

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:

CASE NO.

Employee

UD1040/2007

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 M. O'Connell B.L.

Members: Mr F. Moloney  
Mr G. Whyte

heard this appeal at Dublin on 25th March 2008  
and 22nd July 2008

Representation:

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Appellant(s): Mr. Ed Kenny, Branch Organiser, SIPTU, Security Branch,  
Liberty Hall, Dublin 1

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

The determination of the Tribunal was as follows:-

This case came before the Tribunal by way of an appeal by an employee appealing against the recommendation of the Rights Commissioner (ref r-042453-ud-06/JT)

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

The first witness for the respondent gave evidence of working as a day security guard at the Mater Hospital site. He reported to the hut for duty on the 8<sup>th</sup> April 2006 at 8.05 am. He was due to report at 8am but was delayed due to traffic. He was due to replace the appellant who had worked the night shift. On reporting for duty the appellant complained to him about being late for work stating that all the employees had problems with him. He then noticed that the report sheets for the night had not been delivered and asked the appellant why this was so as they were due to have been

delivered by 7.45am. The appellant replied that he was not his boss. The appellant then delivered the report sheets and returned to the hut.

The witness went to the A & E Department of the hospital and noticed a person asleep in the waiting room. He checked with the receptionist to ascertain if the person was registered. While doing so the appellant approached him and told him that he should not be there and to return to the hut. He told the appellant that this was part of his duties. He was then grabbed by the hand and pulled and pushed by the appellant. He was also verbally abused, told that he was ignorant and stupid and thought that he was going to be struck. The head nurse, the ambulance crew and another colleague witnessed the incident. The witness called his duty manager and immediately reported the matter.

Under cross examination the witness agreed that he did not call control to inform them that he would be late for work and agreed that he had been late for work once previously.

The second witness gave evidence of working as an operations manager with the company since January 2005. Any incidents that occurred on site were reported to the duty manager via the control room. On the morning in question he was contacted by the duty manager and told of the incident. He then attempted to contact the appellant by telephone but was unable to do so. He left a message on his phone asking that he make contact with him.

At approx 6.pm that evening the appellant contacted him. He informed him that an allegation of abuse and assault had been made against him and requested that the appellant submit a report of the incident and to report for a disciplinary hearing the following Monday morning where he could be accompanied by a colleague or union official. He informed him that he was suspended on pay.

The meeting took place on Monday the 10<sup>th</sup> April 2006 and a colleague accompanied the appellant. The Human Resources manager was also present at the meeting. The appellant read an eight-page statement and was then questioned about the events that occurred the previous Saturday. He felt he was being set up and became agitated during the meeting. The meeting was then recessed but the appellant failed to return at the agreed time. The appellant then telephoned saying something had come up and he was unable to return but agreed to return the following morning. The operations manager and the HR manager interviewed two employees on the evening of the 10<sup>th</sup> April 2006 who had witnessed the incident. They also viewed CCTV footage of the incident at 8.30am on the 11<sup>th</sup> April 2006.

A further meeting occurred on the 11<sup>th</sup> April 2006. The appellant, his union representative, the operations manager and the human resources manager were present at the meeting. Events that occurred on the 8<sup>th</sup> April 2006 and CCTV evidence were discussed. The meeting concluded and having considered all the evidence available the operations manager was of the opinion that an incident of gross misconduct had occurred and a decision was taken that the appellant's contract should be terminated.

Under cross-examination the witness agreed that no verbal or written warnings were given to the appellant.

The third witness for the respondent a nurse manager gave evidence that he knew the appellant and he relayed an incident, which occurred between 6.30a.m. to 6.40am. The appellant was aggressive towards a fellow security officer. The f... word was used and he could not recall what other bad language was used. The appellant invaded the other security officer's personal space and had his

finger pointed at him and was quite loud. He tried to diffuse the situation and several other people became aware of the incident including an ambulance crew that had arrived. He was of the opinion that it could have been an assault. He tried to talk to the appellant and tell him to take the matter elsewhere. The appellant did not say anything to him. The other officer's demeanour indicated to him that he was afraid of the appellant and the appellant was talking him down. He intervened twice and the appellant was still verbally and physically aggressive. The witness had other things to do and he did not call the gardai or anyone else. He was worried about the behaviour and he observed the incident from a distance.

Under cross-examination he stated that the incident took place before 7am. He could not comprehend what the appellant was saying. He could not recall the exact words that were used. He was not aware of a counter complaint. Asked if he worked closely with the appellant he replied not specifically but in certain situations they would have to liaise with each other. He had never previously witnessed behaviour like that. Asked if the appellant undertake his duties proficiently he replied it never came to his notice until that morning. Asked if he did not consider it serious enough to mention it to anyone else he replied that it was an oversight on his behalf. The outburst should never have happened in any workplace. He dealt with the situation as he saw it. Asked if the appellant did not assault anyone he replied he saw no blows being struck but it was a very serious situation. The first thing that the respondent did if there was a problem was to call security and then call the gardai. The witness intervened to see if he could prevent a more serious assault-taking place.

In answer to questions from the Tribunal asked if he saw the appellant assault his colleague he replied that the appellant invaded his personal space and he did not see him punch the appellant. Asked if CCTV footage indicated that the incident referred to times of 8.08, 8.18, 8.22, and 8.25 he replied that he thought that the incident occurred before 7a.m.

The HR manager told the Tribunal that her role was to gather evidence and to decide whether the incident warranted a disciplinary meeting. On Monday 10 April 2006 she became aware that an incident had occurred in the hospital. She spoke to the operations manager who had gathered information and he was in touch with the appellant and the operations manager asked the appellant to attend a disciplinary meeting on Monday. The duty manager investigated the matter.

The appellant attended a meeting on Monday morning accompanied by PF, and also in attendance were the witness and the operations manager. The operations manager asked the appellant why he was at the meeting. The operations manager read a seven to eight page statement on his perception of events and went through the events. The appellant came prepared with a seven to eight page statement, which the operations manager read. The appellant denied that any incident took place and he felt it was a set up. The appellant felt that everyone was out to get him. During the meeting the operations manager called for a recess for five minutes. After that PF and the appellant were called in and the duty manager was called in to give his version of events and again the appellant said it was a set up. The operations manager called for another recess as the meeting had become very heated. The appellant made a comment that he felt like the Guildford four and it was getting out of hand. The meeting took place in the respondent's office. After the recess there was no sign of the appellant or PF. There was a missed call from the appellant and there was a message from the appellant, which indicated that something had happened, and he was not coming back to the meeting. The operations manager telephoned the appellant who told him that he was not coming back. The operations manager asked the appellant to return at 11a.m. the next day. The appellant spoke to the operations manager and informed him that he had got in touch with his trade union representative and told him what happened. The meeting with the union representative was

rescheduled for Tuesday and the next day the union representative and the appellant attended. She told the trade union representative that the respondent had CCTV footage but he did not want to see it. The appellant told the trade union representative official that he had no problem with CCTV and she left the appellant and the trade union official to view the CCTV footage. The meeting concluded and she told the appellant that she would revert to him. She then made the decision to dismiss the appellant on the basis of what had transpired on Saturday. She felt the appellant was the aggressor. She also took into account the appellant's demeanour at the meetings. She felt that as the appellant was a supervisor his behaviour was totally unacceptable and she felt that it was gross misconduct. The appellant was given the opportunity to appeal the decision. The chief operations officer heard the appeal and this was normal procedure in the respondent company.

The statement was made available to the appellant at the second meeting, on the first day the meeting did not conclude as the appellant and PF did not return. The respondent had a good relationship with the trade union and it followed procedures in accordance with company procedures.

Under cross-examination she stated that if the respondent received a complaint the person that the complaint was made against was contacted. The appellant told her that he felt his life was in danger and his colleague was not suspended. Asked why the appellant's colleague was not suspended if two people were involved in an altercation she replied she had already started the process and it was only at the disciplinary meeting that the appellant mentioned that he felt his life was in danger. Asked if the appellant was given the opportunity to view statements in advance of the meeting she replied that the operations manager told the appellant why the meeting was taking place and the appellant came to the meeting with a prepared statement of his version of events. The statements were read out to the appellant.

In answer to questions from the Tribunal she stated that on Saturday the operations manager spoke to the appellant and he told him that a meeting was arranged for Monday morning. She did not have notes of the appellant's interview. If an officer was late the officer on duty should remain until a replacement arrived. A higher standard would be expected of a supervisor than a subordinate. The appellant's behaviour was unacceptable for a supervisor and she thought the appellant's behaviour was over the top. She was concerned about the appellant's behaviour at the meeting.

### **Appellant's Case**

The appellant told the Tribunal that he worked from 8p.m. the previous night to 8a.m. At approximately 7.50a.m. RM arrived on site. The appellant did not have a relief security officer and RM expressed concerns regarding this. RM contacted headquarters to find out why the security guard was late and he was informed that he was on his way. The appellant remained in the security hut at the entrance to the accident and emergency department. The security guard arrived at approximately 8.20a.m. in a taxi and he appeared not to be fully awake. The appellant gave him time to settle himself and allowed time for the hand over. The security guard picked up a selection of A4 reports and threw them in his face and told him that they should have been handed in half an hour ago. The appellant tried to explain to him that it was a busy night in the Accident and Emergency Department and him arriving late did not help. The security guard came across as being above him and he seemed very agitated. The security guard then went to the Accident and Emergency waiting room and noticed that there was someone asleep in the waiting room. The appellant had the authority to give the security guard instructions. One security officer was on duty in the Accident and Emergency department and they changed every hour.

That evening the appellant received a call from the operations manager who asked him about the incident in the accident and emergency department. The appellant was a bit shocked and he felt that the matter did not need to go as far as it did. He tried to explain to the operations manager what had occurred. The operations manager told him that he was not required in work and he was summoned to a meeting on Monday morning and that he could bring a statement of the events that had occurred. On Monday morning he received a call from the operations manager who told him that the situation was now serious and he asked the appellant to bring a representative to the meeting. The appellant arrived at the office in HQ and waited for a long time, he was taken to an office and introduced to the HR manager. He was asked if he brought a statement. The operations manager asked him to read the statement and the operations manager took him through his version of events. He felt at the meeting that it was a set up. He felt that there was pressure put on him to cancel his employment. The operations manager and the HR manager called a recess and the meeting did not get heated. After the recess the duty manager was in the room and he gave instructions to the operations manager. Another recess was called and on leaving he felt very uncomfortable. Nothing that he could say would change the decision that the operations manager and the HR manager had made. He contacted his trade union representative and a meeting was then arranged and his trade union representative attended. The trade union representative stated that the matter could be dealt with differently and prior to the appeal being heard the appellant's P45 was posted to him.

Prior to the meeting there was no mention of a disciplinary until about three quarters of an hour before he arrived at the meeting. The operations manager told him not to show up for work until he had spoken to him. He did not ask the operations manager if he needed representation. He felt that the matter had been blown out of proportion. His colleague always felt that he was right and never listened to instructions. He was a supervisor when he started on this assignment and he was on site for six to eight weeks.

He relayed an occasion when he was employed on another site. He had concerns about fire procedures, which he included in a report and as a result of this he was treated differently. He walked off a job on 31 January 2006 after serving a full shift.

Under cross-examination he stated that the other security officer was the senior person on site. The appellant was the only supervisor on site and he reported to the operations manager. If there was a problem the operations manager would tell the appellant and the security officers who worked on days would tell the appellant at 8p.m. Asked if he spoke to the security guard in a calm manner the appellant replied he may have raised his voice. Asked if the head nurse tried to talk to him he replied that it was not the case. Asked if being invited to a meeting was normal and that he should attend he replied yes that he would have to give his version of events. The first time he met the HR manager the meeting was recessed three times. Asked the reason for the recess he replied that there was no reason given and he thought it was to get the duty manager. He admitted that people were shell shocked at the meeting but no one was aggressive. He did not return to the meeting, he tried to contact the operations manager and he thought that he left him a voice mail message. He did not leave a text message. He was not disrespectful at the meeting. He told the operations manager that he did not conduct an investigation and that he the appellant had enough. Asked if his union made representations on his behalf he replied that he believed that there were negotiations.

He was not issued with terms and conditions of employment and he did not attend an induction. Since his dismissal he was unable to obtain alternative employment in security. In August 2006 he started a property maintenance business and there is now a downturn in that business.

## **Determination**

The Tribunal accepts that a confrontation took place between the appellant and a colleague on 8 April 2006.

The Tribunal believes that this incident was heated but the Tribunal does not believe that the CCTV evidence supports the respondent's claim that the appellant assaulted one of his colleagues in the course of the incident.

The Tribunal believes that the decision to dismiss the appellant was disproportionate to the seriousness of the incident.

The Tribunal notes that the appellant had no prior record of being involved in such incidents or had been guilty of such incidents,

The Tribunal had concerns about the investigation of the disciplinary process and its application.

Accordingly the Tribunal believes that the dismissal was unfair.

The Tribunal believes that the appellant nonetheless contributed to the circumstances leading to his dismissal and awards him compensation of €10,000 under the Unfair Dismissals Acts, 1977 to 2001 and upsets the recommendation of the Rights Commissioner.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

