

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYER,

CASE NO.
UD2248/2010

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

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Herlihy

Members: Mr. G. Andrews
Ms. S. Kelly

heard this case in Limerick on 30 August 2012 and 23 January 2013 and 19 March 2013

Representation:

Appellant(s):

Respondent(s) :

The determination of the Tribunal was as follows:-

This determination results from an employer appeal under the Unfair Dismissals Acts, 1977 to 2007, of Rights Commissioner Recommendation r-090439-ud-10. The said recommendation was also appealed by the employee. The two appeals were heard as one case. The Tribunal determination in respect of the employee appeal is UD2319.10.

The employee appeal stated that the employee (hereafter referred to as ST) commenced employment with the retailing employer (hereafter referred to as RX) in October 2005 and that his employment ended on 24 December 2009. It was alleged that ST was unfairly dismissed.

The Rights Commissioner found ST's dismissal to have been fair in that ST's unacceptable actions in the workplace amounted to gross misconduct. However, the Commissioner proposed that ST be given a three-month temporary contract at one of RX's outlets as a last chance to show that he had learned from his mistakes and, in particular, to show other staff members that he was willing to work in a normal manner without offending or harassing other staff or customers. The Commissioner further stated that, if ST were to re-offend in any serious way, the trial contract could be terminated by RX at short notice.

An appeal was brought on behalf of ST seeking compensation on the grounds that the Rights Commissioner had erred in fact and in law. An appeal was brought on behalf of RX on the grounds that the Rights Commissioner had found ST's dismissal to have been fair and yet had proposed that he be taken back for a trial period. RX submitted that it could not accept this because ST had been in serious breach of RX's dignity at work policy and his "continuous actions" could not be tolerated.

The Employee's Case

After the Tribunal had been told that ST suffered from a disability and much witness testimony had been given it was submitted on behalf of ST that, though it was praiseworthy that RX had a policy on disability and employed people with disabilities, there had to be adequate training of management and staff on how to support colleagues with disabilities. Not all disabilities were similar and all needed to be cognisant of this. Whilst on paper there was a policy it seemed that it was nothing more than lip service in that, as in SMcM's testimony, the policy was in the drawer. Mr. H., under cross-examination, acknowledged that it was not appropriate to treat ST in the same manner as other employees of RX particularly regarding training.

It had been brought into evidence that ST had been treated the same as any other staff member whereas consideration should have been given to his ability giving due regard to his disability. ST should have been afforded special facilities and treatment. The company had no understanding of ST's disability, were not in full possession of all material facts concerning his condition and did not make any effort to establish his condition.

It was clear from the number of sanctions in the short period leading up to ST's dismissal that a pattern of behaviour was established. This should have triggered RX's management to take the necessary steps to have ST assessed. During this period ST had also started to suffer seizures and was on medication for depression and low mood swings which affected his behaviour.

The company also had a dignity in the workplace policy. It was clear that the company made assumptions about ST's disability in breach of this policy. It was clear that the company had no idea how his disability affected him notwithstanding that no consideration was ever given to sending ST for assessment.

Furthermore, the company had a set of values one of which was to give support to each other and to praise more than criticise. It was submitted that the company had clearly failed in this regard with ST.

Giving due regard to the company's failings in their recognition of ST's disability, it was submitted that, by their actions, they had contributed to and escalated the incidents on the night in question i.e. 12 December 2009.

ST had no understanding of the disciplinary process. It was contended that it was clear from his evidence that he had not understood the right of appeal and thought that, if he tore up a letter confirming a sanction, the sanction would go away. It was submitted that, had the company adhered to the company/union agreement and sent the relevant sanction letters to the union official there would have been intervention by the trade union and the opportunity to work together to help ST prior to the incident which led to his dismissal.

It was argued that the company had breached its disciplinary procedures by failing to send copies of Stage 3 and Stage 4 sanction letters to the full-time trade union official in accordance with the company/union agreement. Evidence was provided by DOC that he was contacted by the store manager prior to any investigatory meeting, that the manager had already made his decision to dismiss ST and that this was contrary to natural justice and fair procedure.

It was contended that ST had been unfairly dismissed and compensation was sought.

The Employer's Case

It was argued on behalf of the employer that this was an unfair dismissal case rather than an disability-related case before an equality body. ST had been on a final written warning and had known what could happen to him. RX had to take account of potential risk to other staff. Nevertheless, ST was volatile and unpredictable. A knife was thrown.

It was submitted on behalf of RX that ST had been dismissed for abusive and threatening behaviour, that there had been previous disciplinary sanctions for the same issue and that he had been aware of what would happen if there was any repeat behaviour. There had been previous incidents of shouting and abusive language towards staff and management. The Rights Commissioner had agreed that there had been gross misconduct meriting dismissal. It was contended that ST had made a one hundred per cent contribution to his own dismissal and that account had to be taken of the effect of ST's behaviour on other staff. SMcM stated that she had been concerned for her physical safety. There was an obligation on RX to provide a safe working environment for other staff members. When ST was asked in his appeal if he could guarantee that there would be no repetition of his volatile and unpredictable behaviour he could not guarantee this. It was contended that RX had had no option but to dismiss ST.

Determination:

The Tribunal heard sworn testimony in support of RX and ST. Even if RX had not been perfect in its following of procedures it was felt that ST had been given every chance and that people had not been safe. While there might have been stages in RX's procedures where RX was not without fault the Tribunal took into account that RX was a retail operation which was doing ST a favour and employing him during an illness. However, the Tribunal considered that there had to be some responsibility on ST himself for his behaviour whether or not RX had observed every element of its procedures.

The Tribunal is unanimous in varying Rights Commissioner Recommendation r-090439-ud-10 under the Unfair Dismissals Acts, 1977 to 2007, in that it finds that the employee in question was fairly dismissed and the Tribunal does not agree with Rights Commissioner Recommendation r-090439-ud-10 that the employee be given a new temporary contract.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

