

**EMPLOYMENT APPEALS TRIBUNAL**

**CLAIM(S) OF:**

EMPLOYEE

- *claimant*

WT61/2010

**CASE NO.**

UD100/2010

MN109/2010

against

EMPLOYER

- *respondent*

under

**UNFAIR DISMISSALS ACTS, 1977 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: Mr R. Maguire, B.L.

Members: Mr. D. Winston  
Mr M. O'Reilly

heard this claim at Dublin on 11th April 2011  
and 18th July 2011  
and 19th July 2011  
and 24th October 2011  
and 6th December 2011

Representation:

Claimant: John Wilde Crosbie BL instructed by Ms Niamh Maher, Doyle & Company,  
Solicitors, 123 Cabra Road, Dublin 7

Respondent: Mr. Mark Doyle, Actons, Solicitors, Newmount House, 22/24 Mount Street  
Lower, Dubln 2

The determination of the Tribunal was as follows:

The claimant was dismissed on the 3<sup>rd</sup> September 2009 and the claimant initiated the respondent's appeal procedures. As a result of this the decision to dismiss became a suspension. Before this appeal hearing took place the claimant lodged a grievance that needed to be investigated. This appeal process had broken down between the parties, and while the investigation into the claimant's grievance had taken place it was yet to be

determined. It was the respondent's position that the claimant was still under suspension.

The Tribunal ruled that the dismissal had taken place in September 2009 and it fell to the respondent to prove that this dismissal was fair.

The respondent company provide security services both mobile and static. The claimant commenced employment with the respondent as a security guard on the 3<sup>rd</sup> March 2003. At the time of his dismissal he was based in a residential complex of approximately 200 apartments over two blocks.

The claimant was issued with a final written warning on the 5<sup>th</sup> June 2009 in respect of his "being abusive and threatening to a client". This was as a result of a complaint lodged by one of the residents in relation to an incident around a bicycle. Bicycles as per the rules of the residential complex had to be kept in the shed provided. The claimant said he accepted this final written warning on the advice of the union however he felt he was only doing his job when he removed the bicycle to the shed and the resident was abusive to him. The respondent's position was that the claimant had been threatening and abusive to the resident.

The claimant's role on night duty was to carry out patrols during the night and to base himself in the car park from 5.30am to 7.30am each morning. There was a security hut with monitors and approximately 14 cameras located in the exterior of the complex. On the 14<sup>th</sup> August 2009 the claimant was on night duty. The next morning the respondent received a telephone call from their customer, in charge of the residential complex, who informed them of an incident in the early morning that led to the security gates being left in an open position for which they sought an explanation.

When this gate was open a buzzer would sound in the control room, a flashing light would be seen on the monitor and a light would show on the fire alarm panel. A witness from the respondent gave evidence that he had contacted the day security guard (hereinafter referred to as J) who informed him that he had found these gates in an open position, J checked the logbook on witness request and there was nothing noted in this about the gate. The respondent checked the CCTV footage and it showed that the gates were opened at 3.50am. The claimant was not seen on the CCTV from 4.02am when he left the security room until he returned at 6.57am; it was the respondent's position that it would be impossible to move around the complex without being seen on CCTV. The claimant gave evidence in conflict to this position and described a number of ways you could move about the complex without being seen on camera.

The operations/contracts manager telephoned the claimant about the gates. The claimant could offer no explanation and the claimant was informed that the company would investigate the matter. As a result of this incident and another two previous issues with the claimant, the claimant was invited by letter dated 26<sup>th</sup> August 2009 to a meeting on the 3<sup>rd</sup> September 2009 "to discuss a recent incident concerning you". This letter referred him to the conversation he had with the contracts manager. The letter further stated that: "You should note that this may result in disciplinary action and that you have a right of representation".

The contracts manager investigated these incidents before the meeting and prepared a report. On the 16<sup>th</sup> July previously they had received a complaint from the same client that the claimant not paying attention and was failing to notice matters that he should. The chairperson of the residents committee requested a meeting and met with the contract manager and the claimant on

the 16<sup>th</sup> July 2009. At this meeting the chairperson had raised concerns about the claimant's performance but ultimately agreed to give the claimant another chance. On the 20<sup>th</sup> August 2009 the client had instructed the respondent to remove the claimant from the site "ASAP".

The meeting took place on 3<sup>rd</sup> September 2009. Present at this meeting were the contracts manager, the operations director, a HR official, the claimant and his friend (JO). A note from both sides of this meeting was produced in evidence with differences that were objected to by each party. While both notes of this meeting had differences the outcome of the meeting was the same in each account.

In the meeting, the claimant was asked as to why he did not notice the security gates, the claimant initially told them he was on patrols from 4.00 am to 7.00am. The respondents informed him that they could not see him on the CCTV footage between the hours of 4.00am to 7.00am and the claimant was asked to reconsider his answers. The respondents also asked him if he had returned to the reading room after he had secured it for the night at 23.00hrs, and the claimant replied that he had not. The claimant was asked to consider his answers and after a small break the claimant informed them that he had returned to the reading room between 5.30 and 6.30 am while the respondents note reflects that the claimant stated he had returned to this room at 4.00am until 6.50am. The respondent's position was that they thought the claimant had gone to the reading room in the complex at about 4.00am and slept and the claimant admitted to this fact. Access to this reading room is not on CCTV. The claimant's position was he denied that he had slept at all. The respondent felt that they had no other option to dismiss the claimant as he was on a final written warning and the claimant was informed of this decision at this meeting. The claimant was informed of his right to appeal, which he exercised, by letter dated 3<sup>rd</sup> September 2009. The hearing of the appeal was set for 24<sup>th</sup> September 2009 and the claimant was informed of this by letter dated the 15<sup>th</sup> September 2009.

On the 15<sup>th</sup> September 2009 the claimant's solicitor wrote to the respondent on his behalf raising a number of issues including that the respondent had not offered to show him the CCTV footage of the night in question. The claimant also complained about the previous behaviour of the contracts manager towards the claimant, and that the claimant had not got his representative of choice at this meeting because of the scheduling of the meeting.

The appeal hearing took place on the 22<sup>nd</sup> September 2009. Present were the chair (P) a director of the respondents, the claimant, his solicitor, and JO the claimant's friend. Also in attendance were the respondent's solicitor, the operations manager and a note taker. It was Ps position that in light of the fresh allegations made against the company by the claimant, the company would need time to address them; it was decided to adjourn the appeal hearing to a later date. The claimant's solicitor was to provide the respondent with written allegations of the claimant's grievance and a timeline was set in motion. The claimant also requested that BB, another director, hear his grievance. The claimant's dismissal was altered to suspension without pay.

The written allegations were submitted to the respondents on the 30<sup>th</sup> September 2009. There were ten allegations against the company. These included the claimant's belief that the operations manager disliked him; receiving work telephone calls on his day off; issues around annual leave and the operations manager not following up complaints he had made.

The grievance hearing took place on the 8<sup>th</sup> October 2009 and was chaired by BB as requested

by the claimant. In attendance also were the claimant, his solicitor, JO the claimant's notetaker, the respondent's solicitor, operations manager and two others. Both BB and the claimant's solicitor gave evidence in respect of this hearing. BB explained that he was hearing the grievance and that the claimant's dismissal was a separate matter. On previous occasions BB had to counsel the claimant on his aggressive manner however this issue had been resolved. At this meeting BB made it clear that it was an investigation meeting into the allegations against the operations manager. The claimant stated that he had requested holidays but the operations manager had not dealt with his request, and that another employee had been facilitated with a months leave to return home. It was the respondent's position that the claimant had sought three weeks leave through the proper channels after he was dismissed. It was the claimant's position that he had sought leave on numerous occasions and when his solicitor was elaborating on this in the meeting of 8 October 2009, BB had interjected that there was an employee in the company who had worked 11 months without a break. BB denied saying this and explained that their employees take their leave throughout the year. When the holiday issue was detailed the claimant's solicitor expected this to be put to the operations manager however BB wished to deal with all the allegations together. BB said all parties were in agreement with this approach, the claimants maintain that they were not and thought it made sense for all allegations to be dealt with separately.

As this meeting continued BB sought clarification of what had been said earlier, JO read his notes and BB disagreed with the comments noted, as they were inaccurate, so this meeting was halted at this stage. It was the claimant's solicitor's view that he was disgusted when BB opened the meeting referring to counselling the claimant previously on his aggressive behaviour. He was of the view they were there to investigate the operations manager and not his client. His memory of the note taking issue was not clear. He felt that his client was not being afforded an impartial hearing. The claimant and his solicitor left the meeting at this stage.

On the 13<sup>th</sup> October 2009 the claimant's solicitor wrote to the respondents solicitors stating while the hearing of the allegations was unsatisfactory they wished to proceed with the appeal to P on both matters in dispute. The respondent's solicitors replied on the 15<sup>th</sup> October 2009 outlining their understanding that the grievance matter was adjourned and that the claimant could not appeal a matter that had not been decided on. The claimant's solicitor replied by letter on the 21<sup>st</sup> October 2009 stating the allegations matter could not be continued to be heard by BB requesting that the matter proceeded to be heard by P. The respondent's solicitors by letter reiterated that they could not appeal a matter that had not been decided on. However that MD (ex grade) could hear the claimant's complaints.

The respondent's solicitors explained that this is where the correspondence rested between parties. However at the hearing the claimant solicitor produced a letter sent to the respondent on the 25<sup>h</sup> November 2009. The respondent's solicitor stated they had never received this letter.

## **Determination**

The Tribunal considered the evidence adduced at the hearing. The respondent did not act reasonably in all the circumstances. There was not sufficient proof that the claimant fell asleep while working, and in any event, there was no rostered break and so it was not reasonable in all the circumstances for the respondent to terminate the employment of the claimant. The

investigation by the respondent was flawed. In these circumstances and considering the claimant's mitigation of loss the tribunal awards the claimant €20,000.00 under the Unfair Dismissals Acts 1977 to 2007.

The Tribunal makes a further award in the amount of €2912.00 the equivalent of four weeks gross pay under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

The Tribunal makes no award under the Organisation of Working Time Act, 1997.

Sealed with Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)