

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE
- *claimant*

CASE NO.
MN700/2009

UD679/2009

against
EMPLOYER
- *respondent*

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005 UNFAIR DISMISSALS ACTS, 1977 TO 20071

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K.T. O'Mahony B.L.

Members: Mr D. Hegarty
Mr D. McEvoy

heard this claim at Thurles on 29th October 2009
and 14th December 2009

Representation:

Claimant(s) : Mr Gerard Kennedy, SIPTU, Assistant Branch Organiser,
Churchwell, Tipperary Town

Respondent(s) : Mr. Ambrose Downey, IBEC, Gardner House,
Bank Place, Charlotte Quay, Limerick

The determination of the Tribunal was as follows:-

Summary of the Evidence

The respondent manufactures reinforced steel/mesh and provides timber and building products to the building industry. There are seventeen branches in the company, employing a total of 260 employees. In early 1999 the claimant commenced employment as a machine operator with the respondent, which at the relevant time had around 25 employees in the branch.. All sites within the group are no smoking sites.

The respondent's H & S Manager (HSM) gave evidence of having been approached by an employee on 15th January 2009 with a complaint that three different employees had been smoking in the canteen area. He received further similar complaints on 16th January 2009 and 23rd January 2009 from two other employees. Two large signs prohibiting smoking are displayed in the

canteen. The three complainants, being fearful of possible repercussions for making a complaint, did not want their identity disclosed and HSM assured them that their anonymity would be preserved.

On receiving the complaints on 15 January HSM conducted his own investigation and found cigarette butt and ash on the canteen floor. He swept the floor that evening and, on checking the floor area the following day, he found more cigarette ash on the floor. On Monday 19 January 2009 he checked and again found cigarette ash on the canteen floor. HSM passed the information on to the works manager.

Smoking in the workplace is an offence under the Public Health (Tobacco) Acts 2002 and 2004 and a breach of the respondent's Health and Safety policy. Even before the legislation, from around 1998 on, the respondent prohibited smoking in the workplace to ensure the protection of non-smokers. Furthermore, a no smoking policy was a condition of the respondent's insurance cover. On the introduction of the legislation the respondent's policy was updated and memos were circulated in 2003 and 2004 to members of management to be brought to the attention of the employees. Two large notices prohibiting smoking in the canteen were displayed there. It was the respondent's position that as the claimant had at one time been a member of the Health and Safety Committee he was well aware of the regulations on the prohibition on smoking in the workplace. While the claimant maintained that he was unaware of the prohibition on smoking on the premises on health and safety grounds minutes of a health and safety meeting from late 2000 where the policy was discussed recorded the claimant's attendance at the meeting. The company had a designated smoking area near the canteen.

HSM discussed the problem with the managing director (MD). The respondent, intent on honouring its commitment to protect the complainants' anonymity, took a decision to install CCTV to confirm what HSM had been told. The covert surveillance was in place in the canteen for three days, from 26 to 28 January 2009, and it clearly showed the three employees, including the claimant, smoking.

Following instructions from the Group HR & Safety Manager (GHRM) the works manager arranged for individual investigation meetings with the three employees on 29 January 2009. Two of the employees, on viewing the CCTV footage, admitted to having been smoking in the canteen and were apologetic. Both men were suspended on full pay pending a disciplinary hearing. The claimant refused to attend the investigatory meeting without a trade union representative. The works manager explained that he could have a work colleague with him but the claimant maintained his position. Due to his non co-operation WM suspended the claimant on pay pending a disciplinary hearing.

On 3 February 2009 GHRM wrote to the claimant, stating *inter alia*:

As you are aware under section 47 of the Public Health (Tobacco) Acts, 2002 and 2004 the smoking of a tobacco product in a specified place is prohibited. This includes a place of work, which for the purposes of this legislation is defined under the Safety, Health and Welfare at Work Acts, 1989 – 2005.

Even before this legislation the Company prohibited smoking in the workplace to ensure protection of non-smokers, but also as a condition of our insurance policy requirements.

The Company also erected no smoking signs and implemented a strict no smoking policy which is included in the Company's safety statement. Breaches of this policy, the Company's statutory requirements, and its insurance requirements is a serious matter and accordingly the Company is

treating the matter as gross misconduct.

...

Regrettably you refused to co-operate with the Company's investigation on a number of occasions and declined to meet with the Company to discuss the matter at hand.

After consideration of your refusal to co-operate with the Company's investigation the Company was left with no alternative but to suspend you on pay pending an investigation into the allegations that you were smoking on a number of occasions in a prohibited area.

As you are aware all employees are required to comply with the Company's investigations and in particular to co-operate fully to ensure that the investigation can proceed without delay. However as a result of your failure to cooperate with the Company's investigation the Company is taking a serious view of this inappropriate behaviour.

As part of the investigation you are now required to attend a disciplinary hearing on Thursday the 05th February at 2.00pm in the offices of [the respondent].

...

You are if you wish entitled to be represented at this meeting by a work representative.

GHRM chaired the disciplinary meeting and the works manager was also present. The claimant's trade union official (TU) attended the disciplinary meetings in February with the claimant. The claimant initially indicated that he could not recall smoking in the canteen but later denied having done so. The claimant and TU turned down the opportunity to view the CCTV. TU maintained that the covert CCTV surveillance in the canteen was a breach of the claimant's rights under the Data Protection Acts.

The respondent's decision to dismiss the claimant was based on his serious breach of the respondent's safety policy, which constitutes a criminal offence, and on his failure to co-operate with the investigation. These destroyed the respondent's trust in the claimant. In his letter dated 13 February 2009 GHRM confirmed the dismissal to the claimant and advised him of his right to appeal the decision.

The other two employees who accepted that they had been smoking in the canteen were made redundant along with a number of other employees but while the others received an enhanced redundancy package, the two employees only received their statutory redundancy entitlements. Consideration would have been given to a lesser sanction than dismissal had the claimant been co-operative during the investigation. The respondent refuted the claimant's position that his dismissal was a guise to avoid paying him a redundancy payment. The respondent's evidence was that over recent years its workforce throughout the 17 branches had been halved to around 300 by December 2009 and that there had been a substantial reduction in the number of employees in the branch where the claimant had worked in the same period.

MD heard the claimant's appeal on 20 February 2009 and GHRM attended as the note-taker. While TU had no objection to his presence at the outset of the meeting he objected when GHRM clarified a point and following this GHRM remained silent throughout the remainder of the hearing. GHRM did not participate in the decision making function following the appeal hearing. MD found the claimant's responses at the appeal hearing were evasive, inconsistent and dishonest. He could not accept that the claimant could not recall whether he had, some weeks prior to the meeting, been smoking in the canteen. For these reasons and the claimant's breaches of the respondent's

safety policy, the Public Health (Tobacco) Acts 2002 and 2004 and the Safety, Health and Welfare at Work Acts 1989-2005 MD upheld the decision to dismiss the claimant.

The claimant's position was that he was not aware that smoking on the premises was a dismissible offence or about the respondent's no smoking policy. He could not recall attending a health and safety meeting in late 2000 where the prohibition on smoking in the canteen was discussed. Nor could he recall smoking in the canteen in January 2009.

Determination

The Tribunal accepts that the claimant was smoking in the canteen as alleged by the complainants in late January 2009. It does not accept that the claimant could not recall whether he had been smoking in the canteen or that he was unaware of the respondent's strict no smoking policy.

Smoking on the premises is and was at the relevant time a criminal offence under the Public Health (Tobacco) Acts, 2002 and 2004 rendering both the respondent and the claimant liable to criminal prosecution as well as being a condition of the respondent's insurance policy. The Tribunal is satisfied that putting the health and safety of others as well as the safety of the premises, where flammable goods are stored, at risk constituted gross misconduct and came within the respondent's disciplinary policy which provides that: "Deliberate breach of safety regulations likely to cause damage to one self or other employee" is serious misconduct which may warrant summary dismissal. It finds that the claimant's dismissal for breach of its safety policy, statutory obligations and obligations under its insurance policy and for his failure to participate in the investigation was reasonable in the circumstances. The employment relationship cannot continue where the bond of trust no longer subsists.

The Tribunal is satisfied that the claimant's dismissal for gross misconduct in contradistinction to the dismissal of the other two employees whose dismissal was by reason of redundancy was not unfair in that those two employees had participated in the respondent's investigation process.

Having had the benefit of having the parties before it the Tribunal is satisfied that respondent's non-disclosure of the identity of the complainants was not unreasonable in the circumstances. The Tribunal, notwithstanding the decision of the Data Protection Commissioner, finds in all the circumstances that the dismissal was not unfair. Accordingly, the claim under the Unfair Dismissals Acts 1977 to 2007 fails.

Because the dismissal was on grounds of misconduct under section 8 of the Minimum Notice and Terms of Employment Acts there is no entitlement to notice under the Acts

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)