

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee

UD270/2007

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. J. Sheedy

Members: Mr. G. Phelan
Dr. A. Clune

heard this appeal at Limerick on 22 February 2008

Representation:

Claimant:

Ms. Karen Ruddy B.L. instructed by Ms. Patricia O'Connor,
Patricia O'Connor Solicitors, 8 Lower Mallock Street, Limerick

Respondent:

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

The determination of the Tribunal was as follows:

The claimant had been employed as a security guard at various sites in the Limerick area since November 2002. The employment was uneventful until an incident in July 2006 when as a result of not attending for work and not informing management of his non-attendance the claimant received a written warning on 13 July 2006. According to the respondent's disciplinary procedure such written warning has a life of six months. The claimant accepted the written warning and did not appeal against it.

The claimant was one of five guards working the night shift at the site of a soon to be opened hotel on Sunday 13 August 2006. The claimant was guarding the main gate to the site. It was accepted that he could perform this duty whilst seated in his car. There was no site hut at this gate; there was a hut at the rear gate to the site. Some time after 11-00pm on 13 August 2006 the operations manager (OM) arrived at the rear gate. The respondent's position is that OM, accompanied by another guard (AG), walked to the front gate where they found the claimant to be asleep in his car. After some ten minutes, during which time the claimant was heard to be snoring, OM sent AG

away and then shook the car in order to wake the claimant. It is common case that OM then instructed the claimant to go home. The respondent's position is that the claimant was told to report to the respondent's Limerick office on the afternoon of Monday 14 August 2006 to see the general manager (GM). The claimant did not attend the respondent's office on 14 August 2006 and the respondent was unable to contact the claimant by phone on that day to again request him to attend.

The claimant was next rostered for work on Wednesday 16 August 2006. When he arrived at the site he discovered that he had been replaced and was not permitted to work. He then attended at the respondent's nearby offices and told OM that he had not been asleep. Whilst it is in the respondent's disciplinary policy that an allegation of sleeping at work is considered as serious misconduct and that an employee shall be suspended until a final decision in the matter was taken the claimant was not told that he was being suspended by OM on either 13 or 16 August 2006. The claimant's position is that he was threatened if he did not leave the respondent's premises on 16 August 2006.

The claimant attended a disciplinary meeting on 23 August that was attended by the claimant, his union representative (UR), GM and OM. At this meeting OM detailed his allegations against the claimant. UR requested that he be supplied with all relevant information and supporting statements. These were delivered to UR on 31 August 2006. At no stage was a written statement from OM supplied to the claimant or UR. A second disciplinary meeting was held on 8 September 2006 and was attended by the claimant, UR, GM and the assistant operations manager. OM was on annual leave at this time. GM, who did not give evidence to the Tribunal, advised the claimant of his dismissal in a letter dated 14 September 2006. The claimant was advised of his right to appeal the dismissal but did not appeal the dismissal to the respondent.

Determination:

The Unfair Dismissals Acts impose a burden on the respondent to show that dismissal was not unfair. In this case GM, the decision maker, who effected the dismissal, was not called as a witness. In those circumstances it must follow that the dismissal was unfair. Having considered the evidence adduced from both sides in this case the Tribunal, whilst faced with a conflict of evidence on the central issue of whether the claimant was asleep or not, prefers the evidence of OM in this regard. The Tribunal is of the view that, given the circumstances where the claimant was expected to work from his parked car, it would not be surprising if an employee such as the claimant were to fall asleep. The Tribunal, having also considered the claimant's attempts at mitigation of loss and his contribution to the dismissal, in all the circumstances award €20,000-00 under the Unfair Dismissals Acts, 1977 to 2001.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)