

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:  
EMPLOYEE

CASE NO.  
UD1915/2010

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 J. O'Connor

Members: Mr G. Andrews  
Mr O. Wills

heard this appeal at Tralee on 22nd May, 2<sup>nd</sup>, 3rd August and 23rd October 2012

### **Representation:**

Appellant: Mr Ger Kennedy, SIPTU, Conroy Hall, Park Road, Killarney, Co Kerry

Respondent : Ms Paula O'Hanlon, IBEC, Gardner House, Bank Place, Charlotte Quay, Limerick

This case came before the Tribunal by way of an appeal by a former employee against a recommendation of a Rights Commissioner reference number r-082073-ud-09/pob. This hearing was treated as a *de novo* case and the fact of dismissal was not in dispute.

The determination of the Tribunal was as follows:

### **Respondent's (Employer's) Case**

The respondent is part of a group that consists of four hotels two of which are direct neighbours in a well-known tourist oriented town in the southwest. The Tribunal was told that there was an arrangement whereby certain staff that included the claimant were required to work in either of those two hotels. However, the principal place of work for the salaried appellant was at the respondent where he held the title of kitchen porter shift leader. Each hotel had a different scheme in allowing staff record their starting and finishing time. The respondent used a digital biometric system and its neighbour used a clock card procedure. There was also an unwritten procedure concerning how employees earn and apply a time off in lieu scheme. The appellant's detailed signed contract of employment stated *inter alia* under the heading Dismissal: *The final decision to dismiss will be made by the General Manager, or Deputy General Manager...*

On 21 June 2009 a kitchen manager and supervisor learned from a duty manager that there might be some irregularity in the appellant's recent recorded finishing time at this neighbouring hotel. On examining its clocking system the kitchen manager observed that the clocking out time for the appellant read as 01.33 earlier that morning. That examination extended to a relevant viewing of a video recording that showed a colleague of the appellant appearing to clock-out twice around that time. There was no visible sign of the appellant in that recording. When the kitchen manager approached and broached this issue with the appellant the next day he was told that this was related to arrangements over timing. The kitchen manager told the Tribunal that the appellant's answers were "kind of vague". On that day he suspended the appellant and was the instigator of an investigation into this incident. The purpose of the investigation was, according to the witness, to establish the facts of the case and to determine the guilt or innocence of the claimant. He was certain that the appellant had no time in lieu outstanding by 21 June 2009.

A "disciplinary investigation" meeting took place on 24 June 2009. According to documentation submitted to the Tribunal the appellant, the witness, the general manager of the neighbour hotel, and a personnel manager attended this meeting. The claimant declined the invitation to have a representative present. At commencement of that meeting the appellant did not accept he did anything wrong in the recording of his working hours during the relevant time. However, when he viewed the video footage he later accepted his role and contribution into those timings. The cameras recorded him as leaving the neighbouring hotel at 23 55 on 20 June and no subsequent recording placed him back at his work station before his official finishing time of 01.30 on 21 June. The appellant had not been given the opportunity to preview that video prior to this meeting. According to the witness the appellant denied everything at the beginning of that meeting but by its conclusion he had admitted everything. The submitted documentation recorded the general manager telling the appellant that his actions which he regarded as appalling amounted to gross misconduct that could cost him his job. During the course of that meeting the appellant became distressed and the meeting adjourned for several minutes.

As part of the investigation and as a result of a review of the available video footage it emerged that there were further recent apparent irregularities involving the appellant and his recorded timing. The kitchen manager who was familiar with the local flexible time arrangements and who had direct access to the time management system acknowledged that the appellant's reconciled time appeared in order up to 20 June 2009.

A similar meeting took place five days later attended by the same participants. Following further dialogue predominantly between the appellant and the general manager and subsequent to a break the appellant was informed that he was now dismissed with immediate effect. The kitchen manager accepted he was a party to that decision. While he acknowledged that this issue was not treated as a fraudulent case the witness justified it on the appellant's gross misconduct and the breakdown of trust and confidence in him as an employee.

The general manager of the neighbouring hotel told the Tribunal this hotel and the respondent was one hotel complex that shared staff "across the board". Following two investigation and disciplinary hearings attended by this witness he informed the appellant on 29 June that the sanction imposed on him was dismissal. Earlier the appellant had admitted wrongdoing in the time keeping procedures. The appellant had falsified company records to the detriment of the hotel complex in interfering with and abusing the clocking system. The witness commented that the claimant "would have been" invited to have a representative on his behalf for that meeting.

This manager stated that it was his decision alone to impose that sanction and that neither the

kitchen manager nor anyone else had an input into it. He added that it was within his remit to dismiss the appellant as the offence had occurred in the hotel for which he had responsibility. A lengthy letter signed by the witness and dated 29 June 2009 confirming that dismissal issued to the appellant. Up to that time his mind was not made up on this issue. In that letter the witness called the meeting of 24 June as a disciplinary meeting. He supplied the claimant notes on that meeting in that dismissal letter.

This manager accepted he was involved in this case from start to finish. However, the more important aspects of this case, in his view, were the facts against the claimant as shown on the clocking system and video footage.

The managing director of this hotel group upheld the decision to dismiss the claimant. The appeal was based on leniency rather than the facts of the case. The claimant had accepted his behaviour that led to his dismissal was wrong. While the managing director was sympathetic to the claimant's plight he nevertheless could not positively discriminate on the grounds of nationality. This witness was baffled that the claimant behaved in that way considering his circumstances. He was also satisfied that fair procedures were applied throughout this case.

### **Appellant's Case**

The appellant commenced employment with the respondent as a kitchen porter in November 2002. In 2007 he was promoted to a shift leader /supervisor role. By May of 2009 he was being rostered to work at the neighbouring hotel. For the first month the appellant did not have a functioning clock card and his work hours were not recorded on the respondent's time management system. He was then issued with a clock card. The appellant told the Tribunal that he was not being paid overtime and that the arrangement in place at the time was to have a start time and the end time being the time his work was completed for his shift.

References were made to banked hours. These were hours worked in excess of his standard week that could be taken off as time in lieu once circumstances allowed. This arrangement which was subject to terms and conditions had to be approved by his supervisor. Those hours did not appear on payslips. By 21 June 2009 the appellant had a number of banked hours to his credit and based on that he knowingly allowed a colleague to clock him out. This scenario had happened previously and he was unaware this was wrong or improper. There was no written procedure on taking time off in lieu. The appellant did not present that argument to the respondent throughout the investigation and disciplinary process including the appeal.

### **Determination**

In finding against the appellant a Rights' Commissioner noted procedural flaws in the way the respondent conducted this case. Likewise the Tribunal also finds fault with the respondent's handling of this case. The Tribunal finds it unsatisfactory that the general manager of a neighbouring hotel, albeit both physically and administratively linked to the respondent, acted as investigator and then as adjudicator in this case. It is understandable he investigated the case as the events occurred on the premises he which he had responsibility. His further involvement compromised the rights of natural justice for the appellant and that alone renders the decision to dismiss unsafe.

The appellant's admitted actions in this case gave rise to a large extent to the justifiable stance of the respondent in that it no longer considered the appellant a trusted employee. It is the Tribunal's

view that he contributed significantly to his own dismissal.

Considering all the circumstances the Tribunal finds that, on balance, the dismissal of the appellant was unfair as the flaws in the proper procedures outweighed the appellant's input into this case. Accordingly, the Tribunal upsets the recommendation of the Right's Commissioner and awards the appellant €2,000.00 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)