

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

EMPLOYER - appellant

UD2449/10

against the recommendation of the Rights Commissioner in the case of:

EMPLOYEE - respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. McGrath BL

Members: Mr C. McHugh
Mr F. Barry

heard this appeal at Dublin on 11th April 2012.

Representation:

Appellant: Mr. Joe Bolger, ESA Consultants, The Novum Building, Clonshaugh Industrial Estate, Dublin 17

Respondent: Mr. Kevin McMahon, SIPTU, Liberty Hall, Dublin 1

This case came before the Tribunal by way of an appeal by the employer (the appellant) against the recommendation of the Rights Commissioner (ref. r-090810-ud-10/JT).

The determination of the Tribunal was as follows:-

Appellant's Case:

The appellant is engaged in waste collection and was purchased in 1990. It is a service industry. Trucks roll out at 7 am each morning and Service Engineer (TO) commences work at 6 am. The non-attendance of any staff member creates major difficulties for TO. JA is Managing Director. The company is unaware what staff are members of a trade union. JS looks after HR issues and the payroll.

Prior to the respondent's dismissal the company met with a union official with regard to staff issues.

The company had major problems with the respondent's timekeeping and absenteeism. TO reported these to JS and the respondent was spoken to.

The respondent was issued with a verbal warning on 6th August 2009, a first written warning on 3rd November 2009 and a final written warning on 23rd December 2009 in relation to his punctuality and absenteeism from work.

Due to financial downturn in business the respondent tried to introduce a 10% pay cut for all employees in late 2009. There was a resistance from staff and this was further reduced to 7% but this was rejected by a number of employees and was not implemented.

The company continued to lose money and had to introduce cut backs. The two Directors took pay cuts together with sales staff. Routes had to be rationalised as contracts had been lost and there was not enough work for staff.

A decision had to be made to let a driver go. JA and JS met the respondent on 14th January 2010. Each driver's overall performance had been discussed with line managers in advance of this meeting. Due to the respondent's poor timekeeping and absenteeism a decision was made to let him go. His employment was terminated with immediate effect that day.

Respondent's Case:

The respondent commenced employment in February 2009 and was employed as a driver.

He felt he had no rights as an individual while working for the company and decided to join a trade union and he also encouraged others to do so. He contended that the workplace was not a great place to work in. He liaised with a trade union representative whenever he wished to discuss work issues.

On receipt of a first written warning which enclosed a list of his punctuality and attendance records, the respondent offered explanations. He wanted to meet JA on this matter but he refused to meet him. He received his final written warning on 23rd December 2009.

On 14th January 2010 at approximately 1.20 he was informed that JA wanted to meet him. He was told at that meeting that he was being dismissed with immediate effect. He was shocked. He said he would rather have his trade union representative with him. He was handed a letter of dismissal that day. That letter stated that the company had lost contracts and that they had no alternative but to dismiss him with immediate effect. The respondent contended that the reasons given in this letter were ridiculous and that there was no loss of contracts to his knowledge.

Some time after his dismissal the company advertised for driving positions, an employee had been re-employed and trained up by the company to drive a lorry and two helpers had been upgraded to driving positions.

The respondent contended that he was dismissed because he had joined a trade union and also encouraged others to do so. He was not afforded a right of appeal.

JJ a trade union representative met the company on several occasions in relation to employees'

concerns. The company did not consult with him when they wanted to introduce a 10% paycut. As staff were unhappy with the introduction of a pay cut he advised them to write to management with their concerns. A letter was drafted and signed by twenty staff. This resulted in the pay cut being withdrawn.

When the respondent received his final written warning on 23rd December 2009 JJ advised him that he was only a step away from being sacked and that he should meet JA and get matters clarified.

Subsequent to the respondent's dismissal, JJ met him and JJ decided to write to the company. The respondent's attendance record had been a factor in deciding to dismiss him. JJ wanted to meet the company to clarify this matter.

JJ contended that the real reason the respondent was dismissed was because of his trade union activity. No appeal was granted.

Determination:

The Tribunal has carefully listened to the evidence adduced. This matter comes before the Tribunal on appeal from a recommendation of the Rights Commissioner dated 6th October 2010.

The matter is dealt with as a de novo hearing. By way of a preliminary issue the respondent who had less than 52 weeks employment with the company claims his dismissal was wholly or mainly due to his membership or activities on behalf of a trade union.

The appellant claims that the respondent was selected for redundancy or termination in circumstances where the company was dealing with a severe downturn in trade, lost contracts and escalating losses.

There can be no doubt that the respondent had what appeared to his employer to be an erratic attendance record. On foot of this seemingly unsatisfactory behaviour the respondent was given a verbal warning and subsequent first and final written warnings. In evidence it became clear that these warnings might have been unfairly delivered to the respondent who had obtained permission at a local level for some of the absences which were being used against him.

The appellant accepts that in selecting the respondent for redundancy the company did take into account their belief that the respondent had demonstrated himself to be unreliable in terms of turning in for work every day. The Tribunal cannot go into the rights and wrongs of the selection of the respondent for redundancy in circumstances where the respondent has not the requisite 52 weeks employment. Even if the Tribunal believes that the respondent had been unfairly treated and no redundancy situation existed (as the evidence tended to demonstrate) the Tribunal cannot afford the respondent any relief under the Unfair Dismissals legislation.

The Tribunal does accept that the union operated at the perimeter of this workplace. The company was clearly reluctant to allow the trade union be recognised as having a voice for the purposes of collective bargaining. However, on an individual basis the company allows union representatives for the purpose of individual disciplinary matters.

There was an on-going atmosphere of restructuring and change in the workplace. In particular, the company was looking to reduce pay by 10%. Against this background the respondent and a few other co-workers contacted the trade union looking for advice. The advice given was to get a petition started up which process was very successful as the company subsequently resiled from this proposal of a 10% reduction. The trade union encouraged the employees to subscribe to the union but this was being done without fanfare as the trade union did not have the authority of the majority of workforce at this time.

The Tribunal realises that the employer might have known that the respondent was a signed up member of the trade union but there is no conclusive evidence to demonstrate that the fact of his membership with the trade union was a factor contributing to the company's decision to effect a dismissal. There had been no lead up to the dismissal of the respondent and no interaction between employer and employee which established that the employer had any issue or difficulty with the respondent's membership.

The Tribunal upsets the Rights Commissioner's recommendation under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____
(Sgd.) _____
(CHAIRMAN)