

## EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

Employee

UD1335/2005  
MN998/2005

against

3 Employers

under

### MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001 UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr J. Sheedy

Members: Mr G. Phelan  
Mr J. McDonnell

heard this claim at Cork on 8th February 2007  
and 22nd May 2007

Representation:  
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Claimant :

Mr Michael Deasy B.L., instructed by Mr. Terence English,  
Murphy English & Co., Solicitors, 33-34 Cook Street, Cork

Respondent :

Mr Aidan Redmond B.L., instructed by Ms Ciara McLoughlin,  
A & L Goodbody, Solicitors, IFSC, North Wall, Dublin 1

The determination of the Tribunal was as follows:

#### **Respondent's case:**

The first witness was a warehouse operative who had been working with the respondent from September 2003. In October 2004 he started working with the claimant as part of a two-man shift. There were three shift rotas; days, nights and split shifts. From the start on the night shift the claimant went to sleep and the times of the sleeping could be at any time over the shift and could be for an hour or longer. Witness made a complaint to the team leader. The work still had to be done

and he had to skip his breaks as a result. The claimant had a tendency to complain about witness in order to soften the blow against himself. He was not aware of any action being taken after he made the complaint to the team leader. In March a formal complaint was made by a team leader TJ. A team leader DB was appointed to investigate the matter and on 31<sup>st</sup> March 2005 the allegations were put to the claimant in the presence of witness. When the team leader told him of the complaint against him the claimant became confrontational and demanded to know who had made the complaint. When asked was he sleeping the claimant said that he was between 5.30am and 6.00am. When asked if he admitted sleeping the claimant said that he waited until 5.30am to 6.00am. The claimant was then told to go on his break. Witness was being approached and it put to him that the conversation on 31<sup>st</sup> March did not take place and the claimant was now saying that he did not sleep on the job.

In cross-examination witness said that he had been working with the claimant for two months before he made the complaint against him in December 2004. He wanted to give the claimant the benefit of the doubt and he did not wake him. The conversation on 31<sup>st</sup> March went on for twenty minutes. He made a witness statement on the matter.

The Tribunal also heard evidence from DB the team leader in the warehouse. The supervisor told him that two men, the previous witness and a colleague PT had complained about the claimant sleeping. In December 2004 the previous witness told him of the claimant's sleeping and he sought the advice of the supervisor as to what he should do. In March 2005 he spoke to the two men saying complaint made and they said they had not made an official complaint. The claimant commented that he was being asked questions again about his sleeping. He confirmed that the claimant admitted sleeping between 5.30am and 6.00am as he had no break. He told him it was a firing offence. He then told the claimant to go on his break and reported to the supervisor that he admitted sleeping.

In cross-examination witness said that he had never seen anyone sleeping during his time working with respondent. He felt uncomfortable about going to the claimant directly and was only doing what as directed to do by the supervisor.

In answer to questions from Tribunal members witness said he had no function with regard to warnings to staff.

Evidence was also heard from another team leader TJ. In July 2004 he witnessed the claimant asleep. He worked at that time in the department next door. He saw the claimant asleep on three different nights and one night he took photos of him over a forty five to fifty minute period. He saw him asleep again in July but did not take photos on this occasion. He woke him once by banging on the partition. He took the photos in case there was a complaint and he would have the proof. He was promoted in December 2004/January 2005. On 16<sup>th</sup> March 2005 he received a photo from an operator showing the claimant asleep. The first witness had also told him that the claimant slept on a shift. He passed the information to his line supervisor.

In cross-examination he said he was on reasonably good terms with the claimant. He was not aware that the times on the photos could be changed. He named the operator from whom he received the photo on 16<sup>th</sup> March and said that he was related to the claimant through marriage. While he took the photos in July 2004 he was not team leader at that time and it was not his responsibility therefore he passed the information to the supervisor. Other than banging the partition he did not wake the claimant up on other occasions as he decided it was not worth his while.

In answer to questions from Tribunal members he said the post of team leader was advertised and he was interviewed for the position.

The Tribunal also heard evidence from a human resources specialist. In 2005 she was appointed along with AH warehouse supervisor to investigate the claims of the claimant sleeping on the job. Having spoken with the warehouse supervisor she and AH decided to speak with the claimant on 11<sup>th</sup> April 2005. The claimant had been out sick with his back. She told the claimant she had information that he had been sleeping on the job and could he help her. No accusation was being made she wanted to get the facts. The claimant said this had been raised previously, he denied that he had been sleeping and wanted to know where the information came from. He gave no further information. If he had come to the respondent indicating that he would prefer day shifts they would have looked at that option. She said she would revert to the claimant.

The claimant was called to a meeting on 28<sup>th</sup> April and it was put to him that the respondent had received photos from TJ showing him sleeping. The claimant said he never liked TJ and he had pulled him for speeding on the forklift. He said the photos could be tampered with. He was given a copy of the photos at this meeting. It was also put to him regarding the conversation on 31<sup>st</sup> March which was heard by the first witness and the claimant denied that it had taken place. According to the claimant they were all lying and he had no other defence. Witness endeavoured to check the speeding reference to TJ and could not substantiate the allegation other than that the claimant was health and safety representative. On checking witness found that the claimant and TJ had worked three hours together on a shift. Having gone back to the team leader and the first witness they repeated their earlier version of events. Witness felt that it was now time to involve the human resources manager RD.

Witness rang the claimant on 12<sup>th</sup> May 2005 and told him that his job was at risk and asked to meet him at a neutral venue on 16<sup>th</sup> May. The claimant was told this was a disciplinary meeting and he could bring a representative. All issues and the allegations of the first witness LF were put to the claimant and he was told of the photos. He was also told on an instance one frosty night when LF said he was asleep from 2.30am to 6.30am thus creating a backlog of work when he was on duty. The statement of LF was read out to the claimant and it stated that the claimant used to wear a hoodie and he would put up his legs and sleep. Some of the statements were not to hand until the following meeting. The claimant brought up a conspiracy theory in relation to another team leader SM as the claimant mentioned a bullying incident when his brother was supervisor. He said PT could testify that the claimant never slept on nights. The meeting was adjourned and the respondent said they needed to find out more information. Witness spoke to SM and he had not worked with the claimant for four years however there was a bullying incident and they agreed not to pursue it. It transpired that PT worked in a different area to that of the claimant therefore he could not see him. On 7<sup>th</sup> June the claimant's brother attended the meeting with him. The respondent told the claimant the information they now had regarding PT and SM. As the claimant had nothing further to add this disciplinary meeting was concluded. They met again the next day, 8<sup>th</sup> June and the decision was given to dismiss the claimant.

In cross-examination witness said that the claimant had an unblemished record. The managing director gave the permission regarding the taking of the photos subsequent to their being taken. The claimant was notified of the meetings by telephone. The claimant was aware that the meeting of the 16<sup>th</sup> May was a disciplinary meeting and he was told it was serious and his job was at risk. The respondent did not write to the claimant in advance of the 11<sup>th</sup> April meeting as it was a fact finding mission. The claimant was told that his dismissal was for gross misconduct as per the company

handbook. The claimant was also told of this right of appeal but he did not exercise that right. The appeal process was to the managing director but he would not necessarily hear the appeal if he had prior knowledge of the case however the claimant was not made aware of this as he did not make any contact in this regard.

The Tribunal also heard evidence from the human resources manager. In this case prior approval was not given in relation to the taking of the photos. These photos which were taken by mobile phone were part of the total evidence. The photos in question were shown to the Tribunal. Witness was not sure if the previous witness cross-checked the photos with time sheets. He did not see it relevant to investigate the taker of the photos as a number of employees had given statements that they saw the claimant asleep. PT made a statement saying he could neither deny nor confirm seeing the claimant asleep. Employees were concerned that if they woke up the claimant there would have been allegations made against them. He did not personally interview the witnesses. The report of the investigation was not given to the claimant. While the meeting on 16<sup>th</sup> May was a disciplinary hearing no decision was taken as it was possible new information would become available. While PT took the photos his identity was not disclosed. The purpose of the meeting on 7<sup>th</sup> June was to get feed back from the claimant and a further meeting was held the following day. Witness made the decision to dismiss the claimant in consultation with the managing director. The dismissal was confirmed by letter dated 9<sup>th</sup> June 2005.

In answer to questions from Tribunal members witness said that the investigative report was made available to the claimant after his employment was terminated. The incidents of the claimant sleeping referred to the Summer of 2004 and there were one or two others in 2005 in addition to witnesses seeing him at various times. There were three in total and these were put to the claimant in April 2005.

### **Claimant's case:**

The claimant in his evidence told the Tribunal that he commenced his employment with the respondent after he finished school in 1999. He does not have a third level qualification. He was made permanent after three months and worked in a number of places in the warehouse. In 2005 he was the safety representative and got a certificate in that regard. He was very happy in his employment with DB as his team leader and he worked alongside LF. He received all his bonuses and increments and had no difficulties in the human resources area and was never disciplined. On 8<sup>th</sup> June 2005 his employment was terminated orally. In April he was in to see the company doctor and AH the warehouse supervisor rang the human resources specialist and MO'S to say he was in and they came in to the office and told the claimant there was an allegation of his being asleep. The claimant said he was not asleep with the work load he had and he went home. MO'S phoned the claimant and said she would like to meet him again and asked if he would come in after the doctor's appointment. At this meeting were MO'S, AH and JH the logistics manager. They said it was alleged that the claimant was asleep. He said he was not and if they checked his work they would see there were no complaints. They said they had proof he was asleep and that he had admitted it to DB. They also said that LF was there and that DB was going around asking was the claimant asleep. The claimant asked why they did not come to him first and they said they were following what they were told to do. The claimant again told them he was not asleep. He might yawn at lunch time but that was the extent of it. The claimant said if he was not doing his work he would have been told and this was eight months after he allegedly had been sleeping on the job. He had his breaks at his desk with LF as LF did not like going to the canteen.

Regarding the meeting on 29<sup>th</sup> April, MO'S phoned the claimant saying matters very serious and he

might want to bring a witness. He said he would bring his brother. When they arrived at the meeting there were four on the respondent's side including RD the HR manager. There were two seats in the middle and the claimant's brother said they needed tables on which to write and the respondent re-organised the seating arrangements. RD said this meeting was a continuation of the investigation and not a disciplinary hearing. He wanted to hear the claimant's side. The claimant told him he was not asleep and could not have been asleep if he checked his work record. RD said there were photos taken and these were being used as evidence. These photos were taken by mobilephone and the dates could be changed. RD said he was not aware the dates could be altered. The claimant brought up an incident with TJ where he was driving the forklift dangerously and the claimant told him if it happened again he would have to caution him. The claimant is only related to PT through marriage.

MO'S phoned him with the date and time of the fourth meeting and this time they had a round table. The respondent had checked the TJ incident and he denied it ever happened. The claimant asked if the time sheets had been checked and his brother said the lines had been kept going. If there was work missed could that be specified but the respondent could not answer these questions. The respondent asked for a break when the meeting resumed they said it was now a disciplinary matter and that MO'S would ring regarding another meeting the next day. MO'S rang then following morning and a meeting was arranged for 3.30pm. This meeting was delayed in starting and the claimant again had his brother with him. The respondent said they had come to their decision and read out a letter of dismissal. His brother asked for the investigation report in addition to any evidence plus the minutes of meetings. RD responded that it was up to the legal people. His brother also asked about an appeal. When the claimant asked who took the photos they were told TJ. When the claimant asked for the statement of TJ it was not given. When the claimant asked for the letter of dismissal they took it back and it was subsequently received on 12<sup>th</sup> June 2005.

The claimant was out of work with stress and his doctor told him he would need to take it easy and he was also seeing a counsellor. He was advised to go back to work for a few hours a week which he did in his father's business. His own doctor put him on medication and he could not sleep. He also had a back injury and his doctor advised him to stick to light duties. He sent medical certificates to the respondent. After a while he started applying for other jobs and when asked he told them why he had been dismissed. He did not get a reference from the respondent. He is still working with his father doing a bit of everything. Initially he worked with him the odd day and after twelve months he was working with him on a full time basis. He still wants to work in pharmaceutical industry as he is very familiar with that area and went on courses while with the respondent. He has no work experience prior to the respondent and his chances of getting back into that industry are "nil".

In cross-examination the claimant said he did not admit that he was sleeping on the job. When shown the photos again at the hearing the claimant recognised them as being of himself but said the dates and times could be altered. If he was asleep the work would not be done.

In answer to questions from Tribunal members the claimant said he had a back injury in April 2005 and did not return to work. He was on Disability Benefit for approximately nine months. He was stunned when the process moved from investigation to disciplinary. He thought he would have got verbal or written warning but did not expect to be sacked. During his six years with the respondent this was his first time he was brought to the attention of management.

The claimant's brother in his evidence told of his attending the disciplinary meeting along with the claimant on 16<sup>th</sup> May 2005. At this meeting he handed MO'S a written request for the claimant's personnel file and she said it would take twenty-one days. He also asked for confirmation that they were operating from the 2001 company handbook. The question of TJ taking the photos illegally was also raised. The company handbook states that written permission must be sought from the managing director. MO'S said they had not got permission to do what they wished with the photos. It was stated that TJ could not get permission at 3am. They were led to believe that all the photos were taken by TJ and it seems that that was not the case. Reference was made to the timing of the photos in July 2004. The claimant was not at the factory at the time stated as his shift finished at 4am. He got the impression from the third meeting that RD seemed to be part of the investigating team and he could not see any difference between investigation and disciplinary. He also asked that the work sheets be checked. If all the factory knew the claimant was asleep how were they happy to cover for him for six or seven months. Two years previous to this DB had been spoken to by another brother of the claimant's and that may have been the reason for his running with the sleeping story.

At the meeting on the 7<sup>th</sup> June they were still without the witness statements and the allegations against the claimant were not given in writing. After a recess the meeting turned into a disciplinary process and RD was at the third meeting which seemed like it was still at the investigation stage. At this meeting on 8<sup>th</sup> June the claimant was still not given the name of the accusers. He understood the charges to be sleeping on the job yet there were no specific charges. He felt that this was not handled in a professional manner. There were no specific minutes of meetings and no documentation to support the other claims.

In answer to questions from Tribunal members witness said that the claimant was told he could appeal to the managing director. The letter of dismissal was received on 12<sup>th</sup> June and the decision on the appeal had to be made by the 14<sup>th</sup> June. They were not told that they could have got an independent group to hear the appeal.

Counsel for the claimant confirmed that he was claiming Disability Benefit for eight months and he was fully employed again on 29<sup>th</sup> January 2007.

**Determination:**

The Tribunal accepts the respondent's belief that the claimant was guilty of misconduct as alleged in this case. The Tribunal by majority believes that the respondent had reasonable grounds to sustain that belief. However, the Tribunal finds that the penalty of dismissal was too severe in this case taking into account the claimant's previous good work record. Therefore the dismissal was deemed to be unfair. The Tribunal awards the sum of €15,000.00 under the Unfair Dismissals Acts, 1977 to 2001, having regard to all the circumstances in this case.

No award is being made under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 as the claimant was in receipt of Disability Benefit and was therefore not available for

work during the notice period.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

