

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE *-claimant*

CASE NO.
UD604/2009
MN616/2009
WT263/2009

Against

EMPLOYER *-respondent*
under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005 ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms M. Levey

Members: Ms A. Gaule
Mr. G. Whyte

heard this claim at Dublin on 28th January
and 24th March 2010

Representation:

Claimant: Mr. Hugh Byrne instructed by Bowler Geraghty & Co. Solicitors, 2 Lower Ormond Quay, Dublin 1

Respondent: XXXX

The determination of the Tribunal was as follows: -

Respondent's Case

The Tribunal heard evidence from the operations manager, RT, who was responsible for the railway line the claimant's station was situated on. RT became the operations manager for the railway line in 2004. RT told the Tribunal that in 2004 the claimant assaulted a member of the public in a station and subsequently the claimant pleaded guilty to this assault when the case was heard in the district court. The respondent company held their own investigation, which led to the claimant being downgraded and transferred to another station.

On 24th May 2005 there was another incident in relation to a number of complaints from the manager of a bar beside the final train station the claimant worked in. The bar manager said that the claimant was parking his car in a way that obstructed 3 car parking spaces. The manager told RT that he tried to speak directly to the claimant about the incident but was then left with no choice

other than to contact RT. RT then met with the claimant and his trade union representative and explained the situation.

On 23rd December 2006 the Gardaí were called to the train station to investigate an incident involving the claimant. The claimant was reversing his car and a woman, who was walking behind the car, pushing a buggy, put her hand on the car to let him know she was there. The claimant allegedly got out of the car and would not allow the woman and her husband to travel on the train.

RT told the Tribunal that an incident involving the claimant took place on 22nd May 2008, when a young man was allegedly smoking at the doors of a carriage on the train when it was stopped at the station. The claimant allegedly told the 17 year old to put out the cigarette and stop smoking. The youth put out the cigarette and blew smoke into the claimant's face. The claimant would not allow the 17 year old to leave the train station and called the guards. He brought the 17 year old up the platform and into the booking hall area.

RT requested that the station manager, CS, download CCTV footage from the station in relation to the incident and send it to him.

An "A Form" disciplinary hearing in relation to the incident with the youth was carried out. The claimant and his trade union representative attended this hearing. They were provided with all evidence, including CCTV, in advance of the hearing. RT told the Tribunal that the claimant did not object to the CCTV footage. RT made the decision to dismiss the claimant based on the incident involving the youth and the statement from the youth's mother.

At the disciplinary hearing, the claimant alluded that the incident may have been caused by a medical illness. On foot of that, RT advised the claimant that he would not make a final decision on the matter until after the assessment of the Chief Medical Officer. The CMO stated that there was no medical evidence that would explain the behaviour of the claimant and therefore, RT went ahead with his decision to dismiss.

RT told the Tribunal that he is happy with the decision that he made.

Cross Examination

RT said that he did not reach the decision to dismiss the claimant until he received all of the evidence. In relation to investigating the incident of 22nd May, RT contacted the station manager (CS) and asked him to get the CCTV footage and a statement from the individual working in the booking office at the time.

The complaint from the youth's mother was received on 30th May and then the investigating officer interviewed the youth.

RT explained the steps that the claimant took at the time of the incident. The claimant asked the person in the booking office to call the Gardaí. He also asked the person in the booking office to come and assist him. RT said it was not procedure to manhandle a customer. RT said that no further assistance was provided to the claimant because there was no requirement to manhandle the customer.

RT provided the claimant and his trade union representative with all of the evidence on the day of the disciplinary hearing and gave them an opportunity to review it before the hearing started.

Neither the claimant or his trade union representative requested an adjournment of the disciplinary hearing.

At the disciplinary hearing the claimant was not given an opportunity to cross examine the customer because it was an internal incident. RT insisted that fair procedures were adhered to during the hearing and that the claimant had the right to appeal any decision made. RT also insisted that the claimant was made specifically aware that the allegations being investigated could lead to dismissal.

RT, as a representative of the company, prepared and prosecuted the claimant's appeal. RT told the Tribunal that he considered previous incidents involving the claimant, and subsequent warnings, when making his decision because they were referred to in the disciplinary procedures. RT accepted that at no point was the claimant told that his past record would be taken into account. RT insisted that he was not influenced by the claimant's past history and the decision to dismiss was based on the severity of this incident alone. RT said that he looked at all of the past history to see what opportunities had been provided to the claimant in the past.

A rail operative (SH) gave evidence of an incident that occurred at the station on the 22nd of May 2008. SH received a phone call from the claimant on the evening of the 22nd May 2008. The claimant asked SH for security, as there was an incident on one of the carriages of the train as it was waiting to depart. There was no security at the train station. When SH reached the carriage there was a youth standing at the door, he was not smoking or being abusive and when SH asked him if he was going to leave he replied that he had 'done nothing wrong.' The claimant requested the Gardaí so SH called them and they arrived in 5 minutes. SH heard a commotion and called the Gardaí a second time at the claimant's request. The Gardaí arrived and removed the youth. As part of his duties SH would interact with customers but had no authority to detain anyone.

Cross-Examination

SH did not call security because the next train to bring the security would be in twenty minutes. SH recorded the incident in the incident book but did not pass it to anyone as he assumed the Gardaí were investigating the case. There were no complaints made as a result of this incident. The claimant's role was to clean the trains when they arrived at the station.

The Station Manager (CS) gave evidence. CS had responsibility for a number of stations including the one the claimant worked in. CS was on holidays when the incident of the 22nd of May took place. The claimant approached him on his return to inform him of the events. The claimant produced a report to the station manager on the 23rd of May 2008 and informed CS that the Gardaí wanted to see the CCTV footage. CS waited for the Gardaí to contact him requesting the footage but they never made the request. The claimant informed CS that there was a scuffle but that he never touched the youth or laid a hand on him. The claimant did not have the authority to detain a passenger. The claimant could have gone to the booking office and asked for someone to be removed if he discovered someone smoking or he could call the Gardaí.

A separate incident had occurred previously where a local pub was hiring bikes outside the train station. The claimant took it upon himself to remove the bikes and the people. Another incident occurred that led to the claimant receiving a warning; the claimant had shouted at passengers that were sitting on the platform. The claimant was made aware that it was not his job to interact with customers.

Cross-Examination

CS rang RT the day the claimant informed him of the incident but was not able to contact him immediately. RT asked CS to take statements from everybody involved and to download the CCTV footage. CS did not view the CCTV footage only forwarded it. If there was any disciplinary issues with the staff CS would forward their personnel files to head office.

The Station Manager (TH) who was responsible for the claimant before CS gave evidence regarding previous incidents. The claimant had transferred to the station due to a previous incident in a different station not under TH's management. The only information TH had was, that the previous incident that led to the claimant's transfer involved a member of the public.

On Monday morning TH received a phone call from the Gardaí informing him that there had been an incident on Sunday morning. The claimant accused a lady of damaging his car and the Gardaí informed TH about the claimant's aggressive demeanour in handling the situation. On a separate occasion TH was informed of an incident where a group of students took a picture of the claimant and as a result he would not let them leave. The claimant had no authority to detain anyone.

Claimant's Case

The claimant commenced employment with the respondent in 1989. On the 22nd of May 2008 the claimant informed the train driver that there was a passenger smoking. As the claimant passed the passenger he said, "be careful, if security get you, you'll get a fine." The passenger blew smoke in the claimants face so he asked him to leave. The passenger refused, so the claimant rang the Gardaí from his mobile phone. The claimant also rang the booking office and asked SH to come down to the carriage. SH asked the passenger to leave, he refused so SH returned to the booking office to call the Gardaí. The passenger got up to leave and pushed the claimant's arm out of the way. The passenger started 'kicking off' on the platform so for everybody's safety the claimant removed him to the booking office. The passenger was struggling so the claimant blocked him into the area bytrapping him between the railings with the claimant's arms either side holding the railings. The Gardaí arrived and separated the passenger and claimant in order to take their details and find out what happened. The Gardaí told the claimant they would ask the passenger to leave and not return that day. The Gardaí did not press charges.

The following day the claimant approached CS with the report of the incident. The claimant was out sick following an incident the next day and on his return was informed he was being suspended. The claimant was given a 'Form A' dated the 13th of June 2008 outlining 3 grounds for suspension. The claimant had no contact with anyone from the respondent so does not recall how he was informed of the 'Form A' meeting.

The claimant then requested a personal hearing, which took place in July. At this hearing various reports were read out, this was the claimant's first opportunity to view these documents. One of these reports was from the passenger's mother claiming the youth had been bruised during the incident. The claimant asked for a medical report for the youth and to view the CCTV footage but was told, "*If you want it, you go look for it.*" The claimant knew one of the possible outcomes of this meeting was dismissal but did not know he was facing any of them. The claimant received a 'Form B', which is a notice of dismissal on the 11th of December 2008. The claimant is not aware of why this decision took so long.

The claimant appealed the decision to dismiss him, the appeal took place on the 6th of February 2009. There was an independent chairman appointed to hear the appeal. The charges and reports were read out on behalf of the respondent and the claimant and his representative did the same. The decision to dismiss the claimant was upheld but it was also recommended that a severance payment should be made to the claimant, which the respondent refused to pay. The claimant had one weeks annual leave left when he was dismissed.

The incident that occurred the day after the incident with the passenger smoking led to the claimant's sick leave. A passenger took a hatchet out of his bag and threatened the claimant, the claimant grabbed hold of the hatchet and the passenger said, " *I'll kill you if you don't let go,*" to which the claimant replied, " *well you'll kill me if I let go.*" The claimant submitted a report of the incident to the respondent but they said the incident had not occurred.

Cross-Examination

The claimant disputes that he has a history of being rude and abusive. In the district court, the claimant pleaded guilty to assault which had occurred during working hours with the respondent. The claimant admits he was aggressive which resulted in the respondent having to pay €25,000.00 in compensation to the claimant's victim. As a result of this incident the claimant was transferred to an alternative station, demoted and given a final warning. The claimant was demoted to cleaning trains so he would not have any interaction with the public.

The Gardaí spoke to the claimant on the 12th of March regarding being verbally abusive to a lady who banged the back of the claimant's car. The lady banged on the boot of the claimant's car as he was reversing in order to stop him from moving. The claimant saw the handles of a pram in the rear view mirror and thought he had knocked over a child, he got such a fright he gave out to the lady and refused to let her get on the train and proceeded to call the Gardaí.

On the 16th of July the claimant received a severe warning for abusing passengers on the platform of the train station. The claimant appealed this decision but was informed the warning had expired so there is no point in the appeal. On the 22nd of May the claimant warned a passenger that was smoking at the open doors of the train that he would get a fine if he were discovered. After the passenger refused to leave and assaulted the claimant there was no option but for the claimant to detain him until the Gardaí arrived.

During the course of the disciplinary hearing the claimant informed the respondent that he had a medical condition that made him aggressive. The respondent requested a medical report, which was the cause of the delay in the disciplinary hearing decision. The Chief Medical Officer could not find anything wrong with the claimant. The claimant had been attending a councillor for anger management recommended by the District Court Judge.

The claimant received the notice of dismissal on the 11th of December 2008 with a date of the 23rd of January 2009 for the dismissal to come into effect.

Determination

Having considered all the evidence the Tribunal finds that the claimant was not unfairly dismissed.

On his own evidence he detained the passenger which, as an employee he was not entitled to do. The respondent investigated the incident and based on that and the claimants previous conduct and history of aggressive behaviour towards passengers decided to dismiss him following a full and properly carried out investigation. The claimant had representation at all the disciplinary hearings.

The Tribunal find that the claims under the Unfair Dismissals Acts, 1977 to 2007, the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and the Organisation of Working Time Act 1997 fail.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____
(Sgd.) _____
(CHAIRMAN)