

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

EMPLOYEE - *claimant*

UD232/2010
WT112/2010

against

EMPLOYER

- first named respondent

EMPLOYER

- second named respondent

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. McGrath BL

Members: Mr. N. Ormond
Mr T. Brady

heard this claim at Dublin on 21st June 2011 and on 8th November 2011
and on 9th November 2011

Representation:

Claimant(s) : Ms. Eithne Reid O' Doherty BL instructed by:
J.C. Hoban & Co, Solicitors, Suite 114, The Capel Building, Marys Abbey,
Dublin 7 – on first day of hearing

Ms. Eithne Reid O'Doherty BL instructed by:
Keans, Solicitors, 2 Upper Pembroke St, Dublin2 - on second and third days of
hearing

Respondent(s): Mr. Boyce Shubotham, William Fry, Solicitors, Fitzwilton House, Wilton Place,
Dublin 2 - *for first named respondent*

Mr. David Farrell, IR/HR Executive, IBEC, Confederation House,
84/86 Lower Baggot Street, Dublin 2 - *for second named respondent*

Preliminary Issue

During the course of the hearing the Tribunal determined that the second named respondent has no case to answer and was released from the proceedings.

Respondent's Case

The Tribunal heard evidence that the respondent company operated a warehouse distribution centre on the northside of Dublin. The claimant was employed as a warehouse supervisor working the night shift which finished at 2.30am. In July 2008 it came to the respondent's attention that the claimant, along with his staff had left approximately 45 minutes early from the night shift and had recorded their hours as working the full shift. The Distribution Centre Manager contacted the claimant informing him that this was not good enough and he expected people to stay until the end of the shift. The company were aware that employees on the day shift left early on occasions but that position was recorded as (PU), performance unpaid, meaning employees were not paid for time which they had not worked.

Following the theft of a company vehicle in November 2008 it again came to the respondent's attention that the claimant had left his shift early along with his staff. On this occasion the company carried out a full investigation interviewing a number of employees including the claimant. The outcome of this investigation resulted in the claimant being demoted from his position as supervisor to a general operative position. The decision to demote the claimant was made because his actions had resulted in himself and his staff being paid for hours which they had not worked. The process was conducted fairly involving an investigation, a disciplinary hearing and an appeal hearing. The claimant went absent from work on sick leave following his demotion. In early 2009 a collective redundancy situation arose in the company and it was agreed with MANDATE trade union that a last in first out basis be the main criteria for selection for redundancy. The company wrote to the claimant during his absence on sick leave on four occasions in February, April and May 2009 concerning the proposed redundancy situation. As part of that correspondence he was invited to attend a consultation process which was been undertaken but the company received no response to any of their letters. The claimant did not engage in any way in the redundancy consultation process. He was ultimately dismissed by reason of redundancy on 26 June 2009. The company made an ex-gratia payment to the claimant even though he did not have the required two years' service to be entitled to a redundancy payment. The Tribunal heard evidence that even if the claimant had not been demoted it would have been unlikely that he would have been retained in employment following the restructuring and redundancy process due to the length of service policy as agreed with MANDATE.

Claimant's Case

The claimant commenced working for the respondent as a night shift supervisor in July 2007. He was told by the Distribution Centre Manager that the night shift was a very militant shift and he was given measurable and quantifiable targets. His working hours were from 6pm until 2.30am. He met his targets and achieved his key performance indicators and surpassed them on occasions. He received e-mails from the company informing him that he was doing a great job. He earned the trust of his staff. In 2008 he became ill and was absent from work. He returned to his job within 3 weeks as he did not want to let the company down and he loved his job. In November 2008 one of the respondent's trucks was stolen. On the night in question he, along with his staff had left before 2.30am as their work was completed. On 1 December 2008 he was interviewed by the Gardai in the office of the Distribution Centre Manager in relation to the missing truck. He was given no prior knowledge by the company that the Gardai would be interviewing him on the premises. He

believed that the company blamed him for the fact that the truck was stolen.

Following a disciplinary process he was demoted from his position as supervisor to general operative. He felt humiliated by the company's actions and believed that three individuals within the company wanted to get rid of him. He believed that he had the authority to allow staff to leave when the work was done. He accepted that he recorded their finishing time later than they had actually finished. This was a system he had inherited, known as 'job and knock' and the company was well aware of this practice. This practice existed on the day shift and was condoned by the company on the night shift until the truck was stolen in November 2008. He accepted that he had received an e-mail from the Distribution Centre Manager in July 2008 concerning staff leaving the night shift early but the company never met with him at that time and explained their position. He was never disciplined for this previously.

He was never given a copy of the company's disciplinary procedures. His demotion to a general operative effectively constituted a dismissal as he became number 78 on a list of general operatives. The company introduced a package of redundancies and only 11 general operative positions were retained. If he had not been demoted he would have been retained in his position of supervisor following the restructuring and implementation of the redundancies.

Determination

The Tribunal has carefully considered the claimant's and respondent's cases in the course of this two day hearing.

The Tribunal fully accepts that the claimant was specifically employed to manage the night shift crew in the workplace which had been described as "militant" and "unionised". The claimant described a successful integration into the night shift operation and it is accepted that the claimant was a competent supervisor who gained the confidence and trust of the night shift workforce. It is expressly accepted by the Tribunal that the 'job and knock' practice was inherited by the claimant and that the practice was known to management, albeit a blind eye was turned. The claimant allowed this practice to continue as it was an incentive to the staff.

It is accepted that the practice of knocking off early did become an issue in July 2008. The Manager (PD) flagged with the claimant that he was not happy with the idea of knocking off early. Contained in that e-mail is an acceptance however that the company was relaxed about people leaving early on Bank Holidays and Fridays. In addition the Manager (PD) noted that the day shift sometimes left early but they would not be paid for their time. The Tribunal finds the communication to be ambiguous. The communication does not expressly state that the practice was to desist forthwith. If the company intended that the practice should desist there can be no doubt that the company would have had to become involved at management level for the purpose of implementing a change in practice. The company never expressed an intention to become involved in implementing change and essentially continued to leave the claimant to operate the night shift as he saw fit. There was no interference and significantly no support. It is worth noting that the claimant was not given a warning or subjected to any disciplinary process in July 2008.

In November 2008 a truck was stolen in the workplace. The claimant had no part in the theft but in the course of the investigation it came to light that the claimant and his workforce had left the premises early on the night in question. The company was able to acquire this knowledge as the claimant, being the supervisor, handed over the security of the premises that night and every night as part of his job. The Tribunal notes that the practice of handing over the security before the end of

the night shift that night or any night demonstrates that the claimant genuinely believed that he had the support of management in this practice as the records would always have shown what was going on. In response to the theft and the finding that the claimant had knocked off early that night the respondent opted to discipline the claimant as was the respondent's entitlement. The Tribunal does not find fault with the disciplinary and appeal processes but must question the sanction applied and the consequences thereof. The respondent demoted the claimant to the rank of general operative.

The claimant's sanction of demotion came in December 2008 and was confirmed on appeal in February 2009. There can be no doubt that at this time it was well known to the management that the company was imminently facing a redundancy programme and indeed the consultative process with respect to redundancies was already underway. The Tribunal accepts that the claimant's opportunity was significantly reduced as a result of being demoted to general operative as his short service with the respondent company would mean that he would never have been selected for retention within that class of employee. The Tribunal also accepts that had the claimant continued as a supervisor he had a significantly greater chance of being kept on with the respondent company.

In the aftermath of the decision the claimant was out sick as a result of the decision which had been made. The claimant's solicitor engaged in correspondence with the respondent but the respondent proceeded to make the claimant redundant as he was not eligible to be kept on as a general operative with his short service. The claimant's employment therefore terminated in June 2009.

It is noted that the claimant was unavailable for work from December 2008. In those circumstances the claimant can demonstrate no loss. However, the Tribunal is satisfied to award the minimum allowable pursuant to section 7 (c) (ii) of the Unfair Dismissals Act 1977 and awards compensation in the sum of €5,000.00.

No evidence was adduced under the Organisation of Working Time Act, 1997 and accordingly the claim under this Act fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)