

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: Employee -claimant CASE NO. UD142/2008
Against
Employer -respondent
under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms N. O'Carroll-Kelly B L

Members: Mr M. Murphy
Ms M. Maher

heard this claim at Dublin on 12th June and 12th December 2008

Representation:

Claimant : Mr David Kearney B L instructed by
H J Ward & Company, Solicitors, 5 Greenmount House, Harold's Cross, Dublin 6W

Respondent : Ms Patricia Hill B L instructed by
Eirinn McKiernan & Co, Solicitors, 11 Ashe Street, Cavan

The determination of the Tribunal was as follows:

Respondent's Case:

A traffic management expert gave evidence to the Tribunal. The witness has twenty years experience in traffic management. He trains people to the UK standard, as currently there is no standard in Ireland. The witness provides traffic management training in a classroom scenario and also on site. A prepared diagram was submitted to the Tribunal of the stop/go traffic system in place on the N2, where the claimant was working on the 27th November 2007. This system uses a small area as a "holding area" in which traffic feeds through to the following section and to the end of the stop/go system, where the traffic from the opposite direction is waiting to proceed. Without an individual on the stop/go sign the traffic could potentially proceed through the system and meet other traffic head-on. A traffic switch requires a minimum of six people. If only five people were used in a traffic switch, it would not be considered good working practice. Phase 1 of the trafficswitch requires six people while phase 2 of the switch requires four people.

During cross-examination the witness stated that it was within the control of the site supervisor as to whether or not the middle holding section of the stop/go system was required.

The supervisor of the site on the 27th November 2007 gave evidence to the Tribunal that it was his responsibility to ensure that the traffic management operated smoothly and safely. The claimant had a lunch break between 11am and 12pm on that day. A traffic switch was due at 2pm. The claimant was at his post on the stop/go sign at this time. The supervisor was at a different section of the works when the claimant contacted him, by text, to request a break. The supervisor telephoned the claimant and told him that as he was arranging the traffic switch, the claimant could have a break in 10 or 15 minutes. The claimant became aggressive.

The supervisor drove to where the claimant was positioned. The claimant was aggressive and said he wanted a toilet break. The supervisor reiterated that the claimant could have a break in 10 minutes. The claimant replied that if he could not have a break, then he would leave. The claimant left his position unmanned but the stop sign was displayed. However, another employee was still required to stop the traffic and the supervisor had to man the claimant's position until it was covered. The supervisor had to carry out the traffic switch on his own, which was dangerous.

The claimant returned at 2.45pm. The supervisor informed the claimant that he had left the site in a dangerous situation, that he would be paid until 2pm and that he should contact the office about all other matters. The claimant departed the site.

The supervisor added he does not have the discretion to delay a traffic switch as the contractor on site informs the supervisor when the switch is to be carried out. After a traffic switch has been completed only two stop/go operatives are required and the other workers get a break.

The claimant did not mention that he required a toilet break until the supervisor approached him at his position and told the claimant that he could not have a break at that time. There was a toilet 500metres from the claimant's position that he could have walked to but the claimant drove from the site in his car and was gone for approximately 35 minutes. The Contracts director subsequently spoke to the Supervisor as part of the investigation into the matter.

During cross-examination the supervisor stated that it was the claimant's second day on the site.

It was put to the supervisor that he had continued to refuse the claimant a toilet break even though the claimant said he was close to soiling himself. The supervisor denied the claimant had told him this.

It was put to the supervisor that the claimant was not informed that a traffic switch was to take place. The supervisor replied that this was not the case, as a traffic switch could not take place unless the staff knew about it.

When the claimant returned at 2.45pm the supervisor told him that he was finished for the day on the site. He did not dismiss the claimant, as he did not have authority to do so.

In reply to questions from the Tribunal, the supervisor stated that the stop/go system is communicated via radios. The claimant's position in the centre of the traffic switch was necessary as it was a holding area for cars. The claimant was not needed for the traffic switch itself but he was needed for the preparation of the traffic switch. It was not possible for the supervisor to man the claimant's position, as the supervisor was needed elsewhere for the traffic switch. There was a small delay in carrying out the traffic switch as a result of the claimant's actions.

The contracts director gave evidence to the Tribunal that he oversees many jobs and projects. He has been involved in traffic management for a considerable time.

The contracts director was made aware of what had occurred on the 27th November 2007. He spoke with the supervisor who told him what had happened. The general manager made the decision to suspend the claimant while the contracts director carried out an investigation. As part of his investigation the contracts director attended at the physical location of the incident and he also received a full description from the supervisor as to what had occurred.

The contracts director met with the claimant on the 7th December 2007. He asked the claimant to give a full account of what had happened on the 27th November 2007. The claimant's father also attended the meeting. At the meeting the contracts director asked the claimant to recount the day of the incident.

The claimant stated that he had text his supervisor and then when the supervisor telephoned him he told him he needed a toilet break. The claimant said it was safe for him to leave his position, as the supervisor was there. The contracts director told the claimant that the only reason the supervisor was there was because the claimant had given him an ultimatum. The claimant repeated that he had needed a toilet break.

The contracts director considered that the claimant's actions resulted in a dangerous situation. He reached a decision that the claimant had engineered the situation to bring the supervisor to where he was positioned. He recommended to the general manager that the claimant be dismissed. The general manager subsequently sent a letter of dismissal to the claimant dated the 7th January 2008.

The contracts director commented that the claimant was untrained when he commenced employment with the respondent. The respondent company trained the claimant on site, as a training course was unavailable at that time. Traffic management as an industry is mainly to do with safety and the reputation of the company in this respect is very important.

During cross-examination the contracts director was asked what would happen if an employee became ill on site. The contracts director replied that in such circumstances emergency procedures would be implemented. There is a safety issue when working with less than the optimum number of people for a traffic switch. It is the supervisor's decision to continue or not when short-staffed.

The contracts director carried out the investigation in accordance with the procedures outlined in the employee handbook. The supervisor's account of the incident was more credible than the claimant's. It was put to the witness that the claimant was not given an opportunity to give his side of the story and that the outcome was pre-determined. The contracts director replied that this was untrue. The supervisor was not present at the meeting the contracts director had with the claimant on the 7th December 2007. The contracts director considered that the claimant's actions were a major breach of safety procedure and his behaviour was grossly negligent. The contracts manager did not consider remedies other than the dismissal of the claimant. The claimant was paid until the 7th January 2008.

The managing director who was not directly involved in this case said that safety was the respondent's top priority. The company had an excellent record in this regard and their reputation was built on that record.

A foreman with a company who was undertaking the resurfacing work at the time explained how a traffic switch worked. Traffic was stopped at both ends of the area in question to allow plant and equipment to move from one side to another. Ideally that manoeuvre should take only a few minutes in order to prevent frustration with drivers and traffic congestion. He said that this operation could not be done as planned in the afternoon of 27th November 2007, as one of the respondent's signalmen had thrown his signage on the road and walked away from it. He noted that traffic could not be unnecessarily halted due to a toilet break.

Claimant's Case

The claimant had "a labouring role" with the respondent and undertook all tasks assigned to him under that heading. He commented that he was never given any training or instruction on how to operate a traffic control system using Stop and Go signs. He was assigned to such a duty on a section of the N2 in late November 2007. Six other colleagues including a supervisor were also detailed to that operation. Communications between those colleagues was done through vision, radios, and by telephone.

The claimant reported for duty around 7.30am at the respondent's depot on 27th November 2007 and commenced working on the site some thirty minutes later. That work involved controlling the flow of traffic through an area where resurfacing was taking place. He took a fifteen-minute break from that duty around 10.30am. At approximately 1.15pm the witness texted his supervisor stating he needed to go to the toilet. That supervisor phoned back ten minutes later and during the course of their conversation the claimant told his supervisor that he urgently needed to relieve himself. The supervisor refused that request. The pressure to go to the toilet increased forcing the claimant to leave his post some time later with a view to relieving himself. That relief came while he was on the way to the gents. The claimant satisfied himself there was no danger to the public or his colleagues while he abstained himself for that much needed break.

When the witness returned to the site around forty minutes later the supervisor told him in no uncertain manner that he was to leave the site. A number of meetings were subsequently held between the respondent and the claimant resulting in the claimant's suspension. It was the claimant's contention that neither he nor his representative was given the opportunity to present their case. Following that suspension meeting the claimant received a letter from the general manager in early January 2008. That letter informed the witness that his "appeal against dismissal is rejected". The letter writer went on to confirm that the claimant's employment with the respondent was terminated with immediate effect.

The claimant had no knowledge of or any interaction with the foreman from the road surfacing company.

The claimant's father represented him at a meeting with the respondent in early December 2008. His hope and intention was to resolve issues. However, he was unable to put his son's case to the two managers present as he was told to "shut up" when he attempted to speak.

Determination

Following a careful consideration of this case the Tribunal unanimously finds that the claimant was

unfairly dismissed. An employer has a duty of care to its employees and in that context alone, failed to honour that duty in this case. The procedures adopted by the respondent were inadequate and flawed. No proper investigation was conducted into this affair, the claimant was denied natural justice, and both the claimant and his representative were not given a fair hearing. The respondent over reacted to this incident and the sanction imposed was disproportionate to the alleged offence. However, the Tribunal is not satisfied at the attempts made by the claimant to mitigate his loss

The claimant is awarded €10,000.00 under the Unfair Dismissals Acts, 1977 to 2001.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____
(Sgd.) _____
(CHAIRMAN)