

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
Employee

CASE NO.
UD467/2008

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan
Members: Mr F. Cunneen
Ms. E. Brezina

heard this claim at Dublin on 16th December 2008

Representation:

Claimant: Ms Aoife Coughlan BL instructed by Mr Stephen Fleming, Victor Blake & Co, Solicitors, 2 The Mall, Lucan, Co. Dublin

Respondent: Mr. Peter O'Brien BL instructed by Helen O'Riain, Michael Nugent & Co., Solicitors, 6 Sandford Road, Ranelagh, Dublin 6

Background:

Dismissal is not in dispute in this case. The Respondent contends that the Claimant was involved in dangerous horseplay on a building site. The main contractor would not allow the Claimant on the site after the incident. The Respondent made representations to the contractor to no avail. The Respondent had no other work for the Claimant.

Respondent's case:

The Tribunal heard evidence from the foreman and site engineer. The foreman was one of two foremen on site for the Respondent. The Respondent was one of six operators/ sub contractors on the worksite. There were six hundred workers on the site. The Claimant was a machine operator, operating a 360° excavators and JCB's. The Claimant had been given an induction course by the Respondent and the main developer conducted inductions to ascertain which of the workers had a "safe pass" etc. An induction form and site rules document was opened to the Tribunal. The witness explained that they had ongoing and monthly safety procedure checks.

On 20th December 2007, at circa 4.00p.m, which was their last working day before Christmas the witness received a phone call to say that there had been an accident on the site and that the Claimant had hurt his leg. The witness spoke to the employees and to the engineer for the main developer. The Claimant was in hospital and he phoned the Claimant who was waiting to be seen

by a doctor.

When they returned on 07th January an Accident Report Form (ARF) was filled out. He did not get statements from employees. He did not tell the Claimant that he would lose his job because of the incident. He told the Claimant that he would write it on the ARF form.

In answer to questions from the Tribunal the witness explained that a worker had died in an accident just a few weeks prior to the incident. He explained that the main developer was very stringent on safety and it was the main developer that carried out inductions. The Respondent carried out its own risk assessments and its own “toolbox talks”.

The witness explained further, that, “there probably wouldn’t have been disciplinary proceedings, only that (a representative for the main developer) saw the incident and made a report”.

Cross-examination:

The witness was not aware if the Claimant had been given a contract of employment. The Claimant was not given grievance procedures or disciplinary procedures. He himself took no part in the dismissal.

The Tribunal heard evidence from one of the directors of the Respondent. He first heard of the incident on the 20th December. The contracts manager for the main developer phoned him and told him that the Claimant and another worker would not be allowed back on the work site because of “horseplay”. He told the manager “it was a bit harsh as it was coming to Christmas time”. The manager told him that there was “zero tolerance” because a week prior to that someone was killed on the work site.

A letter from the main developer to the witness and dated 21st December 2007 was opened to the Tribunal:

“Following an incident on-site yesterday evening involving two of your employees, namely (the claimant and another named employee) we are writing to inform you that both personnel are not permitted to enter the site from this date.

The reason for the above as (sic) the fact that both men where (sic) involved in actions that compromised the safety regulation imposed on the site and where (sic) a danger not only to themselves but also to other personnel on-site. It should be pointed out that their actions are in complete violation of basic rule number 3 of (main contractor) code of practice which is given to each employee at the initial safety induction course.”

The witness was asked if there was another position that the claimant could have taken in the company. He explained that there were six or seven workers employed on other sites as machine drivers and there were no other vacancies at that time. He explained that “his hands were tied” and his secretary typed a letter for the claimant re-iterating what he had been told by the main developer. He also explained that it was not his decision to let the claimant and his co-worker go. The witness told the Tribunal that if the incident had happened a month earlier then they would have probably been allowed on the site however a worker had died in a site accident a week earlier. There were health and safety personnel all over the site. The main developer told them that if the workers returned to the site then the contract would be terminated.

The witness explained that the claimant was not given a contract of employment. He himself had not heard of grievance procedures.

Cross-examination:

When asked the witness explained that he did not investigate the incident nor did he interview the claimant. An engineer for the main contractor saw the incident and he did not speak to the engineer; he spoke to his site foreman.

Claimant's case:

The claimant explained that he was talking to some people on the site and BK jumped on his back from behind. They fell to the ground. Other workers carried him to a car and drove him to hospital. The foreman phoned him to ask how he was. The foreman did not tell him that he could lose his job. It transpired that the claimant had a bad leg injury and he had an operation.

At some point the foreman told him that he probably would not be able to return to the site.

Cross-examination:

The claimant was aware that an employee (engineer) of the main developer saw the incident and that employee did not take note of his (the claimant's) name.

Determination:

The claim under the Unfair Dismissals Acts, 1977 to 2001, succeeds. The employer's hands were tied, however, procedurally the employer was at fault. There was no investigation and there was no grievance procedure. Having considered the remedy the Tribunal determines that the most appropriate remedy be compensation. Accordingly, the Tribunal awards the claimant the sum of €5,253.66, as compensation under the Unfair Dismissals Acts, 1977 to 2001.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)