

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE

CASE NO.
UD2040/2010

- *claimant*

Against

EMPLOYER - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. E. Kearney BL

Members: Mr. W. O'Carroll
Ms. S. Kelly

heard this claim in Nenagh on 19 July 2012 and 18 October 2012

Representation:

Claimant(s): Ms. E.J. Walsh BL instructed by
John M. Spencer, Solicitor,
Cudville, Nenagh, Co. Tipperary

Respondent(s) : Ms. Teresa Barry, Fitzpatrick O'Dwyer & Co, Auditors & Accountants,
Clonmoney House, Newenham Street, Limerick on first day of hearing.

Mr Joe Kelly, James J Kelly & Son, Solicitors, Co Tipperary on second day of
hearing.

The Claim

A claim was lodged under the Unfair Dismissals Acts, 1977 to 2007, in respect of a storeman (hereafter referred to as the claimant) who had been in employment from August 1988 to May

2010. It was alleged that the claimant had been unfairly dismissed in a summary manner after being falsely accused of stealing.

The Defence

The respondent company (subsequently gone into liquidation) confirmed that the claimant had been employed by it as a warehouse manager with responsibility for checking deliveries and the further task of despatching goods to the family premises in the family's town of operation and to a mini-market. The claimant was employed in a position of great trust.

On Monday 15 March 2010 an incident occurred which necessitated that the claimant be suspended from employment whilst this incident was investigated.

The claimant was confronted with details of an incident witnessed by (DOC) (manager of the respondent's K. Street store). He was asked for an explanation which he duly provided. However, this explanation conflicted with the evidence of another manager (JMCC).

At this point the claimant was suspended from employment with pay. He was asked to give a detailed written account of the events surrounding this incident. This evidence was reviewed at a disciplinary meeting at which the claimant was represented by his solicitor.

During the course of this meeting the claimant spoke only one word – a “yes” in reply to a specific question. The claimant's representative spoke on his own agenda and did not engage regarding the allegations made against the claimant. Subsequent to this disciplinary meeting the claimant was dismissed from his employment. This matter was also reported to the Gardai.

Oral Testimony

Giving sworn testimony, the abovementioned (DOC) said that he had been a director of the respondent but that he now worked in a separate company in the town. At 14.55 on Monday 15 March 2010 he went to collect his son from school and was putting newspapers in a recycling bin when the claimant came out of a shop entrance with two unopened cases of brandy. The claimant saw (DOC) and went a bit pale. (DOC) was about six feet away from the claimant. (DOC) wondered why two cases of brandy would go out the door. The claimant looked at him, went a bit pale and carried on.

(DOC) thought there was something wrong with this. He asked (PB) (an employee of the respondent) why the claimant would take two cases of brandy (of a brand hereafter referred to as HNX) out the door. (PB) replied that he did not have time to look into it but, subsequently, (PB) phoned and said that it had been two cases of beer (of a brand hereafter referred to as TYX).

(DOC) now told the Tribunal that he was fifty-eight and that, from about forty years' experience, he was aware that it had been brandy. He said that HNX had its own appearance while TYX could vary. HNX was a wide bottle. (DOC) told the Tribunal that he would not make that mistake (of identification) from thirty yards let alone six feet. He described himself as a “sleeping director” who had not been involved in day-to-day management.

Continuing his oral testimony to the Tribunal, (DOC) told the Tribunal that he had said to (JMcC) (of the respondent) that the claimant had gone out the door with two cases of HNX. (JMcC) said that five cases had come in and that the claimant had put one away. (DOC) and (JMcC) expected to find four cases. Two cases were there. (DOC) spoke to his brother, (ROC) and also of the respondent).

(ROC) said that it had been two cases of HNX and that he would speak to the claimant. (DOC) estimated the value of two cases of HNX at about seven hundred euro in contrast to two cases of TYX which would be about thirty euro. (DOC) stated to the Tribunal that he had been in business for forty years and that he had never seen this before.

Asked under cross-examination if he was a director of the respondent, (DOC) replied that he had been a director but not a shareholder. (ROC) was the manager. (DOC) was a director and his father, (JOC), was the other director.

It was put to (DOC) that he had come in as a director after (ROC) had left. (DOC) replied that it had not been his business for day-to-day work. Asked who was the Human Resources person for the respondent's sixty-odd employees, (DOC) said that hiring and firing was done by (ROC) with some input from his father (JOC) who kept some responsibility. Asked if the claimant's dismissal had been down to (ROC), DOC replied that it had been (ROC) and (JOC). Asked about the respondent's grievance procedure, (DOC) conceded that it might not have been written down but said that it was a family business in which they were familiar with the law as to what employers do.

After he said that the claimant had been in charge of the respondent's warehousing (DOC) was asked if the claimant had had a contract and replied that he did not know and that the tone of relationships had been a fairly constant family context in which staff had got on very well.

It was put to (DOC) that the claimant's legal team had sought prior sight of the claimant's personnel file and the respondent's disciplinary procedure but had only got it on the day of hearing and that it did not look good if he was not au fait with the respondent's own file and documentation in advance of the hearing. (DOC) replied that he had not looked at it but could read it from his witness position at the hearing.

(DOC) was asked to comment on the contention that the question of redundancies had been raising its head in 2010. He replied that the respondent had thought that it "could iron out the problems" and that there had been some redundancies in drapery. Asked if there had been a question of cutting wages and hours, (DOC) replied that it had not been run by him and that, though he had been director and secretary of the respondent, (ROC) would do that (the cuts).

It was put to (DOC) that the claimant would not put up with this and was causing a lot of trouble. (DOC) replied that his day's work had been in K Street and that (ROC) would answer such questions.

(DOC) was now told that the claimant would say that the mini-market stocked TYX beer. (DOC) replied that he had been going for his dinner, that he had not thought it was his place to ask the claimant about the brandy, that the claimant could be aggressive when he so wished and that (DOC) had had to get his son away from this situation.

Before (DOC) met (ROC), (DOC) asked the claimant himself but did not think that there was

any proper answer coming from the claimant. (DOC) told the Tribunal that he was not blind or thick and that he saw what he saw.

It was put to (DOC) that an order was done for TYX beer the next day. (DOC) did not dispute this but said that the claimant was covering himself and that he (DOC) had seen what the claimant had been doing and that it had been HNX brandy. (DOC) recalled seeing that the claimant's car was checked and that nothing was found. He (DOC) had spoken to (PB), (JMcC) and (ROC) about what he had seen. He told the Tribunal that the respondent's security was "in the staff and their eyes"

(DOC) disagreed when it was put to him that any one of dozens of employees had access to goods. He disputed that employees were allowed go to the warehouse where the claimant's job was. Asked if he had thought to see if other staff had taken brandy from other shops, he said that he had not, that the family's K Street shop had not got brandy on the day in question and that (though he had discussed the dismissal of the claimant with (ROC) the disciplinary action had been (ROC's) decision.

Asked about statements that had been given, (DOC) replied that he initially had handwritten testimony before it was subsequently typed up by someone else and that it was "substantially the same". Asked who had composed his own statement, (DOC) replied: "Probably, my father (JOC) did this." (DOC) added to the Tribunal that everything in the statement was correct, that "there are no lies here" and that he was being as honest as he could be.

At this point, the claimant's representative said that she had a serious problem with this. When (DOC) was asked where was the original statement he replied: "Probably thrown into a bin."

It was put to (DOC) that sentences in his statement had been "dickied up". He replied that there had been no manipulation but that "Dad might have felt it more important to emphasise certain ones".

The claimant's representative now submitted that statements had been altered and that (JOC) with secretarial assistance had put statements together. (DOC) said to the Tribunal: "I was with my dad. We worked it out." Asked who had been typing on the computer and if one or more computer typists would give evidence to the Tribunal, (DOC) replied: "No need." (DOC) added that he was the one who had seen the problem and that typing had been done a few months after the incident.

The respondent's representative now stated that (ROC) had typed statements.

Asked by the claimant's representative if he was perjuring himself, (DOC) replied that there were four or five offices in the relevant suite of offices and that he did not know who had typed up the statements. Asked when it had been decided to take disciplinary action, (DOC) replied that (ROC) had told him that the claimant would be suspended. (DOC) said that the claimant had been trusted and that he had felt a certain amount of shock when he had seen the claimant going out the door with brandy.

Questioned by the Tribunal, (DOC) insisted that beer and brandy would not look the same though both were boxed in cardboard. It was indicated to him that it would be appropriate to have a case of each at the next hearing. (DOC) stated that the claimant should have approached a manager and given a reason to move bottles. He said that brandy would not be sold in a

mini-market.

(ROC) gave evidence that he investigated the matter and gave the claimant an opportunity to explain his version of events but he got very little feedback from the claimant. He told the Tribunal that there is a paper trail for all stock. The company was short two cases of brandy without any explanation. The claimant was invited to a meeting on 30 April 2010 to explain his position. He was shown documentation and evidence but did not offer any explanation. The claimant only spoke one word at the meeting and his solicitor spoke on his behalf at the meeting. The claimant was dismissed by way of letter dated 5 May 2010 and he was not informed that he had a right to appeal the decision.

The witness gave further evidence that the company does have a Human Resources department but that department was not involved in the matter. The company did not have any written grievance procedures at the time but is currently involved in putting grievance procedures in place. He asked all witnesses to go away and write their version of events including the claimant. He put a structure on the statement of (JS) and accepted that the statement is not as (JS) might speak it. He (the witness) typed up (JMcC) statement from his handwritten statement and does not believe that he changed anything substantial in the statement. He told the Tribunal that the evidence of his brother (DOC) on the first day of the hearing in relation to a handwritten statement was incorrect.

Prior to the incident he gave evidence that he had a good relationship with the claimant. By 2010 the company had lost a lot of custom and the company had to cut hours and pay of employees. He did not believe that he had a discussion with the claimant about cuts to wages and hours. He understood that (DOC) confronted the claimant about cuts and reduced hours at some stage. He gave further evidence that he checked the boot of the claimant's car and did not find anything in the boot. Employee (PB) was on duty at the check-outs on the day in question and he did not interview him as part of the investigation as (PB) did not observe anything directly. He confirmed that many people had access to the warehouse.

The next witness (JS) gave evidence that he worked as a shop assistant for the respondent company. On 15 March 2010 he returned from his lunch and went to the warehouse to get stock. He was asked by the claimant to watch the warehouse for 15 minutes as he (the claimant) had to go up town. He could not recall why the claimant said that he had to go up town. He was asked by (ROC) to give a handwritten statement and he did so. He wrote the statement on the company premises and gave it to (ROC).

(JMcC) gave evidence that he was manager of the shopping centre. He gave evidence in relation to receiving a phone call from (PB) on the day in question concerning stocks of brandy. He had placed four cases of brandy in the press on the previous Wednesday and there were only two cases there on the day in question. He was interviewed as part of the investigation gave a handwritten statement to (ROC). (ROC) went away and typed up the statement and he (the witness) signed it. He did not notice if a paragraph had been left out of the typed version of his statement. He told the Tribunal that he never observed the claimant transporting anything.

The Claimant gave direct evidence that he was employed by the respondent company for 22 years. He was employed as a store manager. Prior to the incident on 15 March 2010 he had no issues with the respondent and in particular enjoyed a good working relationship with (ROC). He was never provided with any written grievance procedures. He outlined to the Tribunal the lay-out of the respondent's three premises and the location of the warehouse. He gave evidence

that one week prior to the incident of 15 March 2010 he met (ROC) who said “hey you, you are taking a cut in hours and pay. At this time the witness enquired from (ROC) about a possible redundancy situation and (ROC) replied “you will get no redundancy from me”. The witness asked to sit down and discuss the situation regarding their working agreement but (ROC) abused him and told him to go to work. The witness went to work and continued until the incident on 15 March 2010.

The witness gave further evidence that on the day in question he had picked up two cases of TYX beer from the shop as they were required for the mini market. He brought them on a trolley to the warehouse. (DOC) was working on his van and had the door of the warehouse blocked at that time. The claimant waited for (DOC) to drive away from the door of the warehouse which he did and the claimant then put the two cases of beer in the warehouse. (PB) was present in the warehouse and spoke to the claimant at the time. (PB) then received a call on the intercom system to go to the shop. The claimant continued working in the warehouse and (PB) returned five minutes later saying that (DOC) told him that he (the claimant) had taken two cases of brandy from the shop. The claimant explained to (PB) that he had taken two cases of TYX beer which were to be transported to the mini-market and he pointed them out to (PB) in the warehouse. (PB) was happy with this explanation.

The claimant gave evidence that he was annoyed at this stage and wanted to speak with (DOC). He asked (JS) to stay at the warehouse as he wanted to speak with (DOC). He then drove to the K street shop and (DOC) was not there. He then drove a short distance to (DOC's) home but he was not there either. He returned to the warehouse after 10 minutes and was told by (JS) that (PB) was looking for him. He continued working in the warehouse processing orders for approximately 20 minutes when (DOC) arrived and asked where were the two cases of brandy. He told (DOC) that he had not taken cases of brandy and pointed out the two cases of TYX beer. (DOC) then called him liar. Approximately 30 minutes later (DOC) arrived with (ROC) and (JMcC). He told them again that he had taken two cases of TYX beer for the mini-market. (ROC) then said he wanted to search his (the claimant's) car which he did and nothing was found in the car. Later that day he was suspended with pay. He walked to his car and drove home.

The Tribunal heard further evidence that the claimant was interviewed by the Gardai and made a statement in relation to the matter. A couple of weeks after the interview he was told by the Gardai that they were finished with the matter and there would not be any prosecution. He gave further evidence that he never had any opportunity to question (JMcC) or (JS) and never heard anything from (PB) in relation to the matter. He was never told that he had the right to appeal the decision to dismiss him. The Tribunal heard evidence in relation to his efforts to mitigate his loss.

He told the Tribunal that he never had any gripe with the company prior to the unilateral reduction in his pay. He gave evidence that employees regularly called to the warehouse for stock for the K street premises. He confirmed that procedures in the warehouse were very lax. He confirmed that he did not speak at the meeting on 30 April 2010. He let his solicitor speak on his behalf. When he received his dismissal letter of 5 May 2010 he contacted his solicitor. He left the matter in his hands. He did not appeal the decision as he did not feel that there was any point in doing so.

Determination:

Having carefully reviewed witness testimony given to the Tribunal, the Tribunal finds that the accusation, investigation and consequential finding lacked the basic tenets of fairness. It is clear that there were no grievance procedures within the company in circumstances where the company employed some seventy staff members.

The Tribunal finds that (DOC) stating that he was required to “tighten up” statements was incredible in circumstances where two different statements were before the Tribunal. Another witness (ROC) told the Tribunal that he rephrased statements by (Mr.S) and (JMcC) and subsequently typed them up. No original statements were to hand at the investigation or the Tribunal hearing.

It is clear to the Tribunal that not all relevant witnesses were interviewed, most notably Mr. (PB) whose recollection of events would have helped to shed light on what had happened. It is further clear that the decision to dismiss was taken jointly by (ROC) and DOC. This is clearly biased in that the accuser is also the decision-maker.

Clearly, the claimant should have been afforded the right of appeal. The Tribunal found the claimant to be credible in relation to his version of events.

Under the Unfair Dismissals Acts, 1977 to 2007, the Tribunal finds that the claimant was unfairly dismissed and awards him compensation in the sum of €39,600.00 (this sum being equivalent to 90 weeks’ gross pay at €440.00 per week) under the said legislation.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____
(Sgd.) _____
(CHAIRMAN)