

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

CASE NO.
UD1130/2010

against
EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr M. Gilvarry

Members: Mr. D. Morrison
Ms. R. Kerrigan

heard this claim at Sligo on 15th November 2011 and 20th February 2012

Representation:

Claimant: Mr. Kieran Ryan, Kelly & Ryan, Solicitors, Manorhamilton, Co Leitrim

Respondent: Ms Maeve McElwee, IBEC, Confederation House, 84/86 Lr. Baggot Street, Dn2

The determination of the Tribunal was as follows:-

Background:

The claimant was dismissed following an incident with a customer in a tile store where he used offensive language to the customer. Following a meeting in head office he was suspended on full pay and at a follow up meeting he was dismissed for gross misconduct. The claimant did not appeal the decision.

Respondent's case:

The assistant General Manager JC gave evidence that a customer Mr C advised him of an incident that occurred in the one of the company's show rooms. Mr C arrived at head office and asked for JC by name. He was very annoyed and in an agitated state. Mr C had an issue with a member of staff PG who worked in the show room. A heated discussion took place and PG asked him to leave. He didn't leave and spoke to the claimant who was the store manager instead. The claimant told him he was not dealing with him. He asked Mr C to leave the premises using offensive language.

Mr C told JC that he asked the claimant to repeat what he had said. It was repeated by the claimant who then followed him outside and beckoned him out of his car.

JC said that Mr C had a short fuse but staff was trained to deal with that kind of thing. He told Mr C that he would investigate the incident and went to the show room just after 3pm. JC spoke with both staff separately and asked for their versions of events. He also viewed CCTV, but there was no sound or audio attached. The facts were broadly in line with what Mr C had stated. He reported the incident to the General Manager and asked to see the claimant the next day at head office. The claimant was allowed to bring somebody with him and he brought PG. Nothing new came out of the meeting except the issue of calling Mr C out of his car. The claimant said he wasn't calling him out of the car, it was noisy and he couldn't hear what Mr C was saying through his car window. The claimant at no time showed remorse or apologised. He was suspended for one week on full pay and was then dismissed.

Under cross examination JC stated that Mr C had not asked that the claimant be fired. The video evidence was not retained but a man was repeatedly verbally abused and there is a line you don't cross. The General Manager at the time made the decision to dismiss but he has not been involved in the day to day running of the business for some time. JC was a part of the process which ultimately led to the dismissal. He was not aware of any contract signed by the claimant but the claimant would have had input into drafting a company handbook.

At the appeal meeting the claimant arrived in old jeans and not shaved. The meeting didn't take long and it didn't look like he wanted his job. He did not apologise. Between three and five people had been let go due to the recession.

The claimant was not advised of an appeals process at his dismissal and when asked "who would he appeal to" JC said there was no precedent. No sanction had been taken against PG.

Claimants case:

The claimant began working for the respondent company in February 2007. He did not have a contract. There was no formal training, he learned as he went along. He was manager at one store and with re-structuring he was moved to another store because of lay-offs.

On the day of the incident he and PG were the only people in the show room. Mr C came in and engaged with PG regarding a previous situation and a tiling quote. PG tried to move him to a quieter location of the showroom and Mr C got very irate. It got to a point after 10 or 15 minutes where PG asked him to leave. Mr C said he wasn't leaving and was going to deal with the claimant. The claimant felt he had to back up his colleague's decision and refused to deal with Mr C.

Mr C insisted he wasn't leaving and was there to get a quote. The claimant asked him politely to leave on several occasions. The claimant felt threatened by Mr C's stance and gesticulations and eventually told him to "f... off". Mr C asked him to repeat what he had said and he did. Mr C took the claimant's name and went to his car. The claimant, PG and a driver then went to load a lorry. Mr C reversed his car close to the lorry, and rolled down his passenger window. The claimant couldn't hear what was being said, it was still something aggressive, so he asked Mr C to turn off the engine and say what he had to say. Mr C threw off his seatbelt, slammed the car door and stormed towards the claimant. PG put his arms out to stop him and the claimant stepped back inside the showroom door.

When JC came to the show room he interviewed the claimant and PG separately. The claimant was still shaken and told him what had happened. He felt he could not have handled it any differently. JC said it was a serious incident and asked the claimant to go to head office the following morning. At the meeting the next morning he was informed that he was being suspended. It was considered by the General Manger that he should have given the quote to Mr C, no matter what.

The following Monday was his day off. He received a letter that afternoon advising that he was to attend a meeting at 5pm. He had to jump into his car and leave his house immediately which was his reason for not being appropriately dressed. The claimant knew a decision had been made, he didn't remember being told anything about an appeals process but his understanding was that the only person he could appeal to was the person who had just sacked him.

Under cross examination the claimant said that he had heard of Mr C, he knew there was some kind of history between him and PG. When Mr C came into the showroom he could only hear raised voices but not what was being said. He kept an eye on his colleague in case things got out of control. He had never been in a situation like it before and didn't know what to do. When Mr C approached him he hadn't calmed down but was not rude. He was backing up his colleague by asking Mr C to leave. It was a moment of madness on his part but he felt threatened and intimidated by the man. In hindsight telling Mr C to "f... off" and then repeating it was not the wisest thing to do. He did not follow Mr C out of the store, there was a delivery that needed loading and Mr C had left, he was reversing out of his space and still talking.

The claimant did not advise head office of what had happened, he thought Mr C might just have gone away and he didn't want to throw fuel on the fire. Asked if he wasn't taking the meeting on the Monday seriously by showing up in jeans and a tee shirt he said that it was his day off. He disagreed that he had not apologised and said he had done so on numerous occasions. On not appealing the decision he stated that the only person he could have appealed to was the person who had sacked him. He was shocked at being sacked over a one-time lack of judgement.

PG in his sworn evidence stated that the irate conversation took place and he did ask Mr C to leave the showroom. He told him he would not be getting served by anyone today and he tried to walk him towards the door. Mr C did not leave and went to the claimant who was behind the desk. The claimant did eventually tell Mr C to "f...off" and maybe it was reasonable in the circumstances. Outside the car was being revved and the claimant said he couldn't hear him. Mr C got out of his car and came at the claimant, PG put his hands out and stopped him, the claimant went back into the shop. PG gave a verbal account of what had happened to JC, he apologised and no sanctions have been taken against him.

Determination:

The Tribunal carefully considered the evidence adduced at the hearing. The principal facts of the matter were not in dispute between the parties and the claimant admitted he had spoken the words complained of to a customer and repeated them when questioned. The respondent did not follow best practise in the procedures followed prior to his dismissal but the Tribunal was not convinced that any injustice was done to the claimant in this regard.

The Tribunal however considered that the respondent should have considered all alternative options before coming to the ultimate decision to dismiss and that the decision to dismiss was arrived at hastily. A reasonable employer would have considered lesser sanctions than dismissal and the decision to dismiss was disproportionate in all the circumstances of the case. As a result the Tribunal determined that the dismissal was unfair. The Tribunal considered compensation to be the appropriate remedy taking into account the very considerable contribution of the claimant to his own dismissal. Given this considerable contribution and taking into account the evidence of loss and mitigation given, the Tribunal awards the claimant €2, 500.00 under the Unfair Dismissals Acts 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)