

## EMPLOYMENT APPEALS TRIBUNAL

**CLAIM OF:**

**CASE NO.**

EMPLOYEE - claimant

UD1352/09

**Against**

EMPLOYER - respondent

**under**

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms P. McGrath BL

Members: Ms A. Gaule  
Mr J. Maher

heard this claim at Dublin on 18th June 2010 and 22<sup>nd</sup> October 2010.

#### **Representation:**

Claimant: Mr. Ian McDonnell, TEEU, Regional Secretary, 6 Gardiner  
Row, Dublin 1

Respondent: Ms Mary Fay B.L., instructed by Arthur Cox, Solicitors, Earlsfort Centre, Earlsfort  
Terrace, Dublin 2

The determination of the Tribunal was as follows:-

#### **Respondent's Case:**

The respondent is engaged in port activities. The Maintenance and Services Manager (CC) oversees maintenance works. Staff work a 24 hour shift, 7 days a week. They work in teams of two. They are responsible for equipment maintenance and answer emergencies and attend to unforeseen events.

In 2006 a new working model for staff working in the maintenance and services department was introduced. The claimant was selected for the maintenance shift. The team was self managed and had to have technical abilities and willingness to learn.

A third party report produced indicated that there was a possibility that the shift might not be attentive to their duties. Specifically, an incident had arisen and the level of performance was not

acceptable. Each shift worker had a mobile phone and must complete a report form at the end of their shift. If an employee falls ill during his shift he must inform his supervisor or in the event of him being unavailable, he must inform his manager.

CC carried out a random spot check on the morning of 16<sup>th</sup> January 2009 where the claimant and a colleague (PMcG) were scheduled to be working on a 7 pm to 7 am shift. He checked the tugs on the lead-in jetty for maintenance and service staff as well as the pilot station and neither of the two staff was present. He then went to the M & S building having noticed that the two vans were parked on site. The workshop was in darkness except for the office, and he checked the canteen and changing rooms but no one was present.

CC found PMcG asleep on a camp bed in the small office. He told him that this was a serious disciplinary issue and asked him to dress and leave the premises. He tried to locate the claimant and rang the claimant's mobile phone and as he was leaving the workshop he met the claimant walking in the door. The claimant said he was at the shop or in the yard. CC asked the claimant to come clean. The claimant then admitted he had been asleep. CC asked him to leave the site, the claimant having apologised and showing concern for future shifts. The claimant asked if the matter could be dealt with unofficially.

By letter dated 16<sup>th</sup> January 2009 the claimant was suspended from work with immediate effect pending the holding of a disciplinary hearing. The claimant was forbidden to access the company.

By letter dated 19<sup>th</sup> January 2009 the claimant was asked to attend a disciplinary hearing on 22<sup>nd</sup> January 2009. The claimant attended the disciplinary meeting together with his union representative. CC chaired the meeting and senior administration officer, TW and a representative from the HR Department, ML were in attendance also. The HR employee was present to ensure that procedures were followed correctly and in a fair manner. Both CC and ML took minutes of the meeting.

The claimant was asked about his work on 15<sup>th</sup> January 2009. He said he reported for work at 6.50 pm and proceeded to carry out checks on the pilot boats. He then tried to sort out a spare wheel for the van, which had been punctured. After that he went into the canteen and had tea. He met his co-worker PMcG who told him that he was unwell and that it was too late to ring anyone for cover. The claimant carried out further planned maintenance work and then returned to the workshop and saw that PMcG had gone to bed. The claimant went upstairs and sat down and read the paper and then nodded off. He had not gone up there with the intention of going to sleep. He apologised for his behaviour on that night. The claimant was asked about his work the previous night. He said he had carried out all his duties that night. CC said he could check the claimant's work performance for the night of 14<sup>th</sup>/15<sup>th</sup> January 2009. He wanted to re-establish trust in the claimant and perhaps use this as a mitigating factor.

A ten-minute break followed to afford the claimant time to reflect on his account of events. The claimant said he was happy with his version of events.

By letter dated 28<sup>th</sup> January 2009 CC informed the claimant that he would remain suspended and was recommending to the CEO that the claimant should be dismissed. The claimant was offered a right of appeal within 5 working days. The claimant chose to appeal this decision.

The Head of Operations (S. McL) received a call from CC following the latter's visit to the workshop on the morning of 16<sup>th</sup> January 2009. CC told him that he had found the

workshop in darkness and one employee asleep in a sleeping bag. CC also told him that the claimant had apologised for being asleep and that he suspended him.

S. McL conducted the claimant's appeal hearing. His role was to ensure that fair procedures had been carried out and to give the claimant a fair hearing. It was very clear to S. McL that the claimant had admitted in front of three people to falling asleep on 16<sup>th</sup> January 2009. Issues arose at the appeal hearing. Following the appeal hearing S. McL investigated these issues.

He interviewed CC, ML and TM. He also fully investigated the operation of the lighting system and he subsequently wrote to the claimant on 23<sup>rd</sup> February 2009 stating that he was satisfied that the claimant had shown himself to be untrustworthy and unreliable and the recommendation that he be dismissed was proportionate to the severity of his behaviour and appropriate under the circumstances. He concluded that the findings of the disciplinary hearing should be upheld and advised the Chief Executive accordingly.

He subsequently met the CEO. The CEO enquired if he had considered any other penalty in the circumstances. S. McL said there was a clear breach of trust and other penalties were not appropriate in the circumstances.

### **Claimant's Case:**

The claimant commenced employment in September 1997 as a fitter. He served his apprenticeship with the respondent. Following the completion of his apprenticeship he secured full time work with the respondent. In late February 2009 he was selected to work on the maintenance shift.

On the morning of 16<sup>th</sup> January 2009 he met CC at the back of the workshop while he had been carrying out his duties. A list of work is given to each shift and when completed the shift is then on call to look after emergencies. He had never slept while on duty and never admitted to being asleep to CC on the morning of 16<sup>th</sup> January 2009 when he encountered him. He never set the alarm on his mobile phone that activated at 05.50 a.m. Ten colleagues use the same mobile while working their shifts. His colleague P McG was ill that night and lay down. After a brief conversation with CC the claimant was sent home.

The claimant was shocked when he received CC's letter of 19<sup>th</sup> January 2009 requesting him to attend a disciplinary meeting. In that letter it stated that he had been asleep while carrying out his duties. He had never admitted to sleeping on his shift on 16<sup>th</sup> January 2009.

At the disciplinary meeting on 22<sup>nd</sup> January 2009 he instructed his shop steward to act for him. The meeting lasted approximately ten minutes. He contended that the minutes of that meeting were fabricated. He had never had a conversation in relation to the turning off of the lights and had never turned off the lights. He had never apologised for being asleep. He understood at the meeting that he was being punished for not reporting his colleague falling ill that night.

The claimant was shocked to receive his letter of dismissal dated 28<sup>th</sup> January 2009 and contacted his union representative. He appealed the decision to dismiss him. The appeal hearing took place on 11<sup>th</sup> February 2009. His union representative acted on his behalf at that meeting and referred to CC's letter of 28<sup>th</sup> January 2009 in which CC referred to events of 15<sup>th</sup> January 2009. This contradicted the intended reason for the claimant's suspension, which related to an incident that occurred on 16<sup>th</sup> January 2009.

His appeal was unsuccessful and his employment was formally terminated on 27<sup>th</sup> February 2009.

Since the claimant's dismissal he applied for numerous jobs over a fourteen-month period. In March 2010 he set up as a sub contractor and does some work for a semi-state body.

CR, the claimant's shop steward received a telephone call from the claimant at 4 am on 16<sup>th</sup> January 2009. The claimant gave him his version of events on that morning. CR telephoned CC for his account of what had occurred. CR thought the purpose of the disciplinary meeting on 19<sup>th</sup> January 2009 was to discuss company procedures as he thought the claimant had not followed correct procedures on 16<sup>th</sup> January 2009 by not alerting management to his colleague's illness that night. CR felt that there were alternatives to dismissal and these could have been explored.

**Determination:**

The Tribunal has carefully considered the evidence adduced. On balance, the Tribunal believes that the claimant did fall asleep in the course of his employment as a night time shift worker. In response to this discovery, the respondent engaged in a disciplinary process, which ultimately saw the claimant being dismissed.

The claimant engaged in the disciplinary meeting and had a full appeal and at both of these meetings the claimant was represented.

The Tribunal accepts that the contemporaneous notes form as accurate an account of how these meetings unfolded, as might reasonably be expected.

The claimant appears to have conceded initially that he had fallen asleep. Subsequently, he suggested he might have inadvertently "nodded off" but before the Tribunal he denied that he was anything other than alert and working for the duration of his shift.

The Tribunal cannot reconcile any of these versions of events with one another.

Be that as it may, the Tribunal does not find that the company has behaved reasonably. There can be no doubt that CC deliberately went on to the premises on the night in question to catch employees out. This mission was met with 100% success in this regard.

The Tribunal very much regrets that the company acted in this way and questions why the company had not notified its workforce by way of general circular or notification that falling asleep on the job is deemed unacceptable. Such a notice could give a general warning that going to sleep on the job would be considered gross misconduct – attracting dismissal.

Ultimately, the exact message was got across – using the claimant and his colleague as examples.

The Tribunal cannot find that there is any good excuse for going to sleep in the course of employment – the Tribunal is mindful of the short hours, good wages and level of trust being placed in the claimant all of which were taken for granted by the claimant.

Insofar as the disciplinary process goes the Tribunal does have two criticisms. Firstly, the waters were muddied by raising the work pattern on the night of 15<sup>th</sup> January 2009 – this was extraneous to the matters at hand and was inappropriately raised.

Secondly, the Tribunal would question whether S. McL should have heard the appeal in

circumstances where he had been one of the first people to be notified of the incident on 16<sup>th</sup> January 2009. However, S. McL was not challenged on this point.

CR was clearly shocked at what he considered to be the disproportionality of the punishment that this incident attracted with workplace practices and the Tribunal has every sympathy for this stance. However, the market place changed by 2006 and persons cannot expect that any napping on the job can be in any way acceptable.

The Tribunal finds, save insofar as there may have been a few procedural defects, that the decision to terminate the claimant's employment was reasonable. On balance, the claimant was the author of his own misfortune and the Tribunal awards him compensation in the amount of €10,000.00 under the Unfair Dismissals Acts, 1977 to 2007 to compensate for the company's failing insofar as the disciplinary process was carried out.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)