

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
EMPLOYEE - *claimant*

CASE NOS.
UD50/2009
MN52/2009

against

EMPLOYER – *respondent*

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005 UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. P. McGrath BL

Members: Mr. D. Moore
Mr. A. Butler

heard this claim at Dublin on 8th June 2009 and 25th and 26th January 2010

Representation:

Claimant: Mr Peadar Nolan, Siptu, Food Branch, 7th Floor, Liberty
Hall, Dublin 1

Respondent: Mr. Eoin Martin BL instructed by Maurice G. Lyons & Co., Solicitors,
Universal House, 46 Parnell Square West, Dublin 1

The determination of the Tribunal was as follows:-

The claim under the Minimum Notice and Terms of Employment Acts 1973 to 2005 was withdrawn at the start of the hearing.

The fact of dismissal was not in dispute.

Respondent's Case

The deputy charge hand gave evidence. The respondent's business is a supermarket. He works in the red meat department. The senior charge hand runs the department on a day-to-day basis. A total of 7 staff was employed in the department. The claimant was a general operative.

On the day of the incident, the senior charge hand was off, therefore, he, as deputy charge hand was in charge. It was a Saturday. On Saturdays the department is slow at first, it picks up in midmorning and then is hectic until closing time. That day the department was short staffed so he instructed the claimant to go on his tea break at 20 to 10. At that time the claimant was cleaning the cold room. The deputy charge hand then went on his tea break. At 10 when he returned the claimant was standing in the preparation area doing nothing. He again told the claimant to go on his break.

When the claimant did not go on his break, the deputy charge hand brought him into the cold room and closed the door so they would not be over heard. At that time the pickle tank was outside the cold room and was in the preparation area close to a drain in the floor. The claimant started cursing him and was verbally abusive. He told the claimant that if he carried on like that he could put on his clothes and go.

It was put to the deputy charge hand that the claimant delayed going on his break because when he was moving a pickle tank to clean it one of its four wheels came off. The claimant felt it was important to stabilize the heavy pickle tank and not just leave it before going on his break. The deputy charge hand did not accept this explanation. In his view the tank was secure and the claimant could have left it safely. The tank will balance on three wheels. It was beside the block in the preparation area. There was no danger to anyone. On that day the claimant did not say anything about the pickle tank.

There is no roster for tea breaks. The claimant usually went on his break at 10.15 so he could join his girl friend from the fish counter. After he told the claimant to go he informed the deputy manager of the incident, and was instructed to go back to work.

On the following Monday morning the store manager asked him about the incident. After that he had no further involvement in the matter.

The store manager gave evidence. On the Saturday the managing director told him there had been an incident at the red meat counter. The claimant had refused to go on break and was sent home. He was to meet the claimant on Monday.

On Monday morning he first met with the deputy charge hand, who told him what had happened and who was annoyed at the bad language he had been subjected to. Shortly afterwards he met with the claimant and his shop steward. The claimant said he was busy and wanted to go on break with his girlfriend. The pickle tank was mentioned at a later stage. The claimant denied using foul language but accepted there had been an exchange of views with the deputy charge hand. The store manager then told the claimant it was a serious matter and suspended him with pay until 11.30am on Thursday, when there would be another meeting.

The financial controller accompanied the store manager at the meeting with the claimant and his shop steward. The store manager told the claimant that he regarded his refusal to carry out an instruction of his supervisor as a serious matter. The claimant or his shop steward raised no health and safety issue.

The claimant was not given a statement by the deputy charge hand, neither was he given the opportunity to question the deputy charge hand's version of the incident. No other staff member was asked about the incident. It is a serious matter for a junior not to go on break when told.

Therefore they decided to dismiss the claimant for gross misconduct. No other sanction was considered. A letter of dismissal was issued to the claimant on 31 July 2008. The delay in issuing the letter was because the claimant was on holidays for two weeks.

The financial controller gave evidence. When the deputy manager decided to issue the claimant with a final written warning in August 2007 he typed the letter. He usually does any confidential typing.

He attended the disciplinary meeting with the store manager. The store manager put it to the claimant that he refused to follow an instruction. The claimant was slow to respond. The claimant denied using bad language. No health and safety issue was mentioned at the meeting. He has no recollection of any mention of the pickle tank at the meeting.

The deputy manager gave evidence. When he recruited the claimant he interviewed him and gave him a contract of employment. He went through the contract in detail with the claimant. The claimant's roster was agreed before he started. Rate of pay, method of payment and holidays were all discussed. He stressed the importance of honesty and explained the house rules.

The claimant was initially assigned to the shop floor. After some unauthorised absences from the shop floor and protracted conversations with other staff members in particular with his girlfriend, the claimant was assigned to the red meat counter where he had more supervision. There were some problems with absenteeism on Mondays. On Monday 15 August 2007 the claimant did not turn up for work. The following day he offered no explanation. The deputy manager issued him with a final written warning.

At the appeal meeting on 7 August 2008 the deputy manager and the manager met the claimant and his union representative. The union representative appealed for a lenient attitude towards the claimant. The manager deals with an appeal. The decision to dismiss was confirmed.

Claimant's Case

The claimant gave evidence. He worked as a shop assistant. On the day of the incident the deputy charge hand told him to go on his break at 20 to 10. He said, no, he would wait and go with his girlfriend. At 10 the deputy charge hand came into the cold room and told him to go now. The claimant pulled the pickle tank into the middle of the cold room. The deputy charge hand came back and said to him, get out of here. The deputy manager sent him home.

At 9.40am the claimant when told to by his senior colleague went to clean the walls and the floor of the cold room. To do this he had to move the two pickle tanks away from the walls. When the deputy charge hand returned from his break he told the claimant to go on his break. The claimant said no, he wanted to go on his break with his girlfriend. On other Saturdays he had gone on his break at 10.15am and this arrangement suited the senior charge hand. The wheel had come off one of the pickle tanks in the middle of the cold room. He could not just leave it because if someone else came into the cold room, the unstable tank would be dangerous. He was holding on to the tank and reached with his foot for a dolly (a small trolley) and pushed it under the tank to stabilise it. The deputy charge hand was yelling at him and said you are out go home. The claimant put on his clothes and met the deputy manager who told him to go home.

When he came to work on Monday the store manager called him into his office. The claimant did not recall being told the purpose of the meeting. The store manager said that the deputy charge hand had told him what had happened and that the deputy charge hand was his supervisor. He must

never shout at a supervisor. When claimant tried to explain himself the store manager told him that he could not defend himself.

The store manager suspended him until a further meeting on Thursday. The claimant and his shop steward, the store manager and the financial controller attended the meeting. The claimant felt that he was dismissed for basically doing his job. He did not use foul language towards the deputy charge hand.

The claimant and his shop steward brought up the health and safety issue relating to the unstable pickle tank at the appeal meeting. The deputy charge hand did not attend any of the meetings. His statement was not given to the claimant. The claimant's senior colleague came to the appeal meeting. The appeal confirmed the decision to dismiss the claimant.

The claimant conceded that he should have done as the deputy charge hand asked him. The deputy charge hand did not help him to stabilise the pickle tank.

The claimant's senior colleague gave evidence. On the morning of the incident before going on his break at 20 to 10 he told the claimant to clean the cold room. He would not have done this if he had known the deputy charge hand had told the claimant to go on his break. No one questions the deputy charge hand.

When the deputy charge hand came back from his break he told the claimant to go on his break. The claimant replied, 'no I must finish this'. The deputy charge hand banged the door of the cold room but the door did not latch so he could hear what was said. Neither the deputy charge hand nor the claimant used bad language. The deputy charge hand told the claimant to go home.

The senior colleague gave his statement to the shop steward before the appeal meeting. He did not think it would be such a serious matter.

Determination

The Tribunal has carefully considered the evidence and submissions made over the three-day hearing. The Tribunal accepts that the respondent is entitled to summarily dismiss where gross misconduct is established. In its own Staff Handbook the respondent accepts that gross misconduct can only be proven after 'full investigation'.

It is worth noting that gross misconduct can and does include a refusal to carry out reasonable and lawful instructions from management.

The Tribunal fully accepts that the deputy charge hand, being the claimant's supervisor, was entitled to instruct the claimant to take his break when it suited the supervisor. The claimant was not entitled to refuse to go on his break, when instructed to do so, because he would rather go at a time when he could join his girlfriend on her break. No company can be expected to make its arrangements to facilitate relationships on the shop floor. This was a working environment and the claimant was obliged to follow the deputy charge hand's instruction.

The Tribunal does accept that the claimant was in the process of cleaning out the fridge. The job had involved moving tanks and trolleys, and crates away from the walls to clean them down. It seems to be common case that the wheel of one tank had come away and that the claimant was anxious to stabilise this tank. The Tribunal accepts that the claimant was erring on the side of

caution in wanting to stabilise same. However, even accepting that this was the case, the claimant could have stabilised the tank using the dolly referred to in evidence and gone on his break as directed to do so. The issue was being used as a justification for not following instructions when in fact the real reason was a desire to go for a break with his girlfriend.

The deputy charge hand told the claimant to go home. It seems the deputy manager sanctioned this decision. He then directed the store manager to conduct an investigation.

The investigation was carried out by way of an interview conducted on the 7th July 2008, which proceeded to a disciplinary meeting on the 10th July.

It is noted by the Tribunal that the investigation did not include written statements from either the deputy charge hand or the claimant. No statements were taken from any potential witnesses who might have seen or heard something at the time of the incident. It is further noted that the store manager went through the process of personally putting the deputy charge hand's allegations to the claimant. The claimant was given no opportunity to objectively contradict the allegations when they were being put to him as being factual by the investigator.

In summary the Tribunal finds the investigation process was deficient and certainly did not amount to the 'full investigation' set down in the respondent's Staff Handbook and therefore find the dismissal to have been unfair.

However, the Tribunal does accept that the claimant too bears a considerable responsibility for the consequences of his actions and refusal to follow simple instructions and the Tribunal must take this into account in measuring any compensation to be awarded under the Acts. The Tribunal consequently awards the claimant the sum of €6000.00. The claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)