

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:
Employee

CASE NO.
UD727/2005

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

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. J. Fahy BL
Members: Mr. T. Gill
Dr. A. Clune

heard this appeal in Galway on 26 April 2006, 22 November 2006 and 26 January 2007

Representation:

Appellant: Mr. Frank Jones, Union Official, AGEMO Trade Group,
22 North Frederick Street, Dublin 1

Respondent: Mr. John Barry, Management Support Services (Ireland) Limited, The Courtyard,
Hill Street, Dublin 1

This case came before the Tribunal by way of an employee appealing a Rights Commissioner Recommendation r-022100-ud-04/JH.

The determination of the Tribunal was as follows:

Respondent's Case:

The respondent (hereafter referred to as R) called as a witness a Galway-based test centre manager (hereafter referred to as T). T said that the claimant (hereafter referred to as C) had worked under his supervision as an inspector.

T said that inspectors were not allowed to prepare cars for the test even for friends or family. Inspectors were just employed to conduct the test and to decide to pass a car or not. C was a very competent tester.

A mechanic brought in a vehicle because he was not happy that it had failed the test. T said that he would take a look. The mechanic said that he wanted to talk about a car that should have failed but had passed and said that he was dissatisfied with the lack of consistency. This car was traced to C.

T told C that a customer had made a serious allegation against him. C's opinion was that this was serious. C knew the severity of the allegation and recognised that it was a dismissal offence. C said:

“I’m out of here.”

T and C had a discussion. C said that a lady who had confronted him in the carpark had told him that her husband was terminally ill and that she needed the car to visit him. She told him (C) that she knew that her car would not pass and to do his best for her.

Speaking about what followed, T said to the Tribunal that C, on compassionate grounds as far as T could see, overlooked some items. Any one of these items would have caused the car to fail. Even if the car failed she could have driven away. She could have gone away and come back for a re-test. All she had to do was to get the car repaired. To fail the car would not have deprived her of the use of the car.

C asked T what options C had. T told C that he could defend his conduct, deny it or resign. T did not have the power to dismiss. T told C that the matter was very serious and that T would have to report it to T’s manager. If C defended himself all the truth would come out.

The next day (2 July 2004) T met R’s regional manager (hereafter referred to as G) in Limerick and discussed the matter. They decided to interview C at the earliest opportunity.

On Monday 5 July T took a formal statement from C. On the instruction of R’s HR department C had someone (a fellow tester) present. They went through the list of items at issue regarding the car in question. C admitted that the number plate bulb had not been working. He said that the situation with the track rod end was not excessive but that it could cause problems in the future. He said that the brake light was intermittently working but admitted that there was a problem with it. This was a fail. He said that the horn was working but not very audibly. A horn problem was also a fail.

It surprised T that C had said that the car passed the test but that the lady should get it looked at. T’s view was that a car should either pass or fail. T did not think that he (T) would say that a car passed but that it should be looked at. C said that the lady had said that she had a lot of difficulties. C said in the presence of his fellow tester that the Lord worked in mysterious ways. The lady was lucky to have got him as a tester. She knew that her car should have failed. The onus was on C to either pass or fail it. C had been very open and honest when T had first confronted him. C had concealed nothing. Like T, C’s initial reaction had been one of shock. C knew this was a dismissal offence should he be proven guilty.

T’s impression was that the matter was serious, that the test had been compromised and that C knew the consequences. T passed the matter to G (R’s abovementioned regional manager). C was suspended and subsequently dismissed. T only saw the car in question on a subsequent re-test. The car was not brought back prior to C’s dismissal.

During cross-examination T stated that the manual determines what items of the vehicle are to be tested. If there are any discretionary items 99.9% of the time it will fall on the side of the customer. If there was a debate on the shop floor amongst the testers about whether a vehicle should pass or fail, it would usually fall on the side of the customer. T did not ask if there were any discussions about this car on the shop floor. There are set tolerances for wheel alignment as set down by the Department of the Environment. These are plus to minus fourteen on the front wheels and plus to minus eighteen on the back wheels and the computer is set to these. The guidelines set down have to be followed.

T was not aware that C had written on the vehicle inspection report. The first day T saw C’s letter

of dismissal (dated 9 July 2004) was the 9 July 2004. T did not have any input into the C's dismissal as T handed over his findings to G. T confirmed that the matter was fully investigated by the 9 July 2004. On the 1 July 2004 T spoke to H who requested a meeting. When T interviewed H, H showed him a list that C had given a customer. T copied the list and conducted an investigation into the case. T stated that he did not give the claimant an opportunity to confront H.

T met G on the 2 July 2004. There were no minutes taken at this meeting but the matter was discussed in depth. T and G agreed that H would be contacted and the matter would be reported. C was given every opportunity to confront the allegations.

There were seven items on the list. A number of these included the tracking for the front wheels, the brake light switch, the number plate light and the front left track rod. T stated that tracking is a pass or a fail item, without tolerance. C had passed this on the customer's car. It was put to T that C had said the brake light switch might have a slight stick. T replied that brake items were either working or not. The condition of the front left track rod was not excessive. The bulb was not working on the number plate light. C had said that he should have failed the car because the bulb was not working on the number plate light. T accepted the horn was working intermittently but not very audibly. The servo seal was carrying out its function but it was relying on the baling twine. This was a safety issue.

It was put to T that C asked for an additional twenty-four hours on the 1 July 2004 before a decision would be made and that C had requested the original of the list. T did not know if C had asked for extra time. He thought it was possible that C had asked for the original of the list.

It was put to T that the options he gave C on the 1 July 2004 to resign, deny or defend himself were given to him without an investigation being carried out. T replied that he had given C an honest answer. He had told C that he had got a list from H. T said that he had a very serious problem; he showed C the list. C said it was his writing on the list. T told him there would be an investigation.

T remembered discussing the case informally with G around the time of 8 July 2004. T's initial reaction was that dismissal would be very severe based on the facts of the case and given the customer's own circumstances and her submission.

Answering questions from the Tribunal T stated that the bulb not working on the number plate light and the horn working intermittently, would not compromise road safety but both of them are fail items on the test. T did not question the customer who owned the car regarding the matter. T did not receive her submission until after the 9 July 2004. Around the time of the 8 July 2004 when he spoke to G informally about the matter, T thought dismissal was harsh due to what C had told him about the customer's circumstances.

It did occur to T to recall the car as part of an the investigation but H told T that repairs had been carried out on the car and it was not in the same condition. The Quality Manager later recalled the car to invalidate the test. T did not continue with the investigation after the 1 July 2004 but was present while G conducted the investigation. To his knowledge a car had left the test centre before with the number plate light not working as the testers had missed the item.

Giving evidence Ms. J told the Tribunal that she was very upset and distraught the day of the original test. H was her mechanic. Ms. J went to the NCT centre on the day of the test and she met C who was very nice to her. It was quite obvious that she was very upset. Ms. J's car was an old car and she thought that it was more than likely to fail the test. She was relieved when the car

passed. She brought the car to H to have the repairs carried out.

Ms. J was called to a meeting in the NCT centre some days afterwards. She remembers there were two or three men in the room and T was one of them. Ms. J did not know what was happening. C was not present at this meeting. Ms. J was asked what had happened on the day of the test and Ms. J explained. One of the men in the room asked Ms. J if C at the time of the test had offered to fix her car, or if he had asked her for money or if he had recommended a mechanic to her to do the repairs.

Ms. J told the Tribunal her statement from this meeting did not contain everything she had said and that what had been written in it was favourable to the NCT. Ms. J stated that she had said this on the day of the meeting as well. The statement was shown to her and read to her but it did not include everything that she had said at the meeting. Ms. J stated that a very heavy emphasis was placed on whether or not C received money or if he had offered to fix the car or the name of someone who would fix it. Ms. J's car failed the NCT test the second time.

Answering questions from the Tribunal Ms. J confirmed C had given her the list on the day of the test. She brought the list to H who repaired the car. The car did not pass the test even when this repair work was done.

Giving evidence H stated that he has been the mechanic for Ms. J's car for many years. H holds the original list of items as received from Ms. J on the 28 June 2004. H remembered that the condition of the tracking rod was such that it needed replacement. H did not replace the brake light switch but he cleaned it. When H saw the horn on the car it was not working at all. The servo-seal was leaking. H then contacted T.

During cross-examination H stated it was not noticed at the time of the car's second test that it had a defective steering wheel. H replaced the servo seal on the car but he did not replace the tyres, as he does not specialise in tyres. H could not comment whether or not the tyres were below the legal limit. H stated that he had been concerned with the consistency of the NCT centre for some time.

Giving evidence G told the Tribunal that he is the regional manager for the Northwest and he is also responsible for training. He is responsible for the Galway test centre as well as thirteen other centres. T notified G of the incident involving C around the time of the 2 July 2004. G met with C on the 5 July 2004. T had already gone through the preliminary items with C. G wanted to meet C to examine some details and to ask C some further questions. C had another tester with him at this meeting.

At the meeting G went through the list of items with C. C stated that the track rod was worn but not very badly. G explained to the Tribunal that the track rod was not a computer test but a subjective test done by the inspector. The tyres had wear on them but they passed the test. The horn on the car was working at the time of the test. G told the Tribunal that tyres could be worn but under certain variance or tolerance levels they could be passed. C told G that he had taken pity on Ms. J and that he had been lenient.

G stated that he did not discuss with H about C prior to the 5 July 2004. As a result of the meeting G telephoned H on the 6 July 2004. H confirmed everything that he had said to T previously. H said that the car should have failed the test. H told G that Ms. J had provided him with a list. H told G what repairs had to be done on the car. G did not meet with H before dismissing C as H had confirmed everything on the telephone that he had told to T. H wanted to keep the original of the

list. G has experience of the disciplinary process but had not been in the situation where an outside mechanic was involved.

At the meeting on the 8 July 2004 minutes were taken. G went through the issues again with C. He asked C had he anything more to add. During the meeting C apologised because he knew he had broken the rules. C stated that the issues the car had were minor issues. The servo seal was mentioned. G told the Tribunal there was no dispute from C that the number plate light had not been working at the time of the test. This was a fail item. C did not have the authority to pass this item.

G stated that as a vehicle inspector he would not have passed a car if he saw twine around the rod. G stated that as the manual says if the servo seal is damaged this item fails. G stated that he would not allow the car out on the road, as it was a serious safety feature.

G stated that H was well known to T. G never met H. The NCT have an appeals process. Any mechanic can bring in a car to have it re-examined.

At the meeting on the 8 July 2004 C was advised by G that he was being suspended with pay. C's employment was terminated because he had passed a car that should have failed. C had admitted this and that he had broken the rules. Trust between C and the company had broken down. C's actions amounted to gross misconduct. C had breached the company's rules. C was advised that he had the right to appeal and that he would be kept on pay pending the appeal.

Ms. J's car was re-tested and it was discovered that there were holes in the seatbelt, corrosion, a hole in the boot and frayed seatbelts. It is possible that testers miss items when testing a car. G could not say that these items were there when the car was first tested on the 19 June 2004 but they were items that would happen over time. There was also a problem with the handbrake that would not have occurred in a month.

Photographs were taken of Ms. J's car on the 19 July 2004 as it was felt that these photographs might be useful for further information at the appeals stage. There was no point in taking photographs at the time of the 2 July 2004 as the car had been repaired and the photographs would only show the repaired work. G had grave issues with all of the items on the list. C was there to perform a job that was to pass or fail cars.

G stated that he did not recall anyone asking Ms. J at the meeting if C had received money. The Quality Manager had read Ms. J's statement back to her and asked her to sign it.

During cross-examination G stated that H's evidence regarding the steering on Ms. J's car surprised him as he had tested the car himself.

It was put to G that the service brake percentage had dropped between the two tests on the car. G replied that wet weather could affect this. It was put to G that C had less than forty minutes to test the car but that he G had had over an hour to test the car but had not discovered the problem with the steering wheel. G replied that it was not part of the test to remove the steering wheel components.

It was put to G that it is possible that test items could be missed at the time of the test. G replied some defects are very apparent and should not be passed. There may not have been an investigation if C had not made the list.

Answering questions from the Tribunal G stated that he did not have a copy of the subsequent re-test. The car failed the test on the handbrake. On the fourth test the car passed. G replied that he had taken the decision to dismiss C before the second vehicle inspection report on the car. G stated that even with the problem of the number plate light the car should not have passed the test.

Giving evidence the General Manager (GM) of the NCT told the Tribunal that he handled the appeal. He held a meeting on the 15 July 2005. It was suggested by C's representative at the meeting that except in the case of two instances (the horn and the number plate light) the other items that were allowed by C were not designated test items. GM wrote to C and his representative on the 30 July 2004 stating that:

“Arising from the issues your representative, ...raised I chose to carry out further enquiries into the matter. In this regard I have discovered that despite the list of repairs being carried out as recommended by you the car has failed the test again on other items, which were also fail items which did not arise since the last test.”

GM stated that there is a requirement for controls to be in place. These are a basic requirement of the job and are repeated time and time again. The controls are from the Department and from outside bodies.

On 14 July 2004 the Quality Manager (QM) recalled Ms. J's vehicle. QM had previously discussed this with GM who agreed with QM about the revoking.

A further meeting was held on the 24 August 2004. At this meeting GM addressed with C the points that had been raised. The meeting was a short meeting. The basis of the meeting was that C accepted that he had passed something that should not have been passed. As C accepted that he had passed something that should have failed, the decision to dismiss the claimant was upheld.

In GM's opinion if any vehicle inspector passed what should have failed GM would consider it a serious matter. GM has been at meetings where the Department and the Gardai stressed the importance of the number plate light.

During cross-examination GM confirmed that the decision on the 14 July 2004 to revoke the car did not have anything to do with the decision of the appeal.

Answering questions from the Tribunal GM stated that he did not have any involvement in the decision to dismiss the claimant until the case came to him by appeal. QM had informed him at some stage in July that there might be a need to revoke a certificate.

Claimant's Case:

The Tribunal heard evidence from C. On the day in question he asked for the owner of the car to come out to open the car as he could not open it. The lady arrived out and opened the car. They do not normally meet the owners of the cars. The lady “put her hand on her head” and told him that there was “bailing twine holding up servo”. She was upset and explained her personal situation to him. He told her to go and get a cup of tea.

He finished the test. The car “passed all the machinery on its own merits that is it passed all the fuel emissions, lights, shocks and brakes”. He went out and picked up the printout and called the

owner in, he told her, “the lord works in mysterious ways sometimes”, (the car passed). He also pointed out to her some things that could be looked at. He wrote a list of the items for her.

The Tribunal asked him if the tracking passed and he said it did. He was asked why he pointed it out or put it on list and he replied, “I just noticed”. Regarding the thread on an item he explained that it was an unusual wear pattern and he thought it warranted “having a look at”. As regards the C’s mechanic evidence that the steering rack tooth was broken he explained that their checking was limited, i.e. they checked the movement of the wheels and he could not find fault with this and it satisfied the test. The brake lights do not light up as quickly as he would have liked but technically in his view they were working. There was very little “play” on the front track rod but he could have mixed this with the bearing. The tyres were above the legal limit and he could not fail them but he did advise that they be changed. The number plate light was not working and if he had entered it as a result then there would have to be a visual re-test; the car would just have to return for a visual re-test and the owner would not have to pay again. The car horn was intermittent it was about 90 % and it was adequate enough to pass the test. He did see the bailing twine holding the servo and it was holding the vacuum pipe seal. The seal was doing its job. He tested the servo by applying his foot to the brake pedal with a lot of force. C was asked if the car passed the servo test and he answered “yes”. He wrote this on the list because “it was past the days of bailing twine”. If the bale snapped there was a fail-safe system and the brake would still be available, “you would still have a brake, just have to press them a bit harder and any time I would have to hit the brake I would hit them hard.” “I just thought that I would bring it to the attention of the mechanic”. C told the Tribunal that in his view the car was safe for the road. He could not believe that he was fired for this. He felt that the situation did not warrant his dismissal. If the situation arose again he would apologise to the customer and get someone else to test the car.

The Tribunal asked C if any of the above matters endangered life. He replied, “No I would drive the car myself”. When asked he further clarified that the servo made braking easier and it would not have affected braking ability (had it broke), “Its like the difference between power steering and no power steering”.

C was asked if R ever told him that he could not contact H and he replied “no”. He was asked if R had ever invited him, regarding the allegations, to a meeting with H and he replied “no”.

Determination:

The Tribunal have considered the evidence put forward by both the Respondent and the Claimant. The Tribunal is satisfied that the Respondent did not carry out a full and fair investigation into all matters prior to the issue of a letter of dismissal of 9th July 2004. In fact the Tribunal notes that the car, which was passed by the Claimant, was not called back or re-submitted for the NCT test by the Respondent until 19th July 2004.

The Tribunal also notes that the Respondent did not afford the Claimant an opportunity to confront the party who made the initial allegations that a car had been passed that should have failed.

Whilst the Tribunal accept that the Claimant did not comply in all respects with good operational practices in carrying out the NCT tests, it is nevertheless satisfied that the dismissal of the Claimant was disproportionate.

Under the Unfair Dismissals Acts, 1977 to 2001, the Tribunal sets aside the Recommendation of the Rights Commissioner (Ref: r-022100-ud-04/JH) and orders re-engagement to the Galway test centre from 1st January 2007 with the period from 30th July 2004 to 31st December 2006 to be a period of suspension without pay but with no break in service.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)