

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYEE -*Appellant*

CASE NO.
UD540/2010

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

EMPLOYER -*Respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr R. Maguire, B.L.

Members: Mr J. Goulding
 Ms M. Finnerty

heard this appeal at Dublin on 25th May 2012

Representation:

Appellant: Richard Grogan & Associates, Solicitors, 16 & 17 College Green, Dublin 2

Respondent: Mr. David O'Riordan, Sherwin O'Riordan, Solicitors, 74 Pembroke Road,
 Ballsbridge, Dublin 4

The determination of the Tribunal was as follows:

This case came before the Tribunal by way of an employee (the appellant) appealing against a recommendation of a Rights Commissioner under the Unfair Dismissals Acts, 1977 to 2007 (reference: r-079987-ud-09/GC)

The appellant was employed by the respondent as a garage attendant/shop assistant. The manager of the petrol station within which the appellant was employment gave evidence to the Tribunal. A contract of employment was signed by the appellant.

Given the nature of the business there is a designated smoking area for staff and the manager sits with each staff member at the commencement of their employment and explains the location of the designated smoking area to them. The appellant signed the document pertaining to the designated smoking area. The appellant later disputed that he received this document and the manager produced the document again for signature but the appellant refused to sign it on that occasion.

As both the manager and the appellant spoke Lithuanian the manager explained all matters to the appellant in his native language.

The manager wrote contemporaneous notes after he spoke to the appellant about his performance but the appellant would refuse to read the notes. The manager explained to the appellant how serious the action of smoking on the forecourt was. However, every time the appellant would tell him that it was not a big issue and would laugh or scream at the manager. The manager would reiterate the seriousness again but a few nights later the appellant would do the same thing a number of times during the one shift. The manager did point out to the appellant that his actions constituted grounds for instant dismissal as per the employment contract.

In addition there were a number of occasions when the appellant did not perform his duties and there were also complaints from customers about the appellant. From the time that the manager began to receive such complaints he started to document issues with the appellant's performance. He had discussions with the appellant which he documented but there were also further occasions when he verbally addressed the appellant regarding his performance. The manager spoke to the appellant on more than ten occasions and outlined to the appellant how he needed to improve. The manager explained that the reason he gave the appellant so many warnings rather than dismissing him was due to the fact that he was related to the appellant but the situation became very stressful for the manager.

The manager stated that every conversation with the appellant was stressful as the appellant would scream and laugh into his face. A number of documents were opened to the Tribunal and the manager outlined the issues with the appellant's performance during February and March 2009. In addition other staff members complained that the appellant was not carrying out his duties. On another occasion the appellant consumed shop goods without paying for them. When the manager addressed this, the appellant dismissed what the manager had to say on the issue. There was also an incident when the appellant did not switch the pumps to pre-pay during a night shift resulting in a customer leaving without paying for fuel. The appellant also continued to smoke on the forecourt despite the manager continuing to outline how dangerous this was.

Then on 9 April 2009 the appellant refused to clean the forecourt and the manager instead carried out this duty after the appellant's refusal. After cleaning the forecourt the manager addressed the matter with the appellant and told him that he was deducting one hour's pay from him for failure to carry out his duties. Some two hours later the appellant attended at the manager's office and behaved in an aggressive manner towards the manager as well as threatening and verbally abusing him. The manager was shocked and stressed and told the appellant that he could not continue to work with him given the appellant's behaviour towards him and the issues with his performance. The appellant was rostered to the end of the week so the manager paid him wages for that week and holiday pay.

The appellant gave evidence with the assistance of an independent interpreter provided by the Tribunal. The appellant did not recall receiving verbal warnings from the manager. He recalled getting one written warning but he refused to accept it, as it was not translated into Lithuanian but he accepted that he was given a warning in February 2009 about not stocking fridges in the shop. He accepted that he had not carried out this duty as there was no stock available and he explained this to the manager at the time. However, this was the only warning that he recalled being given and prior to that there was no indication that there was any issue with his work.

However, later in his evidence the appellant accepted that he had received warnings about smoking on the forecourt. When he was told by the manager not to smoke in a particular area he stopped smoking there.

On the day of dismissal the manager told the appellant to clean the forecourt but the appellant was busy and it was raining heavily so he refused to clean the forecourt. The appellant refuted that he had attended at the manager's office and shouted into his face. The manager approached him at 3pm and invited the appellant to his office where he informed the appellant that he was dismissed. The appellant denied verbally abusing the manager. The appellant gave evidence pertaining to loss.

During cross-examination the appellant stated he did not know why he was dismissed. He accepted that he was spoken to about smoking on the forecourt a number of time but he always thought where he smoked was safe as he could observe the area. He said he stopped smoking on the forecourt when he was warned but it was put to the appellant that CCTV footage showed that he continued to smoke on the forecourt.

Determination:

The Tribunal found the appellant to be a confusing, contradictory and unreliable witness. The Tribunal found the manager to be a credible witness. The appellant did not prove that any losses flowed from his termination. However, the respondent did not have an appeals process and in fact broke a number of the terms of the employment contract between the parties. The appellant was dismissed unfairly as there were no proper procedures utilised and he was not informed at any stage that his dismissal was being considered.

However, the Tribunal finds that the appellant's conduct contributed to the dismissal to such an extent that there is no amount of compensation payable under section 7 of the Unfair Dismissals Act 1977 as amended.

Accordingly, the Tribunal upsets the recommendation of Rights Commissioner under the Unfair Dismissals Acts, 1977 to 2007 (reference: r-079987-ud-09/GC) but awards no compensation to the appellant.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____
(Sgd.) _____
(CHAIRMAN)