

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

Employee

against

Employer

under

CASE NO.

UD279/2008

MN257/2008

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. E. Daly B.L.

Members: Mr. W. Power
Ms. M. Maher

heard this claim at Dublin on 23rd June 2008
and 9th September 2008

Representation:

Claimant(s): Mr. Gavan Mackay, Spelman Callaghan, Solicitors, Corner House, Main Street, Clondalkin, Dublin 22

Respondent(s): Mr. Oisín Quinn B.L. instructed by Mr. Finian Finn, Denis I. Finn, Solicitors, 5 Lower Hatch Street, Dublin 2

The determination of the Tribunal was as follows:-

Respondent's case:

In his sworn evidence, RC confirmed that he is the owner of the respondent company, a haulage firm which employs approximately 25 drivers, doing deliveries for builders providers.

The claimant began employment with the company in 2005. That year, a replacement lorry was required at the North Wall by another driver and the claimant was instructed to drive it to him. Before departing the yard, RC put two brand new and distinctive red with blue trim lorry covers into the cab of the replacement truck. Later, the other driver telephoned looking for covers. Some week's later, RC saw the same lorry covers in a yard belonging to the claimant's father. He telephoned the claimant for the return of the covers and the claimant replied "okay". Later, the claimant telephoned RC and said that if the covers could not be seen, nothing could be done. After checking back at the claimant's father's yard, RC found that the covers had been removed.

Until 2007, diesel was filled from a pump in the haulers yard. When diesel was filled, the driver signed for it with his name, the registration number of the truck and the amount of diesel taken. This system depended on the integrity of the drivers. In late 2007, a computerised system for recording the fills of diesel was installed. This system involved a FOB key and a four digit code unique to each FOB. To fill diesel, the FOB is inserted into the diesel pump and the code is also punched. The mileage from the trucks odometer should also be inserted.

With the agreement of the respondent, drivers were allowed to take their trucks home after work, provided they could provide a safe place for parking them. If taken, the driver took full responsibility for the safety of the truck.

In relation to the incident that led to the claimant's dismissal, on Friday 1 February, while sitting in his office at the yard, RC observed the claimant taking a fill of diesel for his truck, a DAF65, which has a capacity of 350 litres. He knew that the claimant had also taken a fill of diesel on the previous Wednesday and Monday. RC considered that three fills of diesel in one week was too much. He instructed his general manager DR, to check the mileage and level of diesel of the truck. The truck was found to be full.

The claimants first trip on the following Monday was to Balbriggan. On RC's instructions, the general manager went to Balbriggan to again check the mileage and diesel level because RC reckoned that the claimant was taking diesel. RC wanted to go about the investigation the right way. The general manager reported that over the weekend, on a journey from the yard to the claimants home and then on to Balbriggan, 52 kilometres had been done and the tank was now half full, 155 litres of diesel having been used. The rate of consumption is approximately 4 to 5 kilometres per litre so the use of 155 litres for this journey was too much.

On the Friday 1 February, the claimant had filled his truck with 295.55 litres of diesel, 301 litres on Wednesday 30 January, 300 litres on Monday 28 January and 300.53 litres on Thursday 24 January. He had travelled to Wexford on one day, Navan on another and around Dublin for the remainder of the week so it would not have been possible to use the amounts of diesel that had been filled.

On Monday 4 February, RC telephoned that claimant and arranged to meet him in the yard that evening and the claimant agreed. As the claimant was getting out of his truck that evening, RC approached and said that there was something seriously wrong with his fuel consumption. Asked if anyone could be stealing diesel from the truck when parked outside his home, the claimant replied "no" and offered no further explanation. RC told the claimant that he was taking the truck to have it tested. The claimant had said that the truck was "running heavy" and the respondent wanted to have the truck tested to rule this out. The claimant was given another truck but was not allowed to take this one home in the evening.

The claimant's truck was tested on Tuesday 5 February and was found to be in good condition. The report from the garage stated that in the "check for diesel leaks, excessive smoke etc., we found nothing to suggest excessive fuel consumption and found the vehicle to be in very good condition". (A copy of this report was opened to the Tribunal). The truck was collected from the garage on Tuesday evening and another driver was put driving it until the following Friday so as to monitor its fuel consumption. Everything was found to be economical.

RC told his brother about what had been going on with the claimant and what the general manager had been doing. In turn, his brother told of an incident where he had overheard the claimant talking for 20 minutes one evening on an open telephone line and where the claimant had been heard to say

that he was going to the yard for a fill of diesel for others. BC had dealt with this incident himself and had not told RC.

When RC confronted the claimant in the yard on the Monday evening, he had warned him that his job could be on the line. RC said that he had made up his mind on Tuesday but wanted to see the performance of the truck from Wednesday to Friday. By Friday 8 February, RC was fully satisfied that someone was stealing diesel. That evening, he approached the claimant and told him that he had done his investigation and gave him his wages and P45, which had been prepared earlier. RC said that the thought that the claimant was expecting dismissal.

In cross-examination, RC confirmed that the lorry covers of the company are red with a blue trim and no logo, and are unique to the company. Covers are purchased every year due to loss through theft. Two covers had previously been recovered. He admitting that he had not conducted an investigation into the disappearance of the covers from the replacement lorry but had applied common sense. He decided that the covers had been taken from the replacement truck and turned up in the yard of the claimant's father. He did not go into the yard and he did not report the matter to the Guards because he had gone about the matter the wrong way. He did not take this matter further because he had no proof but he did warn the claimant that he would be watching him and the equipment on his lorry, such as covers, ratchets, straps etc. He felt that this warning was enough as he got on well with the claimant and he had no concern with his honesty after this incident. He had the claimant under constant monitoring and he personally, or another, checked the claimant's truck every week for the covers, ratchets and straps.

In 2007, after talking to another hauler, the new system for filling diesel was put in place. The old system was open to abuse. With the new system, all drivers had their own FOBs and PIN numbers. Initially there were three general FOBs, which were in the possession of RC, BC and the general manager. FOBs were not to be used by other drivers and in the event that someone forgot their own FOB, they could use one of the three general FOBs. When taking diesel, a driver should enter the PIN number of their FOB and manually record the odometer reading of their truck. The drivers also record their daily odometer reading on a work sheet, so by checking back, errors can be seen. Sometimes drivers record an incorrect odometer reading on taking diesel. Such discrepancies are due to driver error. RC checked for such errors and cautioned drivers informally and verbally when they occur.

RC agreed that he had decided on that Friday to let the claimant go before doing the investigation because he was convinced that he was stealing because of the amount of diesel that he was filling. He had decided to have the truck mechanically examined to ensure that it was running efficiently. He did not show the resulting report to the claimant. He put another driver to drive and check the truck on the Wednesday, Thursday and Friday. By the Friday, RC was very happy that the truck was running economically and that it had no defects. From his experience as a hauler, he was satisfied that diesel was been taken and that it was the claimant who was taking it, thus on the Friday 8 February, he gave the claimant an envelope containing his P45 form and any outstanding entitlements.

On the Friday, the claimant was told that he was stealing diesel, was given his P45 form and dismissed. The claimant's reply to being dismissed was "prove it". When put to the respondent that he had not advised the claimant that he was under investigation, had not given the claimant an opportunity to defend himself, had not put the allegations to him, had not given him sight of the documentation, had not been advised of dismissal procedures but had made up his mind to dismiss the claimant prior to the investigation, RC said that he thought he had done the investigation and dismissal in the right way and that he had had a good working relationship with the claimant. He

had told the claimant on the Monday that he was under investigation and that his job was on the line. He confirmed that he had not told the Guards because witnesses would not come forward due to being intimidated.

In relation to the covers that had been stolen, RC had put them on the sleeper bunk of the cab of the replacement truck himself. When he saw them in the yard of the claimant's father, he had telephoned the claimant to get them back and the claimant had replied "okay" but an hour later, the claimant had telephoned back and said that his father had said that the covers could be recovered if they could be seen.

In his sworn evidence, BC, the transport manager, recounted an incident in June 2007. While locking the yard, his mobile rang and as he answered it, the ringing stopped. However, on the open line that had been created by answering his telephone, he believed that he overheard the claimant and the claimant's wife talking. The claimant was overheard to say that if anyone was in the yard on the following day, he would go and get the truck washed, get a fill of diesel and give the diesel to three named individuals. BC continued to listen until he could hear nothing further and then he terminated the call. Later that evening, he telephoned the claimant back and confirmed to him that no one would be working in the yard on the following day.

BC spoke to the claimant during the following week. The claimant had come to the yard, taken a fill of diesel and then come into the office. BC asked the claimant if he was "robbing diesel from us" and the claimant had replied "no" but would not look at him when answering. BC told the claimant about the telephone conversation he had overheard. He told the claimant not to call him a liar. When asked how long the stealing had been going on, the claimant had said that he had been thinking about it. However he would not give a straight answer. Because BC and the claimant had a good relationship, BC felt that he was in a difficult position. The claimant begged him not to tell RC. BC made the wrong decision and did not tell RC about the incident because he was new to the job and felt that he should be able to deal with the situation himself.

A week later, BC decided to fit a locking cap to the claimant's truck. The two keys for this locking cap were retained by BC and the general manager and would only be used by them when the claimant wanted a fill of diesel. However, the general manager left his keys on a rack in the warehouse where the claimant had access to it himself. When BC found out about this, he was not too concerned because the new FOB system was coming into effect. When RC told him about the diesel incident, he told RC about the overheard telephone conversation. RC had exploded upon hearing this news.

In cross-examination, BC confirmed that the telephone call had happened and he knew what he had heard in relation to the overheard conversation. He recognised the voice of the claimant and that of his wife and had kept listening to the telephone conversation because it was in his interest to know if the claimant was taking diesel and the names of the people that he was taking the diesel for. When asked if he had confronted the claimant, BC said the he had approached the claimant and asked him if he was taking diesel. In reply to the allegations, the claimant had said "I wasn't, I didn't, I was going to but not now". The claimant said that if he had been able to get a fill of diesel on the Saturday, it would have been for someone and he assured BC that it would never happen again. He also said that his wife was unwell and begged BC not to tell RC. BC had concluded that the claimant had been planning to take diesel and had taken diesel before.

In re-direct evidence, BC had purchased ten locking caps but subsequently discovered that one key could have opened any number of the cap-locks. He had also subsequently discovered that cap-locks could be removed and replaced by tapping them off and on without the use of a key.

Re-examination, BC agreed that it would have been possible for someone else to tamper with the cap-locks but they would have had to know exactly how to remove and replace them without causing damage.

Replying the Tribunal questions, BC confirmed that due to the downturn in the market, fewer trucks are now in use and that better economy of loading them is being applied. He also confirmed that there is now less country work for drivers.

The yard manager and supervisor (*hereinafter referred to as DR*) was the final witness for the respondent. He explained that a FOB system for the diesel pump was introduced. He was with RC on Friday 1 February when the claimant had come in to him and asked to fill the truck. RC asked him to go and check the fuel taken and the mileage on the claimant's truck. At this stage, the tank was full. The claimant had to go to Balbriggan on the 4 February. RC asked him to go to Balbriggan to check all drivers' mileage and fuel consumption. He went to Balbriggan where he found the claimant's truck running and loaded but he – the claimant – was not at his truck. The additional mileage since the Friday was 52 kilometres, but there was just above a half tank of diesel missing. He telephoned RC and reported his findings.

He confirmed that the distance from the yard to the claimant's house was 12.6 kilometres and the claimant's house to Balbriggan was 38 kilometres. DR had carried out an exercise since the first day of the hearing for a period of two weeks, comparing the claimant's fuel consumption to the distance he should have travelled. Same was introduced in to evidence. DR explained that he had calculated the distances by GPS, allowed 5 kilometres per litre used. He had also added an additional 500 kilometres for leeway. This resulted in 853.69 litres being unaccounted for over ten working days.

Under cross-examination, DR was asked if he had informed the drivers of the purpose of his visit to Balbriggan. He had not. He was asked if his allowance of 5 kilometres per litre had taken in to account the weight of the load on the truck. DR explained he had added an additional 500 kilometres to the distance the claimant should have travelled.

Claimant's case:

The claimant explained that he had worked with the respondent as a driver of rigid trucks for about three and a half years. He explained that the weight of the truck would vary. To clock up 600 to 700 kilometres per day would not be unusual for him. His average day would be about 400 to 500 kilometres. He had a very good working relationship with RC and RC had given him loans before which were paid back through deductions from his wages.

In relation to the missing truck covers, he had received a telephone call from RC saying that the covers were seen in his father's yard. He had telephoned his father. His father had told him to tell RC they the covers were not the respondents and that RC could come down to his yard to check them out himself. RC was given the opportunity to go down the yard and check and this was the last he had heard regarding the covers. Within a month of commencing employment with the respondent, he was allowed to take the truck home at night. After the covers incident, he was not stopped doing this. RC had never questioned his trustworthiness.

The 1 February was the claimant's third fill of diesel that week. Ninety percent of the time, he would fill the truck twice a week. He had used a fair drop of diesel that week and RC had told him previously not to let the fuel run low. The fill on the 1 February would have carried him to the

middle of the following week. Up to that stage, RC had never approached him about diesel being stolen.

On the Monday, he had received a telephone call from RC telling him to bring the truck to the yard, RC asked him if anyone was stealing diesel from the truck. He was given another truck but did not bring it home. At this stage, RC did not advise him that he was under investigation and that his job was on the line. Between the Monday and the Friday when he was dismissed, he had no direct contact with RC. RC told him a garage was checking out the truck.

On Friday, he went in to work as normal, picked up the truck and did his runs. He was filling with diesel when RC approached him and told him that he had the truck checked out and it was all right. RC then told him that he would have to let him go as they thought he was taking diesel. He was given an envelope but had no opportunity to defend himself. Nobody had put it to him before this that they thought he was stealing diesel. No documentation was produced and the first time he saw the fuel log was at the hearing.

The claimant did not accept the 5 kilometres per litre allowed during the exercise that had been carried out by the yard manager. He thought that the truck would probably use more diesel with a full load and he normally had a full load on the truck.

The claimant denied the telephone call with his wife that BC had said he overheard and the subsequent conversation with BC.

The claimant gave evidence of loss to the Tribunal.

Under cross-examination, the claimant said that he had never been sent to the North Wall to deliver or exchange a truck with new covers in it. RC never went to his father's yard to check the covers and the covers in question are still there.

In relation to the overheard telephone call with his wife, the claimant said that BC was making this up.

The claimant generally telephoned RC or BC to tell them that he was going to the yard on a Saturday to wash his truck and fill it with diesel.

The claimant had put a fill of diesel in his truck on the Friday, drove the truck home and parked it outside his house for the weekend and then he drove to Balbriggan on the Monday, so he had driven about 50 kilometres after this fill. He maintained that the tank was not half full on the Monday morning but half full in the afternoon after he had done some runs to the Wicklow area. He had told RC on the Monday afternoon that the tank was half full. He could not recall whether this conversation had been by telephone or had taken place in the yard. He could not recall if RC had checked the gauge after he told him this.

Determination:

The Tribunal had regard to Sections 6(1), 6(4 b) and 6(6) of the Unfair Dismissals Act, 1977.

Section 6(1) of the Unfair Dismissals Act, 1977 provides that "*Subject to the provisions of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, to be an unfair dismissal unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal.*" Moreover, section 6(4) provides that "*Without prejudice to the generality of*

subsection (1) of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, not to be an unfair dismissal, if it results wholly or mainly from one or more of the following:

- (a) the capability, competence or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
- (b) the conduct of the employee,*
- (c) the redundancy of the employee, and*
- (d) the employee being unable to work or continue to work in the position which he held without contravention (by him or by his employer) of a duty or restriction imposed by or under any statute or instrument made under statute.”*

Section 6(6) of the Act provides “In determining for the purposes of this Act whether the dismissal of an employee was an unfair dismissal or not, it shall be for the employer to show that the dismissal resulted wholly or mainly from one or more of the matters specified in subsection (4) of this section or that there were other substantial grounds justifying the dismissal”.

The Tribunal also considered *Looney & Co. Limited –v– Looney (Ud843/1984)*. In this case, the EAT found that *" it is not for the Tribunal to seek to establish the guilt or innocence of the claimant...our responsibility is to consider against the facts what a reasonable employer in his position and circumstances at that time would have done and decided and to set this up as a standard against which his actions and decisions would be judged"*. The Tribunal does not have the remit of determining guilt or innocence of the claimant but rather is empowered to determine the fairness or otherwise of the dismissal.

The Tribunal finds that the circumstances of this dismissal justified the respondent’s action and that the dismissal was fair.

From the evidence adduced, the Tribunal considers the evidence on the respondent to be more credible. There were substantial grounds justifying the dismissal and the dismissal was fairly conducted under the legislation. The grounds for the dismissal were for misconduct in the form of stealing.

Having regard to all the circumstances, the Tribunal finds that the dismissal was not unfair under Section 6(4)(b) of the Unfair Dismissals Act, 1977 to 2001 and accordingly, the appeal under these Acts, fail. It follows that as the claimant was dismissed for gross misconduct, he is not entitled to payment in lieu of notice under the Minimum Notice and Terms of Employment Acts, 1973 to 2001, and the appeal under these Acts also fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)