EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	CASE NO.
EMPLOYEE	UD281/2010
	WT131/2010

against

EMPLOYER
under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Mac Carthy SC

Members: Mr. J. Browne
Mr. F. Dorgan

heard this case in Carlow on 8 June 2011

Representation:
_____

Claimant(s):
Mr. Conor O'Doherty BL instructed by
King & Company, Solicitors,
Westgate, Wexford

Respondent(s):
Ms. Mary Fay BL instructed by
Arthur Cox, Solicitors,
Earlsfort Centre, Earlsfort
Terrace, Dublin 2

The determination of the Tribunal was as follows:-

The claim under the Organisation of Working Time Act, 1997, was withdrawn

The claimant was a caretaker employed by a technology college from January 1989 to his dismissal on 14 July 2009. The respondent contended that the claimant had not been unfairly dismissed because there had been substantial grounds justifying the dismissal by reason of his conduct.

The respondent's representative stated at the Tribunal hearing that there had been an investigation,

a disciplinary hearing and a disciplinary report recommending dismissal.

Counsel for the claimant stated that the claim under the Organisation of Working Time Act, 1997, was withdrawn but that reinstatement was sought for unfair dismissal. The respondent's counsel disagreed.

Counsel for the respondent said that the claimant had been guilty of gross misconduct. He deliberately closed early on the Friday of a bank holiday weekend in 2009 (Friday 29 May 2009) soon after 6.00 p.m.. A postgraduate student got locked into the premises. She had to use the alarm and the emergency services were called. The claimant was dismissed. The appeal against the dismissal was chaired by an eminent figure but the dismissal was not overturned.

Counsel for the claimant said that there had been a custom and practice to close early before a bank holiday and that the respondent had failed to check this practice. The claimant had no legal representation at first. Despite the sanction of dismissal he could not address the respondent regarding custom and practice. There could have been further disciplinary procedure if the claimant spoke externally of the matter. He was told that he could only speak to his trade union representative. He thought it was not open to him to seek advice beyond that. The Tribunal was referred to a letter dated 5 June 2009 to the claimant from the respondent's HR manager which stated that he had a right to be accompanied by a work colleague or trade union representative at any meeting under the formal disciplinary procedures. In the same letter the claimant was asked to note "that all matters relating to this disciplinary procedure are strictly confidential to the parties and their representatives involved and breach of this confidentiality may in itself result in disciplinary action".

Counsel said that it was not disputed that the postgraduate student had been left in the building but that the dispute was as to whether or not the claimant could lock up early for the bank holiday weekend. The claimant had made all possible efforts to survey the premises but could only do a visual inspection because there had been a change of access code. However, the claimant had not been given any new code details.

Respondent's Case:

Giving sworn testimony to the Tribunal, MM from the respondent said that she had interviewed the claimant and GD who had been the two caretakers charged with closing for the weekend in question. She interviewed them separately. They were each accompanied by MB (a trade union branch organiser). They claimed that there was a custom and practice of closing when the library was not open. MB suggested that MM interview all caretaking staff. She did so (apart from one who was not on the rota) and also spoke to KK (caretaker chargehand). KK said that there was no custom and practice to close early.

One of those to whom MM spoke was ML (a caretaker) who did not say that there was custom and practice to close early. ML said that he would not close early without permission and that he had phone numbers to contact. He only closed the college when given an instruction by a manager.

The bank holiday Monday in question was 1 June 2009. The Friday evening in question was 29 May 2009. All library services had closed after the annual examinations had ended. This was the only time that the college was open with library facilities shut.

MM investigated both caretakers (the claimant and GD) but they just blamed each other regarding the respondent's gates.

Giving sworn testimony, COT said that he joined the respondent in 1994 and that he did HR and legal administration work. Since he joined the respondent he was in charge of the respondent's buildings too. He said that in the early nineties there had been a practice of caretakers doing nights with no shift payments. However, the respondent's need for nightwork grew and caretakers got a shift premium of one sixth. From 1996 they gave up public holiday days but were paid a shift premium for fifty-two weeks of the year. It came to a head in 2003, 2004 and 2005. A practice had crept in to pay overtime. The respondent extended the shift and started to pay overtime after 6.00 p.m..

COT told the Tribunal that he had been unaware of any "custom and practice" about closing early but he said that MM's findings had been accepted rather than contested.

Claimant's Case:

Giving sworn testimony, ML said that he had worked for the respondent in a security/caretaking capacity until he had retired in the past year. Asked if there had been a custom and practice (about closing) among him and his fellow caretakers, he replied that it was generally left up to their discretion. He had done closing on Fridays. Members of management were never involved. The caretakers resolved nearly all issues.

ML told the Tribunal that he had informed MM of the custom to close early in the absence of a clear instruction to the contrary. He asked MM as to whether what he said could have any implications for his future. He was told that there would be no implications for him and he answered informally. There was a team meeting every two months or so. He requested that he be given codes and finally got them. About two months after the claimant's dismissal ML got all the codes.

ML stated that he was sure that he had locked someone in. It would happen three or four times a year. Postgraduates would usually get word to caretakers if they were there late. Normally, the caretakers would be told. His knowledge was "anecdotal". He could not recall being on duty to close for a bank holiday weekend but believed that he had done so during his service with the respondent. In reply to a question from the Tribunal the witness said that the custom and practice of early closing on bank holiday weekends was not known to the management.

Giving sworn testimony, the claimant said that he had worked as a caretaker in the respondent's college for some 20 years. He had reported to the head of engineering. There would be night classes and library facilities until 10.00 p.m.. On Fridays library closure was 5.00 p.m.. The cleaners worked until 8.00 p.m.. KK who became chargehand said to lock up and go if there was nobody there.

More and more was got out of every day at the college. Library hours became longer. Before the

summer examinations library facilities were open even on Friday evenings. However, library staff did not have to work until 10.00 p.m. on a Friday before a bank holiday. Library staff liked to close down on a Friday.

Regarding Friday 29 May 2009 (the Friday before the June bank holiday on Monday 1 June 2009), the claimant was told at 6.00 p.m. that there was only one male teacher still present. The claimant had only one half of the college to cover. He checked all doors and checked them a second time. There were no cars in the car park. Asked at the Tribunal hearing if he had done a laboratory check, he replied that laboratory doors were not checked. Digital locks were starting to come in. Caretakers did not have the codes for all of the doors. He could not enter although most doors did have a window. He came to the laboratory door and then moved on. Nobody came out. He completed his route and put on the alarms.

The claimant subsequently got a call about an alarm going off on Friday 29 May 2009. He heard that there had been a fire brigade callout. He was put on administrative leave and warned not to speak about this to anyone other than his trade union representative (MB). MB told the claimant to own up to everything and hope for the right treatment from the respondent. He felt sad for the foreign postgraduate lady who had had to trigger an alarm to get out of the college that night. He had never got a chance to apologise to her. MB told him not to go near her for fear of influencing the case. The claimant did not think that what had happened would be viewed as misconduct let alone gross misconduct. Regarding any possible sanction other than dismissal he said that something could be put on an employee's record and that he had had experience of that himself in the past (before his record became clear again) but that never in his wildest dreams had he thought that he could be dismissed.

After his employment with the respondent the claimant found that he got no full-time job offers once he revealed that he had been dismissed by the respondent for gross misconduct. Since three months after his dismissal, he had had grave health problems which had necessitated an operation. He said that, in an ideal world, he would like to get his job back. He hoped to make a full recovery from his health problems.

At the end of the hearing counsel for the respondent stated that, rather than arguing that the claimant had been guilty of gross misconduct, she was relying on the claimant's conduct to justify the dismissal.

Determination:

The claim under the Organisation of Working Time Act, 1997, was withdrawn.

A number of issues arose during the hearing, which we should address.

On behalf of the claimant it was argued that the claimant was, in effect, denied the right to legal advice, when he was told that his trade union official would represent him. It is well settled law in the courts that an employer cannot be compelled to deal with a solicitor acting for an employee where there is a recognised trade union and established set of agreements in place (Meskell v CIE). This Tribunal, which itself includes members drawn from the Trade Union movement, would find it hard to depart from this principle.

After the dismissal there was an appeal hearing, but the Tribunal did not consider the appeal as such

for two reasons. Firstly the dismissal had already taken place and the later appeal could not make the earlier dismissal either fair or unfair. Secondly the appeal was chaired by an eminent outsider (admittedly in collaboration with two senior persons drawn from within the organisation). This independent chairman was not the agent of the respondent, and the respondent would not be answerable for his actions or decisions. The claim is that the respondent, not some outside party, dismissed him unfairly.

The claimant argued that early closing on the Friday on a bank holiday week-end out of term, when the library was not open, was custom and practice. The evidence on this point was not conclusive, but the Tribunal is not satisfied that this would justify the claimant's action. Employees may follow a certain 'culture' of early closing or some other practice of which management may be unaware, but employees cannot normally rely on this an excuse, unless management should have been aware of the 'culture.' In the present case this kind of early closing would happen only on one day a year, such a rare event that management could not be expect to become aware of it. The Tribunal does not accept the claimant's argument on this point.

The claimant was paid until 11 p.m. to allow time to ensure that all people had left the premises by 10 p.m., but he closed the building soon after 6 p.m. This was dereliction of duty, for which some penalty would be appropriate, and the Tribunal has to consider whether it justifies dismissal.

Counsel for the respondent relied on an old Tribunal determination from the early 1980's to the effect that it was sufficient if dismissal fell within a range of possible sanctions. That determination was made in the early years of the Unfair Dismissals Act, and was influenced by U.K. caselaw to that effect. In the meantime, however, the doctrine of proportionality was developed in Irish law generally (not just in employment law) and that approach is no longer appropriate.

There have also been developments in industrial relations in this country, where provision is made for dismissal for employment contracts and collective agreements. Over the years the Tribunal has stressed the importance of warnings before dismissal, but has always recognised that there are certain types of conduct so serious that a warning is not required. To take an extreme example the Tribunal would not expect an employer to give a verbal warning after the first murder and a final written warning after the second murder.

Contracts of employment and collective agreements have been drafted to take account of this distinction, by providing for 'gross misconduct' as well as misconduct generally. However the Tribunal has noted a tendency to define 'gross misconduct' in very wide terms.

Lawyers use the adjective 'gross' in limited cases. 'Gross negligence' means negligence of a very high degree, and quite different from ordinary negligence which can happen quite easily. Similarly 'gross misconduct' must be something very serious indeed, perhaps criminal or quasi-criminal in nature.

The word used in section 6 (4) (b) of the Unfair Dismissals Act is 'conduct', which is a neutral word, by contrast with the word 'misconduct' used in the Minimum Notice and Terms of Employment Act to justify dismissal without notice. The use of these two words in related statutes suggest two different standards, and over the years the Tribunal has often found that the nature of an employee's conduct was such as to justify dismissal, but not to justify summary dismissal. The words 'gross misconduct' must therefore mean something even more serious.

The claimant was dismissed for 'gross misconduct' and the respondent relied on the use of those

words in the employment contract where the definition includes serious dereliction of duty.' In evidence the claimant, while admitting he was at fault, told us that he found the use of those words offensive. In fairness to the respondent Counsel withdrew the adjective 'gross' at the end of the hearing.

There is a distinction to be drawn too between the claimant's 'act' (early closing) and the consequences of his act (leaving a person locked inside). If nobody had been locked inside, but the management had found the buildings to be locked early, it would not have been so serious, and no doubt the management would not have viewed it so seriously. To apply the analogy of dangerous driving, the law recognises the distinction between dangerous driving simpliciter and dangerous driving causing death.

In law a person is presumed to intend the natural and probable consequences of his act. This presumption can be rebutted, and consequences may be probable, foreseeable, unlikely, or only possible. In the present case, where the premises were deserted on a Friday before a bank holiday out of term time, the claimant checked the premises and could find no sign of anybody after a car departed. Locking a person inside the building was always possible, even if unlikely, and it is hard to say if was 'foreseeable.'

Overall the Tribunal is of the view that dismissal was disproportionate to the claimant's 'conduct' of closing the building early, and there finds the dismissal unfair.

Redress:

Counsel for the claimant sought reinstatement. Later in his evidence the claimant said he would wish for reinstatement 'in an ideal world' but that life would be very difficult for him if he returned to work. The Tribunal would not be disposed to grant full reinstatement in any event, as that would involve full back pay, and we think some penalty is appropriate. We might have considered this option if the respondent had persisted in the use of the words 'gross misconduct' but we give credit for the withdrawal of the adjective 'gross' even at a late stage of the hearing.

Compensation would be very limited, as the claimant became ill soon after the dismissal and would have been unfit for work for the intervening period. His financial loss would there be very small.

After careful consideration the Tribunal is of the view that re-engagement would fit the case. While that might seem difficult at first, the Tribunal members, from their experience of industrial relations think that it is workable, and that both parties can put this incident behind them and work together. There has been fault on both sides, and we think they should learn from this.

Re-engagement, as opposed to reinstatement, means the claimant in effect will pay a big financial price for his conduct, but he could resume his career, now that his health his recovered.

The Tribunal determines that the claimant be re-engaged as from the commencement of the next academic term on the same terms and conditions as applied before his dismissal (subject to any pay changes that may have taken place in the meantime) and that for all purposes, including pension but excluding wages, his employment shall be deemed to be continuous with his employment before dismissal.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)