

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
Employee

CASE NO.
UD283/2006

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr M. O'Connell B.L.

Members: Mr. R. Keating
Mr T. Wall

heard this claim at Dublin on 7 July, 7 & 8 December 2006,
and 18 January 2007

Representation:

Claimant:

Mr Alan Toal B.L. instructed by Ms. Karen Lydon,
Pearse Mehigan & Co. Solicitors,
83 Upper Georges St, Dun Laoghaire, Co. Dublin

Respondent:

Mr. Tom Mallon B.L. on the first day,
Mr Mark Connaughton S.C. on the subsequent days,
both instructed by Mr. Alan O'Connor, Patrick F. O'Reilly & Co, Solicitors,
9/10 Sth. Great Georges Street, Dublin 2

The determination of the Tribunal was as follows: -

The respondent and its predecessors are in the supply and fitting of motor vehicle tyres and exhaust systems. They employed the claimant, who was the manager of the Kylemore Road depot (KR), for some twenty-five years. The employment was uneventful until the incident that led to his dismissal. The claimant did not have a written contract of employment; these were a work in progress at the time of the dismissal. The predecessor was taken over by the respondent on 31 August 2004 and the respondent implemented new systems of work, particularly involving a centralised purchasing system, which generates twice-daily deliveries to the depots. KR had more involvement with commercial vehicles than other branches of the respondent and the changeover to the new systems was more difficult in KR because a number of parts that KR dealt with for commercial vehicles were off-standard and were not catered for in the computerised system. The procedure was for off-standard items to be ordered by fax from the depot to Head Office and the purchase to be dealt

with centrally. There was no autonomy for depot managers to buy or sell stock outside this system. There was a conflict of evidence as to whether the claimant received training in the new system.

During a mid-term audit in 2005 the respondent became aware of a hand written docket, written in August 2005, from KR on the stationery of the predecessor. The claimant purchased an exhaust part from another company (AC) and sold it to a motor factor (MF), a customer of his depot. The claimant cashed the cheque for €400-00 given by MF for the part but the respondent did not know how much was paid to AC for the part. The transaction did not go through the computerised system and the claimant had not created paperwork to enable VAT to be dealt with. The claimant's position was that the predecessor had dealt with AC but as monies were outstanding to them they had refused to supply other than on a cash basis. The respondent's position was that they were not aware of any monies outstanding to AC.

The claimant was called to a meeting to discuss the matter on 18 August 2005 that was attended by the Managing Director (MD), the claimant, an employee of the respondent who took notes and a representative of the firm of auditors. The claimant said that the AC transaction was one-off and that, as AC refused to supply the respondent, they were owed money and he was left with no option but to do as he did. Whilst the transaction kept MF happy, it did not keep the respondent happy as it was hidden from them. There appeared to be no benefit to the respondent from the transaction. At the end of this meeting the claimant was warned that dismissal was a possibility in view of the serious view that the respondent took of the matter. The respondent wrote to the claimant on 25 August 2005 calling him to a disciplinary meeting on 31 August 2005 to discuss the irregularities and set them out, four other similar discrepancies having now come to light. This letter warned the claimant of the possibility of his dismissal. The claimant submitted a written reply to the allegations on 28 August 2005. In the letter the claimant informed MD that he had made complaints regarding the new system and asserted that his actions had been considered acceptable before the respondent took over. Whilst the respondent accepted there had been some comments in that regard they did not accept that the claimant had no knowledge of the breach in procedures alleged against him.

At the meeting on 31 August 2005 MD asked the claimant for the paper trail of the transactions, none was produced. At the meeting it was pointed out to the claimant that he had compromised the company by not making proper VAT returns on these transactions. The procedure regarding manual records was also pointed out to him. Whilst the respondent understood the explanation given by the claimant, it was not acceptable to them. Again the five invoices referred to in the letter issued to the claimant were gone through and again the claimant offered no satisfactory explanation on why current dockets were not used. MD made his decision to dismiss the claimant the following day and informed the claimant by letter, outlining the reasons for the dismissal. Following his dismissal he signalled his intention to appeal. The appeal hearing took place on 24 October 2005 and was conducted by the Assistant General Manager (AGM). The appeal confirmed the decision to dismiss

Determination

The Tribunal carefully considered all of the evidence in this case, which was held over four days and it gave particular regard to the submissions made on the final day of hearing. The claims of dishonesty made on behalf of the respondent were not denied to the satisfaction of the Tribunal. Specifically, in the course of his cross-examination, the claimant accepted that the VAT payments arising from the five transactions in issue were not passed on to the Revenue Commissioners. The Tribunal believes that the procedures followed by the respondent in dismissing the claimant were flawed. This was most apparent at the appeal stage. The claimant was not afforded the opportunity to make direct representation to the person who determined the outcome. However the Tribunal is satisfied that the claimant was not prejudiced by the defects in the disciplinary procedure. Accordingly the Tribunal does not believe that the claimant’s case under the Unfair Dismissals Acts 1977 to 2001 can succeed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)