

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

Employee

UD890/2006

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: Ms. K.T. O'Mahony B.L.

Members: Mr. M. Forde
Mr D. McEvoy

heard this appeal at Cork on 4th October 2007
and 29th January 2008
and 30th January 2008

Representation:

Appellant(s) :

Mr. Brendan Kelly B.L., instructed by Thomas Coughlan & Co., Solicitors,
Park House, 3 Tuckey Street, Cork

Respondent(s) :

Mr Pearse Sreenan B.L., instructed by Matheson Ormsby Prentice, Solicitors,
70 Sir John Rogerson's Quay, Dublin 2

The determination of the Tribunal was as follows: This case came before the Tribunal by way of an appeal by the employee against the **recommendation** of a Rights Commissioner case ref: r-039770-ud-06/MMG dated 28th July 2006

Summary of evidence:

The respondent distributes gas. It employed the appellant as a bulk-tanker driver. The engine is running while the gas is being pumped into the customer's tank and the tankers have an elaborate braking system to ensure that the tankers do not roll while making a delivery. By means of a model

the respondent demonstrated how the system works. There are three distinct independent mechanisms to the system, which once the handbrake was on, would have to fail simultaneously for the tanker to roll:

- (a) The handbrake in the cab is engaged by means of a switch; it is a pneumatic system and is either fully on or fully off; furthermore, if the handbrake is off a delivery cannot be made to the customer.
- (b) A brake valve, mounted inside the door of the compartment at the rear of the tanker where the hose is housed, will, once the door is opened, automatically apply the handbrake if it had not already been applied; unless this door is closed at the end of the delivery the handbrake cannot be turned off.
- (c) When a delivery has been completed, the hose rewound and re-housed in the rear compartment and the door closed the brake valve neutralises back into the off position; when the driver re-sets the green control button below the dash in the cab all systems are then free, except the manually controlled handbrake in the cab which must be manually released to allow the vehicle to move.

With a heavy load on a very steep incline gravity might overcome the efficiency of the handbrake and for this reason chocks (a device which can be placed behind the wheel to prevent its rolling on an incline) are provided in each tanker.

On 1 December 2005 the appellant was delivering gas to a customer in a village in West Cork. It was his last call of the day. He parked the tanker facing uphill on a slope with a 15 degree gradient. Access to the customer's tank was via a narrow laneway. As the appellant was coming out the laneway towards the tanker, having delivered the gas and shut off the pump by means of the remote control, he observed the tanker moving backwards down the slope. He ran out the lane, around the front of the tanker to the driver's door and either as he was getting into the tanker or when he was in it he heard "a savage bang" and in the mirror he saw the hose snaking and a cloud of gas escaping. He froze. He pressed the foot brake and brought the tanker to a standstill. When he took his foot off the brake the vehicle held. He got out of the tanker and saw that the rear wheel of the lorry had rolled over the hose and sheared it from flange. The respondent maintained that the damage to the tanker shows was that it was its right wheel and not the left one as the appellant had initially contended, that rolled over the hose. The appellant maintained that he had never said it was the left wheel that caused the damage. The swaying hose had broken the rear right light. Standing at the back of the tanker the appellant prised the hose back onto the reel, rewound and replaced it in its compartment and picked up the pieces of broken glass. The appellant then, contrary to company procedures, drove some thirty miles before reporting the accident. Some twenty-five minutes further on he was instructed to pull into a safe place and await the recovery truck. The Distribution Manager brought the appellant back to base on 1 December and together they visited the locus of the incident the following morning to enable the Distribution Manager to ascertain the details of the incident. It was the appellant's evidence that during the return journey the Distribution Manager, having spoken with the Operations Manager on the telephone, told him that the respondent did not believe his version of the incident. The Operations Manager had no recollection of making such a statement. The appellant did not use the chocks on the day. The Distribution Manager wrote a report on the incident. The appellant refused to sign the report.

On late afternoon of Friday 2 December the appellant and his tanker were grounded pending

an investigation. That evening the appellant telephoned the Operations Manager warning that there would be consequences if action was taken against him. The drivers reacted to the grounding of the appellant and refused to do deliveries. The Operations Manager and the representatives of the drivers' trade unions were in negotiations over the weekend. An agreement between the sides broke down when the drivers did not resume work on Monday morning. An agreement was reached on Monday evening and the drivers resumed work. The appellant also resumed work pending the outcome of the investigation. This was the busiest time of the year in the respondent's business.

The technical investigation of the vehicle commenced on Monday 5 December 2005. Extensive examinations were carried out including an efficiency test of the handbrake at a DOE centre in the main agent's garage and it was found to be above standard requirements. A consulting automotive engineer and assessor also carried out an extensive technical examination. He was present at and participated in the investigation meeting held on 8 December 2005. As part of the investigation there was a reconstruction at the locus of the incident on 15 December. At the reconstruction the handbrake held, even though the tanker had a heavier load than at the time of the incident when it only had a half a ton of gas, and an attempt to tow the tanker down the hill failed, the tanker just stuck. The consulting automotive engineer and assessor presented his report to the respondent on 16 December 2005. His findings were: (i) the braking system worked (with the handbrake manually released the tanker could not be moved if the rear door was open, nor could it be moved when the handbrake was manually released and the rear door was closed unless the re-set button was pressed), and (ii) the damage to the vehicle was inconsistent with the appellant's account of the incident. Furthermore, he established that by clamping the valve inside the rear door the braking system could be "fooled" to make it appear as if the rear door is closed and the tanker could be moved by releasing the handbrake and pressing the re-set button; the scratch marks at the lip of the door aperture were consistent with such an occurrence. It was his professional opinion that it was not hand brake failure that caused the incident but rather the over-riding of the safety system and moving the tanker while the hose was out. The consulting automotive engineer and assessor gave evidence at the hearing before the Tribunal. The respondent's technical director also carried out an internal technical examination of the tanker and reached the same conclusions. The tachograph evidence showed that following the incident the appellant drove the tanker hitting speeds of 88kph, 90kph and 92kph.

Prior to the 1 December incident the appellant had complained on three different occasions that the handbrake of the tanker had failed to hold. On each occasion, the service contractor's examination and the handbrake efficiency test, carried out at the main agent's garage, revealed that the handbrake was not defective in any way. On the third occasion, the service contractor replaced all three pneumatic valves because he could not find any explanation for the alleged failures. In these three instances, as distinct from the 1 December incident, the incline was much steeper, the tanker was carrying close to a full load and the tanker rolled before the delivery had been made; on 1 December 2005 the handbrake had held for the duration of the delivery. There had been one recorded incident of handbrake failure subsequent to 1 December 2005 and on examination it was found that an oil seal had failed. The Operations Manager had tested the truck on the steepest hills in the city and the brakes held.

The use of the chocks in a particular instance is at the driver's discretion, depending on the severity of the incline and the weight of the load being carried. The respondent had issued a specific written instruction to the appellant to use chocks on all occasions with the particular tanker because of its alleged history of handbrake failure. Whilst initially denying receiving this instruction the appellant later stated that he had refused to accept or sign the written instruction when it was presented to

him. It was his case that he would not accept this instruction because it was unsafe to get under the tanker to place the chocks behind the wheels; the respondent argued that in general the chocks can be put/kicked in place from the side of tanker. In his evidence the appellant told the Tribunal that he would use chocks when necessary if parked on the road but that he did not use them on the day of the incident because he did not feel they were necessary.

Following the investigation meeting on 8 December and receipt of the reports on the technical investigation the respondent decided to invoke the disciplinary procedure. A disciplinary meeting was held on 19 December 2005. The appellant had a number of trade union representatives present with him at the meeting. The Operations Director, the Operations Manager and the HR Manager were also present at the meeting. The Operations Director informed the appellant that in light of the results, of the "exhaustive technical investigation" of the tanker, it could not accept his explanation that it was brake failure that caused the incident. The appellant maintained his position that the incident was due to handbrake failure. The conclusions of the consulting automotive engineer and assessor were put to the appellant and he rejected them. During a break in the meeting a copy of the report was given to the claimant and his representatives. On resuming the meeting there were further discussions on the report, the failure to use chocks on 1 December and the appellant's assertion that he had stood behind the tanker to re-house the hose and pick up the pieces of the broken glass. The Operations Director requested a further break in the meeting. Whilst the respondent could not understand why the appellant would over-ride the safety system when he had delivered the gas it could not accept his explanation for the incident. From the evidence before him the Operations Director could not accept the appellant's explanation and concluded that he had tampered with the safety system, which ultimately led to an escape of gas. The Operations Manager lost trust in the appellant and considered that his behaviour amounted to gross misconduct. He took the decision to dismiss the appellant. This decision was communicated to the appellant when the meeting resumed and was confirmed by letter dated 20 December 2005. An appeal to the CEO was unsuccessful.

Determination:

The tankers have an elaborate braking system to prevent them from rolling while the gas is being distributed. The hand brake had held for the duration of the delivery of the gas. For the tanker to roll, as alleged by the appellant, all three elements of the system would have had to simultaneously and unilaterally fail and simultaneously and unilaterally restore themselves when he pressed the foot brake. Independent technical examinations following the incident found that the braking system was not defective in any way and that the efficiency of the handbrake was above standard requirements. In the circumstances the Tribunal finds that it was reasonable for the respondent not to accept the appellant's explanation that the hand brake had failed. The appellant's behaviour immediately following the incident *viz* standing behind the truck to roll up the hose and pick up the pieces of broken glass as well as the speed at which he drove supports the respondent's conclusion.

In cases of misconduct the respondent does not have to show beyond reasonable doubt that the appellant is guilty of the alleged misconduct. The well-established test in such cases is whether the respondent had a genuine belief based on a full and fair investigation that the appellant is guilty of the conduct alleged. In light of the braking system and the extensive technical examinations carried out it was reasonable for the respondent to accept the expert professional opinion of the consulting automotive engineer and assessor that it was the over-riding of the safety system and moving the tanker while the hose was out that caused the incident. This conclusion is supported by the paint disturbance at the lip of the door aperture. Safety of the public and of employees is of paramount

importance for the respondent. The Tribunal is satisfied that the claimant's disregard for safety destroyed the respondent's trust in the appellant and constituted gross misconduct warranting summary dismissal.

The respondent carried out a full and fair investigation. Whilst the appellant and his representatives were only given the technical report during the meeting of 19 December 2005, they had time to consider its contents during the break. The Tribunal notes that no request was made for any further time to consider the report.

For the above reasons the appeal under the Unfair Dismissals Acts 1977 to 2001 is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)