

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE

- *claimant*

CASE NO.
RP524/2010
UD349/2010
MN320/2010

against
EMPLOYER
under

- *respondent*

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005 REDUNDANCY PAYMENTS ACTS, 1967 TO 2007 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 claim at Letterkenny on 19th January 2011
and 30th March 2011

Representation:

Claimant(s): Mr. Seamus Gunn, McCloughan, Gunn & Co, Solicitors, The Mall, Ramelton,
Letterkenny, Co Donegal

Respondent(s): Gibson & Associates, Solicitors, Port Road, Letterkenny, Co Donegal

The determination of the Tribunal was as follows:

Respondent's Case:

The respondents have two stores, N and R employing 70 staff. The respondents' key witness the operations manager (hereinafter referred to as MG), is no longer in their employment and was unable to attend on the first day of the hearing. The financial controller who commenced after the termination of the employment of the claimant gave evidence on behalf of the respondents. He commenced in this position on the 11th November 2010, as part of his role he looks after HR and payroll. He confirmed that all the papers contained in the claimant's personnel file were included in their book of documents for the hearing. He was aware that another trainee manager who commenced employment on the 4th December 2010 had replaced the claimant.

An employee of the respondents gave evidence. He was at the respondents' Christmas party in 2008. The claimant and his girlfriend were outside the function room and the witness told the

claimant's girlfriend that the claimant's sister "had went with the manager". He then saw the claimant run through the doors in to the function room saying, "He was going get him". Security then removed the claimant and the manager (hereinafter referred to MC). The claimant's sister was 16 years of age at the time. He was aware that the claimant had hit MC. His employer did not interview him directly after the incident. However a month or two later he was approached and asked about this incident. He told the respondent what had occurred but no notes were taken at this meeting. He was not aware that the claimant had been disciplined in relation to this. MC left the respondent in March 2009, he didn't know why.

The store manager of R store gave evidence (hereinafter referred to as MK). He confirmed that MC left in March 2009 as he had obtained another job. He knew the claimant at their N store and was requested to take the claimant on as a trainee manager in R store. The claimant commenced this position in June 2009.

He maintained that from the moment the claimant commenced in R store it was clear he was unhappy. He thought the claimant wanted to stay in N store, as it was closer to his home. The claimant didn't seem to want his training and thought that he had been the assistant manager in the N store before his move. The claimant made it clear to him he wanted to be in N store as R store was grubby. He explained that it was not unusual for a young lad to be unhappy about being further away from home so he offered the claimant a kind hand and his experience. He constantly offered words of encouragement, told him that he had the capabilities and good opportunities but he had to put the work in. He felt his efforts were going unheeded and in his mind he had realised that the claimant did not want it. As a result of the claimant's attitude he was regularly late; the claimant would be in his car on the mobile phone. He had brought these issues to the claimant's attention.

Before the claimant went on annual leave he gave the claimant a blank appraisal form to complete in preparation of a meeting to take place on the 14th September 2009. The claimant, witness and the operations manager (MG) were in attendance at this meeting. MG took notes of this meeting. The claimant had not completed the appraisal form even though he had been requested to do so, in preparation for this meeting. At this meeting MG went through the form and the scores that this witness had given the claimant. MG asked the claimant his opinion of these scores. The meeting finished with MG informing the claimant that the meeting would reconvene at a later date. This witness had no further involvement with the claimant after this meeting.

He had found the claimant to be a most un-co-operative employee. The appraisal was fair, the issues raised at this meeting were gone through individually and the claimant was given the opportunity to contribute. The more the meeting went on the more the claimant agreed with the appraisal. The claimant knew that they were not impressed with his performance.

Under cross-examination he explained he had joined the respondents' company in 2007. He had worked directly with the claimant from June 2009 to September 2009. He disagreed that he had only given the claimant the appraisal form on the 13th September 2009. He was not aware of when the claimant's previous appraisal had taken place; it was most likely in N store. The claimant's lateness was never serious enough to be advanced to his personnel file.

He is familiar with the respondents' disciplinary procedures as they are similar in all companies. He never gave the claimant a verbal warning. He had never seen the claimant's contract of employment. None of the issues raised at the appraisal meeting of the 14th September 2009 had been the subject of previous formal warnings to the claimant. He was not involved in the decision to move the claimant to the garage forecourt, nor was he aware that the claimant had tried

to invoke the grievance procedure.

At the end of the appraisal meeting on the 14th September 2009 he did not think that the claimant's employment was under threat, however he did not think that the claimant had a future in management.

He was referred to the notes of the appraisal meeting by the Tribunal in which it is stated "We asked claimant to take the remainder of the holidays and consider his position within the group while we done the same". He denied saying this, MG had used the collective we in the notes, He did remember a reference to the claimant taking the rest of his holidays, but could not recall his position to be considered. He was not aware that MG had previously issued the claimant with a warning.

On the second day of the hearing the respondent's previous Financial Controller (JD) gave evidence. He stated that he had written a letter headed final written warning dated January 8th 2009 concerning the incident between the claimant and the store Manager (MC) at a Christmas night out. This letter was submitted to the Tribunal on the second day of the hearing.

The witness stated that he had been at the party that evening but had not seen the altercation. He had discussed the matter with the owner of the company and MC discussed the matter before it was decided to issue the letter. The witness typed the letter and handed it to MC in order for him to give it to the claimant. He explained that they could have dismissed the claimant over the incident but because of his service and as he was a local resident it was decided to give him the warning. He had no involvement in any other warnings given.

On cross-examination he stated he had left the respondent employment in November 2010. When asked he stated that some of the staff at the party had been interviewed but he had not interviewed the claimant before issuing the final written warning letter. When asked he said he had no idea why the claimant had not signed for the final written warning letter even though he had signed for one on January 23rd concerning another matter.

Claimant's Case:

The claimant gave evidence. He had first started employment on a part-time basis, moving rubbish, at the request of the current owners' father when he was 12 years old in the N store. When he completed his schooling he commenced full-time work as a store person and a sales assistant.

In 2006 he was offered the position of trainee Manager and attended a trainee management course. He also attended some other courses. He had been given a staff appraisal in August 2006 and there were no problems at all. When the store Manager left in 2008 there were no more courses arranged and no more staff promotions.

In 2006 the respondent company opened the R store. In March 2009 the Operations Manager (MG) asked him to swap locations with a member of staff in the R store in order for them to get more experience in the larger N store. He moved in June 2009 and continued receiving the same wage. He told the Tribunal that he felt the duties he had been performing in the N store had been taken from him and he was put working on the cash till. The store Manager in R store (MK) dealt with the ordering of stock, dealing with staff and various other duties he had previously undertaken.

The claimant explained what had occurred at the Christmas party concerning his younger sister and

MC. He agreed that he had thrown the first punch. Both were removed from the premises. He told the Tribunal that he had expected to be spoken to, by management, about the incident on his return to work but no one approached him. He said that it had been awkward for the first week between him and MC for the first week after the incident but they continued to work together MC left the respondent's employment in February 2009.

He stated he had never received the final written warning dated January 8th 2009 until the second day of the hearing. He agreed he had signed, on January 23rd 2009, for a caution for an incident when he had been talking to his girlfriend while at work.

At the end of summer 2009 he booked a week's annual leave. On his return the following Monday the store Manager (MK) gave him a self assessed appraisal form to complete that evening and asked him to attend a meeting the following day with him and MG. The following day the meeting took place. He told the Tribunal that he felt it had not gone well. He had not brought the form into the meeting. He felt when he gave a self-assessed figure; say between 1 and 5, for various aspects of his performance, that MK and MG would decrease it. He felt bullied at the meeting and was unable to put his point across. At the end of the meeting he was told to take more annual leave and consider whether he wanted to remain working for the respondent.

He told the Tribunal that at the near of the end of his leave he tried to contact MG. At the start of October he met with MG and another person (KK). He told them he wanted to remain working as a trainee Manager but was told there was only 4 hours work on the petrol pumps available to him or if he wanted to resign he would be paid a certain amount of money. He said he would think about it but MG wanted a decision straight away. He asked for a copy of his contract and was told it would be sent on to him.

On October 2nd he wrote to MG stating he wished to take up the 4 hour a week working on the petrol pumps and stated that he was intending to avail of the grievance procedure. He also requested a written statement of the previous days meeting. Some days later he received a letter from JD stating he had was to be terminated from his employment on October 29th following a review of the appraisal carried out on him. He wrote to MG asking why he had been dismissed.

The claimant gave evidence of loss.

On cross-examination he stated he felt he had been given the self assessed appraisal form at very little notice. He stated that he had applied himself 100% to his job. He stated that he had never arrived late for work. When asked why he had not voiced his feeling that he was being bullied at the appraisal meeting, he replied that he felt he would not be listened to.

Determination:

The Tribunal has carefully considered the evidence heard and submissions made by both parties in this case.

While the Tribunal accepted JD's evidence that he had prepared and given to MC the "final written warning" referred to in evidence, to pass it on to the claimant, the Tribunal also accepts the claimant's evidence that he was never given this letter. It was by no means clear that any such finalwritten warning was justified, based on the evidence heard by the Tribunal, and no proper procedures were followed prior to it being drawn up. The Tribunal was not satisfied that the respondents followed fair procedures in the process leading to the claimant's dismissal,

nor indeed did it seem proportionate to dismiss the claimant in the circumstances. The Tribunal prefers the evidence of MK in relation to the claimant's performance as a trainee Manager, and the Tribunal also accepts that the claimant was not initially made aware his job was at risk. It would have been reasonable for the respondent to consider other options including demotion rather than dismissal, and the penalty of dismissal was excessive in all the circumstances.

The Tribunal find that the claimant was unfairly dismissed. The Tribunal consider compensation to be the appropriate remedy. Taking into account the evidence heard as to loss and mitigation of loss and the evidence relating to the claimant's performance, the Tribunal award the sum of €8,000 as compensation, under the Unfair Dismissals Acts, 1977 to 2007.

The claims under the Redundancy Payments Acts, 1967 to 2007 and the Minimum Notice and Terms of Employment Acts, 1973 to 2005 are hereby dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)