

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

CASE NO.
UD1306/2010, MN1262/2010

against

EMPLOYER
Under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms O. Madden B.L.
Members: Mr J. Horan
 Mr. P. Woods

heard this claim at Dublin on 7th and 8th December 2011

Representation:

Claimant : Mr Ray Ryan B L instructed by
 Ms Susan Webster, Judge & Company, Solicitors, Castle Court,
 Main Street, Castleknock, Dublin 15
Respondent : Mr Gary O'Mahoney, IBEC, Confederation House,
 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

The Claimant's case is that he was unfairly dismissed as a result of an incident which took place between him and a work colleague during a night out on the 13th December 2009. There were approximately nine colleagues out with the Claimant on the night in question all of whom were members of the engineering department in the Respondents Hotel.

Among those who attended this social event was YB, an administrator in the Hotel who told the Tribunal that she neither saw nor heard GW, who also worked at the Respondents Hotel, threaten or provoke the claimant at any stage throughout the night. She did however witness the claimant elbow GW with some force in the face later on in the night while they were all at a nightclub. Earlier that month YB was present when the claimant made a complaint to MM, Director of Engineering, about GW. Another former colleague of the claimant corroborated the evidence of the previous witness in that he did not notice any provocation towards the claimant by GW during this night out.

MM gave evidence that he did receive a complaint from claimant approximately ten days before the night out. While MM was unable to recall the nature of that conversation he told the Tribunal that

he did revert back to the claimant regarding this complaint and told him that the issues raised by the Complainant had now been “sorted” out with GW. During the subsequent social event this witness did not observe GW being provocative towards the claimant but he could not remember whether he actually saw a violent incident between the claimant and GW during the night but did make a statement to the respondent suggesting that he had seen it.

This witness reported the altercation involving the claimant to the respondent’s human resource department on the following Monday morning 14 December. He along with the claimant and the human resource director met the claimant the next day to discuss his report. MM was unsure whether the mention of resignation was aired at that meeting.

The director of human resources, GJ, confirmed that the issue of resignation was mentioned at that meeting but she denied offering the claimant the option of resigning following his admission that he had actually struck GW on the night in question. Following that meeting on 15 December GJ took statements from those employees present at the nightclub when this incident occurred. The contents of all those statements including one from the claimant, which he declined to give initially, were considered. Apart from his statement all six employees did not indicate or describe any form of observed provocation towards the claimant by GW. The claimant alleged that on at least three occasions that night he had been provoked by that person. Apart from that he maintained that had MM properly addressed his grievance about GW then his violent encounter with him would not have happened.

From 14 December 2009 to 3 January the claimant had been on annual leave and was then suspended pending a disciplinary hearing. Subsequent to that the claimant furnished a statement to the respondent. GJ then interviewed GW and the other employees again prior to meeting the claimant and his representative on 14 January. Having considered of all the statements and interviews GJ concluded that the action of the claimant in striking GW was an act of gross misconduct, which was a dismissible offence.

Before announcing that decision to dismiss she consulted a domestic employers’ representative and a colleague based overseas. In reaching her decision GJ concluded that this was a work related event and that he had not been provoked on the night by GW. The amount and influence of consumed alcohol was not taken into consideration, as it was not an excuse for this violent behaviour. She formally confirmed the respondent’s decision to the claimant in a letter to him dated 15 January. She reminded him of his right to appeal that decision to the general manager. This witness was satisfied that the respondent adhered to proper procedures in dealing with this case. She did not agree that her role as investigator and decision maker was a breach of fair procedure.

MZ who was the general manager at the Hotel at this time heard the appeal. He focused his

attention solely on what he considered to be the findings and facts of this case. The claimant admitted he struck GW. Apart from him none of the other colleagues present noticed any provocation or harassment towards him during that night. The case against the claimant was overwhelming and the use of violence by the claimant was not acceptable. Threat of physical violence and fighting were explicitly stated reasons justifying an employee's summary dismissal. While the influence of alcohol was a factor in this case it was not an excuse. Had there been any evidence of mitigation on the claimant's part then perhaps he would not have upheld the decision. In a lengthy letter to the claimant dated 17 February 2010 the general manager listed nine conclusions that guided him in his decision to find that the dismissal was neither unfounded nor disproportionate.

Claimant's Case

The claimant commenced employment with the respondent in January 2008 and worked as an electrician in the engineering department. Despite its name that department consisted of a variety of employees including an administrator and gardener. He enjoyed a good relationship with his colleagues and up to late 2009 got on well with GW. By early December 2009 he felt compelled to approach his director, MM, with a complaint about the way in which GW was talking about him. The Claimant felt that MM acted in a disinterested way and did not revert to him about his grievance.

In describing the events of the night of 12/13 December 2009 the claimant maintained that he was threatened and provoked by GW on at least three occasions. Some of that intimidation took place in the Gents toilets. The witness told the Tribunal that GW told him that he would get him shot. In admitting he hit GW the claimant accepted it was wrong to have done that. That action was out of character as it was a momentary lapse in his reasoning. By that stage he had consumed a significant amount of alcohol.

The claimant interrupted his holidays to attend a meeting with GJ and MM on the 15 December 2009 where he was informed that an investigation in to that incident would be conducted. At that meeting GJ commented that his situation was not looking good and a possible option for him was to resign. During the subsequent disciplinary process he was not offered an alternative to his dismissal. The claimant expressed dissatisfaction at the manner and style of the appeal process. It was his belief that the general manager had a fixed attitude on the company's decision to dismiss him and was only going through the motions in dealing with the appeal.

Determination

The Tribunal accepts that the claimant was a good employee who merited the confidence and appreciation of the respondent. The Tribunal also acknowledge that his behaviour in assaulting his colleague during this work related event was out of character and his expressions of remorse for that act are genuine. He has paid a high price for that inexcusable act.

The Tribunal cannot condone or endorse gratuitous violence and do not consider the influence of alcohol to be a mitigating factor. Even if such factors played a part in this case they are outweighed by the reaction of the claimant. It was always open to the Claimant to leave the club on the night in question is he felt intimidated or harassed.

Having carefully considered all the evidence the Tribunal is satisfied that the dismissal in this case was fair in all the circumstances. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2005 fails.

Since the claimant was dismissed for gross misconduct it follows that the appeal under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 must fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)