. CM had the authority to change policy and an officer could write “not visited” against the sites not called on.

Determination:

The Tribunal finds that there was a misunderstanding between the parties as to whether the meeting of 1 September 2005 was definitely arranged or whether the venue had to be confirmed. Notwithstanding the disciplinary meeting of 29 August 2005, the Tribunal is satisfied that the respondent did not fully comply with the requirements of fair procedures in making its decision to dismiss the claimant on 1 September without giving him the opportunity of being further heard on the issues as had been indicated to him at the conclusion of the disciplinary meeting. Accordingly, the dismissal was procedurally unfair and the claim under the Unfair Dismissals Acts, 1977 to 2001 succeeds. However the Tribunal finds that the claimant contributed to his dismissal. Having taken this contribution into account, the Tribunal awards the claimant compensation in the amount of €5,000.00 (five thousand euro) under the said legislation.

In addition, the Tribunal allows the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001, and orders that the respondent pay the claimant the sum of €1,790.80 (this amount being equivalent to two weeks’ gross pay at €680.40 per week and two weeks’ gross pay at €215.00 per week) under the said legislation.

It was established that the claim under the Organisation of Working Time Act, 1997, related only to Public Holidays. The claim was not lodged within six months of the contravention of the provision under Section 27 (4) of the Act. The claimant was dismissed on 1 September 2005. Form T1A was received on 7 October 2005 and the claim under the Organisation of Working Time Act was lodged with the Tribunal on 31 May 2006. On the application of the claimant, the Tribunal considered whether there was reasonable cause to extend the time limit under Section 27 (5). The only cause advanced was that of an oversight. Having considered the case as advanced the Tribunal declined to extend the time for lodging the claim under the Organisation of Working Time Act, 1997, and dismisses the said claim.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)