

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE

CASE NO.
UD47/2009

against
EMPLOYER (Respondent)

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey B.L.

Members: Mr. J. Goulding
Mr. N. Broughall

heard this claim at Dublin on 17th July 2009 and 12th November 2009 and 13th November 2009

Representation:

Claimant: J.C. Hoban & Co., Solicitors, Suite 114, The Capel Building, Marys Abbey,
Dublin 7

Respondent: Mr. David Farrell, Ir/Hr Executive, Ibec, Confederation House,
84/86 Lower Baggot Street, Dublin 2
Mr. Brendan Kirwan B.L. instructed by Ms Deirdre Lynch,
Matheson Ormsby Prentice, Solicitors, 30 Herbert Street, Dublin 2

The determination of the Tribunal was as follows:

This case was heard simultaneously with ud1281.08-ud1284.08.

Respondent's Case:

A shift manager (MS) gave evidence that the respondent company operates a distribution centre for a supermarket chain. He oversees a number of team leaders on the nightshift from 3-11pm. Each team leader on site reports to him as shift manager. Thirty employees work on a shift either re-stocking or "picking" stock from the shelves for distribution to the shops. The business of the company is driven by the overall work rate.

As shift manager he has full responsibility for the shift and this includes compiling a plan for the shift, which the team leaders then execute. The system produces a report of the number of replenishments performed. The system logs the work performed and the idle times as well as allowing the shift manager to see the location of the pickers.

On the 1st August 2008, he was the shift manager on the 3-11pm shift. The company has an

agreement in place with the unions regarding the number of replenishments per shift. The work rate for the shift was poor as both the picking and replenishing rates had decreased. MS asked NC as team leader to examine the situation. Both NC and the shift manager spoke to the claimant's colleague about the replenishment rate. The shift manager observed this employee speaking to other employees and NC informed MS that there was a bad atmosphere on the shift. When MS walked the floor during the shift he observed some of the employees were excessively sounding the horns on their forklifts around NC. MS felt they were conveying to NC that they were unhappy. At the time of the 1st August 2008 NC had been working with the company for six months but he was one of the top team leaders. NC took responsibility when he spoke to the employees on the team even if the instructions had come from MS as shift manager. The team leaders also have the authority to provide informal interview coaching and give verbal warnings.

At the end of the shift the employees return their headsets to the briefing area. The shift manager usually arrives to the briefing area some 10 minutes later as he has to submit a report to senior management at the end of the shift. A map of the area was submitted to the Tribunal but this did not show the briefing area.

The employees use hand recognition to clock in and out of work. The turnstile report for that evening showed that NC clocked out at 23.17. When MS exited the building he observed a number of employees grouped around a car in the car park. As he made his way towards the car park he heard NC shouting "let me go, I want to go home, why are you blocking me in?" Six cars were parked around NC's car. The cars belonged to the claimant and five other employees. NC's car was parked properly in a space but the other cars were not parked properly in spaces and they were surrounding NC's car.

When the shift manager reached the turnstile he started shouting and asking what was happening. He could see that NC was frightened and twelve people surrounded him. The claimant was the first person to drive away. The other employees followed sometime later. NC was extremely upset, physically shaking and saying that he did not need this, as his wife was ill. The shift manager subsequently contacted NC who had left the car park. NC told the shift manager that when he exited the car park there were two cars parked either side of the road and he felt he was being followed.

On Saturday, 2nd August 2008 the day shift manager was on duty on the 7am to 3pm shift. The employees involved in the incident were on site from 7am that day. MS telephoned the day shift manager and informed her of the incident. MS attended at the respondent's premises later that morning and both managers consulted with human resources regarding the incident. Ms. M in human resources advised them to suspend the employees who had driven their cars to surround NC's car. The six drivers including the claimant were suspended with pay until the following Tuesday. They were each informed individually that they were suspended with pay. The claimant was upset and concerned for his job and for NC. The shift manager provided a statement and attended a meeting with human resources on the 11th August 2008 as part of the investigation.

During cross-examination the shift manager was asked if he had taken any steps when he knew the shift was struggling. He replied that he had asked NC as team leader to speak to the employees on shift. If the employees had an issue they could have spoken to NC who would have spoken to MS as the shift manager in turn. The respondent also provides coaching for improvement. The shift manager confirmed that the claimant was the first person to move away from NC's car and he became upset when he was suspended.

In reply to questions from the Tribunal, the night shift manager stated that two of the employees involved had said to him on a couple of occasions that NC was “over the top” about their rates but he receives complaints about other team leaders from time to time when the employees are told by the team leaders to increase the rates. NC always took responsibility when speaking to employees about their rates and he did not hide behind the shift manager.

The day shift manager gave evidence to the Tribunal. She attended for work at 6.30am on the 2nd August 2008 and met NC who informed her of the incident that occurred the previous night. The night shift manager telephoned her in relation to the incident also. However, prior to receiving the telephone call the claimant came to speak with her and informed her that he was involved in the incident. The day shift manager told him it was a very serious situation. She informed the claimant that she would be speaking with her manager, the night shift manager and human resources concerning the incident. The claimant held his head down as he spoke to her. He was very worried, upset and he was concerned for NC. Another employee also came to speak with her that day about the incident.

The night shift manager arrived at 10am and explained to her what had happened. They telephoned Ms. M in human resources and explained what had happened. The day shift manager confirmed that Ms. M advised them to suspend the six drivers with pay pending an investigation. The day shift manager was charged with the subsequent investigation. She wrote to the employees individually on the 5th August 2008 and informed them that they were required to attend an investigative meeting. During the investigation the claimant was very concerned. Each of the employees were interviewed as part of the investigation and almost all of the employees read a statement that they had prepared in advance of the meeting. The conclusion reached in the investigation was that the incident was supposed to be a joke played on NC but while the claimant and another employee believed it to be a joke the other four employees wanted to achieve more and intimidate and harass NC. Some further factors were also considered in finding that the other four employees were more seriously involved in this act. The day shift manager was not involved in the disciplinary process.

In reply to questions from the Tribunal, the day shift manager stated that throughout the investigation process the claimant was very remorseful.

On the second day of the hearing the team leader (NC) gave evidence. In his role he supervises all the team members on the floor, he monitors the hourly pick rates and reports back to management. He would normally have 15 to 20 people working for him on an eight-hour shift. The claimant was a member of his regular team. He had a good working relationship with him

On Friday 1st August 2008 his team seemed to be indifferent to work and they were not achieving their pick rates. Walking up and down aisles, laughing, joking, it seemed that they were planning something. He had three teams that day so about 20 people in total. He finished work that night and left through the turnstiles. He could see a lot of people huddled in the car park, a big cheer occurred when he came out of the gate. He felt the crowd were hostile towards him, they were jeering and shouting, bantering at him in Polish. Six cars were blocking in his car, including the claimant's and he could not get in to it. A drawing was produced showing how the cars were blocking his. The car park is not well lit and it was dark at that stage.

He reacted, as he did not know what was happening. A colleague of the claimant's MST approached him and said your car is blocked and you can't get out. He told him to move his car, MST responded by informing him he would be there all night. They all started to circle around

him, he continued to ask them to move their cars, but they all just laughed. He started to put the registration numbers of the cars blocking him in to his mobile phone. They started to move towards him again, they were getting more aggressive; it was the most terrifying ten minutes of his life. He then said “move your f***** cars” as he was up to ninety. He saw MS coming to the car park; MS asked what was going on. At this stage some of the crowd got in to their cars, including the claimant. They were still laughing as they drove off.

MS then told him to go home; as he drove out of the gates he could see an employee A in his car on the right and another employee W in his car on the left of the main road. He believed that they were waiting for him, as there was a small gap between them, he put the foot down and drove through. A, drove after him right up to the back of his car and flicking his lights. He believed that both A and W followed him home on his ten-mile journey. He saw A’s car in his rear view mirror the whole time.

He was in work the next day at 7.00 am and brought the incident to the attention of the day shift manager (JL). The rest of his team came in, including the claimant, and they were laughing and joking. The claimant did not approach him or apologise in respect of the night before. JL informed that the claimant and a number of other employees were going to be suspended that day so he would have to write a statement outlining the events of the previous night. This statement was produced in to evidence, he explained he was still very shaken on the Saturday when writing this.

Within this statement he stated that he felt they were specifically waiting for him, he explained that they had a bad attitude towards him all through the shift. The incident had been planned. On the Sunday he added additional comments to his statement, stating he believed that the claimant and another employee “ were also heavily involved “as they had been in constant contact with the other employees involved. On the Friday night he could see them all talking to each other when they drove by him they would all laugh at him. Two of his team were not achieving their rates that night.

He thought that the incident had been planned during their shift, their attitude to him was not good, and as they passed him they would speak to him in Polish. He felt that the claimant and another employee SJ were bullied by their colleagues and told to do what they did. The claimant was trying to impress his colleagues and was easily influenced.

Under cross-examination he was asked if employees were allowed to talk to each other or joke during their shifts. He responded that they do have to communicate with each other but the team was not being productive that day, on this shift they were driving towards each other and wasting company time. The claimant would pass him and be smiling and laughing at him. He was referred to the notes of the meeting he had with HR and JL in relation to the incident, where he mentions the atmosphere on the floor that night and names four employees but not the claimant who were laughing and smiling at him when they passed. He thought the claimant was told to laugh and smile at him, and the claimant had been put in to the situation through peer pressure. In his original statement there was no mention of the claimant but he added on the additional information on the Sunday, which included the claimant. He explained that on the Saturday when writing his statement he had not been thinking clearly, he had asked the claimant to moved his car three or four times in the car park and he had not moved. The claimant was laughing and cajoling with the others in the car park. It was put to him that the claimant maintained that it was not his intention to block his car, and was parked furthest away. He replied as per his statement there was six cars blocking him in, this included the claimant’s.

The AGM (MM) was next to give evidence on behalf of the respondent. He is responsible for the day-to-day running of the site, liaising with customers and management and would know 99% of the staff on a first named basis. He was referred to the “principal statement of main terms and conditions of employment that all of the claimants received. Within this under the heading “Terms and Conditions of Employment” a larger “Team Guide” is referred to. He explained that this “Team Guide” document is held by management and is available to all staff on request and they are aware of this through the “principal statement of main terms and conditions of employment”.

He referred to the Team Guide where the disciplinary procedures are set out. Within this under “summary dismissal” there are a number of offences listed including “Sex, Race, Disability discrimination or harassment/bullying”. His ability to conduct the claimants appeal is outlined in the team guide.

He had no involvement with the disciplinary procedures up to the point where he heard the claimants appeal. He did not review the CCTV of the car park as the incident happened in a blind spot. The claimants appeal meeting took place on the 28th August 2008, present were the witness, HR manager and the claimant. The claimant declined a representative. The notes of this meeting were produced in to evidence and he confirmed that they were a true reflection of the appeal meeting. He adjourned the meeting after about ten minutes to review the claimant’s responses. He decided to uphold the claimant’s dismissal as an employer has a duty of care to all employees. The team leader had been surrounded by about twelve team members and had been intimidated in this situation. He had asked all involved including the claimant to explain why they thought the joke was funny, nobody could tell him why, nor could he see the humour in the incident. The claimant did admit that it was not funny and had tried to distance himself by moving several metres away, however he had stayed in the vicinity. He authorised the issue of the final letter to the claimant on the 1st September 2008 informing the claimant that he was upholding the decision to dismiss him.

Under cross-examination he explained that the claimant had control of his own car, when he realised he was doing wrong, he pulled his car back but he still stayed in the car park. There was disciplinary action taken against six of their employees including the claimant. All of these employees had moved their cars from their normal parking spots to block NC’s car. Six employees had been dismissed in respect of this incident.

Claimant’s case:

The claimant gave direct sworn evidence. He commenced employment with the respondent in 2006. From this time up to his dismissal he had never received any warnings in respect of his work or behaviour. On the day of the incident he never made any comments to NC. He achieved his targets on this day as he did always as he performed his duties very well. He had a good relationship with NC. He explained that it was not always easy to achieve the targets set, as sometimes the aisles are so tight that two trucks cannot pass each other so you would have to wait for the aisle to clear to pick stock.

He never planned anything against NC on the day nor was he aware of any plan on the day of the incident. He clocked out and when leaving the building someone said “come on lets make joke for NC and block his car in for a few minutes”. He thought there was nothing bad in that and NC would laugh about it. He was referred to the statement he prepared for his disciplinary meeting in

He knew the blocking of NC's car would not be received as a joke when NC started to scream at them. His car was moved before NC left the building it was further away from NC's car than the others. He said nothing to NC in the car park and was the first to leave when MS told them to go home. He parked on the side of the road that was the way to his home and waited for a colleague. He spoke to this colleague for about ten seconds; NC then passed them on the road. He did not follow NC home.

On Saturday morning when he reported to work, he went to the briefing and then spoke to the day shift manager alone. He then went to see the day shift manager with another colleague MST. He told the day shift manager that they had played a joke on NC and NC had taken it badly. He wanted to know how could they plead their situation or could they apologise for the incident. He described the atmosphere in work on the Saturday as sad. At about 12.00 the day shift manager and the night shift manager suspended him.

He had never seen the respondent's Harassment and Bullying Policy nor the large Terms and Conditions of Employment (Team Guide). At his appeal, MM had asked him why he had not done something to stop the situation. He had moved his car before MS left the building; he was then an observer to the incident. There had been about 20 other people in the car park at the time and he was not aware that any of these being discipline apart from five other colleagues.

He reiterated he had tried to move his car away from NC's before N C left the building and that he was an observer to the incident. During his time with the respondent he had never done anything wrong. He gave evidence of loss.

Under cross-examination he confirmed he had been working with NC for about six months before the incident. Prior to the incident he may have played a joke on NC but could not recall. He had clocked out at 10.57pm, he does not recall who had shouted out about making a joke or about blocking NC's car. He did really think that NC would find the situation funny. When they went to the car park they blocked in NC's car and went to the smoking area for about five minutes. It was put to him that when they returned to their cars did he not say jokes over let go, he replied no they had continued to discuss work and chat. When asked why he had moved his car to a different space, he replied, it was wrong that his car should blocked this car. He was referred to a diagram of the locations of cars within the car park that was drawn during the course of his investigation hearing. It was pointed out that this diagram showed that when he had moved his car he was still blocking NC's car. The claimant denied seeing this diagram before and said that the day shift manager drew this diagram. It was his evidence that that his car was not blocking NC's car and he did not know when he moved his car why he did not park in a different part of the car park. He did not go home till MS came out and told them to go home, as after each shift they always talk between each other and at about 11.20pm they normally go home. He had left the car park first and he had parked on the side of the main road with warning lights on. He was alone in the car.

He was referred to the notes of his disciplinary hearing where he was asked "Can you see how we see this as harassment and bullying" and he had replied, "right can be harassment". He accepted he had said this but at the time he did not know the meaning of harassment. He agreed that he had at all stages of the process been given the opportunity for a representative and to give his side of the case. He confirmed that he had been informed that the matter could be potentially found as gross misconduct and he could be dismissed. He explained that where he pulled in his car there are two lanes, he was on the inside on the grass verge and Adam was on the outside, and they had spoken through the car windows.

Under redirection, he said that harassment was not explained to him during the course of the hearings, he thought that harassment and bullying was to do something wrong repeatedly to another person, he had never done any wrong to NC.

Determination:

It is well established that each case of unfair dismissal must be judged on its merits and what may justify dismissal in one situation may not in another. The role of the Tribunal is not to establish an objective standard but to ask whether the decision to dismiss came within the band of responses a reasonable employer might be expected to take having regard to the particular circumstances of the case.

The Tribunal is of the view that the blocking in of the supervisor's car could be reasonably regarded as intimidating behaviour given the circumstances and the fact there were a number of people acting in concert. The Tribunal finds that in all of the circumstances the decision to dismiss was proportionate. Therefore the claim under the Unfair Dismissals Acts, 1977 to 2007 is dismissed. Accordingly as the claimant was dismissed for misconduct his claim under the Minimum Notice and Terms of Employment Acts 1973 – 2005 must fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)