

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

Employee
MN616/2006

CASE NO.

UD937/2006

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. Quinn BL

Members: Mr. J. Redmond
Dr. A. Clune

heard this claim at Limerick on 13th December 2007
and 30th April 2008

Representation:

Claimant(s) : Ms. Karan O'Loughlin, SIPTU, 4 Church Street, St. Johns Square,
Limerick

Respondent(s) : Company Solicitor

The determination of the Tribunal was as follows:-

The Factual Matrix

The fact of dismissal was not in dispute in this case.

The Claimant commenced employment with *Córas Iompair Éireann* the Respondent's predecessor in 1979 as a Bus Conductor. Shortly afterwards, having undertaken a six week training course in Dublin and passed an examination at Conyngham Road Garage, he qualified as a Bus Driver, obtained a full driving licence in that capacity from the licensing authority in Dublin and commenced driving activities in 1981.

Rules 41 and 80 of the *Córas Iompair Éireann Road Transport Rule Book* specify respectively, that "At all times when on duty, a Driver must have in his possession a current driving licence" and "At all times when on duty a Driver must have in his possession a Driver's licence and Badge"

At all material times, from in or about 1992 onwards, the Claimant's duties with the Respondent involved him being engaged either as a Driver or a Tour Guide with the Respondent.

The latter function, which was principally for the duration of the months from March to September each year, did not entail driving activities. The evidence of the Claimant was that, for the years 2004 and 2005, he would have operated as a driver for in or about only 60 days each year, such that latterly, his primary activities with the Respondent were not as a Driver.

It appears that by in or about the month of May 2006, it had become mandatory for all of the Respondent's drivers, to obtain a digital tachograph driver card from the Department of Transport and to that end, application forms were provided by the Respondent, to its employees, including the Claimant.

The Claimant in submitting his application form to the Department of Transport in or about the 18th May 2006, was required to supply information regarding his driving licence as well as the Driving Licence then held by him.

It appears that when the appropriate documentation was received by the Department of Transport, it was discovered that the Driving Licence submitted by the Claimant precluded the issue of a digital tachograph card to him, as the category of vehicles to which the licence was valid, did not extend to Category D vehicles, which encompassed buses.

The driving licence that had been submitted by the Claimant to the Department of Transport had been issued to him on the 15th October 2004, was for the period of 10 years from that date and only extended to Category B vehicles, namely private motor cars.

On the 10th July 2006, the Department of Transport telephoned the Respondent's Services Manager in Limerick about the matter and transmitted to him, the documentation which had been supplied to it by the Claimant, in connection with his application for a digital tachograph card, which was received by the Limerick Services Manager on the 11th July 2006. Thereupon, the Limerick Services Manager concluded that the Claimant had no valid licence and decide to invoke disciplinary procedures against him.

This involved the Services Manager writing a letter to the Claimant dated the 11th July 2006. The said letter was entitled "**Disciplinary Charge**" and informed the Claimant that he was charged by the Services Manager with

1. *Being employed as a bus driver with th[e] Company while not being in possession of a valid driving licence.*
2. *Submitting a driving licence for a digital tachograph card knowing that [he was] not in possession of a valid driving licence.*
3. *Driving buses on behalf of Bus Eireann, at least since 15th October 2004, without a valid driving licence.*
4. *Putting the Company's reputation in jeopardy by operating in such a cavalier manner.*

A hearing of the charge was notified for 11 am on Thursday July 20th, 2006 in the office of the Services Manager. The Claimant was requested to arrange his attendance and was notified that he was entitled to be accompanied by his Trade Union Representative or by a fellow employee and that he could if necessary, call witnesses.

The Claimant first learned of events when he was at Shannon Airport, at the conclusion of a tour, which he had been guiding, when he was summoned to the Respondent's desk, to take collection of an envelope which had been left for him there.

On reading its contents, it appears that the Claimant was not unduly concerned about matters. Having spoken to the Respondent's Chief Inspector who was not aware of any difficulties concerning him, the Claimant considered that the hearing on the 20th July 2006, would involve him having a relatively informal conversation with the Services Manager about matters.

To that end, it appears that it was only on the night preceding the meeting, that the Claimant contacted a work colleague, who was also a Limerick Driver Section Chairman and requested him to accompany the Claimant, to a meeting with the Services Manager the following morning, without even informing him of the nature, or substance, of the charges and the Claimant and his colleague met each other only a few minutes before the hearing began on the following morning.

In attendance at the meeting were the Services Manager, the Claimant and his work colleague aforesaid.

The evidence of the Claimant and his work colleague was, that as the hearing proceeded, it became apparent to them that potentially serious consequences might be entailed for the Claimant and as the Driver Section Chairman had no previous experience of providing representation at dismissal hearings, the Claimant and the Driver Section Chairman requested an adjournment of the hearing, in order to facilitate the Claimant to be represented by a full time Trade Union Official.

In the course of his evidence to the Tribunal, the Claimant, who it has to be acknowledged, in the course of his employment with the Respondent had historically been actively engaged in trade union activities, expressed the view that, had he been aware that he was facing a "*dismissal charge*" that morning, there is no way that he would have chosen an inexperienced Section Chairman to accompany him to the meeting, as opposed to having representation by a full time union representative.

The evidence of the Claimant and his work colleague to the Tribunal was that the Services Manager would not entertain the request for an adjournment and was adamant that the hearing had to proceed. In evidence to the Tribunal, the Claimant expressed his belief that the reason for the refusal of the Services Manager to adjourn the hearing was that the latter had come to the meeting with his mind made up on the matter and the Claimant also evidence to the Tribunal of some acrimony historically between himself and the Services Manager, concerning the reimbursement of monies to the Claimant, following the payment by the Claimant, of a release fee, in respect of one of the Respondent's vehicles which had been clamped by the authorities, for

illegal parking in Dublin.

The evidence of the Services Manager to the Tribunal on cross-examination by Ms. O'Loughlin was that he had no recollection of such a request for deferral ever being made to him and Mr. Connolly of Counsel, in the course of cross-examination of the Claimant drew attention to the fact that prior to the *viva voce* evidence before the Tribunal, this issue or allegation, had not previously surfaced in any documentation emanating from the Claimant.

From an examination of the surrounding circumstances and the contents of the letter of the 11th July 2006, the Tribunal accepts the evidence of the Claimant, that at all material times up to the commencement of the hearing, it was not apparent to him that he was facing a "*dismissal charge*", notwithstanding the contention of the Services Manager that such would have been apparent to anyone reading the letter aforesaid and the Tribunal believes that it is more likely than not, such a request for an adjournment of the hearing was made by the Claimant and his work colleague and was not acceded to by the Services Manager, for whatever reason.

It appears that the duration of the hearing was between fifteen to thirty minutes. Introduced into evidence before the Tribunal was a one-page document in the handwriting of the Services Manager which on its face, would appear to be a note of what transpired at the hearing. On cross-examination by Ms. O'Loughlin for the Claimant, the Services Manager conceded that all of what was said at the hearing was not reflected in the said document.

The evidence of the Services Manager to the Tribunal on direct examination was that as the charges were put to the Claimant, no explanation was proffered by him as to why he did not have a Category D Licence in his possession, although the Services Manager testified that a number of things were suggested by the Claimant as to what might have occurred to it.

In particular, the Services Manager testified how the Claimant recounted his involvement in a very serious road traffic accident in County Kilkenny in the course of his employment with the Respondent some years previously and considered that as part of the investigation into that incident he might have surrendered his licence to the Gardai in Kilkenny and not had it returned to him. On cross-examination by Ms. O'Loughlin for the Claimant, the Services Manager conceded that he did not have any knowledge of the date or other details of the road traffic accident, apart from the fact that it had occurred and was in County Kilkenny and that notwithstanding what had been recounted to him by the Claimant as regards his licence, he did not make any enquiry of the Respondent, nor of the Gardai in County Kilkenny, about the matter.

The evidence of the Services Manager to the Tribunal on direct examination, was that at the hearing, the Claimant was adamant that he would never have knowingly put the Respondent's reputation in jeopardy and that having considered his submissions in that regard, he decided to withdraw Charge No.4 aforesaid.

The evidence of the Claimant to the Tribunal was that at the hearing on the 11th July 2006 he explained to the Services Manager that over time his Category D licence had somehow become misplaced. He had recounted how on the date of the accident in

County Kilkenny he recollected having produced such licence to his Area Manager.

The Claimant emphasised that it was not a case of him ever having been disqualified from holding a Category D Licence, or having driven a Category D vehicle for the Respondent whilst disqualified from driving. He was not aware when his licence had expired as he had misplaced it. He was always of the opinion that he had a valid Category D Licence. He had suggested that the Respondent, from an examination of its records of the Kilkenny incident, might be of assistance in that regard and that he had endeavoured to pursue the matter, with the Gardai in Kilkenny and with the Respondent, without success. He further lamented the absence of adequate procedures in the Respondent for recording the details of licences and for requiring the production of licences which may have been of assistance to him in resolving matters and in obtaining or producing his Category D Licence.

On cross-examination by Counsel for the Respondent, it was suggested to the Claimant that by October 2004, when he was issued with a driving licence which only extended to Category B vehicles, namely private motor cars, that he would have had to have known that the lawfulness of his position as a Bus Driver for the Respondent was quite precarious and when asked why he did not notify the Respondent about a problem at that time, the Claimant replied that he was still looking for his licence at the time and was confident that such would materialise.

In so far as his application to the Department of Transport for a digital tachograph card was concerned, and the submission of a Driving Licence, which only covered Category B vehicles and which did not extend to the driving of the Respondent's Category D vehicles, the explanation offered by the Claimant to Mr. Connolly in cross-examination was that he was taking responsibility for the matter in drawing it to their attention, as he considered the Department of Transport to have had a record of his Category D Licence, or of its number and which would have allowed matters to be resolved.

The evidence of the Services Manager to the Tribunal was that he considered the actions of the Claimant to amount to a major breach of the Respondent's regulations. He considered that the onus of responsibility for compliance with legal requirements lay with the Claimant. He observed that, had there been a serious incident involving a bus driven by the Claimant, his "*own job would have been on the line*" and that he considered the actions and omissions of the Claimant in this instance, as one of the gravest incidents that he had come across in his over 30 years experience with the Respondent. Having reached such a conclusion, he "*determined that the Claimant could no longer drive a bus for the Respondent in the future*" and that "*the dismissal of the Claimant from his employment with the Respondent was the only option that [he] could come up with*" in the circumstances.

From the Respondent's own "*Disciplinary Policy & In-House Procedures*," it is apparent that depending on the nature of misconduct, disciplinary action may have involved any one, or a combination of, a reprimand, a severe reprimand, a loss of pay increment(s), a recorded suspension, a suspension without pay, a demotion, a transfer, or a dismissal, allied to either a warning, a severe warning or a final warning.

By a letter to the Claimant dated the 20th July 2006, being the date of the hearing

aforesaid, the Services Manager notified the Claimant that in relation to Charges Nos. 1-3 aforesaid, he was giving the Claimant notice of his dismissal and that his employment would be terminated as and from the 29th day of July 2006. The Claimant was also informed that he was entitled to appeal the decision within seven days of the receipt of that letter to a higher manager, or the Appeals board and that the appeal had to be submitted in writing indicating the grounds on which the appeal was to be based.

The Claimant appealed to the Appeals Board sitting at Broadstone Garage in Dublin.

In accordance with the Respondent's *Disciplinary Policy & In House Procedures*, the Appeals Board was constituted by an Independent Chairperson, a Nominee of the Respondent and a Nominee of SIPTU.

The evidence of the Services Manager to the Tribunal was that in the context of the Claimant's appeal to the Appeals Board, his role was merely to forward the relevant documentation to the Appeals Board and that after the 20th July 2006, he was *functus officio*.

The Tribunal understands this to mean, the Claimant's application form for a digital tachograph card, the Claimant's driving licence which accompanied such application, the letters to the Claimant aforesaid of the 11th and 20th July 2006 respectively, the Service Manager's one page handwritten note of what had transpired at the hearing on the 20th July 2006, [which did not reflect all of what had been said at the hearing] and the Claimant's Notice of Appeal.

The Appeals Board heard and determined the Claimant's Appeal on the morning of the 3rd August 2006. By a 2:1 majority, with the SIPTU nominee dissenting, the Claimant's appeal against his dismissal was disallowed and the Claimant's employment with the Respondent ceased on the 4th August 2006.

Although, it appears to the Tribunal that the hearing before the Appeals Board was in the form of a hearing *de novo*, it is unclear whether the Appeals Board could look again at the wrong allegedly committed, the disciplinary action taken and the procedure followed. It also appears that the Services Manager whose decision was being appealed by the Claimant was not obliged to make a submission as part of the appeal process.

Furthermore, it is not apparent to the Tribunal, whether the Appeals Board may of its own initiative exercise an investigative role, or whether it was limited to assessing the decision under appeal against the facts known at the time to the Services Manager who made the disciplinary decision

The Claimant gave evidence to the Tribunal that, on the 2nd August 2006, being the day before the Appeals Board hearing, he attended in Dublin and underwent a driving theory test for the purposes of obtaining a Category D Licence. On the evening of the 3rd August 2006, being the date of the Appeals Board hearing, he underwent a practical driving test which he passed.

The Claimant testified to the Tribunal that he made the Appeals Board aware of having undertaken a driving theory test the previous day and that he was scheduled to

undertake a practical driving test later that day.

On the 4th August 2006, being the date on which the Claimant was notified of the decision of the Appeals Board and that his employment with the Respondent was terminated, the Claimant was issued with a Category D Licence, authorising him to drive the Respondent's vehicles.

A number of side-issues arose in the course of the hearing before this Tribunal concerning whether the Claimant had prior knowledge, or awareness of the contents of the Respondent's Booklet on "*Disciplinary & In House Procedures*" and its "*Road Transport Rule Book*" and also whether the Respondent had removed the Claimant from the roster prior to the hearing and decision of the Appeals Board.

Whilst such matters were largely irrelevant to the ultimate determination of this Tribunal, albeit of some relevance to the issue of the credibility of the testimony of the Claimant and the Respondent's Services Manager, the Tribunal is satisfied that the Claimant would, at a minimum, have had constructive knowledge of such "*Disciplinary & In House Procedures*" and "*Road Transport Rules*" at all material times and furthermore, that the Claimant had been removed from the roster by the Respondent, prior to the hearing and determination of the Claimant's appeal.

In addition, at the hearing before this Tribunal, witnesses for the Respondent were cross-examined to some degree by the Claimant's representative, about a number of persons, alleged to have been in the employment of the Respondent, or associated entities and who, having been disqualified from driving, were deployed within the enterprise, as opposed to having been dismissed. However, no probative evidence in that regard was adduced, by or on behalf of the Claimant and the Tribunal has not arrived at its determination, by reference to that aspect of the matter.

Submissions Of The Parties

For the Respondent, essentially it was urged upon the Tribunal by Mr. Connolly, Counsel for the Respondent, that the legal and contractual obligations were on the Claimant to be in possession of a driving licence authorising him to drive the Respondent's vehicles and that not only did he not have one, but that for the period from October 2004 until matters came to a head in July 2006, the Claimant had chosen not to inform the Respondent of that fact.

In so far as s.6 of the Unfair Dismissals Act 1977 imposes a general presumption that dismissals are unfair and further that a dismissal is deemed not to be unfair if the employer can show it arose principally from any of a number of factors, Mr. Connolly submits that the dismissal of the Claimant was justified on grounds of misconduct and a fundamental breach of the Claimant's contract of employment with the Respondent, the Claimant having been afforded fairness of procedures in meeting the charges levied against him.

For the Claimant, essentially it was urged upon the Tribunal by Ms. O'Loughlin that what was at issue here was the question of the Claimant's licence having been mislaid, as opposed to the Claimant having been disqualified from driving, that

having regard to his previous exemplary service record with the Respondent, the fact that he was not a Driver at the relevant time and would not resume such activity for a further period of months, it was unreasonable and disproportionate to dismiss him in the circumstances, when alternative disciplinary sanctions were reasonably available to the Respondent.

Determination

In exercising its function, the Tribunal is particularly mindful of the passage from *Bunyan v United Dominions Trust* [1982] ILRM 404 at 413 to which it was referred by Mr. Connolly, that “*the fairness or unfairness of dismissal is to be judged by the objective standard of the way in which a reasonable employer in those circumstances in that line of business would have behaved. The Tribunal therefore does not decide the question, whether or not, on the evidence before it, the employee should be dismissed. The decision has been taken and our function is to test such decision against what we consider the reasonable employer would have done and/or concluded*”

In deciding whether, within the band of reasonableness of decision-making, the Respondent’s decision to dismiss the Claimant was not unfair, the Tribunal has asked itself whether the Respondent has satisfied it, that its decision to dismiss the Claimant was reasonable “*having regard to all the circumstances*”.

“*Having regard to all the circumstances of this case*” the Tribunal is not so satisfied, that in this instance, the sanction of dismissal imposed upon the Claimant, was within the range of reasonable responses and the Tribunal determines that the Claimant was unfairly dismissed from his employment with the Respondent.

In so determining, the Tribunal has of course been cognisant of the provisions of section 38 of the Road Traffic Act 1961 whereby a person cannot lawfully drive, or allow another to drive, his vehicle in a public place without an effective driver’s licence, as well as the provisions of Rules 41 and 80 of *Córas Iompair Éireann Road Transport Rule Book* referred to above.

The Tribunal also notes that on a conviction for an offence contrary to section 38 of the Road Traffic Act 1961, the general penalty as prescribed by section 102 of the Road Traffic Act 1961 applies, which on a first offence would involve a fine not exceeding €800.

In the first instance, in applying the test of reasonableness to the nature of the enquiry carried out by the Respondent, prior to its decision to dismiss the Claimant, the Tribunal, having been satisfied that a request for an adjournment of the hearing was made by the Claimant and refused by the Services Manager, determines, that a reasonable employer in conducting such enquiry when faced with such a request, would have reasonably afforded some degree of indulgence to the Claimant in that regard.

In further applying the test of reasonableness to the nature of the enquiry carried out by the Respondent, prior to its decision to dismiss the Claimant, the Tribunal determines that in all the circumstances, a reasonable employer in conducting such

enquiry, prior to arriving at a decision, would have taken it upon itself, to pursue an avenue of inquiry, as to what might have become of the Claimant's licence, or the whereabouts thereof, in circumstances, where the Claimant had contended that it was misplaced and proffered suggestions as to how such had come to pass and how such could be produced.

In so far as the actual enquiry in this case is concerned, the Services Manager conceded that he although he did not have any knowledge of the date or other details of the road traffic accident, apart from the fact that it had occurred and was in County Kilkenny and notwithstanding what had been recounted to him by the Claimant as regards his licence, he did not make any enquiry of the Respondent, nor of the Gardai in County Kilkenny, concerning the matter.

In the second instance, the Tribunal has determined that the application of the sanction of dismissal to the Claimant, in all of the circumstances of the case, was an excessive, unreasonable, disproportionate and unjustifiable remedy on the part of the Respondent.

The evidence before the Tribunal disclosed that at the time of hearing on the 20th July 2006, the Claimant was almost 55 years of age. He had twenty seven years service with the Respondent. He had an otherwise exemplary disciplinary record in the course of his employment. He had been the recipient of awards in 2001 and 2005 from the Minister for Transport and Bord Failte respectively. Whilst at that time of the hearing at first instance, he may indeed have been an unlicensed driver of Category D vehicles, there is no suggestion that he was disqualified from driving such vehicles. He also was not operating as a Bus Driver at the time and would not be so working for a number of months. His principal duties in recent years had been as a Tour Guide for the Respondent which did not entail driving activities at all.

On cross-examination by Ms. O'Loughlin for the Claimant, the Respondent's Services Manager conceded, that after the hearing on the 20th July 2006, in determining the sanction to be imposed upon the Claimant, he did not have regard to the Claimant's record with the Respondent. He stated that he dealt purely with the issue at hand. It was further acknowledged by the Services Manager that no consideration was afforded by him to any sanction other than dismissal of the Claimant from his employment. He did not consider exploring any of the range of alternative sanctions which could have been imposed upon the Claimant.

In all of the circumstances of this case, the Tribunal determines that such an approach by the Respondent's Services Manager was unreasonable. From the Respondent's own "*Disciplinary Policy & In-House Procedures*," it is apparent that depending on the nature of misconduct, disciplinary action may have involved any one, or a combination of, a reprimand, a severe reprimand, a loss of pay increment(s), a recorded suspension, a suspension without pay, a demotion, a transfer, or a dismissal, allied to either a warning, a severe warning, or a final warning.

Notwithstanding some uncertainty around the precise nature and extent of the functions of the Appeals Board, it is the determination of the Tribunal, that notwithstanding such appeal was conducted ostensibly in accordance

with the Respondent's "*Disciplinary Policy & In-House Procedures*," it cannot serve to legitimise, or place a "*stamp of respectability*", on the flawed decision of the Services Manager at first instance.

The Tribunal also cannot ignore the facts that, as at the date of the Appeals Board hearing, the Claimant had already sat a driving theory test for the purposes of obtaining a Category D Licence and he was scheduled to undertake a practical driving test in that regard later that afternoon, all of which had been made known by the Claimant to the Appeals Board.

Redress

As regards redress for the Claimant, the Claimant has sought to resume his employment with the Respondent.

Specifically, he has sought re-instatement in the position which he held immediately before his dismissal on the terms and conditions on which he was employed immediately before his dismissal, together with a term that re-instatement shall be deemed to have commenced on the day of his dismissal.

The Tribunal does not consider that re-instatement would be appropriate, having regard to all the circumstances of this case and the not insignificant contribution of the Claimant, by his conduct, to the decision that was taken by the Respondent's Services Manager.

In arriving at its determination as to the appropriate form of redress, the Tribunal has regard to the nature and size of the Respondent's enterprise and notes that as and from the 4th day of August 2006, the Claimant has been in possession of a Category D Driving Licence. He is now almost 57 years of age and since July 2006, has not obtained alternative employment. Apart from the episode the subject matter of these proceedings, he had an exemplary record of service with the Respondent over a period in excess of 27 years.

Evidence of mitigation by the Claimant of his losses since the date of his dismissal was not compelling. He only applied for one position as a driver, which was for the position of a depot lorry driver, with the Office of Public Works, for which he was unsuccessful. He has not applied for any positions as a Tour Guide. Whilst he has undertaken a number of FAS courses to improve his employment prospects, he has remained in receipt of social welfare assistance since 2006.

The Tribunal has determined that in the circumstances of this case, compensation for the Claimant is neither feasible nor appropriate.

Accordingly and having sought the views of the parties on the issue of redress and considered the submissions made in that regard, the Tribunal unanimously determines that having regard to all of the circumstances of the case, the appropriate form of redress for the Claimant is that, pursuant to s.7(1)(b) of the Unfair Dismissals Act 1977, he be re-engaged by the Respondent no later than the 1st day of August 2008, either in the position which he held with it, immediately before his dismissal in 2006, or in an alternative position, which would be reasonably suitable for the Claimant and

on similar terms and conditions of employment and no less favourable to him than pertained heretofore.

Furthermore, the Tribunal determines that by re-engagement of the Claimant, his statutory entitlements are deemed to be preserved and the period prior to 1st August 2008 is to be regarded as a period for which the Claimant was suspended by the Respondent without pay. There is to be no break in the Claimant's length of service with the Respondent and in all other applicable respects, he is to be afforded similar treatment to an employee on suspension without pay, throughout the duration of the period concerned.

In the light of the foregoing and as the claimant succeeds in his claim pursuant to the Unfair Dismissal Acts 1977 to 2001, in the circumstances of the remedy awarded herein, his claim pursuant to the Minimum Notice and Terms of Employment Acts 1973 to 2001 does not arise and such claim stands dismissed.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)