

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
EMPLOYEE *-claimant*

CASE NO.
UD795/2009

Against

EMPLOYER *-respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Mac Carthy S. C.

Members: Ms J. Winters
Mr. P. Woods

heard this claim at Dublin on 23rd February 2010
and 18th May 2010

Representation:

Claimant: Ms Niamh McKenna, O'Mara Geraghty McCourt, Solicitors, 51
Northumberland Road, Dublin 4

Respondent: Ms Sinead Mullins, IBEC, Confederation House, 84/86 Lower Baggot Street,
Dublin 2

The determination of the Tribunal was as follows:-

Respondent's Case

The respondent's first witness (DK) is a supervisor with the respondent restaurant since the 16th of January 2009. Initially DK worked as a general assistant reporting to the claimant when the general manager was not present. DK and the claimant had a good relationship and had socialised together before her promotion to supervisor.

The claimant's attitude changed and began appearing for work smelling of alcohol, his uniform was un-ironed and he was generally unkempt. The claimant refused to take instruction from DK stating, 'you can't order me to do anything.' The claimant also used obscene language to a customer resulting in a complaint from that customer. DK received complaints about the claimant's behaviour from both customers and other members of staff. DK contacted the respondent's Managing Director about the situation with the claimant. DK informed the MD that the claimant would not take instruction from her and that he appeared for work unshaven and smelling of alcohol. The claimant's behaviour deteriorated after he was demoted to general assistant, threatening DK and continuing to refuse to follow instruction. DK kept a record of the claimant's

behaviour in her diary as she had become frightened of the claimant. The claimant used his phone to film DK in the course of her work duties. The record DK kept includes days the claimant was late without explanation and when he was unhappy with his rostered duties so reported sick to work. DK contacted the MD again regarding the claimant's behaviour reiterating the previous issues with the addition of the threatening behaviour.

A meeting was scheduled for the 13th of February 2009. The allegations put to the claimant were;

- *Failure to follow reasonable instructions-serving customers, maintaining both deli counter and the hot food counter adequately and answering the telephone.*
- *Use of foul and inappropriate language to both staff and a customer*
- *Either actually or by way of pretence using a mobile phone to video DK sitting with a customer*
- *Threatening a staff member –DK and her husband*
- *Failure to co-operate with other members of staff in the conduct of day to day duties*
- *Repeatedly taking breaks without permission*
- *Failure to come to work clean shaven and with a presentable uniform*

The claimant was informed of the seriousness of the situation but did not respond to the allegations. DK was at the meeting and another member of staff that had a complaint but neither of them spoke. The meeting concluding by arranging another meeting for the 16th of February.

The second meeting was held on the 16th of February with the claimant, his partner, DK and JB. The claimant's partner objected to DK's presence but it was explained DK was only there in case clarification was needed on any of the issues. This meeting concluded with the claimant's dismissal. DK had no input into the decision to dismiss the claimant.

The claimant and DK's husband had a fight outside working hours but it had not affected DK's relationship with the claimant.

The claimant was offered the opportunity to adjourn the meeting on the 16th of February if he needed more time to prepare.

Cross-Examination

DK disputes telling the claimant she would, 'have him fired.' DK was unaware the claimant had made a complaint about her; he had never approached her with any issues. DK was at both meetings with the claimant in order to 'verify the facts.' The manager before DK had never 'dealt' with the claimant's behaviour so it was left to DK to remedy. DK was aware how serious the meetings were and this had also been made clear to the claimant.

Prior to this, the claimant was given a verbal warning but a record was not kept. The claimant was offered the opportunity to bring a representative to the meeting. Prior to the first meeting the claimant was unaware of the allegations against him.

The respondent's second witness (JB) has been a Director with the respondent for 28 years. JB had been concerned with the claimant's behaviour but had left the responsibility with the restaurant manager. When DK's predecessor resigned he recommended DK for the position as he had problems with the claimant. The concerns over the claimant's behaviour were highlighted at a management meeting on the 25th of October 2008 where it was decided that the

claimant would be spoken to and informed that he must drastically improve his performance.

JB received a fax from DK regarding the problems she was having with the claimant. JB arranged a meeting with the claimant where he decided to step down as supervisor, JB issued the claimant with a letter acknowledging his decision on the 21st of January 2009. The claimant did not accept any responsibility for his actions. The claimant's behaviour deteriorated further so JB organised a meeting with DK, the claimant and another member of staff. The claimant did not respond to the allegations made against him at the meeting on the 13th of February. JB informed the claimant how serious the situation was and that it could lead to his dismissal. The claimant did not apologise or make any suggestion that his behaviour would improve. JB organised a further meeting for the 16th of February so the claimant would have time to consider the allegations and informed the claimant that he could bring a representative.

At the meeting on the 16th of February JB went through the allegations against the claimant relating them to the disciplinary procedure. The claimant received and signed the employee handbook, which contains the disciplinary procedure. JB expected the meeting to end in an amicable resolution to the issues, but as the claimant was unresponsive to everything he made the decision to dismiss the claimant for gross misconduct. There was no point in issuing a warning or suspending the claimant as it was clear he could not continue to work with the respondent given his behaviour. The claimant was given the opportunity to appeal the decision to the respondent owner but did not avail of this option.

The claimant never raised any issues concerning DK. The claimant was given every opportunity to respond to the allegations and explain his actions and cross-examine DK on her allegations against him but choose not to say anything.

Cross-Examination

JB was aware before the two meetings that a verbal warning had been given to the claimant. If the claimant had been willing to improve and address the issues the situation would have been resolved. The claimant never told JB that DK had said she would get him fired. As per the disciplinary procedures the respondent reserves the right to skip some of the disciplinary procedures if the situation merits it. The claimant did not receive a written or final warning before his dismissal. The claimant's behaviour was deemed Gross Misconduct by definition;

- 1. Conduct likely to prejudice the safety of the Company's employees or property.*
- 2. Refusing to obey a legitimate instruction given by a properly authorised person.*

Claimant's Case

The claimant commenced employment in June 2006. After the fight with DK's husband at the respondent's Christmas party 'things' deteriorated. The claimant had no problems with the previous manager. The claimant had an agreement with DK that her husband would not come onto the respondent premises while the claimant was working and they would continue their good relationship.

The claimant was not aware that the meeting on the 13th of February could lead to his dismissal. The claimant felt shocked and intimidated with DK present at the meeting and therefore did not respond to any of the questions or allegations directed towards him. On the 13th of February the claimant was suspended and informed he could bring a representative to the meeting scheduled for

the following Monday the 16th of February.

The claimant admits to not following instruction as he felt the instruction was above his remit as general assistant. The claimant admits to threatening DK's husband as a direct result of the fight between them. The claimant admits he used bad language but had always done so and it had never been an issue before. The claimant reported DK for threatening him the previous week and was informed by JB that he 'talked to her sternly in case it happened.'

At the meeting on the 16th of February the claimant asked his partner to speak for him. It was not made clear that he could be dismissed for his actions. The claimant was not offered an adjournment but informed he could have rang the respondent if he felt he didn't have enough notice of the meeting. The claimant does not recall if he was given the opportunity to cross-examine DK. At the end of the meeting he was informed that he was dismissed.

Cross-Examination

The claimant did not appeal the decision to dismiss him as he did not read the letter properly that gave him the opportunity to appeal.

The claimant's partner (LR) gave evidence of the final meeting on the 16th of February. LR objected to DK's presence at the meeting, as DK was the claimant's 'accuser.' LR requested the allegations in writing and a copy of the disciplinary procedure, which JB said he would post to her. There was no opportunity to cross-examine DK. There was not enough time to get a representative. The meeting proceeded, as they did not think the claimant would be dismissed. It wasn't made clear that the issues raised could lead to the claimant's dismissal. The minutes do not accurately reflect the content of the meeting.

Cross-Examination

LR attempted to ask DK about the allegation that the claimant threatened her but DK responded, 'well in fairness you weren't there.'

Determination

The Tribunal is of the view that the respondent did not follow fair procedure. The claimant was not told that the meeting might lead to dismissal so that he could prepare his defence.

For this reason the Tribunal finds that the dismissal was unfair under Section 5(b) of the amending Act of 1993.

On the other hand the claimant himself failed to engage with the management during the investigation, and he did not exercise his right to appeal. He thereby contributed to the dismissal. The Tribunal also has regard to his use of bad language, unsuitable appearance at work, and his failure to co-operate with his supervisor. The Tribunal finds that his contribution to his dismissal was substantial, and must be reflected in the amount of compensation.

Compensation is governed by Section 7(1) (c)

‘Payment by the employer to the employee of such compensation (not exceeding in amount 104 weeks remuneration in respect of the employment from which he was dismissed calculated in accordance with regulations under section 17 of this Act) in respect of any financial loss incurred by him and attributable to the dismissal as is just and equitable having regard to all the circumstances’

In the view of the Tribunal compensation would be “just and equitable having regard to all the circumstances” in the amount of €4,500.00 and the Tribunal makes an award in that amount under the Unfair Dismissals Acts, 1977 to 2007

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)