

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE

CASE NO.
UD939/2010

against

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan

Members: Mr. J. Goulding
Ms. M. Maher

heard this claim in Dublin on 19th September 2011 and 6th December 2011

Representation:

Claimant(s):

Mr. Denis Linehan, Denis A. Linehan & Co, Solicitors,
Rathgoggin South, Charleville, Co. Cork

Respondent(s):

Ms. Rosemary Mallon BL instructed by
Ms Ciara Fulton, Tughans, Solicitors,
Marlborough House,
30 Victoria Street, Belfast BT1

The determination of the Tribunal was as follows:-

The claimant, a linesman for overhead lines for electrical supply, alleged unfair dismissal after employment from August 2003 to January 2010. It was alleged that he had been dismissed without justification and without the respondent taking his disciplinary record into account. It was conceded, by the claimant's representative, that the claimant had been in breach of the alcohol and drugs procedure with the company and that the Company followed proper procedures in dealing with this matter. However the claimant's representative submitted that the penalty of dismissal as a consequence had been unwarranted.

The respondent submitted that the claimant had been fairly dismissed (on grounds of conduct) for breach of the respondent's alcohol and drugs procedure in that the penalty of dismissal had been warranted. On 8 December 2009 the claimant was tested under the respondent's random drug and alcohol testing policy and tested positive for the presence of an illegal drug in his system. The claimant admitted taking illegal drugs. The respondent submitted that the claimant had completed an acknowledgement of its random drug and alcohol testing policy which made it clear that contravention of the respondent's rules could result in dismissal.

The respondent considered it necessary to have strict rules on drug and alcohol use in order to comply with its obligations under the safety, health and welfare at work legislation to ensure, so far as was reasonably practicable, the health, safety and welfare at work of all its employees. Consequently, random alcohol and drug testing was carried out for all employees who worked in safety-critical environments. The claimant was employed as a linesman and his duties involved carrying out maintenance work (at height) on electrical cables. Accordingly, his role was considered to be safety-critical.

It was submitted by the respondent that the claimant had been afforded a full and fair investigation and disciplinary process involving an investigation meeting, a disciplinary hearing and an appeal process and that the claimant had had the benefit of legal representation at appeal stage.

Accordingly, the respondent submitted that the claimant was dismissed for a fair reason following the carrying-out of fair procedures. Furthermore, the respondent submitted that it had acted reasonably in treating as sufficient to dismiss the claimant's breach of its drug and alcohol testing policy given the claimant's safety-critical role, the fact that he was fully aware of the respondent's policy and the fact that he admitted that he had breached this policy.

Giving sworn testimony, ST (a manager with the respondent) said that the respondent worked in

crews on overhead lines for the electrical industry. The respondent took health and safety very seriously. The claimant did the above work. There was also access to a vehicle as part of the job.

The claimant was an overhead linesman with many years of experience. On 8 June 2009 he signed to confirm receipt of a briefing document and revised policy on alcohol/drug use and agreed to the company carrying out random alcohol/drug screening as outlined in related documentation as part of his contract of employment.

However, an alcohol/drug test was carried out on 8 December 2009. The claimant was subsequently found to have tested positive for cannabis and was dismissed. Mindful of the nature of its work (e.g. the climbing of poles), the respondent had a policy of zero tolerance in respect of drugs. It took the view that drugs had the ability to impair judgment and that drug use could affect the health and safety of the claimant and of members of his team. It was said that the claimant had not known that cannabis could stay in his system for a protracted period. The claimant had not brought his drug use to the attention of ST (with a view to getting some assistance towards rehabilitation) prior to his failed drug test.

Under cross-examination, ST said that if the claimant had told him that he had a problem the respondent could have dealt with it. ST accepted that the respondent had had no major problem with the claimant in the past and that he had never previously been subject to disciplinary procedure such that the claimant's employment contract had been renewed without question and he had an excellent work record in general.

Asked if he had had other options apart from dismissing the claimant, ST replied that he felt he had no other option but to treat the claimant's case as gross misconduct.

It was put to ST that an associated U.K. company employee (CW) had consumed alcohol while on duty. ST accepted this but said that CW had gone through a rehabilitation process and had admitted that he was an alcoholic whereas the claimant had not given ST the chance to help him. ST said that, if the claimant had approached him, the respondent could have looked at rehabilitation.

It was put to ST that the respondent's 2009 policy referred to conduct that could (rather than would) result in dismissal. ST admitted that he had not done a study into the effects of cannabis although the claimant's representative contended that the respondent was obliged to carry out further research. The claimant's representative asked if ST had

considered everything including that the effect of cannabis could decrease as time went on (such that psychotic effects would be gone in a few hours). The respondent's representative objected at

this point whereupon the Tribunal clarified that it had to decide whether or not there had been gross misconduct and if the respondent had acted reasonably in opting for dismissal as a sanction.

Regarding whether CW (the abovementioned other worker) had been guilty of gross misconduct, the respondent's representative objected that CW was a different case and involved a different company. ST stated that he would have needed to have been there and to have had all the facts.

The claimant's representative contended that the dismissal had had serious consequences for the claimant (a South African national) and that the respondent should have taken this into account. ST replied that he had known that the claimant needed a work permit but that he had not known the claimant's financial position.

Giving sworn testimony, the claimant said that he had worked in the industry since 2003 and had not had any previous disciplinary issues or adverse comment about his work. He admitted use of cannabis around the time of a pop concert. He accepted recreational use of cannabis surrounding weekend parties although he said that he had since discontinued it. He was surprised that he failed a drug test but had gone of his own accord and at his own expense to a help centre in Mallow from which he had received a letter saying that he had done their course.

The claimant said that he had never been involved in an accident to himself or to anyone else. He described the chance of injury from a fall as "probably zero".

Under cross-examination, the claimant accepted that he had signed documentation from the respondent which referred to zero tolerance of, among other things, drug use saying that he had not read it all but had read the first page. He was asked to comment on the fact that zero tolerance was mentioned on the first page but he did not do so.

In a closing submission, the respondent's representative said that the nature of the respondent's work (involving overhead power lines admittedly not meant to be live) had to be considered in the context of whether dismissal was reasonable.

The claimant's representative contended that gross misconduct did not always have to lead to dismissal and that both the gravity of the complaint and the effect of dismissal on the employee had to be considered. It was submitted that the respondent had not taken into account that this had been the claimant's first transgression, that the other worker

(CW) had been treated differently, that the respondent had not looked into the effects of cannabis or the effect that dismissal would have on the claimant and that, therefore, the sanction of

dismissal had been unreasonable.

Determination:

The respondent submitted that the claimant had been fairly dismissed (on grounds of gross misconduct) for breach of the respondent's alcohol and drugs procedure and that the penalty of dismissal had been warranted. On 8th December 2009 the claimant was tested under the respondent's random drug and alcohol testing policy and tested positive for the presence of an illegal drug in his system. The claimant admitted taking illegal drugs. The respondent submitted that the claimant had completed an acknowledgement of its random drug and alcohol testing policy which made it clear that contravention of the respondent's rules could result in dismissal.

From the outset the claimant's representative made it clear that the claimant was making no objection to any procedural matters and what the Tribunal had to consider was the proportionality of the sanction.

Section 6 (3) of the Unfair Dismissals Act 1977 as amended by Section 5 (b) (a) of the 1993 Act states that:

“in determining if a dismissal is an unfair dismissal, regard may be had, if the Rights Commissioner, the Tribunal, or the Circuit Court, as the case may considers it appropriate to do so

to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal”

The Tribunal had to consider if the respondent acted fairly and if dismissal was proportionate to the alleged misconduct. Does the punishment fit the crime? In considering this question the fact that the Tribunal itself would have taken a different view in a particular case is not relevant. The task of the Tribunal is not to consider what sanctions the Tribunal might impose but rather whether the reaction of the Respondent and the sanction imposed lay within the range of reasonable responses. The proportionality of the response is key and that even where proper procedures are followed in effecting a dismissal, if the sanction is disproportionate, the dismissal will be rendered unfair.

The Tribunal notes that the claimant was fully aware that there was zero tolerance of drug use and had signed a document where this was clearly set out. The Tribunal also notes that the claimant's duties involved working on overhead power lines. This meant working at significant

heights which was safety critical, even if the lines were not live.

The precise terms of the test to be applied as to whether the sanction was reasonable was set out in **Noritake (Ireland) Limited V Kenna UD88/1983** where the Tribunal considered the matter in the light of three questions:

1. Did the company believe that the employee mis-conducted himself as alleged? If so,
2. Did the company have reasonable grounds to sustain that belief? If so,
3. Was the penalty of dismissal proportionate to the alleged misconduct?

After hearing the totality of the evidence the Tribunal determines that the answer to these three questions is in the affirmative and unanimously finds that the sanction of dismissal for gross misconduct was entirely proportionate having regard to all the circumstances. The claim under the Unfair Dismissals Acts, 1977 to 2007, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

