

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

EMPLOYEE

- *Claimant*

CASE NO.

UD1352/2010

Against

EMPLOYER

- *Respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mrs. M. Quinlan

Members: Mr. D. Winston
Mr P. Trehy

heard this claim at Dublin on 8th November 2011
and 24th January 2012

Representation:

Claimant: Michael Kinsley, B.L., A C Pendred & Co, Solicitors, Derrynane House, 77 Lower Dorset Street, Dublin 1

Respondent: Ms. Caoimhe Scolard, IBEC, Confederation House, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

Respondent's Case

The Tribunal heard evidence from RF, the senior operations manager of the respondent company. His role involves all aspects of the security officer role and managerial responsibilities.

The company is the leading provider of cleaning services and security in Ireland. The company is contracted by the HSE at hospitals and public health offices. A handbook is issued to each security officer, which includes a code of conduct, and they sign it. There is a big onus on vigilance.

All officers on site are subject to client approval. If a client is not happy with an officer that officer may be removed from the site. If an officer is found to be in breach of the code of conduct the client would advise the company and the company would follow up with it's disciplinary procedure.

The claimant was assigned to work at a client's hospital. The original contract was for the hospital and outside of that the company were required to place officers on the two entrances to the hospital. This was to control all access to the hospital as a result of an incident that took place in 2009. All officers who were subsequently hired were aware of this incident and the gate duties on the entrances to the hospital were as a result of this incident.

There were several security officer posts in the client's hospital. Officers assigned to external patrol always worked in pairs. When working the night shift officers positions are rotated throughout the night to keep them fresh and alert.

In August/September 2009 RF was approached by the claimant in relation to his hours of work. The claimant requested that he only be rostered at night with somewhere to sit due to a medical condition. RF informed the claimant that the company would endeavour to offer him night shifts. With the introduction of the new gate duties at the hospital the claimant was offered the position in the gate house at one of the entrances to the hospital. He was provided with training for the post and took up the position.

On 19th January 2010 an incident report was filed in relation to the claimant having been found asleep while on duty. The client was not happy with the situation and requested that the claimant be moved from his position on the client's site. As a result the claimant was site bound. The two officers who found the claimant asleep lodged incident reports in respect of same. RF contacted the claimant and told him that he no longer had permission to be on the site and disciplinary proceedings would commence.

A disciplinary meeting took place on 25th January which the claimant attended accompanied by his shop steward. The claimant was given the incident reports made by the two officers that found him asleep prior to the disciplinary meeting. He strenuously denied the situation and argued that the information in the reports was not what happened. The claimant told RF that he greeted the two officers and invited them into the hut. He said that his colleagues reports were false and inaccurate and that footage from the hospital security cameras would confirm that he was awake and did not have torches flashed at him.

RF contacted LMcG to obtain the CCTV footage in order to confirm events. The footage corroborated the two security officer's version of events. RF viewed the footage several times and showed it to the claimant at a reconvened meeting on 3rd February 2010. The claimant said that the footage was doctored and taken out of context. RF explained to the claimant that the time shown on the CCTV footage matched the times on the reports made by the security officers. After viewing the CCTV footage the claimant became agitated. The claimant agreed that he had not been approached at any other stage of the night in question. The claimant and his shop steward stepped outside of the room to speak separately. On return the shop steward said that there was no way he could fight the claimant's case. The claimant did not sign the minutes of the meeting but the shop steward did.

Having viewed the footage and read the reports RF decided that the events and behaviour of the claimant on the night amounted to gross misconduct in accordance with the employee handbook and as a result dismissed the claimant.

During cross examination RF confirmed that the claimant had been sent home in January 2010 after an incident in which he could not stand. He told the claimant to get a letter from his doctor outlining his needs so that they could accommodate him in the workplace. This was the purpose of

assigning the claimant to the gatehouse duty as it provided seating and night work as requested by the claimant.

RF explained that he was not working on the night in question. LMcG was on duty that night and received the complaint from the client and the incident reports from the two officers. She informed RF about the incident the following morning and the fact that the client had been in touch. She initially investigated the incident and then referred the incident reports to RF and on the basis of these he initiated disciplinary proceedings.

The decision to suspend the claimant was a joint decision made by RF and LMcG. RF did not interview the two officers who filled out the incident reports and only viewed the CCTV footage at the request of the claimant. RF was not aware that there were CCTV cameras that would capture the gatehouse and only sought the footage because at the disciplinary meeting on the 25th January the claimant said it would support his version of events.

At this stage the CCTV footage was viewed by the Tribunal.

The footage showed one of the security officers flashing his torch downward into the window of the hut. RF confirmed that the bottom third of the window is covered with a white sheet. Inside the hut there is a low level of lighting to prevent reflection. There is a flashing beacon on the barrier outside of the hut but RF said that there is a big difference between the light flashing from the beacon and a torch flashing directly into the hut.

RF confirmed that the two officers who filled in the incident reports were not in attendance at the claimant's disciplinary hearing because it is not company procedure as it may cause conflict. The company process is to meet with the employee involved, give them the statements/incident reports and allow them to defend themselves.

The claimant's representative opened the gate log to the Tribunal and when questioned, RF said there was a period of non-activity for 23 minutes when the claimant could have fallen asleep. RF was not aware of any other disciplinary matters involving the claimant and at no point during the disciplinary hearing did the claimant raise issues with the representative that he brought. RF told the Tribunal that the claimant refused to sign the declaration because he felt it would show an admission of guilt.

The claimant decided to appeal his dismissal and was afforded an appeal hearing. The director of the appeal hearing BK upheld the decision to dismiss the claimant.

The Tribunal heard evidence from GW, one of the security officers who was on patrol on the night in question. On the night in question, 19th January 2010 GW started work at 8pm. At 2:23am he took up duty in the hut to cover for the claimant's break.

GW was on external patrol, which involves going to each building and checking thoroughly for any signs of break in or damage. He was on external patrol with a colleague, NM. They were approaching the gatehouse to see if the staff member was ok. When he got to the door he could see the claimant sitting in a chair. There was no sign of movement from him so GW shone his torch into the gatehouse. There was still no movement. He turned to NM and told him that the claimant was asleep.

When GW first looked through the window he could see the claimant sitting in a chair with his

head tilted to the right, his vision was not blocked and the claimant was asleep. He called the in house supervisor and explained the situation. He then knocked on the door and told the claimant that it was not acceptable to be asleep while on the gatehouse duties due to the incident that had taken place in 2009. He completed the incident form on his own in the duty room later in his shift.

During cross examination GW confirmed that he moved away from the gatehouse to phone the on site supervisor. He spoke to the on site supervisor and then came back to talk to the claimant and that this would have taken a couple of minutes.

The Tribunal heard evidence from NM, the second officer on external patrol with GW. On the night in question he carried out patrol with GW between 2am and 5am. At approximately 2am NM had relieved the claimant for his break.

NM explained that when approaching the gate house they usually let the security officer inside the gatehouse know that they are arriving by shining the torch. The security officer inside the gatehouse would usually stand up and open the door but this did not happen on this occasion. They flashed the torch into the gatehouse several times and there was still no response. They stood back and GW phoned the on site supervisor.

NM filled out an incident report form on his own at approximately 5am when he returned to the duty room. He then left the form in the required tray for the day shift site manager.

During cross examination NM confirmed that he could not see the claimant's face when looking into the gatehouse because of the angle at which the claimant was sitting. NM did not speak to the claimant and could not confirm if GW spoke to the claimant through the window of the gatehouse. He could not explain to the Tribunal why they would walk away without knocking on the door if they were concerned that a security officer was asleep while on duty.

NM was never interviewed about the incident and was not asked to attend at any hearing in relation to the incident.

The Tribunal heard evidence from LMcG, the site manager with responsibility for all of the respondent's employees on site. She was responsible for the cross over from the night crew and works from 7am – 3pm.

LMcG had not met the claimant in person prior to the incident but had dealt with him on the phone. On the morning of the 19th January LMcG was informed verbally of the incident with the claimant by the night crew during the handover. She then checked the incident reports and contacted her manager to inform him of the situation. She then contacted RF, the claimant's manager. At this stage the CCTV footage was not available to her but she did view it later in the day.

LMcG received a memo from AB, the client who oversees the respondent's contract, who had been informed of the incident with the claimant. He requested that the security officer in question, the claimant, be removed from the site roster with immediate effect. As a result of this memo she spoke to RF and they decided to remove the claimant from the roster and carry out an investigation. She compiled all of the information for the investigation.

During cross examination LMcG confirmed that she did not interview GW and NM about their incident reports. When requesting the CCTV footage from the controller she gave them a time scale of footage to be downloaded. LMcG had conducted disciplinary procedures prior to this and was

aware that RF would be the person responsible for making the decision on the disciplinary process. When handing this footage over to RF, LMcG may have told him that it confirmed the events.

The Tribunal heard evidence from BK, the facilities service director at the time of the incident, who carried out the claimant's appeal hearing. He did not have any dealings with the claimant prior to his appeal hearing. BK had carried out appeals before and is familiar with the company's procedure. The claimant's appeal hearing took place on 12th February 2010 and BK heard the appeal on the basis of the claimant saying that he was not asleep on the night in question.

BK read the incident reports and viewed the CCTV footage. He wanted to check that the process used and the sanction applied were correct. During the hearing he asked the claimant was this the only time during the night in question that the officers called to the gatehouse. The claimant told him that it was. He told BK that he had greeted the officers and invited them in but BK could not see this on the CCTV footage. On the balance of probability BK upheld the decision to dismiss the claimant.

During cross examination BK told the Tribunal that the evidence before him at the appeal hearing was the two incident reports, the CCTV footage and the claimant. BK confirmed that the letter from the claimant requesting an appeal hearing suggested that the CCTV footage was incomplete and did not show that the claimant opened the door to GW.

BK did not seek further CCTV footage for the appeal hearing nor did he interview GW and NM who had completed the incident report forms. BK agreed that if he viewed a further 3 or 4 minutes of footage he may have seen the claimant talking to GW and NM on the night in question but this would only reinforce the fact that the claimant did not open the door in a timely fashion because he was asleep. BK did not think it was necessary to view further CCTV footage because the claimant said that he only had one visit to the gatehouse on the night in question.

The Tribunal heard evidence from LR, the note taker at the appeal hearing. She has been employed with the company in the human Resources department since 2008. Her role at the appeal hearing was to take notes and she had no decision making function.

During cross examination LR did not accept that the sanction of dismissal was disproportionate because the claimant's actions amounted to gross misconduct in line with the company handbook.

Claimant's Case

The Tribunal heard evidence from ES, the claimant, who commenced work with the respondent company in 2004. He had no disciplinary incidents during his employment until the night in question. He had been placed on the gatehouse duties as a result of a medical condition which required him to work in a seated position.

The claimant told the Tribunal that on the night in question he was working in the gatehouse at one of the entrances to the hospital. The gate at the entrance is closed from 11pm and before someone enters it his job to find out where an entrant is going, write it down and open the gate for them. The gate is opened immediately for emergency service vehicles. There is no light inside the gatehouse and no other workers can walk in and out of it because the gatehouse is sealed up.

If somebody wished to contact the claimant while on duty in the gatehouse they would phone him or knock at the door. The claimant said that flashing of lights was not usual as a means of

communication because he had been told to only open the door if there was a knock at it and to look first to see who is at the door. The claimant was told this by GW.

The claimant did not respond to the torchlight on the night in question but did answer when he heard the knock. The claimant told GW and NM that he was not asleep. He did not receive any other contact during his shift about being asleep. He was not told to go home and he finished his shift.

The following day he was due to resume work at 11am. When he arrived for work he received a phonecall from the station manager telling him to go home and report to RF the following day. The next day he phoned RF, who said he would call him back. When RF phoned the claimant he told him that he had been informed that he was asleep while on duty. The claimant told him that he had not been asleep. RF told him to attend a disciplinary hearing.

The claimant attended the disciplinary hearing with a union representative that the company had assigned. The union representative told him that if he admitted to being asleep he would get another job. He told the respondent that he had not been asleep on the night in question and they said that they had CCTV footage to confirm it. The claimant demanded to see the footage and the hearing was adjourned for a few days in order to get the footage.

At the adjourned hearing the claimant viewed the CCTV footage and again said that he was not sleeping. The footage did not show that the claimant opened the door to let the security officers in. When RF told the claimant he was dismissed he did not do anything. He left the hearing and wrote to BK asking his office to investigate the matter because he was not asleep. At the appeal hearing the claimant told BK that he was not asleep on the night in question.

During cross examination the claimant said that he was aware of the company's disciplinary procedure and that it provides for different levels of sanctions. The claimant said he did not receive site specific training for his duties in the gatehouse. He was told that he should get the details of any vehicle entering after 11pm and the purpose of their entry. He was told to be alert at all times and any time he heard a knock at the door he should first look very well and then let them in.

When the claimant sees a torchlight he knows that there is a patrol taking place but the patrol officers don't come over to talk they just check on you. He was never told to open the door in response to a torchlight.

The claimant agreed that when he told RF he required a role with a seating facility his request was accommodated by RF. The claimant said that the initial disciplinary hearing he said that he had spoken to the two officers on the night in question and the hearing was adjourned to obtain the CCTV footage at his request. The CCTV only showed the officers approaching the right hand side of the gatehouse and did not show them moving to the door on the left. The claimant said that if the CCTV footage were a few minutes longer it would show him talking to the officers at the door.

The claimant said that he saw the torchlight but did not respond because he was told to only respond to a knock. The claimant told the Tribunal that he is aware that falling asleep is not allowed and there was no delay in opening the door because he opened it when the officers knocked.

The claimant agreed that in relation to the disciplinary procedure he was aware of the allegation put to him and had sight of the incident reports prior to the meetings. He was happy to proceed at the

second hearing without a representative. He agreed that the company kept him informed of what was happening.

Determination

Having considered fully all of the evidence adduced before it, the Tribunal is of the unanimous view that the manner in which the inquiry was conducted was unsatisfactory. The Tribunal accordingly find the dismissal was unfair and in the circumstances the claimant succeeds in his claim. In these circumstances compensation appears the appropriate remedy and having taken into account a contribution by the claimant awards the sum of €21,840.00 under the Unfair Dismissals Acts 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)