

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYEE
- Appellant

CASE NO.
UD284/2008

against the recommendation of the Rights Commissioner in the case of:

EMPLOYER
- Respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J Flanagan BL

Members: Mr J Horan
Mr A Butler

heard this appeal at Naas on 25th June 2008 and 31st October 2008 and 3rd March 2009

Representation:

Appellant: In Person

Respondent: Mr Paul Dunne, IBEC,
Confederation House, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

This case came before the Tribunal by way of an employee (the appellant) appealing a Rights Commissioner's Recommendation reference r-049110-ud-07/JC.

Respondent's Case:

The first witness for the respondent was a supervisor at time the matters the subject of this claim arose back in September 2006, although he has since been promoted to a different role. On 7th September 2006 the appellant contacted the supervisor by telephone to inform him that she would be a few hours late for work that day for reasons of a personal nature. The appellant had been due to start work that morning at 8am. The supervisor had replied that this was not a problem since she had made contact with him about the matter in a timely fashion. Later on that morning the supervisor saw the appellant arrive at work at some time shortly after 9am.

It was part of the supervisor's role to check on time keeping. The supervisor was responsible for checking employee timesheets on a daily basis. When the supervisor checked the timesheets for 7th September 2006 he discovered that the appellant had signed in at 8am. The supervisor was surprised as it is stated in the respondent's rules that wages are paid only for the time the

employee worked. When the supervisor raised this with the appellant she told him that she had signed in at 8am because she had needed the money. The supervisor reported the matter to the site manager who asked the appellant to report to him.

At the end of the shift the same day the supervisor was with another supervisor checking that all the employees were signing out on time. Only the other supervisor was present when the appellant came to sign out. The appellant began to shout and verbally attack the supervisor about how he had not covered for her. The supervisor was shocked. The appellant made a number of allegations including one that the supervisor was sexually harassing her and some other female employees. The appellant threatened that she would make a complaint to SIPTU. Half of the workforce on the site was female and it would have had a huge impact on the supervisor if the appellant made such a complaint.

The site manager was not available for the supervisor to speak to until the following morning. The supervisor informed the site manager of what had occurred and when asked the supervisor gave a written account of the incident. The written statement was opened to the Tribunal.

During cross-examination it was put to the supervisor that the appellant had told him she had signed 8am on the timesheet out of habit. The supervisor denied that the appellant had said this. It was put to the supervisor that the appellant had not made sexual allegations against him but the supervisor replied that she had.

The second witness for the respondent became a site supervisor in 2005 and he confirmed that he was the only other person present on 7th September 2006 when the appellant started shouting at the supervisor. The appellant was very aggressive. She had called the supervisor derogatory names and said that she would make a complaint to SIPTU that the supervisor had been touching her. The appellant was very angry and told the supervisor that she would “finish” him. The site supervisor confirmed that he had provided a statement about the incident to the site manager on the following day. The written statement was then opened to the Tribunal.

The second witness for the respondent had been the site manager. The site manager outlined a previous incident involving the appellant, which had occurred two or three weeks before the event of the 7th September 2006. A complaint was received on that occasion that the appellant was very loud and unsuitable for the workplace. The site manager had held a counselling session with the appellant.

The appellant’s terms and conditions of employment were opened to the Tribunal. This document incorporated the company’s disciplinary/dismissal procedure. The company’s policy of disciplinary and grievance procedure had been kept in the site manager’s office. The various stages of the company’s disciplinary procedure had been set forth in the document.

The site manager confirmed that the supervisor had made a report to him stating that the appellant had signed in for work at an earlier time than she had in fact attended at work and that she had said she did so because she needed the money. When the site manager spoke to the appellant she admitted telephoning to say that she would be late for work. The appellant also stated that she had signed in at 8am and that she was sorry. The site manager wanted to establish if the appellant had made a genuine mistake by signing in at 8am or if she had deliberately falsified her timesheet.

The site manager became aware of the incident involving the making of allegations of sexual abuse the day after it had occurred. The site manager met the appellant and put the two supervisors

version of events to her. The appellant admitted full responsibility for what had happened. The site manager made the decision to suspend the appellant with pay because he believed it was less than ideal to have all parties on site while he was investigating the matter.

The site manager wrote a letter dated 11th September 2006 to the appellant, which stated, *“An official complaint has been made against yourself by one of your supervisors on Friday the 8th September. Due to the serious nature of the complaint it has been decided to suspend you with pay until Wednesday the 13th of September at which time after further investigation a decision will have been made as to the outcome. You are requested to come to work at the normal time Wednesday and report directly to me. You are at this time also entitled to bring a witness should you require to do so.”*

The site manager requested written statements from both of the supervisors and from the appellant. The site manager did not have all of the statements collected until Tuesday, 12th September 2006. The appellant wrote in her statement that she had lost self-control and had told the supervisor that he did not know the main rules of managing staff. The letter ended with the appellant stating that she pleaded guilty and that she did not have the right to state her personal opinions in the workplace. The site manager was told that only the two supervisors and the appellant were present when the incident occurred.

The appellant did not wish to have a representative at the meeting on 13th September 2006. The site manager outlined to the appellant the accusations that had been made against her and which were the subject of the hearing. The statements of the two supervisors were provided to her and readthrough at the meeting. The appellant admitted that she had falsified the timesheet, that she was wrong about making an allegation of sexual harassment and that she had “lost the head.” At the end of the meeting the site manager told the appellant that he would consider the matter further.

The witness subsequently posted letter dated 13th September 2006 to the appellant dismissing her from her employment due to the severity of the incident. The letter stated,

“I wish to confirm that due to the severity of the incident, your acknowledgement of the allegations made against you by X and your acceptance that you falsified the signing in book for your own gain, the decision has been taken to terminate your employment.”

The letter also informed the appellant that she had seven days within which she could appeal the decision of the company. The appellant lodged an appeal and was represented by the union at the appeal hearing.

During cross-examination it was put to the site manager that the appellant was not provided with the letter of 11th September 2006 and that she was not shown the supervisors’ statements until the appeal hearing. The site manager confirmed that the appellant was provided with both the letter and the statements during the investigation.

It was put to the site manager that the letter of dismissal was prepared prior to the meeting of 13th September 2006 and that the letter was handed to the appellant at this meeting. The site manager denied this stating that he had typed the letter after the meeting and subsequently posted it to the appellant.

The human resources manager gave evidence that she had arranged the appeal hearing with the appellant’s trade union representative. When the appeal hearing was held the human resources

manager was present as was the client service manager, the appellant and her union representative. The appeal process was explained and outlined at the start of the hearing. The union representative asked the appellant to explain the contents of her own statement. The appellant accepted that she had lost control and that she had signed in incorrectly and that she had made false allegations.

The appellant had told her union representative that she had not had sight of the supervisors' statements prior to her dismissal and the union representative submitted that this was procedurally unfair. The human resources manager attempted to contact the site manager to verify that the appellant had seen the statements; however she was unsuccessful in contacting him at that time, as he had since left the employment of the respondent.

At the request of the union representative a token gesture was made to the appellant. The human resources manager considered this request because of the good working relationship the respondent has with the union. The respondent believed the matter was resolved until a letter dated 7th March 2007 was received from the trade union stating that the appellant was not accepting the gesture. The appellant subsequently lodged a claim to the Rights Commissioner service.

The human resources manager subsequently spoke with the site manager who was adamant that the statements had been shown to the appellant.

In reply to questions from the Tribunal, the human resources manager confirmed that there was an admission from the appellant that the allegations of sexual harassment were false. The union representative had confirmed to the witness that no such allegation had been made to him.

Appellant's Case:

The first witness for the appellant had been a colleague. The colleague stated that she was present at the incident between the appellant and the supervisor on 7th September 2006. The colleague observed both the appellant and the supervisor shouting. The colleague was not asked for a statement as part of the investigation.

During cross-examination it was put to the colleague that the appellant spoke to her approximately one year ago about the incident and the appellant told the colleague that she would have to give evidence.

The appellant gave evidence to the Tribunal. The appellant confirmed that she made a telephone call to her supervisor on 7th September 2006 informing him that she would be late for work. The appellant arrived to work at 9am. Later the supervisor drew the appellant's attention to the fact that she had written 8am as her sign in time. The appellant told him that she had filled in the sheet incorrectly and she offered to fix the sheet. The appellant also told him that she would stay late, as she wanted to complete her 8-hour shift.

Subsequently, the supervisor told the appellant that the site manager wished to speak with her. The appellant told the site manager that she had made a mistake by completing her sign in time as 8am. The site manager told her to return to work. Later, when the appellant saw the supervisor she shouted at him that she had signed 8am on the sheet out of habit.

The appellant confirmed that she was asked for a statement in relation to this matter. The appellant was asked to leave work on Monday 11th September 2006 and attend a meeting on Wednesday 13th September 2006 however the appellant did not have any knowledge of what this meeting was about

or that there could be serious implications.

When the appellant attended at the meeting the site manager had the letter of 13th September 2006 on his desk and the appellant was dismissed. The appellant stated that her dismissal was unfair as there were no procedures used in dismissing her from her employment. The appellant stated that she was first told of the supervisors' allegations at the appeal hearing. The appellant denied at the appeal meeting that she had made such accusations.

Determination:

The Tribunal has carefully considered the evidence adduced at the hearing and finds that the dismissal of the appellant was not procedurally unfair. The Tribunal finds that the appellant was not a credible witness and prefers the evidence of the respondent's witnesses. The Tribunal finds that the appellant contributed 100% to her dismissal.

In arriving at her recommendation the subject of this appeal the Rights Commissioner found that the dismissal was unfair for procedural reasons relating to the alleged failure of the respondent to furnish to the appellant copies of witness statements in advance of the disciplinary hearing. The Tribunal finds that there is no automatic or inherent obligation upon an employer to furnish copies of witness statements to an employee the subject of a disciplinary hearing in advance of the disciplinary hearing and the failure to furnish copies of witness statements does not of itself make a dismissal procedurally unfair. The Tribunal might well take a different view had there been a contractual obligation or other special obligation requiring the furnishing of witness statements prior to a disciplinary hearing, but there was no evidence either from considering the contract of employment or the company disciplinary procedures or any other source to support a conclusion by the Tribunal that the relationship between the was governed by an additional requirement over and above the usual considerations of natural and constitutional justice. What is of essential importance to the conduct of a fair hearing is that the employee be adequately informed of the accusations against her in sufficient detail and sufficiently in advance as to allow the employee to conduct her defence unprejudiced by any failure by her employer to have done so. The employee's entitlement is to be informed of the disciplinary charges rather than of the evidence supporting them. On the other hand the Tribunal recognises it is best practice to furnish the employee with statements in advance of the hearing and where it is argued that an employer who has failed to fully specify the disciplinary charges in a letter the employer may in a suitable case to be able to rely upon accompanying statements in order to prove the appellant had sufficient knowledge of the charges.

The Tribunal regards the respondent's written policy in relation to disciplinary and grievance procedures to be poorly drafted in that it appears to merge the investigatory and disciplinary phases into one. The letter dated 11th September 2006 fails to make it clear that the claimant is being invited to a disciplinary hearing rather than an investigation and it does not set forth the disciplinary charges at all. The three charges, which were considered by the respondent as the basis for the dismissal, were the deliberate falsification of the timesheet for the purpose of pecuniary advantage, a verbal attack upon her supervisor and the threat to make false allegations of sexual assault against her supervisor in who had reported her falsification of the timesheets.

The Tribunal has considered the disciplinary process as a whole and is satisfied that the appellant had adequate knowledge of the allegations against her and that any defects of a procedural nature were either minor in nature or were capable of being rectified by the appellant at the appeal hearing. The deliberate falsification of a timesheet for personal gain is a matter of sufficient gravity alone to

have justified the dismissal and of that matter there is no doubt of the appellant's awareness in a timely manner. There also appears to be sufficient evidence that the appellant knew of that there was an allegation of verbal abuse in advance of the hearing although the appellant claims that the exact nature of the abuse was not communicated to her. There appears to have been an unwillingness on the part of the respondent to place on the record the false allegations of sexual abuse against the supervisor. At the disciplinary hearing the appellant was represented by her trade union representative who raised as a procedural defect the failure to provide statements in advance of the disciplinary hearing but it was not contended by him on her behalf that the appellant did not know what was alleged in them.

The Tribunal finds that the appellant was employed to work a 39-hour week at a rate of €9.46 per hour. The Tribunal finds that the appellant ought to have been able to find similar work within three months of the termination of her employment had she made reasonable efforts to do so given the state of the local labour market then prevailing and measures her loss due to the dismissal at three months wages, before allowing for the appellant's own contribution to her dismissal even if the dismissal had been unfair.

The Tribunal upsets the Rights Commissioner recommendation reference r-049110-ud-07/JC under the Unfair Dismissals Acts, 1977 to 2007. The Tribunal finds that the appellant's claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)