

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.
UD297/2007

EMPLOYEE – *claimant*

against

EMPLOYER – *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J Flanagan BL

Members: Mr M Murphy
Ms E Brezina

heard this claim at Dublin on 9th June 2009 and 18th September 2009

Representation:

Claimant: Mr Kieran Kelly BL instructed by Christopher B Walsh, Solicitor,
90 Park Drive Avenue, Castleknock, Dublin 15

Respondent: Mr David Keane, IBEC, Confederation House,
84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows: -

Respondent's case

The respondent had employed the claimant as a security guard guarding the premises of a client. The operations director of the client gave evidence first. The operations director explained that confectionery is stored on the client's premises. The confectionery is highly tradable and is stored on pallets. In June 2006 some pallets of confectionery went missing. As a result of this loss security was upgraded, cameras were placed on each door of the building and stocktaking was carried out on a more regular basis. A stock controller was appointed to monitor all stock.

During the course of the night of 4th August 2006 a pallet of confectionery went missing. The respondent carried out an investigation to ascertain how the pallet had gone missing. Part of that investigation involved viewing CCTV footage of the premises. This footage showed a white van arriving at the gates of the premises and the claimant moving stock around. It was noted that the security cameras were also off for periods of time. The operations director interviewed the claimant

as part of the investigation process. The claimant informed the operations director that nobody had come on site and nothing untoward had happened on the night in question. The claimant informed him that he had slept from 10.30 pm until 6 am.

The operations director was taken aback by this reply as the claimant was expected to secure the site while he was on duty. The operations director gave evidence that the security cameras had been switched off for over half an hour on the night in question. The claimant had recorded that a person driving a white van (hereafter known as JS) and who worked for a client company had visited the site on the night. Following receipt of this information the operations director contacted the relevant client company and was told that no such person as JS worked for them.

The operations director gave further evidence of being contacted in June 2006 by a transport company informing him that the claimant had contacted one of their drivers requesting that goods be removed from the premises. Upon receipt of this information the operations director interviewed the driver concerned but did not pursue the matter, as he had trusted the claimant. With the benefit of hindsight he now has a different view of the matter.

Under cross examination the operations director confirmed that on 4th August 2006 that he knew exactly what stock was held on their premises. Stock was monitored continuously throughout the day. Their computer system recorded the exact amount of stock held every minute of every day. From viewing the CCTV footage it is evident that the security cameras were switched off for a period of time on the night of 4th August 2006. The claimant had entered the control rooms immediately prior to the cameras being switched off. The operations director stated that his company is a client of the respondent and that following the investigation the client did not want the claimant working on its premises. The client had lost trust in the claimant and the operations director made their position known to the respondent.

Claimant's Case

The claimant gave sworn evidence that he had no knowledge of stock going missing on the night of 4th August 2006. The claimant denied that anybody had removed pallets from the premises on the night in question. The claimant had seen JS on previous occasions at the premises picking up goods belonging to the client. The claimant could not recall the dates on which these goods had been collected. The claimant stated that although JS had visited the premises previously the claimant did not recognize his face. The claimant only identified JS by his van, which had an English registration plate. The claimant allowed JS enter the site because he understood that JS wanted to drop off empty pallets. The claimant denied that he told the previous witness that he was asleep on the night of 4th August 2006. The patrol supervisor had visited the site at 10pm. The claimant had informed his patrol supervisor that he felt unwell. The patrol supervisor said he did not have anybody to replace him. The claimant had noticed no untoward occurrence during his shift on the night of 4th August 2006.

Under cross examination the claimant agreed that he had dozed intermittently on the night in question as he was feeling unwell but denied that he had slept continuously from 10.30pm until 6am. The claimant stated that somebody else could have gained unauthorised access to the premises while he was dozing. The claimant agreed that he had entered the control room for the internal cameras at 19.33. Thirty four seconds later the cameras went off but the claimant does not know the reason for this. The claimant agreed that at 20.14 he entered the security hut from where the external cameras were controlled. Thirty seconds later all external cameras went off but he does not know the reason for this either. The claimant has no explanation as to why the CCTV recording ceased recording for both periods of time on the night of 4th August 2006.

Determination

The claimant had brought his claim against the above named respondent and a number of others. It was agreed between the parties that the above named respondent was the employer of the claimant at the material times and the claims against the others were dismissed on consent of both parties.

The fact of dismissal was not in dispute and therefore the respondent proceeded first. It was agreed that the gross remuneration of the claimant was €711 per week. Both parties indicated a preference for compensation as a remedy.

On the first day of the hearing the representative for claimant indicated that the claimant was not disputing the procedures. On the second day of the hearing the claimant was represented by counsel for the first time. Counsel for the claimant submitted that the procedures were unfair in that the respondent had relied upon video evidence in reaching its decision to dismiss the claimant and that the appellant had not been shown this evidence and thereby had been deprived of an opportunity to challenge the evidence against him.

The representative for the respondent objected to the introduction of a challenge to the procedures aspects of the dismissal at this stage.

The Tribunal has decided to allow the procedural aspects of the dismissal to be raised by counsel for the claimant. The burden of proof lies upon the employer to satisfy the Tribunal that the dismissal was fair in all respects, both procedurally and substantively. The Tribunal finds that the burden of proof upon the employer is not discharged merely by the failure of the employee to raise any particular issue of procedural fairness. The Tribunal was satisfied that no unfairness would be caused to the respondent by allowing the claimant's representative the opportunity to raise procedural issues at this stage which could not be remedied by the Tribunal showing reasonable flexibility to the respondent. The Employment Appeals Tribunal has long regarded itself as having an inquisitorial role and irrespective of whether issues of fair procedure had been addressed by the parties at any earlier stage it is usual that the Tribunal would enquire into procedural matters itself.

The Tribunal notes that the claimant in his Form T1A stated that the reasons for his appeal were: "I was dismissed without fair procedures for misconduct in circumstances where the finding was unsound and the penalty was disproportionate." The Tribunal considers this statement to be a notice in general terms to the respondent that fair procedures were in issue. The Tribunal also notes that the respondent in the Form T2 asserts that "The claimant was ... afforded due process during the process that led to his dismissal." The Tribunal considers this statement to represent some acknowledgement by the respondent that the fairness of procedures was in issue.

The Tribunal has had opened to it correspondence between the parties and it is clear from the correspondence that the claimant and his legal representatives were raising two specific procedural issues. The first procedural issue was that the respondent had failed to particularise with sufficient exactitude the disciplinary charges against the claimant. The second procedural issue was that the respondent had relied upon video evidence which had not been shown to the claimant. The Tribunal is therefore satisfied that the respondent was aware in general terms that the fairness of procedures would be in issue at this hearing and that the respondent had some forewarning of what those issues were likely to be from the *inter partes* correspondence. In any event, the Tribunal finds that there is no obligation upon a claimant to particularise the alleged breaches of fair procedures in the Form T1A. The Employment Appeals Tribunal is not a court of pleading; indeed the Tribunal is expected to operate as a "less formal" tribunal accessible to private individuals who may wish to

represent themselves without any legal assistance and therefore the Tribunal approaches cases as best it can so as to minimise the burden of formalities, once no actual prejudice is caused to the other party. Each party to an unfair dismissal case has a statutory entitlement to make an opening statement. Although the initial statement on behalf of the claimant that procedures would not be in issue had the potential to mislead and therefore prejudice the respondent's case, the Tribunal is satisfied that no actual disadvantage was suffered by the respondent.

The client's premises were extensively surveilled by closed circuit television cameras. The Tribunal notes reference to a figure of some forty cameras internally. The exterior of the premises was also covered by CCTV. The doors were operated by an electronic card and so a record was also available of when the claimant's card was used to open which doors. The video from the CCTV was the property of the client and the client made the video available to the two individuals who constituted the respondent's investigation team. The combination of the CCTV footage and the electronic door records provide a detailed account of the claimant's movements throughout the client's premises. The stock taken from the premises was confectionary bars valued at approximately €10,000 and was of a substantial weight and bulk. The theft of the stock became the subject of a Garda investigation and the Tribunal understands that the Garda Síochána took possession of the video and they were disinclined to make it available to the claimant who was a principal suspect in their investigation. This investigation did not result in the conviction of the claimant for any criminal offence. Ultimately the respondent regained access to the video long after the claimant had been dismissed and then sought to put the video before the Tribunal. The claimant had never seen the video until the day of the hearing before this Tribunal and therefore the Tribunal directed that the video be shown to the claimant and his representative so that instructions could be taken prior to the Tribunal proceeding any further.

The Tribunal has seen the video which is of good quality and in colour. The claimant is seen entering the room where the internal cameras can be switched off and half a minute after the claimant enters this room the cameras surveilling the interior of the premises shut down. The Tribunal heard evidence that when the CCTV system is switched on it takes a number of minutes for the system to boot up and when the cameras came back on line the claimant was located at a distance from the control room which could be easily reached in that time. Subsequently the claimant entered the control room for the cameras which surveil the exterior of the premises and half a minute later they also went off-line. When the external CCTV camera system booted back up the claimant was within a similar range of that control room. Furthermore, a pallet appears to have been taken through the warehouse to the outside when the internal CCTV was off and when the system came back on the claimant was seen admitting a white van to the premises and then the claimant entered the other control room and then the external CCTV went off and when it came back on the van and the pallet had gone. Having carefully considered the video evidence and the electronic card record the Tribunal is satisfied as a matter of overwhelming probability that either the claimant was grossly negligent in the performance of his duties in failing to observe and prevent the removal of the pallet from the warehouse in all the circumstances that then pertained or the claimant actually was involved in its removal as an accomplice. The Tribunal gives the claimant the benefit of the doubt and proceeds on the basis that the claimant was grossly negligent.

The respondent has carefully and consistently confined itself to dereliction of duty as grounds justifying the dismissal and has never sought to ground the dismissal by attempting to make or prove any allegation of larceny against the claimant himself. In assessing the fairness of the dismissal this Tribunal shall confine itself to the sole reason for dismissal relied upon by the respondent which is dereliction of duty. Having seen the video evidence the Tribunal finds that the

contribution to his dismissal was total and even if the claimant had been found to be unfairly dismissed the Tribunal would award compensation in a nil amount.

Counsel for the claimant opened to the Tribunal the Supreme Court case of Ludlow –v- DPP [2008] IESC 54.

Ludlow –v- DPP

The accused was a lorry driver and had been charged with dangerous driving occasioning death, an offence with a maximum sentence of ten years. The accident had occurred on a sweeping bend in the road. According to witness statements it was raining and the road was greasy, but neither of the vehicles were travelling excessively fast when the lorry seemed to slide across onto the incorrect side of the road and into the path of the deceased who had been travelling by car in the opposite direction. A Garda Sergeant and Public Vehicle Inspector inspected the lorry and he found that two of the tyres on the lorry had excessive wear. The Garda Sergeant concluded that the excessive wear on the tyres contributed to a loss of directional control of the lorry in wet conditions. The vehicle, including its tyres, was returned to its owner who was also the employer of the accused. The employer later disposed of the tyres. The accused and his technical expert were therefore prevented from carrying out an examination of the tyres. The accused then sought an injunction to restrain the continuation of the prosecution on the basis of the failure to An Garda Síochána to preserve the evidence. The matter then came before the Supreme Court by way of an appeal by the DPP against the order of the High Court granting an injunction restraining the continuation of the prosecution and declaring that the Director and An Garda Síochána were obliged to preserve the evidence. The decision of the High Court was upheld.

Counsel for the claimant referred to two Supreme Court cases McHugh –v- DPP [2009] IESC 15 and Gallagher –v- Revenue Commissioners (No. 2) [1995] 1 IR 55 although no copy was handed in.

McHugh –v- DPP

A security guard became suspicious of the movements of two individuals in the shop and discovered that a leather jacket was missing. On checking the CCTV he observed the same two individuals; one had removed his top, put on a leather jacket and put the top back on over the leather jacket. When the Gardaí asked for a copy of the video they were not given the hard drive. Ultimately were given a CD which did not contain any moving images but only five still photographs. The moving images had been routinely destroyed after 30 days. Held that the court can only decide if there was a real risk to the fairness of the trial where the original footage was not made available to both prosecution and defence on an equal basis. In the very particular circumstances of this case there was such a risk as the defence is simply unable to test the identification of the state witnesses. This does not mean that still images taken from a missing video are generally inadmissible. All depends on the particular facts. The order of the High Court was affirmed.

Gallagher –v- Revenue Commissioners (No. 2) [1995] 1 IR 55

The applicant was a Customs and Excise officer with more than 20 years service. He valued cars for the purposes of assessing the import duty. The respondent had carried out an investigation in which it obtained third party valuations of the cars the applicant had valued and drew the conclusion that the applicant had deliberately undervalued the cars. An oral hearing was scheduled and the respondent stated that it was not going to call the third party valuers or make them available for cross examination. Held that while there were occasions when a tribunal of inquiry could act on hearsay evidence, in the applicant's case to rely on written hearsay evidence and deny the applicant

the opportunity to cross examine facts central to the establishment of the charges amounted to a failure to afford fair procedures. The order of certiorari quashing the dismissal was affirmed.

All three cases involve the absence or non-availability of evidence at or for a hearing and are pertinent to the facts of this case in that the video evidence was not available at the time for the purposes of the disciplinary hearing because the video evidence was the property of the respondent's client and in the hands of the Gardaí.

This Tribunal must confine itself to assessing the fairness of the dismissal on the basis of the evidence actually relied upon at the disciplinary hearing. In assessing the quantum of compensation the Tribunal may rely upon evidence not available at the disciplinary hearing. The Tribunal finds that the respondent had sufficient evidence at the hearing to base its finding of dereliction of duty. The evidence included the admission that the claimant had slept for a prolonged period of his watch. The respondent also presented at the disciplinary hearing the time log of use by the claimant of the electronic card access controlled doors such that the claimant's movements could be ascertained. The Tribunal therefore finds that the respondent fairly dismissed the claimant on the basis of dereliction of duty.

The respondent also satisfied the Tribunal that the evidence it relied upon at the disciplinary hearing from its stock control system proved on the balance of probabilities that a full pallet load of confectionery had gone missing at the material time, that the building had been secured and that the doors were not being opened by anyone but the claimant and that there was no evidence that anyone else was present in the building and that *res ipso loquitur* applies. The Tribunal notes the somewhat fanciful claim that he opened the gate to the premises to admit a white van with Northern Irish registration plates, that he has no recollection of its number or any other identifying feature of the van, and yet has claimed that he recognised the driver as someone who had been on the premises previously by his van and not by his face. The Tribunal therefore finds that the respondent was fully justified in dismissing the claimant on the basis of lack of trust and confidence.

The Tribunal finds that the refusal of the client to have the claimant ever present again on its premises justified the respondent in not allowing the claimant to work at that location on the grounds of necessity. The Tribunal is of the view that an employer may rely upon all relevant evidence, including evidence not made available at a disciplinary hearing to form a business decision as to whether or not an employee can be re-employed elsewhere.

The Tribunal finds that the claim under the Unfair Dismissal Acts, 1977 to 2007 therefore fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)