

EMPLOYMENT APPEALS TRIBUNAL

Claim Of:
EMPLOYEE

-Claimant

Case No.
UD1245/2009

against
EMPLOYER

-Respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. F. Crawford B.L.

Members: Mr. F. Moloney
Mr. P. Woods

heard this claim at Dublin on 1st April 2010

Representation:

Claimant: Mr. Oliver McDonagh, Branch Organiser, MPGW Group, SIPTU,
35 Lower Gardiner Street, Dublin 1

Respondent: Mr. Michael McNamee B.L. instructed by Ms. Denise Fry, DAS Group, 12
Duke Lane, Dublin 2

The determination of the Tribunal was as follows:

Background:

The claimant was employed as a docker. He was dismissed from his position with the respondent due to an incident that occurred on the 1st September 2008. CCTV footage of the incident was opened to and viewed by the Tribunal. The claimant was sitting on a forklift on the quay when a loud noise ensued from the rubbish shed. A colleague beckoned the claimant into the shed. The forklift he had been using rolled down the quay and over the quay wall becoming wedged between the quay wall and a ship that was moored there. When the claimant exited the shed he walked across the now horizontal mast of the forklift onto the ship, in order to retrieve his personal belongings from the forklift. A number of tests were carried out to recreate the events and the company had a report of the findings.

Respondent's Case:

The Operations Manager gave evidence on behalf of the respondent. After the investigation was concluded he was charged with the disciplinary process. The claimant was invited to attend a disciplinary hearing on the 21st October 2008. The claimant's union representative was present at the meeting and the General Manager was also in attendance. At the meeting the CCTV footage was viewed and the incident outlined to the claimant. The claimant stated that he had panicked

when he followed his colleague into the shed following the loud noise from within. He got a fright when he realised what had happened to the forklift and he immediately retrieved his personal belongings. The claimant outlined at the disciplinary hearing that he was willing to accept any disciplinary sanction short of dismissal.

Having considered the incident including the health and safety implications of the whole incident and the fact that the claimant had placed himself at extreme risk by retrieving his personal belongings in the manner in which he had, the Operations Manager and the General Manager made the decision to dismiss the claimant. This was communicated to the claimant in letter dated the 5th November 2008.

During cross-examination it was put to the Operations Manager that other employees who had been involved in other incidents had not been dismissed from their position with the respondent. The Operations Manager replied that he did not think the other incidents were comparable to what had occurred in this instance. The respondent could not have an employee who placed himself and other employees in such danger.

The Chief Executive of the respondent gave evidence that he heard the claimant's appeal on the 26th November 2008. At the appeal the claimant put forward a number of reasons as to why the sanction of dismissal was too severe. The reasons were; that other employees had been treated differently in that they had not been dismissed as a result of causing damage, that the previous warning had expired and should not have been used in the disciplinary process and that the sanction of dismissal was too severe in relation to the offence.

Having heard the appeal the Chief Executive communicated the outcome of the appeal to the claimant in letter dated the 1st December 2008. Having considered the circumstances the Chief Executive concluded, that the basic facts were not in dispute, that the claimant fully understood and accepted the seriousness of the incident and that the claimant declined to identify at the appeal any particular instance to support his assertion that he had been treated differently from other employees. This was an important issue and the Chief Executive asked for names and details but the claimant declined to give this information at the appeal.

In the outcome of appeal letter the Chief Executive wrote that he was aware that another employee was dismissed in November 2007 as a result of negligence but subsequently re-employed on a day one basis. After that a notice was written to all employees outlining the consequences and implications of reckless driving. The notice was included in the employees' payslips. The Chief Executive was satisfied that a line had been "drawn in the sand" and that all employees were informed that reckless driving would no longer be tolerated.

The Chief Executive was satisfied having heard the appeal that the claimant had placed his own safety in jeopardy and he could have risked the safety of other employees had he fallen off the mast and into the water between the ship and the quay wall. In doing so, he had exposed the company to the potential consequences of serious injury or loss of life and there was also the financial cost of the damage to the forklift and to the ship. As a result, the Chief Executive believed the claimant to be an unsuitable employee and he upheld the decision to dismiss the claimant.

Claimant's Case:

A fellow employee gave evidence that he did not accept the outcome of the tests that the forklift would not have moved if the handbrake had been engaged. He stated that he was familiar with the

claimant's forklift and had operated the machine. He outlined how he would have to wedge the wheels to stop the forklift moving.

The claimant gave evidence to the Tribunal that the respondent had employed him for five years at the time of the incident on the 1st September 2008. The claimant outlined that on that date he was sitting in the forklift facing the shed. After a loud noise from within the warehouse a fellow colleague beckoned the claimant inside. The claimant ran into the shed and then realised he had left the forklift. When he ran back outside the forklift had rolled backwards and was wedged between a ship and the quay wall. The claimant walked across the horizontal mast of the forklift and switched off the forklift's engine and retrieved his personal belongings.

The claimant told the Operations Manager that he had panicked and did not realise at the time that he was retrieving his personal belongings that it was unsafe. The claimant had his car keys and a sum of money in the forklift and it had only taken him a number of seconds to retrieve these items. Later that day the claimant was asked to lean over the ship again to hook chains around the forklift so it could be lifted out. He performed this task in front of members of management.

The claimant had stated at the disciplinary meeting that he was willing to accept a final written warning or a reduction in pay as options other than dismissal. The claimant was aware that he should not have climbed across the forklift.

The claimant gave evidence pertaining to loss.

In cross-examination it was put to the claimant that when he had been asked to hook the chains onto the forklift the moorings on the ship had been pulled tight to render it safe for the claimant to place the chains around the forklift. The claimant accepted this might have been the case.

Determination:

The Tribunal is satisfied from the careful consideration of the evidence adduced, that the dismissal of the claimant was disproportionate to the actions of the claimant. It is noted by the Tribunal that the respondent's foreman directed the claimant to secure chains around the forklift in a similar manner to how the claimant had retrieved his personal belongings. Albeit the respondent stated that the ship had been secured against the quay wall.

The claim under the Unfair Dismissals Acts, 1977 to 2007, succeeds. However, the claimant contributed to the dismissal by virtue of his actions. In relation to the calculation of loss, the Tribunal also noted that there were subsequent redundancies within the respondent company. The Tribunal finds compensation in the sum of €15,000 to be the appropriate remedy in this case.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)