

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

Employee

CASE NO.

UD628/2008

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. P. McGrath B.L.

Members: Ms. A. Gaule
Ms. M. Finnerty

heard this claim at Dublin on 7th October 2008
and 13th January and 14th January 2009

Representation:

Claimant(s): Mr. Peter Connolly, Peter Connolly, Solicitors, 6 Capel Street, (Opposite
Nealons Pub), Dublin 1

Respondent(s): Mr. Breffni O'Neill, Construction Industry Federation, Construction House,
Canal Road, Dublin 6

The determination of the Tribunal was as follows:

Respondent's case:

The company Director (BO'H) gave evidence that he received a phone call saying that someone was attempting to steal material (steel purloins) from the site. He went to the site and noticed a blue van leaving the site. Someone he didn't recognise opened the gate to let the van out. He also saw a truck coming out of the site and heard noises coming from the shed, which was not normal as no one was rostered to be there at that time. He took photos of the truck and spoke to the driver who said he was doing a collection, but BO'H said that this was not authorised. Then the man in the van said that there was no need to call the Guards, they could do a deal. BO'H told the van man that the product had already been sold.

The truck was then unloaded. The van left and the Guards arrived. They spoke to the claimant who was the only employee on the site, and two others who BO'H did not know. The guards took the

three men to the station. He was later told that two men were arrested and he was asked to make a statement. He saw the claimant on the site walking beside the transit van. The two vehicles could only have got access by someone on the site, and the claimant was the only person who was on the site at the time. He suspended the claimant pending an investigation by the company. He interviewed four other employees about the incident including JR who rang his brother (another Director) alerting him of the incident.

On 10 March 2008 BO'H had a meeting with the claimant. He said the claimant knew the routine and should have contacted the foreman or a Director about it. If he had no credit on his phone, he could have asked the truck driver to contact one of the managers. A SIPTU and CIF representative also attended the meeting. BO'H told the claimant that he would be interviewing other employees about the incident.

At the meeting on 19 March 2008 the claimant said he had let the vehicles in and showed them the purloins. Disciplinary hearings were held on 4 and 8 April 2008. The claimant had received a previous warning for similar activity and this was also taken into consideration. There were many contradictions about the claimant's statement. Based on what BO'H had seen and the lies he had been told, he dismissed the claimant. The claimant was not paid while on suspension. The appeal was heard by PO'H and BO'H took no part in the appeal.

In cross-examination BO'H thought it was correct that he conduct the investigation, as it was a small family concern with only two Directors. He said that the claimant never asked to question the statements of the other employees. The claimant said he had a key. He denied that he jumped the gun in dismissing the claimant.

The claimant's representative stated that it was a shoddy process where the man who conducted the appeal was not present at the Tribunal hearing. There was also an allegation of purloins sold the previous week. The claimant is facing a case of gross misconduct and witnesses were not present. In addition, criminal proceedings are extant.

Determination:

The Tribunal members have carefully considered the three days of evidence heard in conjunction with this case. This was a very serious case wherein the employee was **dismissed**(*suspended*) without pay pending a full investigation into an attempt to remove goods from the respondent's premises and without the knowledge or permission of the respondent. At the conclusion of the investigation, the employee was dismissed and the Tribunal must now determine if the dismissal was lawful and reasonable in all of the circumstances. The onus rests on the respondent to establish that their procedures and conclusions were fair and reasonable.

The Tribunal considers the conduct of the (*respondent's*) hearings to have been deeply flawed. In particular, the Tribunal first found the role of BOH (*the Director*) to have been well beyond the accepted norms. It is not good practice to allow a director of a company, who had witnessed

nevent involving the employee, to conduct an investigation into that event and then make a decision in the disciplinary process. This is particularly so in circumstances where the same director suspended the employee without pay in the immediate aftermath of the said event – which said suspension without pay could be seen as indicative of the director’s frame of mind and appears to prejudge the guilt of the employee.

That said, the SIPTU(*union*) representative did allow the investigation and the disciplinary process to proceed, and as a matter of fact, the Tribunal finds that this representative was correct in doing so. It was clear to the Tribunal that BOH was never going to allow the investigation be conducted by anyone other than himself and the representative was anxious to try and sort this matter out at a local level regardless of the obvious flaws. The Tribunal does not criticise the representative for proceeding as too often, the Tribunal finds that parties do not explore all available opportunities and avenues before issuing a T1-A form.

Ultimately though, the SIPTU(*union*) representative did state in evidence that the various investigative meetings, the disciplinary hearing and the appeals process were satisfactory as a package. In addition, the SIPTU(*union*) representative confirmed that the employee was given every opportunity to put his version of events. Whilst it is regrettable that the process did not allow an opportunity to personally cross-examine the witnesses, this facility was not sought.

In considering the conduct of the employee, the Tribunal can only have regard to the events surrounding the 3 March 2008. There can be no doubt that the employee acted in a misguided, ill judged and wholly unacceptable manner when he facilitated – whether knowingly or unknowingly – the entry onto the respondent’s premises, of a group of persons, without the knowledge of sanction of his employer, the respondent. This was done against a backdrop of a theft of purloins having been discovered only that morning. The Tribunal cannot accept that the breach of security and trust represented by opening the gate to a group of strangers to take away more of these purloins can be seen as anything other than misconduct.

The Tribunal therefore finds that the employee’s claim under the Unfair Dismissals Acts, 1977 to 2001 must fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)