

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:
EMPLOYEE

-claimant

CASE NO.
UD490/2009

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

EMPLOYER *-respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. M. Gilvarry

Members: Mr. D. Morrison
Ms. R. Kerrigan

heard this appeal at Letterkenny on 11th November 2009
and 18th January 2010

Representation:

Appellant: Ms. Fidelma Carron, SIPTU, Port Road, Letterkenny, Co. Donegal

Respondent: Mr. Padraic Lyons instructed by Matheson Ormsby Prentice,
Solicitors, 70 Sir John Rogerson's Quay, Dublin 2

This case came before the Tribunal by way of an employee appeal of the Recommendation of a Rights Commissioner Ref: r-064019-ud-08/EOS.

Respondent's Case

The respondent is a meat-processing factory that partakes in the slaughtering, de-boning and vacuum packing of meat. The claimant was a tabletop scale operator. This involved weighing and labelling boxes or trays of meat that came directly from the boning hall. The claimant put the box on the scale, selected the cut of meat, two labels came out of the machine and the claimant put the labels on the box or tray. This was a skilled position that required the claimant to be able to identify the cut of meat to make the right label selection. Prior to the claimant's disciplinary hearing his supervisor had been investigated for stealing meat. During the investigation into the claimant's actions he denied all allegations against him.

The Managing Director (PA) was appointed to Chair the claimant's disciplinary hearing on the 11th of February 2008. Also present at that meeting was the claimant's union representative and an independent person nominated by the respondent. An investigation into the allegation that the claimant was manipulating the weight of boxes of meat had already taken place.

During the course of the Disciplinary Hearing the claimant admitted that he had not been truthful during the investigation. The claimant now admitted that he had manipulated the weight of the boxes under the instruction of his supervisor. The claimant also admitted he choose which cut of meat for the label under the instruction of his supervisor not by the meat it contained. This has extreme consequences for the respondent as the difference in labelling an expensive cut of meat as a cheap cut of meat could mean the difference of €500.00: €50.00. The Managing Director saw this as a double fraud, the label and the weight. This was happening once a week or fortnight for over a year without the respondents' knowledge.

PA asked the claimant why he didn't come forward and report his supervisor to which he replied he was afraid of his supervisor, that he would make life difficult for him. The claimant was a member of the 'works committee' along with PA. PA had a good working relationship with the claimant and would expect the claimant to approach him with this information.

The claimant was not offered money for his actions nor had he any knowledge of where the meat was going. The respondent discovered that the claimant's supervisor (SR) had an arrangement to sell the meat to some hotels and that's how he was benefiting from the claimants actions. The claimant informed PA that SR contacted and threatened him during the investigation. During the disciplinary hearing the claimant said, "*how could I come forward and grass him in..*" PA took this as an acknowledgement that the claimant knew his actions were wrong.

The first investigation meeting took place on the 25th of January 2008 where the claimant declined representation. PA had access to both investigation reports and noted the contradictions in what the claimant said and was saying at the disciplinary meeting. The second investigation meeting took place on the 31st of January 2008 where the minutes of the first meeting were agreed and they viewed the CCTV footage. The claimant agrees, as per the CCTV that he manipulated the weight on the scales under the instruction of his supervisor. The CCTV shows the claimant manipulating the weight on the scales on a number of occasions without looking at the contents of the box of meat. During the second investigation meeting the claimant said the boxes were too heavy that's why he didn't put them fully on the scale. Another member of staff was discovered doing the same thing and was given a warning but not dismissed. PA signed the letter dated the 22nd of February 2008 suspending the claimant on full pay pending his decision. The claimant was in a position of trust; PA felt the claimant had breached this trust and it was gone. PA wrote to the claimant on the 3rd of March 2008 informing him that,

"The company considers your actions to be gross misconduct, and having considered all alternatives it has been decided to dismiss you with immediate effect from today."

The claimant's contract states that Gross Misconduct can be fraudulent activity. PA believed that the scale operator position was so important that he had no choice but to dismiss the claimant. The respondent operates on a small percentage of profit margins so the weight of the meat is very important. The dismissal letter notified the claimant of his right to appeal this decision.

Cross-Examination

PA took over the Disciplinary Hearing as he was removed from the whole situation and was a senior figure within the respondent. PA agrees that all the claimant's instructions regarding the weighing and labelling of the meat came from his supervisor however PA believes that the claimant knew his instructions were wrong and should have reported this. PA does not believe the supervisor threatened the claimant and if he did there is a clear grievance procedure that the claimant could have followed. PA was not aware of the 'Swedish order' where all boxes had to weigh 20kg. The other scales operator that manipulated the scales was not dismissed as his situation was under different circumstances. The 'alternatives' explored by PA were to move the claimant to a different department but his actions were such a breach of trust PA didn't want him working anywhere else.

The HR Manager and Director of the Respondent (NmI) was appointed to hear the claimant's appeal against the decision to dismiss him. NmI had no prior involvement with the investigation, disciplinary hearing or the decision to dismiss the claimant. The appeal hearing took place on the 25th of March 2008.

NmI did look at the investigation notes as part of the appeal process. NmI understood that at the second investigation meeting by way of explanation the claimant said the boxes were too heavy for him to put on the scales properly. This claim is vastly different to the claimant being instructed not to lift the boxes fully onto the scale.

When considering the notes from the disciplinary hearing NmI believes that the claimant should have reported the practices even if they were done under his supervisor's instruction. The claimant's use of the phrase '*grass him in*' suggested that he was 'in' on everything from the beginning.

The claimant said he '*had no place to go*' with his allegations but NmI believes the respondent has an open door policy and that the claimant was on the 'works committee' so had ample access to senior management. The claimant had been a shopsteward and as a result knew all the management quite well. NmI believes the claimant breached the trust of the respondent beyond repair. All the points of the claimants appeal were addressed and decided;

1. The claimant was a willing participant in the scam.
2. If a supervisor gives an order you know is wrong it should be reported to management.
3. The respondent is not obliged by law to have a whistle blower policy.
4. There are grievance procedures in place for any employee that feels threatened.

NmI upheld the decision to dismiss the claimant and informed him of this by letter dated the 28th of March 2008. The same letter informed the claimant that this was the respondent's final decision that all options open to him had now been exhausted.

Cross-Examination

If an employee refuses a direct order from a supervisor they would be open to disciplinary procedures being taken against them. The supervisor can take the disciplinary action directly without involving any of the managers. NmI does not know why the investigators changed during the process other than it demonstrates the seriousness of the situation. If the claimant had made a complaint about his supervisor it would have been kept confidential within the management. NmI believes the outcome would have been different for the claimant if he had co-operated with the investigation from the start. The respondent had lost all trust and faith in the claimant so re-deployment was not an option. The claimant's supervisor was also dismissed. The respondent's grievance policy would protect the claimant at work but the respondent has no control over what happens to the claimant outside of work.

Claimant's Case

The claimant commenced employment with the respondent in March 1999. After two years bagging meat the claimant moved position to scales operator. Prior to these events the claimant had a clean disciplinary record. On most days the claimant had to complete unusual instructions. When the respondent was completing the 'Swedish order' the claimant was instructed to ensure that the trays did not weigh over 20kg. The claimant queried what he should do, if he should split the meat into two trays but was told this would take up too much room in the lorry and to manipulate the scales instead. This practice happened all the time. The claimant asked the bone hall manager about the practice and this is highlighted in the first investigation meeting held on the 25th of January 2008. The bone hall manager's response was "*get on with it or someone else will.*"

The claimant does not believe the respondent cultivates a 'team environment' you just keep your head down. As a shop steward the claimant had experience representing staff with grievances and found that overall the respondent was negative and never changed their mind once a decision was made. If an employee was in a grievance situation against a supervisor/manager the employee was always the one to be punished. The respondent never overturned a grievance with a supervisor.

It was normal practice for the claimant to be instructed to manipulate the scales. The claimant did not look into the boxes if it had a lid on it - the supervisor instructed him as to what cut of meat it is. The claimant did not feel he could approach management about his instructions as his previous attempt was shot down.

The claimant knew that at the first investigation meeting the respondent thought he was involved in some type of fraud. SR contacted him before the first meeting and said, "*it is a setup and I'll be back as your supervisor so keep your mouth shut.*" The

claimant knew the respondent could not protect him outside of work and probably not inside either. SR phoned him three times before the second investigation meeting. The claimant felt that SR would not be dismissed and that he would have to work under him then SR could do what he wanted to him. The claimant feels that at the second investigation meeting the respondent had already made a decision. A letter dated the 7th of February 2008 from the claimant's representative corrects the minutes to read that the General Manager says to the claimant regarding the allegations, "*it does not matter what excuses you make, I will be able to disprove it.*" He felt the investigation team changed after that because it was obvious the General Manager was prejudiced. The claimant decided to tell the respondent everything after this as it became clear his job was on the line.

The claimant did not profit in any way as a result of following SR's instructions to manipulate the weight of the boxes.

Cross-examination

The claimant accepts that an employee has a duty of trust and honesty to his employer. The claimant only manipulated the weight of boxes of meat when directly instructed to by his supervisor; this practice had been going on for approximately one year. The claimant realises now how serious the situation was but at the time he was just following orders. The claimant did not question SR as manipulating the scales was common practice and the claimant knew his job was at stake if he didn't do what he was told. The claimant decided to tell the truth when the threat to his job became greater than the threat of SR. Although the claimant knew PA he did not think he would be protected if he approached him regarding the situation. Working from past experience with the respondent the claimant felt that if he complained the respondent would go after him. The claimant was asked on many different occasions by different managers and supervisors to manipulate the weight of the boxes on the scales. The latest instructions given to the claimant by SR can be distinguished from all the other times as these boxes mostly have white lids on them.

Determination

In this matter the Tribunal carefully considered the evidence given in the matter and the submissions made by the parties.

In this matter the claimant was employed by respondent and was ultimately promoted to the position of some responsibility in the weighing and labelling section of the factory where at all times material to the events leading to his dismissal he was under the supervision of SR to whom he directly reported.

The respondent became aware of a possible problem relating to under weighing and/or mislabelling of meat and carried out an investigation. In the course of the investigation they interviewed the claimant on two occasions. At the investigation

meetings the claimant denied any involvement about mislabelling and incorrect-weighing and any knowledge of same. However at a subsequent disciplinary meeting the claimant admitted that he had misweighed and mislabelled boxes of meat on the instructions of his supervisor SR.

He was subsequently dismissed by way of letter and this dismissal was affirmed by the company after an appeal.

The Tribunal notes that after having heard the evidence of the respondent and the claimant there is little dispute between them as to the sequence of events and what transpired in relation to the case.

The claimant has always maintained that he received no personal benefit or payment for acting in this manner and this has not been disputed by the Respondent.

What is in dispute in the case is the importance that should be given to the particular circumstances in the case viz. that the claimant claimed that he had been acting under the orders of SR, whereas the respondents case was that even if this was accepted the claimant was under a duty and responsibility to report these unlawful and irregular instructions from his supervisor to management.

The claimants excuse for not immediately disclosing what his supervisor had been ordering him to do during the course of the previous year or indeed at the first or the second investigative meeting was that he felt pressurised and threatened by SR and that SR would make life very difficult for him if he made a disclosure to the investigation.

The claimant also makes the case that it was not reasonable for the respondent to dismiss him taking into account these circumstances.

The Tribunal accepts the claimant's evidence that he received no personal benefit from the matter and that he was acting under direct orders from his supervisor in carrying out these activities. The Tribunal further accepts the claimant's evidence that he felt under threat from SR and this is why he did not make a disclosure to the investigation and only disclosed SR's involvement at the disciplinary hearing. The claimant's actions were certainly a breach of discipline and did deserve a disciplinary sanction.

However the Tribunal feels that the respondent did not take sufficient account of the claimant's length of service, or the fact that he was actually under instructions from his supervisor, and the pressure that the claimant was under during the investigation process in reaching the decision to dismiss. In the view of the Tribunal the sanction of dismissal was excessive and the Tribunal determines that the claimant was therefore unfairly dismissed.

The Tribunal determines that the appropriate remedy for the claimant is compensation and taking into account the evidence of loss and the circumstances of the case the Tribunal awards the sum of €20,000.00 compensation to the claimant.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)