

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:

CASE NO.

Employee

UD1065/2007

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

Employee and

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. O'Leary B L

Members: Mr. J. Reid
Mr. N. Broughall

heard this appeal at Dublin on 14th March 2008
and 3rd June 2008

Representation:

Claimant(s): Mr. Joe Donnelly, Divisional Organiser, Mandate Trade
Union, O'Lehane House, 9 Cavendish Row, Dublin 1

Respondent(s): Mr. Eamonn McCoy, IBEC, Confederation House, 84/86 Lower
Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

This case came before the Tribunal by way of an appeal of a recommendation of a Rights
Commissioner reference r-049194-ud-07/JT

Respondent's Case

The HR manager MF told the Tribunal that she held this position for the past five years; she was responsible for two hundred and eighty five staff and twenty-eight managers. She was responsible for employees' time keeping and disciplinary issues. The claimant commenced employment in a temporary capacity in October 2002 until 31 December 2002. He was rehired in February 2003. In 2006 the claimant had a number of disciplinary issues and he was issued with a first written warning. In September 2006 he was issued with a letter of concern. The claimant refused to take

instruction from his manager CE and he shouted at her in an abusive manner on the shop floor in the menswear department. She met the manager CE on 5 February and went through details. She told the claimant to do certain things in the department and he refused. Another manager U McG was made aware that a customer complained about the claimant. The claimant was abusive and walked away from her. UMcG told her when she spoke to the claimant he did not pay attention and he walked away and told her to go to hell. She invited the claimant to a meeting on 25 February and made him aware of complaints that were made about him and gave him an opportunity to respond. She told the claimant if he was given instructions he should undertake them. If he had a grievance he could bring it to either her attention or to the attention of the store manager PB. She went through the details of the complaints and gave him the opportunity to respond. He told her that he did not take instructions from CE and that he took instructions from the senior manager. The claimant was very surprised that a customer had complained. The claimant worked in the hanging section of the men's department, the manager asked him to move to the shirts section and the claimant refused to go to the section. On 19 March the claimant took twenty minutes for his break.

The claimant was issued with a first written warning by letter on 1 April 2006. The claimant accepted that his behaviour was inappropriate. A complaint was made by AD who worked in the same area as the claimant. The HR manager took every complaint seriously. The claimant made unacceptable remarks to AD on a regular basis and he told her that he should marry her. The respondent had to speak to the claimant previously in another case about similar issues. AD was very upset and she could not take anymore. AD tried to talk to the claimant and she told him that she did not want to marry him and the respondent felt it necessary to interview him. She offered the claimant representation at a meeting and went through the details. The claimant admitted that he made comments to other staff and he was asked to discontinue this behaviour. He admitted that he had a conversation with AD. The HR manager asked him if he referred to her as his wife and he denied that he did. AD told him not to call her that and he admitted that he had a conversation with AD. The claimant was very aggressive at the meeting and he was not co-operative. He did not take on board the seriousness of the complaint. The claimant did not accept that the comments he made were inappropriate. At a meeting on 25 August they took everything into consideration because the claimant was adamant he did not understand some of the things that were said. The claimant was uncooperative at the meeting on 25 August.

It was then decided to issue the claimant with a "letter of concern" on 9 September 2006 and the complaints, which were made, were outlined in this letter. A meeting was arranged for 15 September and she wanted to read the letter of concern and afford the claimant the opportunity to ask questions. The claimant did not engage at the meeting, she read the letter and as soon as she read the letter, the claimant threw the letter at her, left the room and he then went to the men's locker rooms and kicked the walls and lockers. After that she was frightened as the claimant was going on the shop floor. She went to the shop manager to seek assistance as she was concerned at how angry the claimant was and no matter how she tried she could not calm him down. She went to the manager's office and told him about the situation. The claimant left at 4pm. that day and he was due to remain in work until 6p.m. The claimant was next due in work on Sunday but did not appear. She telephoned the claimant at home on Monday and he told her he would be in work on Tuesday.

In cross-examination she stated that she was HR manager for five years. The respondent had employees from twenty-five countries. When staff joined the respondent they attended an induction and the grievance procedure and disciplinary procedure was discussed. The claimant understood his instructions. She had two meetings with the claimant, one on 25 February and one

on 25 March and he was given a first written warning. The claimant was informed on the day about the meetings and the claimant always declined representation. In relation to the final written warning when asked if she told the claimant what the meeting was about she replied at that stage that the claimant declined representation. Asked that she did not issue a warning on 25 February she replied that she spoke to the claimant about his refusal to take instructions. The claimant did not ask for copies of the notes that were taken at the meeting. Asked what process she used she replied the informal procedure first to establish if it could be sorted out. Asked that she summoned him to another meeting and decided that a union representative should be present she replied that it was in his interest to understand the seriousness of the matter. She gave the claimant every opportunity to discuss the matter.

At every meeting the claimant was aggressive and he requested to work extra hours and she told him she could not accommodate him, as the store was not busy at the time. Asked if the claimant stated that there were three people present she replied it was not true, the claimant did not know what room the meeting was. Asked if the claimant did not know whom the union representative BA was she replied that the claimant elected the union representative. She was upset after what happened, the meeting ended at 4p.m. and the claimant was due to finish work at 6p.m. When she contacted the claimant regarding his absence on Sunday he told her that he was very upset. She made an appointment with the claimant on Tuesday.

The second witness for the respondent BA told the Tribunal that she was shop steward for five years. She attended a meeting on Friday 5 September in an office as a representative and a witness and that this was not a disciplinary meeting. The claimant did not want to attend but he then did. The claimant did not want to hear what was being said at the meeting. The HR manager read a letter of complaint and the claimant reacted angrily to it. The HR manager emphasised that it was not a disciplinary meeting. The claimant stormed out of the room at the end of the meeting and went into the locker room and banged and punched the lockers. The claimant came out of the locker room and said that he was leaving. She appealed for him not to leave but he went out through the loading bay. On the way out he said that he would do Mountjoy no problem and that he would come back and burn the place down. She was on her own when this was said to her. The claimant was angry and he just left. She was scared due to the remarks and she told P B because she was worried and requested that he inform security. This meeting took place on a Friday. There was another meeting on Tuesday and this was about the Friday meeting when the claimant denied that he said anything about a fire. The claimant did not want her at this meeting. She could not recall the end of the meeting.

In cross-examination asked did the claimant know why she was present at the meeting she replied she would definitely say yes. She did not know where the letter of concern went. Asked if he was angry about the contents of the letter she replied no that he was just angry to be there. She did not see the claimant kicking the locker and no damage to the locker was evident. On leaving he said that he would do Mountjoy and burn the place down but when pressed if he meant this she replied no. She was worried about the threat of fire and she suggested that extra security should be provided at the weekend. Asked who invited her to the Tuesday meeting she stated that it was not the claimant but she was with the claimant. The claimant was not surprised with the meeting but he did not want to go in to the meeting.

In re-examination she replied that she stated that as far as she could remember that the claimant left the meeting empty handed.

In reply to questions from the Tribunal when asked if it was usual that she should attend at the

invitation of management she replied that she was present as a witness not as a shop steward. The meeting was a cautionary meeting and it was usual for her to attend such meetings.

The third witness for the respondent PB the manager for twenty-three years told the Tribunal he was responsible for future sales targets, health and safety and three hundred employees. He knew the claimant and he had met him previously. It was brought to his attention that there was an issue with the claimant regarding a letter of concern and the meeting the HR manager attended in August 2006. The claimant had become aggressive at the meeting and when he went to the meeting the claimant had left. He interviewed those who had been present and heard the remarks about burning the store. He instructed security to be extra vigilant. On the 19 September the claimant was summoned to another meeting. PB attended with the HR manager and the claimant and shop steward attended. At the meeting he expressed concern at the claimant's aggressive behaviour and his remarks and he asked the claimant for an explanation. The claimant was aggressive and waved his arms and the claimant left his chair. It was a difficult meeting and he wanted to show the claimant that this was not an isolated issue. There were fourteen previous issues and all of these issues were put to him and he was given the opportunity to reply to all. He denied all involvement in the fourteen incidents and there was no common ground. The claimant denied saying that he wanted to burn down the store. The claimant was issued with a disciplinary letter on 19 September 2006 in which it outlined to him the damage to company property, aggressive behaviour and leaving work without informing his supervisor.

The claimant was invited to a meeting on 25 September. Present at the meeting were the trade union representative, the claimant, HR manager and PB the general manager. The atmosphere was good but the claimant denied everything that was put to him. The meeting lasted for over an hour and the claimant was given the opportunity to respond to allegations. The claimant stated that waving his hands was his normal behaviour. The claimant was invited to a meeting on 3 October when he would be informed of the outcome. He wanted to reflect on the matter and he took the view that the claimant would not apologise and took no responsibility for his behaviour. The claimant was issued with a letter of dismissal on 5 October 2006.

In cross-examination he stated that during the course of the claimant's employment he met the claimant on a number of occasions to encourage him and he felt that the claimant trusted him.

The claimant requested to work extra hours and he approved of it. He was amazed at the claimant's threat to burn the store. He acted on what he was told by BA the shop steward. The meeting on 19 September was for the claimant to explain his actions and previous actions. On 19 September he dealt with all issues including the issues of 15 September. Asked if the claimant did not have the chance of representation he replied witnesses are always invited as representatives for people. Three lockers were damaged but the claimant was not observed doing the damage. Asked if he only get one version of the events and dismissed the claimant's version he replied he gave everyone a fair hearing but took exception to the claimant's allegation that he was biased

In re-examination he stated that the claimant worked eleven hours per week and working on a Sunday was a regular occurrence.

In answer to questions from the Tribunal asked if he inspected the locker room he responded that he inspected every room and damage was done. Extra security was put in place. Asked what a letter of concern was he replied it was to show the claimant meant he was doing wrong by his behaviour. The concern meeting was to get the claimant to change or amend his ways.

The fourth witness for the respondent LC told the Tribunal that she has been employed in HR with

the respondent for three years. She did not know the claimant. The claimant wrote to her regarding an appeal and she arranged to meet with the claimant. She introduced herself to him and explained her role and explained that she was giving him an opportunity to explain in his own words what happened. The claimant commented on the fourteen issues and she wanted to get further background on all the issues.

The claimant's view on the meeting was that she had raised her voice to him and put words into his mouth and that PB had been poisoned against him. In relation to A D he said that she had bullied him and he agreed that though these had happened they had not happened as recorded. He said that he had felt that the meetings had not been fair, that he had not got fair representation. He had not asked for attendance representation. It was her understanding that shop stewards attended meetings as representatives. The claimant felt that the meetings were falsely recorded. She felt that the allegations against PB had to be investigated further. After this meeting she met with staff and PB. She addressed the issues that PB had raised and he was of the view that a fair hearing had been given to the claimant. Her conclusion was that no new or additional information was given to change the dismissal.

In cross examination asked that it was made clear that BA was not a suitable representative she replied that if an employee does not bring a representation a shop steward would always be brought into the meeting. The claimant had not looked for an alternative representative. All issues were taken into consideration and she took the view that dismissal was the only option.

In answer to questions from the Tribunal asked if the claimant would have never been allowed to work on the Sunday she replied that if he explained himself he would have been allowed to work.

In re-examination she stated that she spoke to the claimant regarding his unauthorised absence. The claimant telephoned her to apologise for his behaviour and to acknowledge that she was only doing his job.

Claimant's Case

The claimant told the Tribunal that in 2002 the respondent interviewed him. After three months he told that manager that he was going home and that he could come back to work. He completed two inductions with them. He received the handbook twice but it was not explained. Staff were brought around the store and all the managers were made known to them. He made friends with managers but not with the younger staff. He got on well with customers especially with older female customers and he was the mascot of the store. He asked the HR manager for more hours and she refused and he approached PB. HR resented his approach to PB. He was not given notice of the meeting of 15 September. He joked about more complaints and he did not know why anyone was there. He did not know why BA was there and she was not there to represent him. He was accused of being a bully and being romantic. He left the meeting and went to the locker room and he did not cause damage to the lockers. Before leaving he met with AD and said that he would leave because the other staff would provoke him and put him out of control and that he might cause a fire and end up in Mountjoy. He did not threaten to burn the store.

He went to the union office on Tuesday evening but did not meet an official. On 19 September he met with PB, BA shop steward, TD union representative and MF, HR. The claimant was not allowed to speak and defend himself. He stated that PB was poisoned against him. PB did not listen to his side of the story and he was not aggressive at the meeting. He did not telephone MF to apologise. His supervisor for one and a half years had no complaints against him. He was

dismissed on 4 October. From October to Christmas he was unemployed. During December and January he worked in security and earned €124 per week. From January 2007 to April 2008 he was unemployed. In May 2008 he was employed in security. He endeavoured to obtain employment during 2007 but he did not have evidence of this with him. He had his own business in Africa, which he derives an income from. He attends college Monday to Thursday and weekends Friday to Sunday he is available to work.

In cross-examination he stated that he commenced employment with the respondent in February 2002 and restarted in 2003. In December 2002 he went home to Africa but was rehired in 2003 and was given induction. He signed the handbook because he wanted a job but he did not read it. Asked if he accepted the first verbal warning he replied he never accepted such a warning. He kept the letter in his locker. The letter was given to him but he was ignorant of its contents. He did not take the contents of the letter into consideration. He did not shout at managers and he never shouted at anyone. He never read the letter of complaint and no one explained it to him and he did not accept it. AD was assigned to his section but she was not nice. He stated that he never asked anyone to marry him, AB made this complaint and a meeting was called. He was not asked if he wanted to have a representative at the meeting. He did not know that the first meeting was not a disciplinary meeting. He was unhappy about the meeting and he asked MF if she wanted to see him. He was given a letter, which he pushed aside, and he left the room. There was no damage to the locker but there may have been noise. He left by the back door because by going out the front the staff would provoke him. Asked if he was angry but he did not intend to burn the place he replied he did not explain what he meant by this to BA. Management should have listened carefully to understand what he meant.

He did not report for work on Sunday and he went to the union on Monday. He attended the meeting on Tuesday; he did not know how long the meeting lasted. PB did not listen to him and he never had time to talk to him. The claimant had two roles at the meeting, to explain what had happened and deal with the notes that were false. He was suspended and told to go, that there would be another meeting with his trade union representative present. At the second meeting he hoped to prove that false allegations were made against him. At the meeting his union representative stated that only the issues of AD could be addressed. The issues were not fully addressed because this meeting was postponed.

PB did not speak because he had his mind made up. During the break the claimant and his union representative discussed issues. When the meeting restarted PB came back in and concluded the meeting. He was not happy with the content of the meeting. He asked his trade union representative what was happening next and he said that there would be an appeal. On 3rd October he was dismissed and that was confirmed in a letter dated 4 October 2006. PB considered all the issues over two meetings and gave his considered opinion. He had a good relationship with PB and he approached him for extra hours and he listened to him. After the meeting with MF, PB was poisoned against him and did not listen to him. He stated that he never knew who was in the union. He knew that someone always attended from the office. TD was the only one who defended him.

BA did not give him advice. He stated that they were all afraid of management. He applied to another retail outlet for a job and he applied to teach English. He went for induction to the retail store but afterwards they did not hire him and the position he applied for was part time. The claimant is currently attending Dublin Business School.

In re-examination the claimant said that no one told him that he had the right of appeal.

Determination

The Tribunal determines that the claimant was not unfairly dismissed in this matter. The claimant's actions at the meetings were such that entitled the employer to take the action that was taken. The employer's meeting with the claimant on the 25 August was, in the opinion of the Tribunal a disciplinary meeting and gave the relevant information to the claimant that should have enabled him to address the allegations made against him. Instead of acting in that way he chose to become aggressive and indulged in threatening behaviour. This was not the first time that he had acted in this way and his general behaviour with the other staff left something to be desired. The Tribunal accepted the claimant's contention that he did not mean to convey to the person who accompanied him to the meeting that he intended to burn down the store. The Tribunal accepts what in fact was said was "that he did not want to cause fire" meaning that he did not wish to cause further acrimony between himself and the staff. The allegations made to him at the meeting of the 25 August were in the opinion of the Tribunal not that serious and were probably little more than puffin statements. Overall however, the Tribunal accept that the behaviour of the claimant was such that could be considered threatening and put the staff interviewing him in fear and thus entitled the respondent to dismiss. His claim under the Unfair Dismissals Acts, 1977 to 2001 fails. The Tribunal upholds the recommendation of the Rights Commissioner.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

