

EMPLOYMENT APPEALS TRIBUNAL

Claims Of:
Employee
MN28/2007

Case No.
UD43/2007

against
Employer

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mrs. M. Quinlan

Members: Mr. J. Goulding
Mr. G. Whyte

heard this claim at Carlow on 17th October 2007

Representation:

Claimant: Mr. Michael Murray B.L. instructed by Mr. Martin O'Carroll,
Michael Lanigan & Co., Solicitors, 1 High Street, Kilkenny

Respondent: Ms. Emer Costigan B.L. instructed by Ms. Sue Blake,
P.J. Byrne, Solicitors, Athy Road, Carlow

The determination of the Tribunal was as follows:

Respondent's Case:

Giving evidence the Managing Director (hereafter referred to as MD) told the Tribunal that the company monitors CCTV for homes and businesses. The company operates a detailed protocol if a break-in occurs at a customer's premises. The protocol is agreed with the client. Each client has a different protocol but there are common features to each. Part of the protocol is to issue an audio warning immediately. The company's response should be instantaneous.

The claimant was employed as a Monitor Centre Operative in the company's command centre. The employees in the command centre often have interaction with the Gardaí, who visit the command centre to view footage. There is a possibility that the employee who responds to the alarm might have to give evidence in court. Therefore, the integrity of the company is very important.

The company operates a very stringent recruitment policy. The first stage of the process is an

interview, conducted by two people, one of whom is the Command Centre Manager (hereafter referred to as CCM). The second stage is when the potential employee meets with either one or both of the directors. The final stage of the process is when the director/s and the two interviewers meet and discuss the candidate. Standardised criteria are used in assessing a candidate at this stage.

MD was involved with the claimant's recruitment at the final stage of the recruitment process. If a potential employee has a criminal record the matter is raised at this stage. MD remembers the CCM at that time saying that the claimant had a clear record with just a few minor traffic offences. The claimant's employment commenced in June 2005 and after six months he became a supervisor.

In the early hours of the 15 November 2006 there was a serious incident at a client's site. The alarm was raised and the claimant responded to that alarm. The claimant did not give the audio warning for a further three and a half minutes. Within the next six and a half minutes the claimant contacted the security firm for the site. MD was aware of the times as the company logs all incoming and outgoing calls.

Later that day MD received a telephone call from the Contracts Manager at the site who queried the delayed response from the respondent. MD telephoned the command centre and spoke to the Assistant Command Centre Manager (hereafter referred to as the ACCM) who confirmed the response times. MD asked if a delay had ever occurred before. ACCM said that it had and that the claimant had responded to that alarm also.

MD performed an Internet search on the claimant. There were a number of newspaper articles reporting that the claimant had a number of previous convictions for driving without insurance, for not having a driving license, for not displaying tax and for not having an NCT certificate. It was an article from February 2005 that caused MD to make the decision to dismiss the claimant. The article stated it was the claimant's fifth non-insurance conviction and that he was sentenced to five months imprisonment and banned from driving for seven years. The jail sentence was suspended on a condition. The article also reported that the claimant was completing a community service order.

During the recruitment process it is made very clear to potential employees that they must make the respondent aware about any criminal convictions they have. MD was concerned about the company's clients. He was also concerned about the Gardaí attending the command centre would recognise the claimant. An employee who continued to flaunt the law could not be retained in the company's employment.

On the 16 November 2006 MD telephoned the Technical Director (hereafter referred to as TD) to discuss the matter. When they had confirmed the articles related to the claimant they decided to dismiss him. In making this decision they considered the section of the claimant's contract entitled "Special Considerations" in which it is stated,

"The company assumes that all information supplied by you, by any means, written, verbal or otherwise is accurate and truthful. If at any stage before or during the employment this is found otherwise, the Company reserves the right to terminate the employment immediately."

MD and TD believed the claimant had breached his contract by withholding critical information about his convictions. The new CCM was asked to arrange a meeting with the claimant to terminate his employment with immediate effect. The company did not engage the disciplinary and dismissal procedure, as it was a summary dismissal for gross misconduct.

The claimant was dismissed at a meeting on the 16 November 2006. MD was not present at this meeting but he spoke to CCM and the Operations Manager who were. Following the dismissal of the claimant MD received a letter from the claimant's solicitors stating that the claimant's convictions related to "regulatory offences". MD now realises that in their own right traffic offences are not criminal offences, however, if the claimant had disclosed at the interview that he had such offences, he would not have been employed. MD stated it was quite clear that the claimant had not raised his pending offences at the time of interview as he would have been questioned about them in detail.

The claimant did not avail of the appeal available to him. MD confirmed that the events of the 15 November 2006 formed the basis for the decision to dismiss the claimant. There had been a number of other small instances in the command centre and these had been on his mind also but the claimant was dismissed by reason of his convictions.

During cross-examination it was put to MD that the claimant was dismissed because of the complaint he made against ACCM and that there had not been an incident on the 15 November 2006. MD replied that the incident had occurred, had been documented by the claimant and the report of the incident emailed to the client.

It was put to MD that he had not dealt with the claimant's grievance about ACCM. MD stated that he was unaware of any grievance the claimant had until he met with the claimant in February 2007.

Answering questions from the Tribunal MD stated that the complaint from the client was the catalyst that caused him to perform the internet search on the claimant. He did this when he could not get in contact with the claimant's previous employer.

Giving evidence the Technical Director (hereafter referred to as TD) stated that he is responsible for the Command Centre. TD and CCM conducted the claimant's second interview. The claimant had completed an application form before the first interview. TD asked the claimant a number of questions. He asked the claimant if he had a criminal offence or anything else that the company should be aware of. The claimant said he did not have any criminal offences but he had some minor traffic offences. TD recalled the claimant mentioning not having car tax or an NCT certificate. TD did not think these offences were important. If he had known the full nature of the claimant's offences, the claimant's interview would have been terminated. TD stated that the company is answerable to stringent licensing regulations by the Private Security Authority. When MD made TD aware that the claimant had a community order and a suspended sentence TD agreed that withholding this information was gross misconduct and that the claimant should be dismissed. At the time they considered the offences to be criminal offences.

Before the claimant's dismissal TD was not aware of any complaint from the claimant against the ACCM. If a complaint had been made it would have been investigated. CCM provided a verbal and a written account of the dismissal meeting to TD. A number of days after being dismissed the claimant contacted TD. TD told him that he agreed with the decision to dismiss him.

The claimant was paid his minimum notice and holiday monies owing. The company posted the claimant's P-45 to him.

During cross-examination it was put to TD that the claimant had mentioned at the second interview that he had not had a driving license or car insurance. TD denied this.

Answering questions from the Tribunal TD was asked about the other paragraph under the heading “Special Considerations” that states, *“Due to the nature of the business, any employee charged with a serious criminal offence will be suspended without pay pending the outcome of an investigation, and dismissed should a conviction be proven.”* TD replied that the claimant had been summarily dismissed for gross misconduct as per the claimant’s contract of employment.

Giving evidence the Command Centre Manager (CCM) told the Tribunal that he was in this position since October 2006. His predecessor was involved in the claimant’s interview process.

CCM was approached by the claimant in early November 2006. Protocol had been deviated from a number of nights earlier and the claimant was concerned. CCM reassured the claimant that no disciplinary action was being instigated. CCM and the claimant had a similar conversation on the 15 November 2006 about the claimant’s incident report for that date. During this conversation the claimant did not tell CCM that he had a difficulty with ACCM or that he had suffered harassment. If he had CCM would have investigated the matter. After his conversation with the claimant CCM spoke to ACCM who informed him of the claimant’s delayed response to the incident earlier that day.

On the 16 November 2006 CCM received a telephone call from TD who told him the claimant had seriously breached his contract. CCM was not provided with any further details. He was asked to set up a meeting with the claimant and dismiss him for gross misconduct.

CCM met the claimant that day in the Operations Manager’s office. CCM told the claimant he could have someone present at the meeting if he wished and that the Operations Manager would be present for the company. CCM explained to the claimant that the company had documentation relating to the claimant’s offences. CCM took notes of the meeting. CCM told the claimant that because he had a criminal record he could not continue working for the company. The claimant said it was because ACCM and MD wanted him out of the company. CCM stopped the meeting at this point because the meeting had been held to dismiss the claimant.

During cross-examination it was put to CCM that no audio warning was required for the client site in question. CCM replied that the report stated that the claimant had sounded an audio alarm but that there had been a delay. It was put to CCM that the claimant had delayed with the audio alarm as the security firm was on duty at the site all night. CCM said he had to rely on what was stated in the report. The claimant had expressed a concern over the incident to CCM on the 15 November 2006. CCM confirmed he was not involved in the decision to dismiss the claimant.

Answering questions from the Tribunal CCM confirmed he had contacted the claimant at 5pm on the 16 November 2006 and asked him to attend a disciplinary meeting at 6pm that day.

Giving evidence the Operations Manager (hereafter referred to as OM) confirmed he was present at the dismissal meeting on the 16 November 2006. OM confirmed what CCM had said at the meeting. The claimant became upset when told he was dismissed and the meeting became heated. OM attempted to diffuse the situation. OM asked the claimant if he had received a suspended jail sentence and the claimant said he had not.

Giving evidence the Assistant Command Centre Manager (ACCM) told the Tribunal he held this position three weeks at the time of the 15 November 2006. ACCM reviewed the incident report for the night of the 15 November 2006. There was an obvious issue on the claimant’s incident report

and he raised this with the claimant. The claimant responded by shrugging his shoulders. ACCM was not aware of any issue between him and the claimant. ACCM did not have any involvement in the dismissal of the claimant.

During cross-examination ACCM stated that he was not aware of any problem that the claimant had with him. ACCM denied hassling the claimant or singling him out.

Claimant's Case:

The claimant attended for his first interview and the CCM (at that time) provided him with an application form to complete. When the claimant was answering the question "*have you ever been convicted of a criminal offence, if so, please give details*" he did not consider his traffic offences to be criminal offences so he answered "no". The claimant told the CCM that he had offences relating to having no car insurance and that he did not have a driving license. It was the CCM at that time who wrote on the application form "nothing like DUV, or that."

The claimant was asked to attend for a second interview. TD informed the claimant that the company would carry out a background check. The claimant informed TD that he had traffic offences relating to insurance and that he did not have a driving license. TD stopped the claimant and said, "that does not matter." TD told the claimant that the company was concerned with more serious offences and gave examples. The claimant commenced employment with the company and after six months he was promoted to supervisor. He did not receive any serious reprimands during the course of his employment.

The claimant made an informal complaint to the new CCM about ACCM on the 15 November 2006. The claimant was not asked to put his complaint in writing. When the claimant was asked to attend a meeting on the 16 November 2006 he thought the meeting was to deal with the complaint he had made. When he was told he was dismissed because he had a criminal record he denied that he had a criminal record. When he asked for written proof CCM said that all the information was in the public domain. CCM was holding a piece of paper in his hand but would not show it to the claimant.

The claimant accepted he was paid his minimum notice but stated he had been unaware of this, as he did not receive his last payslip or P-45. The claimant established his loss for the Tribunal.

During cross-examination the claimant stated he did not receive the information telling him he could appeal the decision of the company. If he had received the letter he would have lodged an appeal.

It was put to the claimant that his P-45 had been sent by post to him and a copy of the P-45 was shown to him. The claimant stated that it had been posted to an incorrect address and that the company were aware what his address was.

It was put to the claimant that the company's grievance procedure states, "*If you wish to discuss a grievance or raise a query arising from your employment, the matter should be raised with your Supervisor/Manager in writing.*" The claimant replied that he thought the meeting on the 16 November was the next stage in the process.

Answering questions from the Tribunal the claimant stated that the first time he knew that the

meeting of the 16 November 2006 related to gross misconduct and dismissal was at the meeting.

The claimant did not know who he could have appealed the decision to dismiss to, as the directors were the people who had made the decision to dismiss him.

Determination:

The Tribunal carefully considered the evidence adduced at the hearing. The respondent failed to properly research the claimant's background at the time of the interview process. The Managing Director and the Technical Director ultimately agreed in evidence that the claimant's offences were not criminal offences. The decision to dismiss the claimant was taken prior to the meeting of the 16 November 2006. There was a conflict of evidence between the parties as to whether or not the claimant knew in advance of that meeting what the meeting related to. The claimant attended that meeting and was summarily dismissed.

The claimant in not admitting that he had a suspended sentence and in not expanding on the extent of his traffic offences caused a breach of trust between him and his employer. The Tribunal finds that the claimant's conduct contributed in part to his dismissal. The Tribunal award the claimant €4,500.00 under the Unfair Dismissals Acts, 1977 to 2001.

The claimant accepted during the course of the hearing that he received payment as his minimum notice entitlement. This being the case the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)