

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYER
- appellant

CASE NO.
UD1337-1338/2011

against the recommendation of the Rights Commissioner in the case of:
EMPLOYEE *- first named respondent*
EMPLOYEE *- second named respondent*
under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey B.L.

Members: Mr F. Moloney
Mr G. Whyte

heard this appeal at Dublin on 13th September 2011
and 5th December 2011
and 6th December 2011

Representation:

Appellant(s) : Mr. Paul Dunne, IBEC, Confederation House, 84/86 Lower Baggot Street,
Dublin 2

Respondent(s) : Mr. Ian McDonnell, Regional Secretary, TEEU, 6 Gardiner Row, Dublin 1

The determination of the Tribunal was as follows:-

These appeals came before the Tribunal by way of an employer (the appellant) appealing against a Rights Commissioner recommendations reference: r-100746-ud-10/RG and r-100718-ud-10/RG

Background:

Both appeals were heard in tandem as both respondents (employees) were dismissed over the same incident. The appellant company was in the business of installing and maintaining lifts and escalators.

The first named respondent (PC) was employed as a Lift Engineer from 1st March 1999 until his employment was terminated on 6th December 2010. He was paid € 24.31 per hour working a

39 hour week. He had a written contract of employment and was covered by the Company /Union Agreement, which covers the Company's disciplinary policy.

The second named respondent (AD) was employed as a Senior Engineer from 15th June 2000 until his employment was terminated on 6th December 2010. He was paid € 24.31 per hour working a 39 hour week. He had a written contract of employment and was covered by the Company / Union Agreement, which covers the Company's disciplinary policy.

Both respondents were employed in the T2 terminal in Dublin Airport. Many other contractors and sub-contractors worked on site. The DAA had a system in place at the only entrance onto the site, a turnstile. It was called the Alandale swipe system and was in place for health and safety reasons. There was no agreement between Management and the Union that the system could be used for the purpose of time and attendance of the appellant's employees. The appellant's employee's submitted weekly time sheets of hours worked. Sometimes there could be errors on them and would be rectified accordingly.

The working shift on the site was 8 a.m. to 5 p.m.; lunch was 1 p.m. to 2 p.m. Flexibility on working hours could be allowed but only with prior consent from Management. Allowances could be paid for certain tasks carried out; for example, "dirty money" was paid for the maintenance carried out on existing machinery. Both respondents were questioned over overtime sheets and allowances they had submitted.

Appellant's Case:

The Senior Project Manager (DP) gave evidence. He explained that the respondents (PC & AD) reported to a different Manager on a day-to day basis.

On Thursday 16th September 2010 the New Field Manager (JC) and the Modernisation Field Manager (BM) left the site at approximately 6.25 p.m. They observed the two respondents and another employee (JOB) crossing the road, they parted company and the respondents were observed walking to the green DAA car park. JOB was observed entering the Radisson Hotelcar park and witnessed leaving at 6.45 p.m. Copies of JC's and BM's time of swiping through the Alandale system and copies of car park receipts were also viewed by the Tribunal. The witness said that he could not have accessed their details on the Alandale system without their permission.

On 20th September 2010 the New Field Manager (JC) was checking the time sheets and noticed errors on some of the employees, including the two respondents, time sheets. These errors included:

- Dirty money being requested
- Tea money being requested
- Use of private car being requested
- Excessive travel time being requested
- Excessive carriage being requested
- Excessive fares being requested
- Overtime being requested that may not have been worked

The New Field Manager (JC) reported it to the witness. Two Engineers were asked to attend the witness's office to explain the irregularities on their time sheets. They were asked if they

wished to resubmit their timesheets and still submit the sheets as they were. Both Engineers decided to submit new timesheets removing the excessive expenses having reviewed the Company / TEEU agreement. Another Engineer was called to the office and he also decided to submit new timesheets.

The two respondents (PC and AD) were asked to attend the office. The witness told them that he was concerned with the amount of overtime booked for 16th Thursday 2010 as they had been witnessed by JC and BM leaving the site at 6.25 p.m. Both respondents had booked overtime until 8 pm. They both requested to see the Company / TEEU agreement and took the opportunity to resubmit new timesheets.

The witness held separate investigatory meetings with PC and AD. Both attended with their TEEU shop steward. It was put to them, separately, that the purpose of the meetings was to consider the allegation of falsifying timesheets. It was explained that the meeting could lead to disciplinary action. Both were informed of two Managers seeing them leaving the T2 site early but claiming for overtime. Both said they had gone to the changing room to drop off their lunch bags and returned to the site. At the end of the meeting both respondents were informed that they would be contacted in due course.

On 28 September 2010 the witness wrote to both respondents. They were invited to another investigatory meeting the following day. Enclosed with letter was a copy of:

- Witness statement from BM - Modernisation Field Manager
- Witness statement from JC - New Field Manager
- Copy of notes taken at the meeting of 24th September 2010
- Copies of clock in / out records from Dublin Airport for JC provided by Alandale
- Copies of clock in / out records from Dublin Airport for BM provided by Alandale
- Copies of parking receipts from the Radisson Hotel for both JC and BM for 16th September 2010

He also informed them that he intended to get copies of both of their Alandale clock in / out details but if they had an objection to it they were to notify him before 11 a.m. the following morning. The witness explained to the Tribunal that these details would prove what time both respondents swiped through the turnstile.

He held separate investigatory meetings the following day. During the meetings both respondents respectively objected to the appellant company acquiring their details for the day in question from the Alandale system. Both respondents remained persistent that their timesheets were correct. Both respondents were suspended with pay pending the outcome of a formal disciplinary meeting. A formal letter of suspension was sent to both respondents. It stated that the disciplinary investigation concluded that:

- *“There is a clear difference in the information provided by parties interviewed during this investigation on the time you left site on Thursday 16th September 2010*
- *Your clock out time can be confirmed by one simple request for this information to Alandale.*
- *Your objection to my obtaining this information in order to consider the facts as part of my investigation, and your failure to provide me with any reasonable explanation*

for your objection, leads me to believe that this information would not in fact back up your version of events on Thursday 16th September 2010.

Falsification of Company timesheets is an example of an action that the Company would potentially consider Gross Misconduct, Based on the above information, I therefore have no alternative but to suspend you pending a disciplinary hearing. Please note suspension in itself is not a form of disciplinary action and involves no prejudgement. It is a precautionary measure to allow full and complete consideration of the alleged incident, including consideration of any mitigating circumstances.”

Both were informed of the times, dates and the persons involved in the disciplinary hearing. New information later came to the respondent's attention concerning the company van in relation to PC. An invoice from the company involved in the M1 – Dundalk Toll Plaza invoiced the van driving through the toll at 19.08 p.m. on the day in question.

On cross-examination he agreed there were other contractors working on site and one in particular used a biometric system to record staff clock in / out. When asked he said there had been no previous issues regarding timesheets with the respondents. When put to him if the respondents had been given redundancy forms he replied that he was unaware. He explained that there had been a strike as the appellant company was looking for some redundancies. PC was a union shop steward at the time. When asked he said he was aware the New Field Manager (JC) worked during the strike.

When put to him did he think it was appropriate to dismiss two employees for the sum of € 40 they claimed each, he replied that he was following company procedures. He explained to the Tribunal that there were set hours to work on site, staff did not work through their lunchtime unless there was management permission. It was seldom this occurred. He said there had never been a staff problem with the Alandale system in the past. He told the Tribunal that he felt all trust was gone with the respondents; they had been seen leaving the site early. When put to him he said that working hours and breaks were set on the T2 site. Staff did not work through lunch and finish early unless they had prior permission from management.

The Modernisation Field Manager (BM) gave evidence. On 16 September 2010 he and the New Field Manager (JC) observed the two respondents (PC and AD) and another colleague (JOB) walking to the car park at 6.25 p.m. Time sheets later three submitted stated all three were working until later. He submitted a witness report and copies of his car park receipt to DP. He also gave permission for DP to gain access to his time of swiping through the Alandale system in T2. JP later changed his timesheet but could not remember who he had been with on the evening in question. He had viewed the two respondent's timesheets.

On cross-examination he confirmed what time he had left the car park. When asked he said he had clearly seen the two respondents and their colleague leaving the premises early.

The Service Sales Manager (GF) gave evidence. He had very little interaction with the engineers. He had PC in the office previously but had never met AD. Both respondents were notified separately to inform them of their suspension and invite them to a Gross Misconduct Disciplinary Meetings on 5th October 2010. They were provided with all documentation forming the basis for the meeting. They were also advised they could be accompanied by a colleague or a full time or representative of “*an appropriate registered Trade Union*”.

The meetings were held and DP was present at the start of both separate meetings to present the findings from his investigation. They went through the reports. PC said his colleague JOB had not been with him. The respondents would not give permission to access their Alandale timings. The witness told the Tribunal that he felt he had tangible evidence of where the two respondents had been from the two Managers. He only had verbal evidence from the two respondents. The witness again spoke to DP, JC and BM regarding the matter. He even visited the site at around the time the respondents had been observed leaving the terminal. He found the view was not obstructed.

The witness came to the decision both respondents were not telling the truth and believed it was a breach of trust. He told the Tribunal that if they had said they had made a mistake a different sanction would have been taken. On 14th October 2010 he informed both respondents of the outcome of the disciplinary hearings. They were both dismissed but given the right to appeal the decision within five working days.

On cross-examination he stated that he had considered both respondents long service. He told the Tribunal that the Union Representative had informed him that there had been a “history” between one of the respondents (PC) the New Field Manager (JC) but he did not think it was relevant.

When asked he agreed three other staff had been suspended for falsifying documents. He told the Tribunal that on the balance of probabilities he found against both respondents. It took ten days to make the decision.

The U.K. / IRL Human Resources Manager (RS) that carried out the appeal hearings gave evidence. He told the Tribunal that both respondents had been on full pay until the result of the appeal hearing was submitted to both respondents. The appeal hearings were held separately in head office on 29th October 2010. At the meeting he went through the six bullet points sent out by the respondents’ union representative in his letter dated 18th October 2010. The points were:

- “ - *Denial of natural justice*
- *Inappropriate use of the Alandale system*
- *Non-consideration of all relevant evidence from (respondents)*
- *Use of non-relevant evidence from management*
- *Breach of procedures*
- *Without prejudice to our member’s innocence on these allegations the disciplinary sanction imposed is draconian given the high service of (respondent) with the (appellant)”*

At the meetings he was asked to reinstate both respondents. All the evidence was put to both respondents. In the case of PC and the M1 toll plaza he responded that he had been on site until 19.30p.m. The witness told the Tribunal that it was clear to him that PC had been on the M1 at that time. PC’s union representative later wrote to the Area Sales Manager (AF) to inform him that it was PC’s wife that had been driving the company van through the M1 toll plaza. The witness told the Tribunal that it was unclear where PC’s wife’s own car was. Both respondents were notified by letter dated December 6th 2010 that the decision to dismiss was upheld and there was no further right to appeal.

On cross-examination he stated he had not spoken to JOB about the evening in question as he had said that he had not been with PC and AD. When asked he said he had not spoken to PC’s

wife about the evening in question. When asked he said he had not spoken to the Bar Manager of the premises PC and AD had allegedly gone to after their shift on the evening in question.

Both Respondents' Cases:

An Engineer working on the T2 site gave evidence. He stated that if needed staff would work through lunchtime to finish and job and then finish up early. He agreed that he had given a statement dated 30th March 2010 stating he had falsified his timesheet and was told it was a minor incident but if it happened again more serious actions would be taken. He was given a verbal warning.

A Test Engineer with twenty-nine year's service gave evidence. He had worked on the T2 site. He told the Tribunal that staff occasionally had to work through lunchtime in order to finish a task.

On cross-examination he stated that the Alandale system broke down from time to time and staff had to sign in / out, it was purely for a "head count".

Another Field Test Engineer (LF), with twenty-two years experience and who worked for one year on the T2 site gave evidence. He stated that no one had been dismissed in the past for problems with timesheets. He had been present at the induction of the Alandale system which was not used for the attendance of appellant employees. Other companies on site had a biometric system. He explained that staff did work through their lunch-break to get various jobs done.

On cross-examination he stated he had attended the disciplinary hearings. When asked he said that the Alandale system was only used for health and safety purposes, the staff submitted time sheets. He told the Tribunal that both respondents had been involved in a strike concerning a number of staff to be made redundant; everyone on site was at risk.

PC's wife gave evidence. She stated she had been driving the company van through the M1 toll plaza on the evening in question. She had followed her husband, PC, to work that day and left her car at her Mother's home and taken the van. She picked up the car the following weekend.

PC (the first named respondent) gave evidence. He had twelve and a half years experience with the appellant company. He had received a merit award in the past for his workmanship.

On the evening in question he had worked until 19.30 p.m. and had worked through his lunchtime that day. He then when to a local pub to have drinks with family. He told the Tribunal that he had worked through his lunch-break on many occasions. He explained that he had been earning a substantial salary and would not have jeopardised his position for the sake of € 35 - €40. When his timesheets and expenses were put to him for the day in question he amended the expenses. On the week he was accused of leaving early he was offered a substantial amount to take redundancy. He gave evidence of loss.

On cross-examination he stated he had never seen his contract. When asked he stated he had not spoken to JOB after he was accused of falsifying his timesheet. He agreed that he had not given permission for the appellant company to view his timings on the Alandale system on the day in question.

AD (the second named respondent) gave evidence. He gave evidence of his ten years experience with the appellant company. He gave evidence of loss. He had no previous problems with the appellant company. He explained that he had been earning a substantial salary and would not have jeopardised his position for the sake of € 35 - €40. He had no problem amending his timesheet concerning tea and dirty money on the week in question. He gave evidence of loss.

Determination:

The claimants' should have co-operated with the employer's request to view the records of their attendance on the Alondale system, notwithstanding the fact that the swipe system was not used for time-keeping purposes. However, the Tribunal is mindful that the onus is on the employer to show that the dismissal was fair and concludes that on balance, taking all the circumstances into account, the sanction was too severe, thus rendering the dismissal unfair.

It is the decision of the Tribunal that both claimants be re-engaged from the date of issue of the determination.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)