

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

EMPLOYEE

UD2196/2011

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: Mr D. Mac Carthy S C

Members: Mr R. Murphy
Mr D. Thomas

heard this appeal at Dublin on 4th April 2013

Representation:

Appellant : Ms Rosemary Mallon B L instructed by
Mr Patrick McMahon, B P O'Reilly & Co, Solicitors,
Coric House, Tallaght Village, Dublin 24

Respondent : Mr David Farrell, IR/HR Executive, IBEC,
Confederation House, 84/86 Lower Baggot Street, Dublin 2

This case came before the Tribunal by way of an appeal by a former employee against a decision of a Rights' Commissioner reference r-103406-ud-11/DI

The determination of the Tribunal was as follows:

There was no contest as to the central facts of the case. The appellant was employed on the public transport service provided by the respondent. A member of the public was seen on CCTV annoying other passengers and she went to deal with the problem. The other party reacted to her offensively, including racial abuse, and then spat at her as the appellant was walking away. She then turned around and spat back at him. This brief interchange was recorded on CCTV, and footage was played at the Tribunal hearing.

The appellant at all stages admitted she was at fault during the disciplinary process, and she was dismissed for what was described as “gross misconduct.”

Counsel for the appellant argued that dismissal was too severe in the circumstances, given the provocation involved and her excellent prior record in employment. Counsel also made some procedural points, which the Tribunal did not consider significant.

On behalf of the respondent it was argued that dismissal fell within the range of reasonable actions and relied on case law to this effect.

Section 6 (1) of the act provides that

“the dismissal of an employee shall be deemed, for the purposes of this Act, to be an unfair dismissal unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal.”

The adjective “substantial” means that the ground relied upon should be a matter of substance rather than form, and should be a matter of gravity. In weighing the gravity of the matter against the penalty of dismissal the Tribunal must have “regard to all the circumstances” as the subsection requires. In other words the Tribunal should decide whether the penalty of dismissal is proportionate to the offence. The doctrine of proportionality is now well established in Irish law since *Cox v Ireland* (1992 2 I.R. 503) and *Heaney v Ireland* (1994 3 I.R. 593) and elaborated in other cases since then.

Having viewed the video of the event, the Tribunal is of the view that the conduct of the appellant was such as to bring the company into disrepute and would justify a penalty of some sort, but “having regard to all the circumstances” especially the severe provocation would not amount to “gross” misconduct as the respondent argued. Subsection 6 (1) does not use the adjective “gross” or even the word “misconduct” but only the more neutral word “conduct.” As already stated her conduct did merit some penalty, but the penalty should be proportionate. When we add in the element of provocation, and also have regard to her previous excellent record, we are of the view that dismissal was disproportionate.

The Tribunal therefore finds that the dismissal was unfair under Section 6 of the Act.

The Tribunal also determines that the appellant’s conduct did contribute to her own dismissal under Section 7 of the Act as amended, and this is a matter to which we must have regard in considering redress. The appellant was seeking reinstatement, but this form of redress, which is rare enough in practice, would involve no penalty at all. While we are disposed to some form of re-employment, we are also of the view that re-engagement allows the Tribunal a wide discretion to meet the circumstances of the case.

The Tribunal determines that the appellant be re-engaged back into the position she held with the respondent on 1 December 2010. This re-engagement is to take effect from 1 January 2012. Her remuneration is to recommence from that date. However, the appellant is not permitted to avail of leave entitlements until she actually returns to work. The period from 1 December 2010 to 1 January 2012 is to be treated as continuous service for other purposes other than remuneration and leave entitlements.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)