

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:
EMPLOYEE

UD1325/2011

CASE NO.

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

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P. O'Leary B L

Members: Mr E. Handley
Mr G. Whyte

heard this appeal at Dublin on 30th October 2012

Representation:

Appellant: In person

Respondent: Joseph T Mooney & Co, 22 Upper Mount Street, Dublin 2

Background:

This case came before the Tribunal by way of an employee appeal of a Rights Commissioner recommendation under the Unfair Dismissals Acts, 1997 to 2007, reference r-097718-UD-10/SR.

Respondent's case:

The Tribunal heard evidence from a director of the respondent. She told the Tribunal that it was the responsibility of the appellant to open and close the premises, cash up, do banking and look after the day to day running of the business. He was also a key holder.

The appellant was an employee of a former business which the respondent took over in 2008. When that business was losing money the appellant was laid off. The respondent opened its current business and offered the appellant a full time position at the first available opportunity. No new contract was issued to the appellant, the terms of employment remained the same. There was a history of warnings from the original employment, the appellant had been sent home drunk on one occasion and had received a written warning.

Various instances occurred at the new establishment including leaving money in the till overnight, leaving money on top of the safe (not in it) and giving free lunches to a business next door. Verbal

warnings were given and he accepted responsibility for all of them.

An employee who was only 6 weeks working for the respondent made a complaint about the appellant in July 2010. She said he had left her on the premises on her own for up to 3 hours. When the witness for the respondent sat him down to talk about it he said “no way, you can check the CCTV, I went to the tills every ten minutes”. The witness told him if he was proved wrong she would have to take further action. On checking the CCTV it became 100% apparent he was not there for 1 hour and 40 minutes.

On 15th July the appellant was due to open the premises at 8am. Staff and customers were left outside. His employer rang him on a few occasions and when contact was made between 9.30 and 10am he asked “what are you doing ringing me”. The respondent considered it the final straw, the appellant was dismissed over the phone by the witness.

Appellant’s case:

The appellant gave evidence that the respondent re-hired him in their café in July 2009. He asked not to receive a P45 from the previous employment as he was on a work visa that tied him to his employer. He said that there had been a few verbal warnings about various issues, but nothing that wasn’t laid out and discussed at meetings in an informal way.

He was drunk and sent home on one occasion, the food given to employees next door was on Fridays when it would otherwise be thrown out and he took full responsibility for not putting money in the safe on one occasion, it was an oversight. With regard to missing for a long period of time in July 2010 he insisted that he was cleaning all three toilets during that period of time and might not have been picked up by CCTV. On the morning of his dismissal he was due to open the café at 8am, he overslept and before he could get to work he received a telephone call saying he was dismissed.

Under cross examination the appellant said that he might be five/ten minutes late from time to time, there was no major reason for it. He was the person in charge and took his position seriously. Noise on the street had kept him awake the night before he overslept and he was talking responsibility by cleaning areas that hadn’t been cleaned for some time when the new employee reported him to the director.

Determination:

On considering the evidence the Tribunal noted the lack of compliance with the procedures in this dismissal. The respondent gave the appellant a final written warning and stated that they had given him verbal warnings on a number of occasions. The final written warning was given before the verbal warnings and therefore the respondent failed to follow the procedures laid down in the conditions of employment issued to the appellant.

In the circumstances the Tribunal must find that the dismissal was procedurally unfair. In considering the entirety of the evidence however the Tribunal noted the many instances of the appellant failing to perform the duties imposed on him under his contract of employment. The version of the incident with regard to the CCTV footage given to the Tribunal by the witness for the respondent was accepted by the Tribunal. The appellant as a supervisor was missing from his control of the premises for 1hour and 40 minutes on the day in question. He freely admitted he did not attend the cash register every 10 minutes.

The Tribunal also accept that the appellant was late for work on a large number of occasions. On

the day of his dismissal he failed to open the premises at the allotted time and was at least 2hours late when he took the phone call from his employer. While the respondent should not have dismissed him in a telephone conversation nonetheless there were reasonable grounds had the proper procedure been adhered to.

The Tribunal considered the remedies in this case and find that the most appropriate remedy is compensation. However because of the serious neglect of duty by the appellant the Tribunal varies the Rights Commissioner decision and makes no award in this case.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)