

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.
Employee UD426/2007
MN294/2007
against
Employer
under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001 UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. O'Leary B L

Members: Mr. M. Flood
Ms K. Garvey

heard this claim at Dublin on 6th September 2007, and 30th November 2007

Representation:

Claimant: Mr. Conor Kearney BL instructed by Mr. John Geary, Walsh Warren & Co.,
Solicitors, 331-332 The Capel Building, St Mary's Abbey, Dublin 7

Respondent: Mr. Michael Gillen, IBEC, Confederation House,
84/86 Lower Baggot Street, Dublin 2

Respondent's case:

The respondent's representative said that the claimant had committed serious breaches of discipline on two occasions, August (the more serious one) & December '06. Procedures were adhered to, and he was given the right of appeal, which he took up, but dismissal was upheld.

T C (Security Officer): TC told the Tribunal that his role was to monitor breaches of discipline. He was asked what crew were in the van on the day of December incident – he said the claimant and R S. He was then asked what he discovered and said he found unlocked money bags on the floor of the van. He stated that this was a breach of discipline and he reported it to the Security Manager SC. It was RS who unloaded the bags and admitted breach of discipline.

L T (Operations Manager): LT stated to the Tribunal that the claimant was warned in December for breaching procedures, he was off the vehicle smoking while another staff member collected the money, and it was the customer who notified the company of the breach. Both staff were issued with a final warning after the August incident, but they were both given a second chance. The claimant admitted he was aware of the bags on the floor, both crew should be aware of procedures, including the driver (Claimant). Notice of the appeal was given to the claimant by the union representative. At the meeting with AJ, RS admitted full liability for the bags on floor.

R Q (Shop Steward): RQ told the Tribunal that he represented the claimant at the disciplinary hearing. He stated that it should be possible for the driver to have knowledge of money bags being left on the floor i.e. it should be communicated to both parties on board, so the driver should be aware of it. When he drove away from the last location, he was told about the bags on the floor.

A J (Country Manager): AJ told the Tribunal that he upheld the dismissal because of the grave breach of discipline, & it was the second such breach in a six month period. If the claimant had said he had not known of the bags on floor it would be a different matter, but he admitted he knew. He had two choices: to pull over, or phone the depot. All staff on board have to work as a crew, they both knew the procedure was breached, so they both had responsibility. AJ heard the claimant's appeal against dismissal. The rules for breaches of discipline & appeals were contained in regulations known within the company as the "Ten Commandments" which are constantly updated, and the employees were always consulted about these regulations.

Claimant's Case

The claimant told the Tribunal he was employed by the respondent in September 2005 as a driver. He was involved in an accident in January 2006 and he broke a bone in his neck. He was then out of work until August 2006. He relayed an incident, which happened when he was working with DK crew leader. DK received a message that his mother had an accident. Both the claimant and DK returned the van to base. DK went to check on his mother. The claimant contacted control and he was told to remain until DK returned. This was after 10a.m. and DK returned after 4.15pm. The claimant started work at 7a.m. and he should have finished between 3 to 4p.m. but he was requested to go to a supermarket. The maximum time they spent at a location was ten minutes unless it was at a bank and it would probably take an hour to complete the task. DK went in to the supermarket but he was informed that the bags were not ready. The claimant contacted control, as the van and hatch were not compatible. He was requested to reverse as tight as he could to the hatch. He also informed control that the bags were not ready and he was told to pull away and he waited for DK to return. He informed control that he had waited for forty minutes and the bags were not ready and the air conditioning was broken. DK came back out and told him that it would be another ten minutes before the bags were ready. The claimant opened the side door of the van as he believed that it was a safe area and he realised there was a laneway nearby which he was not aware of. The claimant remained in the van, he did not step off the van and he stood between the doors. The camera could not identify who the person in the van was but the claimant admitted that it was him. DK told the claimant he was ready to go and he reversed the van, DK was in the back of the van and the claimant was in front control. They completed the collection and DK put the bags in the drop safe and returned to base and put the bags in the vaults. The supermarket telephoned the respondent about the matter.

The claimant was given a final written warning, which he accepted. He was glad to be back in work. He did not get the opportunity to explain what had happened and his union representative

told him that he could appeal it but the claimant did not pursue the matter further.

The claimant recounted the events, which led up to his dismissal, between Christmas and the New Year 27/28 December 2006. Prior to starting the run he contacted control and he asked for the open code. RS who was crew leader that day had responsibility for everything that happened. The claimant remained in the van and controlled the opening and closing of the safe. If he left the van everything shut down. He did the first delivery and RS did the next two. They returned to the bank centre and opened all the locks, the rest of the day they continued delivering and collecting money. The last run was at 4.50p.m. and he received a call from control regarding his whereabouts; he informed control that he was in Clondalkin. The claimant was told to go to the bank centre as it was too late. He returned to base and was then sent on another run and on the last part of the run he assisted RS to put the money away. RS told him that was the last bag, RG was in the vaults and the claimant was in the front RS came to the cab and sat down. They waited there for thirty-five minutes and tried to get as close to the front door as possible. There was a queue of cars behind and RS undertook paperwork. The claimant drove along the Naas Road and M50 to go back to base. RS asked him where he was going and he told RS he was going to base. RS told him to go to the bank centre and the claimant told him that it was too late. RS told him he had bags on the floor. The claimant asked him why he had the bags on the floor and why were they not in the drop safe. The bags were in the back of the van. The claimant told RS that he was not taking responsibility for this. RS told the claimant that if they were questioned about the bags that he would say that the claimant did not have anything to do with it. The claimant had two choices, go to base or stop on the motorway and put the bags in to the lockers. He told RS that he was going straight back to base. RS agreed that it was his fault and he drove back to base

The claimant reported to work on New Years Eve He was rostered for a call at 615am but he was told on Saturday that he was not getting this. RS came in at 8.30 and he was brought upstairs due to the incident. RS wrote a letter to the respondent in which he outlined that he did not want to get the claimant into trouble for his mistake. RS attended a disciplinary meeting for over a half hour. The claimant was asked to go upstairs. He informed those present at the meeting that the incident had nothing to do with him and RS had told them everything. The claimant was informed that the matter was very serious and he would be suspended because he was driving the van. It never occurred to the claimant that he was going to be dismissed for this incident. He was dismissed on Friday, he pleaded for his job and he was told that he could appeal the decision. The appeal was heard a week later. His work pass was taken off him and he queried why this was happening to him. He did not put the bags on the floor and it was physically impossible for him to see the bags on the floor. He was conveyed to the door and he felt like a criminal. He met the MD at the appeal hearing and he told the MD that the incident had nothing to do with him. The claimant had a family to support and he loved the job. On the day of appeal the MD told him that the appeal was not accepted and the claimant was dismissed. After his dismissal he was out of work for five months He applied for numerous positions. He started work in late October and he earns €570.00 per week.

In cross examination he stated that he had worked for seven weeks with the respondent until the crash. He could have appealed the first written warning on 24 August 2007, he was told to appeal it but he was pleased to be back at work. His colleague also received a final written warning. It was company policy to deliver bags first and then collect. It would have been possible for RS to put the bags in the locker. He was aware that RS had a subsequent disciplinary hearing for which he received a final written warning. When asked if the issue of dismissal was for breach of security he responded that RS was the boss and he the claimant was the driver. The claimant's duties were to open the locker and drive the van. It was not possible for RS to put the money in

ockers without the claimant's assistance. He did not meet the MD until his appeal, he was dismissed and could not believe it and he was not responsible for what happened on the day. When asked if he was aware of the importance of security procedures he responded he was trained by two good men and he was to ensure he got as close as possible to the front door. His job was to open locks and get the morning code which he did. When driving he was responsible for the van and the crew leader was responsible for everything. Present at the appeal were his union representative, the head of the union and the MD.

RS who was subpoenaed by the claimant's representative told the Tribunal that he made the decision to leave the bags on the floor of the van. He was sure the claimant was aware of this. He got back to base in the evening, and the security officer TC saw the bags on the floor. He was called for a disciplinary meeting the next day, the witness admitted to what he had done and he was totally responsible. RS received a written warning, which was on his file for a year. He told the claimant that he would take responsibility for leaving money on the floor of the van. He knew that the claimant was going to be called for a disciplinary hearing. The witness was ultimately responsible for the cash and he left the bags on the floor. He took responsibility for his actions and he did not want the claimant to get into trouble. He wrote a letter after this and he explained what happened, he could not recall if this was before or after the claimant was dismissed. RS was surprised that the claimant was dismissed when RS admitted to his error. He thought the claimant would have received a written warning and he was not aware of the claimant's previous warning. He did not talk to the operations manager regarding the claimant's dismissal. He would not have bags on the floor of the van if he were going to HQ.

In cross-examination he stated that he was employed with the respondent for almost ten years. He had received a final written warning but he could not remember what it was for and it was just over a year. When asked if it was possible to put money in the locker without the claimant's assistance he responded no. He could put money on the floor without assistance. He could not recall the claimant's response when he told him he had money on the floor of the van. He would have bags on the floor of the van at some stage but he was not supposed to do this. When asked if the claimant had options he responded that they could have stopped and put the bags away. He did not think TC who worked in security was going to be in the yard when they returned. He previously received a written warning but it had now expired and he was in the clear. The van would be spot-checked.

In answer to questions from the Tribunal when asked if the claimant knew the money was on the floor of the van he responded yes. The claimant opened the lockers with the code. RS took out what he needed and he left the bags out as he thought he was going to the bank centre. He left the lockers open when he took something out. On the day in question he closed them. The claimant would not be aware of that as he was in the cab. He told the claimant the bags were on the floor while when they were on the M50. He did not know if control would be aware if he stopped at an unauthorised site.

The third witness for the claimant ES told the Tribunal that he was employed with the respondent from 1999 until November 2006. It did happen that bags were left on the floor of the van and the driver would not be aware of this 70 to 80% of the time. To access the locker it was necessary to have a code.

Determination

The Tribunal having carefully considered the evidence in this case find that the claimant was unfairly dismissed. The Tribunal came to this determination by reason of the fact that the claimant had no culpability whatsoever in the money being present on the floor. When the fact that the money on the floor was disclosed to the claimant he could not have changed the situation without putting the safety of the vehicle and the monies and other employees in jeopardy. This fact was known to the employer when they made the decision to dismiss but they chose to ignore it and appeared to find him at fault under the principle of him being “guilty by association”. This concept has no place in fair procedures.

The Tribunal awards the claimant compensation of €16,858.00 under the Unfair Dismissals Acts, 1973 to 2001 and the claimant is entitled to compensation for one week’s gross pay in lieu of notice in the amount of €538.12 under the Minimum Notice and Terms Employment Acts, 1971 to 2001

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

