

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE

CASE NO.
UD330/2011
RP1293/2010
MN898/2010

against

EMPLOYER

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey BL

Members: Mr. C.A. Ormond
Ms. M. Maher

heard this case in Dublin on 2 December 2011 and 11 April 2012

Representation:

Claimant(s):

Mr. Paul Henry, SIPTU,
Membership Information & Support Centre, Liberty Hall, Dublin 1

Respondent(s) :

Ms. Kerry Molyneaux, IBEC,
Confederation House, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

It was alleged that the claimant, a chef who had worked for the respondent hotel since late 2005 had been unfairly dismissed in February 2010 in breach of procedure.

The respondent contended that the claimant had been fairly dismissed for gross misconduct

after proper investigation in accordance with the respondent's disciplinary procedure. It was alleged that the claimant had headbutted another respondent employee (hereafter referred to as D) on a bus back to the city centre after an off-site Christmas party whereupon the claimant was suspended on full pay. (The headbutting incident caused D to need treatment because he sustained facial and dental injury.)

It was argued on behalf of the respondent that, during the investigation, all evidence was provided to the claimant and that the cross-examination of all investigation witnesses was permitted to the claimant's trade union representative.

An appeal was allowed to the claimant but was not successful.

At the Tribunal hearing sworn testimony was given by NJ (the respondent's HR manager who had carried out the investigation) who said that she had got a call the day after the incident. She was the mentor of D (a trainee manager) who was on placement with the respondent in different parts of the hotel. D said that the claimant had headbutted him. JP (the respondent's deputy operations manager) had dealt with the aftermath of the incident to which JP said that there had been two witnesses. Statements were taken. NJ suspended the claimant with pay without prejudice and, "to allay fears", D was also suspended.

NJ stated that the claimant had a problem recalling what had happened but did not deny that he had inflicted the claimant's injuries. It was known that the claimant was the trade union's shop steward but NJ was satisfied that the claimant had headbutted D. The claimant had no excuse but that he had had a lot to drink and that D had said that people could be put off the bus (if the claimant did not control them). D had not been happy with the way the claimant had spoken to him. NJ acknowledged to the Tribunal that the claimant had had a clean disciplinary record but said that headbutting was not acceptable. She said that alcohol was "partly mitigating" but that it was "not reasonable" for one grown man to headbutt another. Statements having been taken and people having been questioned, it was clear that D had not provoked the incident but had just been trying to protect himself from verbal abuse. NJ believed that her decision that the claimant should be dismissed was "fair and right". The claimant was a chef de partie. NJ did not believe that it was appropriate for the respondent to have someone like that in the hotel.

Giving sworn testimony, D said that he had studied hotel management in Shannon and that he had been on work placement for one year from June 2009 to June 2010. He had performed the accommodation, front office, banqueting and duty manager roles.

Regarding the abovementioned Xmas party and the bus journey back to the city centre, D said that the bus driver had stopped the bus because people were smoking. D asked, but did not tell, the claimant to tell people to stop smoking. D was only a trainee and was not aggressive or confrontational but the claimant grabbed him by the shirt and headbutted him chipping off tips of teeth even though they had been very good friends with "no bad history" between them.

D denied that he had been pushing the claimant and said that he had only had hands on the claimant because the claimant had had his hands on D. D had thought that other people would listen to the claimant about smoking on the bus. The claimant got off the bus and got back on saying that D was "lucky to be alive". D did not respond. The bus brought him back to the respondent. He went to his shift at 8.00 a.m. but only worked for about an hour before being sent home. He was dazed and shocked. He was advised to ring NJ. He did so and told her what had happened.

D gave a statement for the investigation. He told the Tribunal that he had not been drunk and that he had been conscious that he would have a 8.00 a.m. shift the next day. He and the claimant had been friends. The claimant had been drunk. D had been "more surprised than anything by the incident". D was also suspended while the investigation was carried out. D stated to the Tribunal that he had had to get dental work done on two front teeth since the incident.

Giving sworn testimony, PM (the respondent's general manager) said that he had heard the claimant's appeal against dismissal. The claimant's trade union sent a written submission. The claimant had five years' service. Statements had been taken from employees on the bus. PM thought this right. NJ had had to find out what had happened. The practice of having off-site parties had been discontinued.

PM did not believe that the claimant's actions had been in self-defence. Nor did PM attach weight to the fact that the incident had not occurred during working hours. He felt that the respondent's management had a responsibility for employees on the bus in question and he expected professional conduct at a work-related event. He could not blame alcohol. There had to be "decorum". Asked if the claimant could do what he had done again, PM replied that it was hard to tell but that the respondent "can't condone that". PM was satisfied that D had been assaulted. He did not see grey areas telling the Tribunal that one either headbutts someone or one doesn't. In PM's view, if there had been a repetition of this, it would have been remiss of him just to have given a slap on the wrist. He felt that testimony had been got from all relevant people. D had asked that smoking on the bus be stopped. Headbutting was not acceptable in PM's view.

Asked why the claimant had been dismissed, PM replied that it was "gross misconduct to attack somebody like that" and that the respondent could not tolerate that. The respondent had nearly three hundred employees. He could not take the risk of such an incident recurring. He thought that, unfortunately, dismissal was appropriate. The claimant had asked for a room in the party venue and PM had said that he would talk to NJ. When PM heard of the incident he had asked why the claimant had been on the bus at all.

After taking the affirmation, the claimant (as mentioned above, a shop steward) said that his relationship with NJ had been "negative". He had been the first to pass on staff issues. As an employee he said he had no relationship with NJ. He only had contact with her regarding others. He would be there to represent someone. There would be talk about people being short pay or hours. He and NJ just said: "Good morning!" That was it.

Regarding the bus journey, the claimant said that someone was smoking "hash" on the bus and that the driver had threatened to put people off. D had told the claimant that the claimant and his friends would get them "f**ked" off the bus. The claimant never intended to hit D. The claimant really liked D and had no problem with him. D was "a good kid and very polite". People jumped in. The claimant told the Tribunal that he knew contact was made but that he had never intended to hit D and that he had not assaulted D.

Asked about his disciplinary record, the claimant replied that he had never had a problem.

The claimant admitted that he had drink taken on the night in question. He said that PM (the

respondent's abovementioned general manager) had bought him drink and knew that he had done so.

The claimant told the Tribunal that D had been sitting surrounded by managers who were beside him and that he (the claimant) was "only chef de partie". He felt that the claimant was being confrontational. D was taller than him and sometimes D walked around kissing his arms and saying: "I love these guns."

Asked if he had headbutted D, the claimant denied it but admitted that he had "made contact" and that D "had blood on his head" for which the claimant apologised.

The claimant told the Tribunal that he felt the sanction of dismissal was too severe and mentioned that he had three children.

Giving evidence on the second day of the hearing, the Training Manager said that he had not been drinking on the night in question. He said the bus left at about 2pm and that the incident started when someone started to smoke. D said the cigarette should be put out and the claimant said "shut the f--- up". D told the claimant not to speak to him like that and the claimant then became aggressive. The claimant went towards D, pointing in his face but D was not aggressive and appeared calm. The claimant pulled D by the collar. The Training Manager tried to pull them apart. The claimant then head butted D with force and was taken away by a group of people. D was on the coach showing blood and said he wanted to talk to the claimant but the group said no.

The claimant tried to get back onto the bus and said he wanted to say something to D. The claimant said "you are lucky to be alive". The Training Manager told the driver to drive away and the bus went back to the hotel. D said it was an unprovoked attack and out of character for the claimant.

In cross-examination, the Training Manager said he recalled D standing when he was hit.

The claimant gave evidence stating that he had not worked since 16th February 2010. Recent work applications were opened to the Tribunal as evidence. The claimant is on job seekers allowance.

Closing submissions were put forward by both parties at the end of the hearing.

Determination

Having considered all the evidence adduced, the Tribunal is satisfied that an assault took place and that the incident was a work related incident in the sense that the company organised and financially contributed to the social occasion and provided and paid for the transport where the incident occurred.

In the circumstances, the Tribunal finds there was substantial grounds' justifying dismissal and therefore the claimant's case fails.

As the claimant was dismissed for gross misconduct, the Minimum Notice and Redundancy claims fail.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)