

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

EMPLOYEE - **Appellant**

UD1327/2009

MN1299/2009

against the recommendation of a Rights Commissioner in the case of

EMPLOYER -**Respondent**

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. N. O'Carroll-Kelly B.L.

Members: Mr. L. Tobin
Ms. M. Maher

heard this appeal at Dublin on 30 June
and 13 October 2010

Representation:

Appellant:

Mr. David Miskell, Mandate Trade Union,
O'Lehane House, 9 Cavendish Row, Dublin 1

Respondent:

Mr. Eamonn McCoy, 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 appeal by an employee against the recommendation of the Rights Commissioner in the case of Norbit Gnitecki V Tesco Ireland Limited (R-073138-UD-08/JC)

The appellant was employed as a general assistant in the respondent's 24hour store in Finglas from June 2006. The employment was uneventful until an incident on 21 August 2008 that led to his dismissal and now to this appeal. On that day at around 2-30pm the appellant, who had a short time previously completed an alcohol stock count for the Departmental Manager (DM), was found by the Grocery Manager (GM) apparently asleep sat on a low guard rail in an area, not covered by CCTV, where empty high value stock cages are kept adjacent to the lock-up where the appellant had conducted the stock count.

GM called DM to see the appellant and they then called the Duty Manager. It is the

respondent's position that the appellant was startled when DM tapped him on the shoulder, other than that there was no response from the appellant, who was unable to speak coherently. The Duty Manager, who had formed the view that the appellant was possibly unfit for work, convened a meeting in the training room also attended by the appellant, his union representative (UR) and GM who was taking the notes of the meeting. The appellant became concerned at GM taking notes and an adjournment was sought to allow UR to calm the appellant down. The appellant was again unhappy at GM's taking of notes to the extent that the meeting had to be again adjourned as GM now felt concerned for his safety. At the resumption the Compliance Manager (CM) was substituted for GM who had sought refuge in the security office and arranged for security personnel to be close to the training room for the resumption of the meeting. In the event the appellant was not happy with CM taking notes and the Duty Manager, who was by now satisfied that the appellant was unfit for work, sent the appellant home with an investigative meeting arranged for the following day. The appellant's position is that he had begun to feel unwell while at work, had tried to explain this but not been understood and then sought the assistance of an interpreter.

On 22 August 2008 the appellant attended an investigative meeting accompanied by UR and conducted by the Trading Manager (TM) with the Personnel Manager taking the notes of the meeting. During this meeting the appellant stated that he had been tired on 21 August having been up until 5-00am that morning but again denied being asleep. He accepted that his behaviour in the meeting with the Duty Manager the previous day may have come across as aggressive but that had not been his intention. As there was a difference between the appellant's position and that put by those who found the appellant he was suspended with pay pending further investigation.

The appellant, UR, a union official and a note taker attended a disciplinary meeting conducted by the Store Manager (SM) on 5 September 2008. At the outset SM read out the statements, which had been provided by DM and two of the security personnel involved on 21 August 2008. Again the claimant denied being asleep on the rail and apologised for coming over as being aggressive during the 21 August meeting. SM wrote to the appellant on 23 September 2008 informing the appellant of his dismissal with immediate effect on the grounds of serious misconduct. The claimant exercised his right of appeal to the Regional Development Manager on 26 September and the appeal, which was unsuccessful, was heard on 7 November 2008.

Determination:

The Tribunal having considered all of the evidence given over the two-day period, the documentation and the legal submissions submitted conclude that the respondent's procedures in relation to the disciplinary and investigation meetings were flawed. The claimant stated in evidence that his English was not good and he didn't understand the nature of the complaint being made against him. He requested an interpreter but stated that he believes the Duty Manager and GM didn't understand him. An interpreter should have been provided for the claimant without him having to request one. It is the responsibility of the respondent when investigating an issue or disciplining an employee to ensure that that employee understands everything that he is being asked and is being told. This clear lack of understanding lead to the claimant becoming very frustrated and possibly aggressive and that finally lead to the claimant's dismissal. Whilst the Tribunal find the correct procedure would have been to make an interpreter available it is not in this case a fatal flaw.

The claimant had an impeccable employment record with the respondent having never received so much as a verbal warning. No evidence was given that the respondent considered his past employment record before making its decision to terminate his employment. The employee's employment record is something that should be considered when carrying out a full and thorough investigation. A failure to do so could and did in this case lead to an unbalanced decision and disproportionate sanction.

Accordingly the Tribunal find that the claimant was unfairly dismissed and award € 7,500-00 under the Unfair Dismissals Acts, 1977 to 2007

No evidence was adduced in relation to the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and therefore the Tribunal makes no Order in that regard.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)