

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:
EMPLOYER

CASE NO.
UD694/2009

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

EMPLOYEE
-v-
EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr N. Russell
Members: Mr J. Browne
Ms S. Kelly

heard this appeal at Carlow on 15th March 2010
and 17th May 2010

Representation:

Appellant: Ms. Helen Barry, Ibec, Confederation House,
Waterford Business Park, Cork Road, Waterford

Respondent: Mr. Michael Browne, Siptu, Barrack Street,
Co Carlow

This case is before the Tribunal by way of an employer appealing the Recommendation of the Rights Commissioner, ref: (r-058614-ud-07/DI), (UD694/2009). The employer is the appellant the employee is the respondent.

Appellant's case:

The Tribunal heard evidence from the financial controller, who also dealt with HR matters. He explained that the company processes timber and sells the products to customers in Ireland, Northern Ireland and the UK.

The witness explained that there was an incident on 24th October 2007. The site director (hereafter known as JM) told him that there had been an incident in the car park. The incident was an alleged assault on DM by the respondent (employee).

He spoke to the respondent about the incident and spoke to DM. He obtained statements from both parties. He reviewed video footage and the footage indicated to him that the respondent was the aggressor. It emerged that other incidents occurred on the day in question. He found that there

were inconsistencies with the respondent's statement.

The witness explained that he relied on the procedures that were agreed with the trade union and the company; he also relied on the oral and written evidence and on the CCTV footage. He concluded that the evidence supported DM story and not the respondent's story.

He decided that that proper sanction was to dismiss the respondent.

The Tribunal asked the witness to clarify evidence relating to an incident in the clock-in area of the company and if anyone complained of any such incident. The witness explained that no one made a complaint about an incident. The witness was asked if it was a concern that a previous serious incident happened on 24th October and was not investigated he explained that he could not say what would have happened regarding the first incidence if the incident had not happened in the evening.

The Tribunal heard evidence from DM. On 24th October he was on a daily round of the factory and the respondent asked him about the new clocking machine. He told the respondent to take the matter up with someone else.

Later on he had an altercation with the respondent. The respondent swore at him, "fell toward" him and the respondent "led with his shoulder".

Later on he clocked out and went to the car park. He noticed his car hubcap was loose and returned to get a cable tie. When he returned he saw the respondent in the car park. He asked the respondent about the earlier incident. The respondent told him that he was in his way and that he was "sticking his nose in as usual". The respondent made contact with his forehead and clenched his fists. The respondent then told him that he would "love to hit" him.

DM reported the incident to JM who is his brother.

The witness clarified that he was the respondent's supervisor.

Respondent's case:

The Tribunal heard evidence from the respondent. He explained that the clocking house area was very small. He was speaking to a colleague when DM banged on a window and told him to get out to see him. He apologised to DM for swearing. They "brushed" shoulders.

Regarding the incident in the car park, he was getting into his car when JM said that he wanted to talk to him. They "got into each others faces", "his nose touched my forehead". He told JM to be careful, as there was camera and pointed out the cameras.

The Tribunal sought clarification and the respondent explained the there was no "headbut".

17th May 2010

On the second day of hearing the respondent gave evidence pertaining to loss and was cross-examined on it.

Determination:

The Tribunal must have reservations about the manner in which the allegation against the employee was handled on this occasion. In a company like the appellant's, with a management structure dominated by members of the same family, closely related to the other party to the incident, it would have been preferable to have the investigation carried out by an external, independent third

party. Not only must procedures be fair but they must be seen to be fair and above reproach. The Financial Controller, who investigated the incident, advised the Tribunal that there were three crucial matters on which he reached his decision. These were as follows:

The contents of the CCTV footage from the car park.

A pattern of aggressive behaviour on the part of the employee (respondent), which the Financial Controller stated, was evident from the incident in the clock house earlier in the day.

The discrepancies between the written and verbal statements of the employee (respondent) at the time of the investigation.

In relation to the CCTV footage the Tribunal did not find the “still” images introduced of any evidential value. The parties and their representatives could not agree the content of the “real time” CCTV as viewed at the time of the investigation.

The Tribunal did note a number of discrepancies between the written statement of the employee (respondent) and his verbal statements.

The flaw that the Tribunal has identified in the investigative process arises from the statement by the Financial Officer before the Tribunal, that he gave considerable weight to what he believed to be, the pattern of aggression on the part of the employee (respondent) as evident during the morning incident. In his earlier evidence the Financial Officer indicated that the incident in the clock house in the morning was separate from the evening incident and was not investigated by him. Yet in arriving at his decision he then gave considerable weight to the alleged conduct of the employee (respondent) during that incident without investigating it. The Tribunal considers this to be a fatal flaw in the process. The two incidences occurred on the same day and it was clear from the evidence that the later incident was a continuation of the earlier one, so that an incomplete investigation was carried out.

Therefore, the Tribunal finds that the employee (respondent) was unfairly dismissed and awards him compensation in the sum of €6,000.00 under the Unfair Dismissals Acts, 1977 to 2001, thus varying Rights Commissioner Recommendation reference:(r-058614-ud-07/DI), (UD694/2009).

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)