

**EMPLOYMENT APPEALS TRIBUNAL**

APPEAL OF:

CASE NO.

**EMPLOYEE - appellant**

UD1536/2010

against the recommendation of the Rights Commissioner **R-078560-UD-09/JT**  
in the case of:

**EMPLOYER – respondent**

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr R. Maguire B.L.

Members: Mr. B. Kealy  
Ms. M. Mulcahy

heard this appeal at Dublin on 25 August 2010  
and 18 January 2011

Representation:

Appellant:

Mr. Ed Kenny SIPTU, Security Services Branch,  
Liberty Hall, Dublin 1

Respondent:

Ms. Lauren Tennyson BL instructed by, on the first day, Ms. Fiona Brick  
on the second day, Ms. Patricia Byrne both of Byrne & Company, Solicitors,  
11 Malahide Road, Swords, Co. Dublin

This appeal arose as a result of an employee (the appellant) appealing against a recommendation of a Rights Commissioner **R-078560-UD-09/JT** in the case of an employer (the respondent)

The determination of the Tribunal was as follows:

The appellant was employed as a security officer from December 2005 at a site where the respondent provided security services to a company (the client) involved in the pharmaceutical industry. At the times relevant to this appeal the appellant was one of two security guards at the site on the night shift from 7-00pm to 7-00am. The second guard, who was situated at the gatehouse, controlled access to the site and monitored the CCTV systems. The appellant was based in the reception area of the office block. As part of his standard operating procedure the appellant was required to make regular check calls to the respondent. He was further required to conduct hourly patrols of the client's premises including the car park.

On 19 February 2009 the client contacted the respondent as three windows at their premises had

been damaged having had rocks thrown at them. These incidents had not triggered any CCTV activity in the area of the damage, neither had they been reported by the security officers, one of whom was the appellant, working the previous night.

As a result the appellant's branch manager (BM) conducted an investigation into the events of the night of 18 February 2009 by reviewing CCTV footage at the client's premises. As a result of his investigation BM became concerned about the manner in which the appellant was carrying out his duties. He believed that the CCTV footage of the reception area where the appellant was based when on duty and which is activated by movement showed the appellant to be asleep on duty. He compared the CCTV records with the duty log and check calls made by the respondent and extended his investigation to a total of three shifts worked by the appellant in February 2009.

On 10 March 2009 the Human Resource manager (HR) wrote to the appellant inviting him to a disciplinary meeting on Monday 16 March 2009, as there had been a complaint that he was sleeping on duty. He was warned that the meeting may lead to disciplinary action and advised who his union representative was. On 13 March 2009 the appellant phoned HR to point out that he was rostered to work the night before the meeting and HR agreed to reschedule the meeting to a later date. In the event and having worked the Sunday night the appellant attended the respondent's offices at the time indicated in HR's letter and the meeting proceeded with the claimant signing a waiver to attend the meeting without representation. HR, BM and the appellant were in attendance. BM was the only person at the meeting who had viewed the CCTV footage. The appellant was shown the logs of the three shift reports and the check call reports.

As a result of this meeting on 18 March 2009 HR sent the appellant a letter of termination for gross misconduct by reason of his sleeping on duty. The appellant was given one week's notice with a termination date of 30 March 2009. He was advised of his right of appeal to a different branch manager (DB).

On 23 March 2009 the appellant wrote to DB. The first sentence of that letter is as follows "I wish to contest the letter of termination dated the 18<sup>th</sup> of March 2009." He then set out his dissatisfaction with the dismissal. On receipt of this letter from the appellant DB examined the appellant's file, spoke to both HR and BM about the matter, got the client's approval to let the appellant view the CCTV footage and recommended that HR and BM rehear the matter. On 30 March 2009, in a letterheaded "Re Letter of Appeal" BM advised the appellant that a re-hearing was to be held 2 April 2009.

HR, BM, the appellant and his union representative attended the meeting on 2 April 2009. After viewing the CCTV footage at the client's premises the four of them went to a hotel to conduct the meeting. On 6 April 2009 HR wrote to the appellant to state that there was no alternative but to terminate his employment for gross misconduct by reason of his sleeping on duty. The appellant was given one week's notice with a termination date of 9 April 2009. He was again advised of his right of appeal to DB within seven days. No appeal was lodged.

## **Determination**

DM recognised that it had been unfair to the appellant that he did not receive an opportunity to view the CCTV footage. DM's role in this was supposed to be in the conducting of the appeal. Instead of that he sent it back to HR and BM for a re-hearing of a matter on which they had already made up their minds. As far as the appellant was concerned the re-hearing on 2 April 2009 represented his appeal. It is unsurprising that he chose not to avail of the opportunity offered to him to appeal to DM in the second letter of termination. It must follow that the dismissal was unfair. Nevertheless the appellant contributed substantially to his dismissal by reason of his conduct and in the circumstances the Tribunal measures the award under the Unfair Dismissals Acts, 1977 to 2007 at €10,000-00.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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