

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

EMPLOYEE

UD560/2011

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: Ms P. McGrath B.L.

Members: Mr F. Cunneen
Mr D. Thomas

heard this appeal at Dublin on 25th July 2012 and 12th October 2012

Representation:

Appellant:

Mr John Kennedy, Claudine Hanratty & Co, Solicitors,
1 Main Street, Tallaght, Dublin 24

Respondent:

Mr. John Barry, Management Support Services (Ireland) Limited,
The Courtyard, Hill Street, Dublin 1

This case came to the Tribunal by way of an appeal by the employee against the decision of the Rights Commissioner Ref: r-095988-ud-10/RG

Respondent's case

The appellant was employed by the respondent as a General Assistant from 13th October 2006 until he was dismissed on 14th April 2010 for gross misconduct.

An allegation was made against the appellant that he had physically and sexually assaulted a female colleague (Ms. X) three times while on a work organised night out. The night out began in a hotel function room and later on some of the staff went on to another venue. It was in the hotel that the first two alleged assaults took place. The appellant was on prescribed medication for depression and had also consumed a large amount of alcohol. As Ms. X was leaving the other venue to return to the hotel where the function was held because she was spending the night there, she encountered the appellant who was bloodied and in some difficulty with the

police. Out of a sense of responsibility to the appellant she agreed with the police to take him in her taxi rather than them taking him away in a squad car.

Ms. X hoped to locate other work mates at the hotel but mistakenly they took the service lift which left them in the wrong part of the hotel. They then entered a stairwell in the hope of getting back to the function room but ended up trapped there for up to an hour. It was during this time that the alleged third assault took place.

Ms. X reported the matter to her employer because she felt she could no longer work with the appellant. The Human Resources Manager (HR) took a formal complaint from Ms. X and invoked the respondent's formal grievance procedure.

An investigation was undertaken by the Financial Controller (FC) of the respondent with the input of HR. The appellant and Ms. X were interviewed separately and both gave statements. The appellant had no memory of the alleged assaults. However Ms. X gave a comprehensive account of the events that allegedly took place.

There were other colleagues, whom Ms. X said were potential witnesses. However when these people were interviewed they said that the appellant was very drunk but they did not witness the alleged assaults and no written statements were taken from them.

Having carried out the investigation FC decided that there was no reason to doubt the validity of Ms.X's account of what happened on the night in question. FC felt he had no choice but to dismiss the appellant and did so on 14th April 2010.

The appellant availed of the respondent's appeal process and a director (LO) told the Tribunal that he heard the appeal. LO relied on the information he obtained from HR and spoke directly to her in relation to the matter. The statement from Ms. X was so strong that LO felt he had no choice but to uphold the decision to dismiss the appellant.

Appellant's case

At the time of the alleged assault on Ms. X the appellant was on medication for depression. On the day of the alleged assault the appellant took three times the prescribed amount of medication and told the Tribunal that he wanted to forget his troubles. The appellant then drank four pints of beer before arriving at the hotel function room and he has very little memory of what happened from very early in the evening. He had no recollection of the alleged assaults but told the Tribunal that he would never do something like that and that if he did it would be completely out of character for him.

The appellant contended that it was unreasonable to dismiss him as the investigation was flawed insofar as potential witnesses were not properly interviewed and the disciplinary and appeal procedures were unfair. The preferred remedy of the appellant was re-instatement.

Determination

The Tribunal has carefully considered the evidence adduced in the course of this two day hearing.

The appellant comes before the Tribunal on foot of an appeal from the findings of the Rights

Commissioner, Ref: r-095988-ud-10/RG, wherein a finding was made that the appellant was unfairly dismissed and a nominal award was made.

The appellant, in appealing, hopes in essence to have the severity of the sanction to have him dismissed be reconsidered.

In coming before the Tribunal a “de Nova” hearing is given to the parties and the onus rests with the employer to demonstrate that it has acted fairly and reasonably in all the circumstances.

There can be no doubt that this was a very difficult case for both the employer and the employee. At the heart of the facts leading to the dismissal is an allegation of a most serious nature. A senior female employee (Ms. X) described a protracted and sustained assault and provocation of a sexual nature from her junior male colleague. The Tribunal has no difficulty with the employer herein taking this matter into it’s hands, albeit the alleged assault was conducted off-site and in the early hours of the morning.

The alleged victim herein, having initially believed that she could cope with the continued interaction between herself and the employee, ultimately felt that she could not. She made a complaint and once made the employer was bound by it’s duty of care to conduct an investigation. The nature of the complaint made was so serious that even though the alleged assault did not occur in the workplace, it could only be damaging to the working relationship. On top of this, there was an undeniable nexus to the workplace as the parties had been on a work night out and the events complained of arose during the course of this long evening.

The appellant stated that he had absolutely no recollection of the events complained of. In his evidence it was accepted by him that he had taken a mixture of prescribed drugs together with an enormous amount of alcohol. The appellant agreed that he was out to forget his worries.

In the early course of the evening Ms.X had noted that the appellant was pretty drunk and had simply moved away from him when he made unwanted advances. The evening progressed and the work colleagues moved “en masse” to a dance venue uptown. When she had had enough Ms.X was leaving the premises only to come across the appellant once again, who was in a bad way and on the point of being arrested by the police.

The Tribunal accepts that Ms.X, having been approached by the police, agreed to take the appellant in her taxi with a view to getting him out of the situation he was in and generally diffuse the situation with the police. This was the act of a good colleague who felt “some responsibility” for a junior colleague. The Tribunal does not find that there was any other alternative motive herein. She was simply trying to do the right thing.

The appellant accompanied Ms. X back to the hotel she was staying in. Ms. X was hoping, it seems, to catch up with other work colleagues who might be able to help the appellant. Once back in the hotel Ms. X sought to bring the appellant up to the function room on the first floor, where the earlier function had been held. Unfortunately and by mistake they took the service lift, which left them in the wrong part of the first floor altogether. They entered an emergency stairwell which they subsequently could not get out of for a considerable period of up to an hour. It was while wandering up and down this stairwell that the actions complained of were carried out.

On balance the Tribunal accepted Ms. X's account of the evening in question. A very serious situation had arisen which left her shocked and scared. Although Ms. X did eventually get out of the stairwell and leave the appellant with another colleague she was not able to move on from this incident as she had initially hoped to. It is worth noting that Ms. X states that she and her female room-mate both received phone calls later that night from the appellant's phone.

In the days that followed the incident complained of, the appellant failed to show any remorse for the actions described. The appellant placed emphasis on the fact that he could remember nothing of the evening. He did not deny the actions nor did he accept that he had committed them. By the time the appellant came before the Tribunal his evidence had clearly become more nuanced and he was saying that these were actions that he was incapable of committing and out of character.

The Tribunal therefore accepts that there was a very serious complaint made which the employer had to investigate.

The Tribunal accepts that the investigation was not as thorough as it might have been, given the lack of third party and/or other corroborative evidence. However this was not a criminal trial (albeit the sanctions are onerous) and the employer need only be satisfied that the behaviour warranted gross misconduct. At all times it was open to the appellant to procure evidence refuting Ms. X's account of the events, this he chose not to do.

Much was made of the fact that the police were not brought in but the Tribunal accepts that was always the victim's prerogative. This was an investigation within the workplace wherein a duty of care is owed to all employees to ensure that the working environment is free from vulnerability, harm and fear. The issue of sexual harassment, once raised, cannot be brushed under the carpet. It must be dealt with swiftly and decisively. If the acts complained of are of such a serious nature as herein it would be unreasonable of the employer to expect Ms. X to continue work comfortably and without fear in this workplace. This is at the very top end of gross misconduct and the respondent had no choice but to dismiss the claimant.

The Tribunal upsets the Rights Commissioners decision Ref: r-095988-ud-10/RG and finds that the appellant was not unfairly dismissed. The appeal under the Unfair Dismissals Acts, 1977 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)