

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

EMPLOYEE *-Claimant*

CASE NO.

UD1292/2010

RP2768/2010

MN1976/2010

WT903/2010

against

EMPLOYER *-Respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms O. Madden B.L.

Members: Mr C. McHugh
Mr F. Dorgan

heard this claim at Carlow on 3rd November 2011

Representation:

Claimant: Sean Ormonde, Neil J. Breheny Solicitors, 4 Canada Street, Waterford

Respondent: Clarke Jeffers & Co, Solicitors, 30 Dublin Street, Carlow

The determination of the Tribunal was as follows:-

The claims under the Redundancy Payments Acts, 1967 to 2007 and the Organisation of Working Time Act, 1997 were withdrawn at the outset of the hearing.

The respondent was a sole trader whose business was part of the security industry. The claimant worked as a security guard for the respondent from the time of March 2008 until the time of dismissal in May 2010. Since that time the respondent's business has been wound up at the request of the Revenue Commissioners.

During early 2010 the claimant was posted at a factory. It was the respondent's evidence that a senior member of staff at the factory reported that when she could not access the main security gate to the factory by vehicle she had utilised a foot gate at the other side of the factory. When she returned to the main gates and entered the security hut she found the claimant sleeping. The General Manager of the factory notified the respondent about the incident and requested that the claimant not be returned to the post at the factory. It was the respondent's evidence that he issued the claimant with a verbal warning in relation to this incident. He re-located the claimant to another

security post at a manufacturing plant.

It was the claimant's evidence that he had not been issued with a warning in relation to this incident. He did recall a discussion with the respondent where he outlined to the respondent that the door of the hut was open and he explained how the senior member of staff came into the security hut to enquire about how the gates opened. The claimant could not explain why the senior member of staff had walked around the building but he accepted that she might have been kept waiting. He did not object to being re-located to the manufacturing plant as it was closer to his home.

A second incident arose when the respondent was informed by his Contracts Manager that the Security Manager on the manufacturing plant had brought an incident to her attention. A perimeter fence was damaged and a number of people had gained access to the plant's site. An Garda Siochana had been called to the site but nothing had been taken from the site. The claimant and a colleague were providing security on a night shift. As was the norm one security guard would conduct a foot patrol while the other monitored the CCTV to ensure the safety of their colleague.

It was the respondent's evidence that when the claimant's colleague returned from performing the foot patrol he had observed the claimant slumped in a chair, with his feet on the table and with his eyes closed. The colleague checked that the claimant was actually asleep before taking a photograph of the claimant with his mobile phone. He referred this information to the Security Manager as the respondent's employees were new on site and the plant was the respondent's largest client. The Security Manager in turn informed the respondent's Contracts Manager of the incident the following day.

It was the claimant's evidence that he had only worked five shifts at the plant and only two or three of these were with the colleague in question. The claimant was suspicious of this colleague as he felt that he was following him. He recalled the night in question and remembered his colleague holding a mobile phone in his hand which the claimant thought his colleague was texting with. The claimant had been outside for a period of time and had just made a cup of coffee. As the lights inside the room were bright, he had probably closed his eyes for that reason but he remembered his colleague taking the photograph. The reason his feet were on the table was because he thought he might be suffering from deep vein thrombosis. He subsequently attended a doctor and was informed that he was in fact suffering with leg cramps.

The Contracts Manager and the respondent discussed the matter and a decision was reached to dismiss the claimant. However, at that time the claimant was about to depart on a long-haul holiday and for this reason they decided not to inform the claimant of his dismissal until after he returned.

On his return from annual leave the claimant was asked to attend a meeting at the office with the Contracts Manager. It was the respondent's evidence that the claimant was presented with the photograph and the issue was put to the claimant. The Contracts Manager informed the respondent that the claimant had become quite irate at the meeting and said that he was not the only one sleeping. The claimant was informed of his dismissal by the Contracts Manager, and a letter outlining this was presented to the claimant, informing him that his sleeping in the control room was an act of gross misconduct and a breach of health and safety regulations and in doing so put the safety of the guard on patrol and the site at great risk. During cross-examination the respondent acknowledged that the claimant should have been afforded the opportunity to have a representative

accompany him to the meeting.

It was the claimant's evidence that the Contracts Manager described the photograph to him but did not in fact show it to him. He has been unable to find alternative employment.

Determination:

The Tribunal having considered the evidence in this case must find that an unfair dismissal occurred given the non-existence of procedures in the dismissal of the claimant from his employment. However, it was also clear from the evidence adduced to the Tribunal that the claimant contributed significantly to the termination of his employment. In the circumstances the Tribunal deems the appropriate award to be compensation of €5,000 under the Unfair Dismissals Acts, 1977 to 2007.

The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, fails, as no evidence was adduced by the claimant in relation to this matter. It was the respondent's case that any notice monies due, have in any event, been paid to the claimant.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)