

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

James Canon, No 2 Ruanbeg Lawns,
Kildare, Co Kildare

-claimant

CASE NO.
UD2116/2011

against

Blake Bros. Limited, Unit 11, Oak Road Business Park,
Oak Road, Nangor Road, Dublin 12

-respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan
Members: Mr. J. Horan
Mr. N. Dowling

heard this claim at Dublin on 26th March 2013
and 16th October 2013
and 17th October 2013

Representation:

Claimant: Ms Catherine Ardagh Solicitor, Ardagh, Solicitors,
168 Walkinstown Road, Dublin 12

Respondent: Mr. D. Garry, P.Garry-P.Brady, Unit K2, Dinan Ent-Park, Swords Bus Pk,
Swords, Co Dublin

Background

The respondent is a food distribution company. The claimant worked for the respondent as a warehouse worker and, occasionally, as van delivery driver. As dismissal was in dispute the claimant went into evidence first. While the claimant signed a letter of resignation he contended that he signed it under duress.

Claimant's case:

The claimant commenced employment in March 2000. He worked as a van driver

delivering goods around the north side of Dublin. He became ill in late September 2006 and was (what transpired to be temporarily) unable to drive. One of the store workers was leaving the respondent so the claimant was asked and agreed to work in the stores. When the claimant recovered he did some relief driving duties when the drivers were on holiday leave or on sick leave. For 4-5 weeks a year he covers for drivers who were on annual leave. He had a good relationship with his employers.

The claimant related an incident circa September / October 2009 whereby a driver was an hour late and the delivery list had to be done quickly. NB, one of the owners asked the checker (K) to organise a pallet and K said he was too busy. SB the other owner arrived and was very annoyed. The claimant completed the pallet. He had a disagreement with SB and there was a scuffle. The claimant was given a written warning. He disagreed with the written warning and handed it back.

The claimant went on to explain that things continued as normal until a final incident in September 2011.

The claimant explained that a driver collects the stock/products and places them in the van. The checking of the stock is an integral part of the work. At the end of the delivery day a driver should have no stock in the van. However errors do occur with delivery dockets and goods for returns. The list of goods that are ordered by the customer are called "pick lists" or "pick sheets" and are also referred to as PL's. The PL's at the commencement of the mornings work might change if the customer phones to add products to their order. The final list is the list of goods that goes out in the van at 8.30 a.m. and is the final list or the full sheet and is referred to as a FL.

On the day in question the claimant found that he was short a box of chicken fillets. He rang his supervisor (KD). To remedy the situation he was to bring the chicken fillets some two days later, which would be a Friday. This was logged onto the system and his supervisor was aware of the situation. On Friday he found that he was left with a lot of leftover stock. He phoned (PS) the regular relief driver who told him to try a customer located in Balbriggan (because PS recognised that the stock in question would normally be delivered to Balbriggan customer). He brought the stock to the location and the customer said that they would accept the stock and as he had no docket he had to write out a docket. The time was 5.30 pm and he still had a box of chicken fillets left over. He would not get back to base in time to have them refrigerated. The procedure was that if there was any excess stock left over it could be temporarily left in a customer fridge (this was because when the vans were not being driven the refrigerator would not run so the stock would not be refrigerated and would perish). He phoned PS to say that the chicken fillets were in a customer's fridge (BI). On Monday he phoned PS to ask if he had collected the chicken fillets and he said that he did and he had also put the chicken fillets back into stock.

On Tuesday the claimant was called into the office with NB, one of the owners, and DG. They told him that there was an accusation of him retrieving goods from the store and that there was going to be an investigation and he was suspended pending the investigation.

A meeting was arranged off the respondent premises with DG, the respondent's representative. The claimant told the respondent how upset he was over the situation and explained exactly what happened. He was told that his version of events would be submitted to the Directors and that they 'would be in touch.' The claimant had not been told the specifics of the allegations, only that it concerned 'stores.'

A further meeting was arranged by DG's which took place in DG's car in a car park, adjacent to a named public house. Various papers were pushed on the claimant to sign; the claimant was reluctant to sign anything but was informed that the signature was required only to prove that the meeting took place. It was further stated, 'don't worry I'll shred them when I get back to the office' and that the papers were of no significance. The claimant signed the papers as he felt so threatened and stressed "*he would have signed anything.*" It transpired that the letter he signed was the respondent's pre-prepared resignation letter; the claimant did not request that this letter be drafted. The claimant did not get a copy of any of the documents. During this meeting the respondent repeatedly told the claimant that he 'did not want to go down the unfair dismissals route, the papers and everyone will know your business.'

The claimant gave evidence of his loss and attempts to mitigate his loss.

The Tribunal heard evidence from the claimant's wife. She phoned either one of the owners or DG and asked him what was going to happen because she was terrified that her husband was going to lose his job. He told her that there was "not much hope of him being accepted back". She told him that if something had happened could her husband not get a chance to explain why he did it or if he did it. She told the Tribunal that her husband did not get a chance to explain anything.

Respondent's case:

The Tribunal heard evidence from Mr. C who has a butchers shop and is a customer of the respondent. He was working on his own in the shop when the claimant arrived with a delivery. The claimant said to him that he had a "a chip of chicken fillets and give me €20.00". He was being offered chicken fillets for €20.00. The claimant told him that he did this all the time with the other butcher (MP) that worked there. He looked at the claimant in disbelief, however he did take €20.00 from the till and gave it to the claimant. He did this unawares as he had other things on his mind. However about twenty minutes later he thought about the matter again. He phoned M the other butcher, who worked with him in the shop, and M confirmed that he had purchased chicken fillets from the claimant and brought them home. He then phoned NB one of the owners of the respondent to tell him about the matter.

The Tribunal heard evidence from SB who is one of the owners of the respondent company. He spoke to the claimant's wife on Monday 3rd October. It was a brief conversation and she told him that she was phoning to apologise. She said "I got nothing out of it and I knew nothing".

The respondent's representative (DG) gave evidence. He was contacted by the respondent company and went to meet the company owners. He was told that there was an allegation against a driver and they wanted to go through correct procedures. He asked them for the background. He asked the owner if he had spoken to the claimant and he was told no. He said he would meet with the claimant and would prefer if a third person attended and he was told SM from the office would attend.

DG met the claimant with SM. He told the claimant that an allegation had been made that a customer alleged that company stock had been misappropriated. The claimant asked repeatedly who made the allegation and he told the claimant that he was not at liberty to say. He told the claimant that it was his job to investigate the matter.

He then spoke with Mr. C the customer. The customer explained the situation to him and that he had given the claimant €20.00, because he had been caught out in surprise as he had a lot on his mind.

Some days later on or about Thursday 29th September the claimant phoned him to say that he could not stand the pressure and had bad thoughts. He agreed to meet the claimant.

He met the claimant and the claimant was upset. He reassured the claimant and told him the honesty was the best policy and if he had anything to say to him. The claimant told him that he hid food product in the van and that he sold products to the respondent's customers for cash. He asked if his employer would forgive him and he had not told his wife and asked what he should do. He told the claimant that he could not tell him what to do and that he would tell the respondent and that he would be in contact.

He met the claimant again and the claimant had told him that he had informed his bank manager that he was going to lose his job. The claimant then asked him how much he would get if he resigned. He told the claimant that he "could not say".

He met the claimant on or about Thursday 29th September. The claimant asked if he could help in typing a letter of resignation. He told the claimant that he could not be involved in accepting his resignation.

They met a third time and the claimant signed a letter of resignation.

He asked the claimant if he was returning after the weekend i.e. the following Monday and the claimant said that he might. He told the claimant that the earliest that he would be able to deliver the letter of resignation would be the following Monday.

He took a phone call from the claimant's wife on Saturday and she told him that her husband would not be returning to work. He told her that he could not take any instructions and he was put on to the claimant. The claimant seemed very relaxed and told him that he was glad his wife now knew.

DG handed the letter of resignation to the respondent the following Monday. The Tribunal asked the respondent representative for the staff handbook/ disciplinary procedures and the company opened the claimant's contract of employment to the Tribunal (in which procedures were contained).

The Tribunal asked the respondent's representative if he wanted to call any more witnesses and he replied that he did not.

Both representatives made closing submissions.

Determination:

It is difficult to conceive of a more broadly based criterion for dismissal than that envisaged by Section 6(4)(b) of the Unfair Dismissals Act 1977. This paragraph provides that dismissals for "conduct" are deemed not to be unfair. No definition of "conduct" is provided in the Act.

It is not possible to provide a list of the types of conduct which will be adjudged by the Tribunal as being so serious as to justify dismissal without prior warnings. Much will depend on such factors as the nature of the work involved and the level of responsibility of the employee in question.

In all cases of dismissal for conduct, an investigation by the employer is required. The precise requirements of each investigation will be determined by the facts of the case, but the onus will be on the employer to show that it was "fair" in the sense of being open-minded and "full" in the sense that no issue which might reasonably have a bearing on the decision was left unexplored. If an investigation fails to meet these requirements, the decision to dismiss is likely to be found unfair.

The employer will be expected to show that the investigation fulfilled the following general conditions:

- that the employee was aware of all allegations and complaints that formed the basis of the proposed dismissal,
- that the employee had an adequate opportunity to deny the allegations or explain the circumstances of the incident before the decision to dismiss was taken. This includes a right to be represented in appropriate circumstances,
- that the evidence of witnesses or other involved parties was sought where the allegations were denied or the facts were in dispute,

- that all statements relevant to the investigation were furnished to the employee.
- the right to be represented by a fellow employee or trade union official.

The Tribunal is not satisfied that the respondent conducted a proper and fair investigation having regard to the above criteria.

The conduct of any work-place investigation will be dictated by the nature of the incident(s) being investigated. However, the requirement of fair procedures will underpin all such investigations especially with regards to witnesses and their evidence. Witness statements may be necessary to determine the events which occurred in respect of the subject matter of the investigation, and the conclusions of any investigation must be drawn from evidence of facts – which may include witness statements. The Tribunal also notes from DG’s evidence that the claimant was not made aware of the identity of the person [C] who made the allegations against him, let alone giving him a copy of C’s statement. This was fundamentally unfair.

An employee, as part of his right to fair procedures, is entitled to be furnished with witness statements and witnesses’ names may not be redacted from the statement.

The Tribunal notes that the Respondent did not follow its own Disciplinary Procedure which states that:

“An employee is entitled to be accompanied by a workplace colleague at any stage of the disciplinary procedures”

Dismissal and disciplinary procedures:

In situations where the individual’s contract of employment or a collective agreement sets out a disciplinary procedure, the Tribunal will be concerned to see that the procedure is adhered to in all material respects including any right of appeal therein provided. *Condon v Rowntree Mackintosh Ltd* (UD 195/1979). This should not be taken to mean that strict adherence to procedures will automatically make the dismissal fair. The Act requires the Tribunal to direct its attention to ‘all the circumstances’ and the question of adherence to procedures is only one issue which has to be considered.

The employee must be made aware of the potential consequences of his alleged misconduct which may put him at risk of dismissal. None of this was done in the claim before the Tribunal.

The reasonableness of the conclusion:

The logic of the principle that each case of unfair dismissal must be judged on its merits rests on the fact that the standards of each employment situation will vary. What may justify dismissal in one context may not in another. Thus the role of the Tribunal is not to establish an objective standard but to ask whether the decision to dismiss came within the band of reasonable responses an employer might take having regard to the particular circumstances of the case.

The Tribunal is very conscious that dismissal for a man of the claimant's age may be of the gravest consequences to him. They have asked themselves whether a sanction less far reaching in its consequences for the claimant might not have been more appropriate. But they recall that the task of the Tribunal is not to consider what sanctions the Tribunal might impose, but rather whether the reaction of the respondent and the sanction imposed lay within the range of reasonable responses.

Consequently, only decisions which fall outside the 'band of reasonableness' will be found to be unfair.

The Tribunal considered the claim before it the legal background and previous case law and notes the following:

- The respondent did not follow its own Grievance procedure;
- The claimant was given a letter of resignation to sign in car in a car park, drafted by the respondent representative;
- He was not given the opportunity to take independent legal advice;
- The claimant was not given the statements taken from fellow employees/third parties;
- The claimant was not told to take independent legal advice;
- The claimant was not given a "cooling off period" which would have allowed him reconsider his position In *Southern –v- Franks Charlesly & Co.* [1981] I.R.L.R. 278 it was noted:
"A reasonable period of time should be allowed to lapse and if circumstances should arise during that period which put the employer on notice that further enquiry is desirable to see if the resignation was really intended and can be properly assumed, then such enquiry is ignored at the employers risk".
- Whilst the letter of resignation was not a severance agreement the effect was that the claimant was relinquishing his rights to continue in his employment. In the Supreme Court case of *Hurley v Royal Yacht Club* ([1997] E.L.R. 225) the Court considered the issues surrounding the enforceability of severance agreements. The Court held that there must be "informed consent by the employee to contract out of his rights..".
- In *Donna Millett –v- Charles Shinkwin* [2004] 15 E.L.R. 319 the Labour Court found:
"That where an employee makes a decision to resign which is not fully informed because he/she is not in a position to fully evaluate his/her options or he/she may act on a misinterpretation of something which is said or done and the situation is still retrievable, it would be unreasonable for an employer to deny an employee an opportunity to recant within a reasonable time once the true position becomes clear and such denial may in the circumstances amount to a dismissal".

The Tribunal notes that KD, who according to the claimant was aware of the situation in relation to the chicken fillets was not called to give evidence by the respondent.

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This Tribunal cannot envisage circumstances in which it would be acceptable to conduct an investigation with an employee in a pub, or pub car park for that matter; fail to advise an employee in writing of the charges against him, or that he could be represented; fail to furnish him with statements which were taken in the course of the investigation; failed to advise him that the allegations against him could lead to his dismissal, draft a letter of resignation and get him to sign it. It is not remotely fair or reasonable to arrange for an employee to sign a letter of resignation in the car park of a public house or in the public house itself, for that matter.

If an employer prepares a letter of resignation it is important that the employee is signing it voluntarily and that s/he knows and fully understands what he is doing. In the *Hurley* case the Court also stated that an employee contracting out of his/her right to take a claim should be advised of his/her entitlements under the relevant employment legislation. The employee should be advised in writing by the employer that s/he should take appropriate advice in relation to the severance agreement and as to his/her rights generally, and that there must be informed consent. While the Tribunal accepts that the claimant did not sign a severance agreement, the claimant, by signing the letter of resignation, effectively relinquished his employment rights.

In the High Court case of *Sunday World Newspapers Limited v Stephen Kinsella and Luke Bradley* ([2007] IEHC 324) the Court reinforced the notion that the employee should be advised in writing to seek appropriate advice as to his/her rights. However, here the Court made it clear that there was no requirement that the advice be professional legal advice, rather the important aspect of the advice is that it be appropriate.

The Tribunal determines that the claim under the Unfair Dismissals Acts, 1977 to 2007, succeeds. The Tribunal is absolutely satisfied that the claimant was dismissed and that his "resignation" was a forced resignation in unacceptable circumstances.

The Tribunal ascertained from both parties, that should the claimant succeed, what their preferred redress would be and both parties chose compensation as their preferred redress.

The Tribunal determines that compensation be the most appropriate redress and awards the claimant the sum of €30,000.00, as is just and equitable having regards to all the circumstances, under the terms of the Unfair Dismissals Acts, 1977 To 2007.

Sealed with the Seal of the
Employment Appeals Tribunal

This 17th day of January 2014
(Sgd.) Thomas Ryan
(CHAIRMAN)