

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee

UD767/2007

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr M. Gilvarry

Members: Mr. D. Morrison
Mr M. McGarry

heard this claim at Castlebar on 29th May 2008, and 1st October 2008, and 2nd October 2008

Representation:

Claimant: Ms. Martina Weir, Siptu, Mayo No. 2 Branch, Moneen Road, Castlebar, Co. Mayo

Respondent: Mr. John Brennan, IBEC, West Regional Office, Ross House, Victoria Place, Galway

The determination of the Tribunal was as follows:

Respondent's case:

The Tribunal heard evidence from the managing director who was also the general manager (AM). The company is part of a multinational fish food company. The company makes fish food mainly for Trout fish and in pellets. They sell to farms in Ireland and Scotland. The factory was built in 1999. They employ twenty people. The plant is computer controlled and they run two shifts. The hourly paid employees, which number circa sixteen people have siptu as their union. The Claimant was a general operative on the bagging line and on the forklift.

On the evening of 11th July 2007 circa 9.00 p.m. he missed a call from the shift supervisor (aka DG). He was at home and the supervisor was operating the evening shift. The evening shift was from 4.00 p.m. to midnight. The message that the supervisor left was that the supervisor wanted him to call to the plant to deal with a problem. He contacted the supervisor and went to the plant.

He arrived at the plant at 9.35 p.m. He went to the outside laboratory and asked the supervisor what the problem was. The supervisor told him that at the beginning of the shift the loading bay operator (aka EM) told him that some of the feed would have to go directly to the loading bay

rather than the racks, where that feed normally went. In this instance the feed was destined to go out the following morning therefore it was to go directly to the loading bay.

The loading bay operator also told him that he told the Claimant that the feed needed to go to the loading bay. The Claimant asked him if he was going to be paid extra for that work. The Claimant went on a break and the supervisor took over in assisting the work. The supervisor assisted with the loading. A general operative (aka JL) took over the forklift. The supervisor asked JL how many tons of feed were on the loading bay and JL told him that only four tons were to go to the racking bay and not the loading bay. The supervisor instructed JL to put food onto the loading bay and he did.

The Claimant returned from his break and took over the forklift. The supervisor stayed on the packing line. The supervisor again told the Claimant to put the food onto the loading bay and the Claimant refused. The supervisor told the Claimant that if he was not prepared to do that then he might as well go home. The Claimant got out of the forklift and stood on the platform beside the supervisor. The Claimant was, "right up into his face wagging his finger" and he was telling the supervisor not to threaten him. The Claimant went back to the forklift. During this time the supervisor was saying to the Claimant, "how is it I am threatening you". The Claimant then got off the forklift again and told him not to threaten him the supervisor then said to hell with this I will let (managing director) deal with this. It was about this time that he (the witness) got a missed call on his phone.

He went to the plant. He was shocked at how upset that the supervisor was. He interviewed a number of shift employees, specifically JL and HC. HC was a machine operator working on an extruder two floors above the ground floor. None of those men were aware of any incident. He had notes from discussions that he had with the people on 11th July.

He discussed the matter with the supervisor and the supervisor told him that he did not want the matter to escalate or that the Claimant be fired. The supervisor was very concerned what might happen to his family he told the supervisor not to mention it to the Claimant. The supervisor was fearful.

He did not speak to the Claimant. He then left the plant and phoned LR who was the company human resource manageress. The witness explained that they had a sister company in the UK and it so happened that LR had travelled over from the UK and was staying locally in a hotel. He went to the hotel to meet her at approximately 10.25 p.m.

While he was speaking with her he got a call from the Claimant at circa 10.37 p.m. The Claimant told him that the supervisor had accosted him about five minutes prior. The Claimant told him that the supervisor told him that if he did not "f*** ***" out of the plant he would have him shot. The Claimant told him that he was upset and told him that he was going home. The Claimant put down the phone before he could say anything to him. He was surprised at how calm the Claimant seemed on the phone.

At approximately 10.39 he phoned the supervisor. He asked the supervisor if anything had happened in the last five minutes and he was told no. He asked the supervisor if anything had happened in the last ten minutes and he was told no. He told the supervisor that he was returning to the plant with LR. He did not tell the supervisor what the Claimant had told him.

He and LR arrived and asked the supervisor if there had been an altercation or if he had said

anything to the Claimant and he told them no. He then told the supervisor what the Claimant had told him. The supervisor was absolutely shocked at this and denied having said that. He then called JL to a private area and spoke to him and JL had not seen or heard anything. He is the same with HC and he also saw nothing. JL and HC had not seen anything between the Claimant and the supervisor.

At this point he decided to check the CCTV system for the time of his absence i.e. from 10.15 p.m. onwards. He and LR looked at the footage. They saw that at 11.13 the Claimant had gone to his car. He saw that at 10.16 he himself went to his own car. The Claimant returned to the plant at 10.24 p.m. The Claimant came back out and "leaves" at 10.37 p.m.

He interviewed an operator (OM) who saw nothing. He and LR then discussed how to proceed. The supervisor was extremely concerned for his safety and that of his family. Because of his concern he told the supervisor to leave work early and to consider varying his route to work. The supervisor went to presumably shower change and then go home. He and LR left the plant. He gave LR a lift to her hotel and he went home.

A booklet of evidence was opened to the Tribunal. They had interviewed workers about the in and the minutes of the interviews were opened. The interview with JL was the most detailed as it was he who worked in the area where the incidents occurred. LR who was also at the interviews typed the notes afterwards.

A letter dated 12th July 2007 that the Claimant addressed to the managing director was opened to the Tribunal. The Claimant handed the letter in person to the production manager (DD). In the letter the Claimant complained about his supervisor. He alleged that the supervisor threatened him. That the supervisor told him to leave the job or he would have him shot. That since 12th July the supervisor bullied him. That on 12th July the supervisor said a disparaging remark. That the supervisor told him that he would get him "and your union" out of the plant.

The Claimant also outlined that outside of work he had built dog kennels for no reward for the supervisor. He had brought the supervisor to and from work hundreds of times without reward or favour. He had brought the supervisor to the gym on his own time. That the supervisor bullied him for circa one year or more. That the supervisor said that he would get him out of the plant.

The Claimant also stated in his letter that he went with his father to the Garda station to make a complaint about the life threatening remarks that the supervisor had said to him in the workplace. Also that he wanted the managing director to take decisive action against the supervisor.

The witness explained that the dates in the letter were incorrect as Wednesday was the 11th July and the Claimant returned on the 10th July. He was shocked at the letter, for a number of reasons. At the reputed statements, also as no one had made complaints about the supervisor bullying.

He also noted that in 2006 the Claimant was asked to move to another shift and he declined, as he wanted to continue on the same shift as the supervisor.

Because of the seriousness of the situation he informed the Gardaí.

He interviewed the shift supervisor and asked him if anything had occurred and they went through the alleged incidents one by one. The one whereby he was to have said that he would have the Claimant shot they had dealt with the previous night. Regarding the allegation that he said to the

Claimant that he thought he had died as well the supervisor told him that he would not say that. The supervisor told him that he recalled he told the Claimant that he was welcome back to the land of the living. The supervisor told him that the temporary lab assistant (FC) was there also.

Regarding that he said that the Claimant had to go he admitted that he said it on numerous occasions but only in a general way and not a specific way.

He did not say to the Claimant not to worry, as he would not be doing it for very long. He did not tell the Claimant that he would get him and the union out of the plant.

The supervisor was very upset that it had been brought to the attention of the Gardaí as he expected a visit from them to remove his gun. Also the gun club would be upset.

The supervisor told him that he never bullied the Claimant. He told him that he had disagreements with him but never bullied him. That was the end of the interview.

The next person he interviewed was OM. OM said that the supervisor did not bully him nor did he see the supervisor bully anyone.

He interviewed JL who told him that he could not have a better boss than the supervisor.

He interviewed HC. HC told him that the supervisor told him that he would have him sacked and he saw the supervisor having arguments but no bullying. HC did not feel he was bullied or see bullying.

The reason the claimant was dismissed was because of a series of incidents, and a complaint from his supervisor. On investigating the claimant's allegations, there were inconsistencies in his statements, so his evidence was found to be unreliable. But no such inconsistencies were found in DG's evidence. The claimant had left the site without permission, he was already on a final warning, he had threatened his supervisor, therefore the conclusion was to move on to the next stage, i.e. the dismissal procedure. The claimant had even suggested to him that he would drop the case if a financial agreement was offered to him.

He denied that no action was taken on the claimant's allegations made against DG. He said that staff members were interviewed and that none of them witnessed any bullying or threatening behaviour by DG against the claimant. He admitted that HC and JL did say that they witnessed DG threatening to get rid of the claimant out of his job, but the company had taken disciplinary action against DG on this issue. He also admitted that no one had witnessed the claimant threatening DG. He said that the decision to dismiss the claimant was not based solely on the complaints made by DG, but that all aspects were investigated, the decision was not based on one person's word against another. On being asked why he dismissed the claimant, he said that the claimant was in a disciplinary process, and that the next step was dismissal. He agreed that the claimant was dismissed for displaying further threatening behaviour after the step two warning in October 2006. He denied that it was his job to prove that the claimant made threatening remarks, but to investigate the issues, and it was his view that the claimant had shown threatening behaviour towards DG. He said that there was also a similar incident with the Operations Manager prior to this. He made the decision to dismiss the claimant on his own.

The supervisor (DG) gave evidence that he started work with the company in 1989 and was a

supervisor since April 2006. His relationship with the claimant was fine at first, but later deteriorated. He found it difficult to get through to him, but he didn't follow through with any disciplinary action. He said that he had two run-ins with the claimant that affected him somewhat.

On 11 July 2007 he asked the claimant to take a load out to the loading bay, and his reaction was to make the "money" gesture. The claimant then went on a break, so JL did the loading work. When the claimant came back from his break he again asked him to bring back the remainder to the loading bay, but he again made the "money" gesture, so he said to him that if he wasn't prepared to do the work he might as well go home. The claimant's reaction was to jump off the forklift and shout into his face, "don't you be threatening me". He said that he felt unsafe and said that he would leave it to AM to deal with. AM came in later after he texted him, and he told him what had happened, but he asked him not to fire the claimant.

He met AM and LR later that evening, and he was told that the claimant had alleged that he had said to him that "if he didn't leave the job I would blow his head off". At a meeting with AM on 12m July 2007 he was told that the claimant had made allegations about him to the Guards. He said that the statement by the claimant about having him shot was a complete lie, that he never made a remark to him the day he returned to work stating "I thought you had died as well, welcome to the land of the living", and denied he had said that he would get the claimant and his union "out of here". He said that he never bullied anyone, but he admitted that he had said on a few occasions that the claimant had to go. He said that he had a disciplinary meeting with AM about the issues raised, but he was told that he no authority to fire anyone.

Asked why he hadn't instigated disciplinary procedures against the claimant himself, he said that he felt threatened enough not to do this. He said that the reason he had said to the claimant that he wanted him out was because the claimant was making it difficult to do his job properly. He agreed that it was inappropriate for him to say this to the claimant. He didn't make any complaint about the claimant to the Guards, and AM advised him not to seek legal advice on the matter. He denied that he was pleased by the claimant's dismissal, and said that he had not been threatened by the claimant since he left the company. He accepted that he had threatened the jobs of HC and JL also. He said that what he said to the claimant on 10 July 2007 was "welcome back to the land of the living", but that it was just a phrase that is used. He said that he didn't make the decision to dismiss the claimant, nor did he initiate the investigation.

The HR Manager UK & Ireland (LR) gave evidence that she was in Ireland on 11 July 2007, and witnessed AM's interview with DG. She said that she also heard the claimant's appeal against his dismissal on 3 August 2007, and that she brought over the UK Plant Manager as an independent person at the appeal. At the appeal meeting the claimant was asked to explain the inconsistencies in his statements, but he couldn't do so, that he just said he had described it all before to AM. She asked him again to give his side of the story, but he refused. She said that she adjourned the meeting in order to interview staff to see if any of them had witnessed DG making threats to the claimant, but found no one who had witnessed this behaviour. She said that she was happy that the company's investigation was a full and fair process, and she was happy to stand over the decision. Nothing new was discovered at the appeal meeting to change their decision. She said that DG was the more credible witness, and that she was struck by how agitated he was by the whole incident, whereas the claimant would not engage with her. In addition the claimant's employment record did not enhance his credibility.

Respondent's concluding remarks:

There was no grievance procedure instigated by the claimant. The company were faced with a conflict of evidence and they had to deal with it as best they could in the absence of any independent witnesses. They ran it on the balance of probabilities, and on what was reasonable and plausible.

They chose DG's version of events, which was more credible. The claimant's evidence was puzzling and inconsistent. He had previous form with final written warnings that had not been overturned. The claimant did not say anything in his own defence, he felt only he was right, and that everybody else was wrong.

Claimant's case:

A retired employee (JL) gave evidence that he worked for the company for 18 years. He knew both DG and the claimant. DG had been his supervisor also. He got on well with the claimant and said that he was a good worker. He also got on well with DG, but that they had their "moments". He did hear DG say that he would get the claimant out of the job, in fact he had said similar things to himself and HC on another occasion but had not acted upon it. He agreed that he had said in his interview with AM that the claimant would seem to think that a supervisor had said something about him when he hadn't, and he stood over this statement.

A supervisor (HC) gave evidence that he heard the claimant's job being threatened on a number of occasions by DG and GK (a manager who left the company in June 2007). He heard DG say that they would get the claimant out, and GK say that the claimant had to go. He also said that both his and JL's jobs were threatened by DG. He said that morale was low in the company due to staff changes and redundancies. On the day of the incident the claimant told him that DG had made a statement to him along the lines of 'I thought you were dead like the rest of them'. He told the claimant he would just have to deal with it, but the claimant was upset. He said he was unaware of any threat made by the claimant against DG. He said he was never bullied by DG but he did see him intimidate people. He wouldn't take a grievance procedure against DG because he knew him and his family well.

The claimant gave evidence that he worked for the company on and off for 16 years. He said he had never received a complaint about his work, and that he got on well with his colleagues. His relationship with DG deteriorated when DG was made supervisor. At the incident in July DG said to him that if he didn't leave his job he would have him shot. This statement shocked him to the core because he knew DG had a gun, so he rang AM and told him what DG had said. He also reported the incident to the Guards. There was another incident when he came back to work after a bereavement when DG said to him "I thought you were dead as well, oh well back to the land of the living".

In relation to the incident with the 'sivs', he said that alterations had to be made, but they got it sorted, and he asked DG did they need to make any more adjustments, and DG said to him not to worry because he (the claimant) wouldn't be doing it much longer. He said that DG's complaint against him was discussed at his disciplinary hearing, and he was surprised that he had made this complaint. He said that he never threatened DG. He denied making the 'money gesture' when asked would he do the extra work required, and also denied jumping off his fork-lift and rushing up to DG to have 'words' with him, nor did he recall DG saying to him that he might as well go home if he refused to do the work. He said he never refused to do any work. He made numerous complaints to the Operations Manager, but he just laughed at him.

He said that he didn't use the formal complaints procedure because he didn't want anything to happen to DG for the sake of his wife and children, but that he had brought it to GK's attention. He said that they tried to sort things out between themselves. He didn't think that it would escalate to the point it did, that DG was always making idle threats. He denied that he and DG had an argument on 11 July 2007.

He accepted that he was on a final written warning in regard to attendance issues and for use of threatening behaviour. The reason he said nothing at his appeal was because he had no confidence in the appeal process. He denied that his letter to the company was a concoction, and he stood by it.

A former employee (FC) gave evidence that when the claimant came back to work on 10 July 2007 she was with him in the smoking area and DG greeted them, then she heard the claimant say that DG had a good colour. That's all she heard. She wasn't sure if it was the 10th or the 11th that this occurred.

Claimant's concluding remarks:

The situation that resulted in the claimant's dismissal was based on the supervisor's allegations, for which there was no proof, nor any evidence to support them. The company took the word of the supervisor, so the dismissal was unfair.

Determination:

The Tribunal found this a most difficult claim to deal with because of the strong conflict of evidence between the parties. The dismissal arose from alleged conduct, which if the employer's evidence is accepted, would not – of itself – warrant instant dismissal. However it was accepted by the claimant that he had received two Step 2 final written warnings, one for threatening behaviour, and the other for absenteeism, both of which were in force at the date of dismissal. The company's disciplinary procedure provides that dismissal may be the next step, if there are further difficulties after a Step 2 written warning is issued.

It appears that the claimant had sought to appeal the Step 2 written warning for threatening behaviour to a Rights Commissioner under the provisions of the Industrial Relations Act. This appeal had not come up for hearing before the date of dismissal, and it also appears that it was adjourned generally at the request of the employer, and not subsequently pursued by the claimant. Under cross-examination, the claimant also alleged that this warning had been "manufactured". In addition, some evidence was tendered by the current shop steward (HC) which tended to cast doubt on the written warning for threatening behaviour. However, there is no doubt that there was at least one valid Step 2 warning at the date of dismissal.

The Tribunal finds, on the balance of probabilities, that there was an incident on the night in question, as described by the supervisor (DG). The Tribunal accepts the evidence of the General Manager (AM) that he visited the plant on foot of a complaint by the supervisor regarding the claimant's conduct. It is noted that the claimant's complaint of a serious threat against him by the supervisor, was only made after the General Manager's visit to the plant. The Tribunal was not convinced by the evidence of the claimant alleging a gun threat on his personal safety by the supervisor. No Garda prosecution has arisen from this allegation.

The Tribunal notes that the claimant was well versed in Industrial Relations procedures having been

shop steward for a significant period at the date of his dismissal. It further notes that no formal complaint appears to have been made by him about the alleged bullying. In addition, his failure to co-operate at the appeal hearing against his dismissal, is noted.

Accordingly, his claim under The Unfair Dismissals Acts, 1977 to 2001, fails.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)