

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

Employee –**Claimant**

UD599/2008
MN533/2008

against

Irish Rail **Respondent**

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr D. Cagney B.L.

Members: Mr .T. O'Sullivan
Mr B. Byrne

heard this claim at Dublin on 2 October and 18 December 2008,
and 6, 9 March, 22 and 29 June 2009

Representation:

Claimant:

Mr. Gabriel Haughton B.L. instructed by
at separate times Ms. Eilish Bradshaw and
Mr. Fachtna Whittle both of Haughton McCarroll Solicitors,
2 Church Street, Wicklow

Respondent:

XXXX

The determination of the Tribunal was as follows:-

The claimant commenced employment in July 1987. By the time of the incidents that led to his dismissal the claimant was acting as a permanent way inspector, he was an appointed grade A supervisor. In March 2007 the dismissal of the claimant for involvement in the illegal disposal of the respondent's assets, namely rail and sleepers, was recommended. The claimant was granted an Ad Miseracordiam appeal, which was heard on 9 March 2007 by the Director of Strategy and Business Development (DS) in the presence a union official (UO), who is also a worker director of the respondent. The decision of the appeal was as follows

1. In acknowledgement of the claimant having issued a written apology in respect of his involvement in irregular activities, which resulted in circumstances where the respondent's resources were diverted in consort with other parties in order to personally benefit.
2. The inappropriate activity having been admitted both internally and before the law courts in respect of a particular instance where the claimant was involved in arranging the theft of materials from the respondent for the purpose of selling them to a third party and sharing in the realized value of the transaction.
3. Having acknowledged that in addition to the instance referred to in 2 above there were many other instances of a similar nature over a long period of time. The claimant also admitted that he had engaged in other inappropriate activity, which resulted in personal gain and cost to the respondent.
4. Having taken account of the claimant's admissions and his family circumstances including the record of his father and the claimant's own work record and the apparent co-operation given to the Gardai in their investigations.
5. Taking into account the admissions, the co-operation and deep expressions of regret together with the assertion that he should be given the opportunity to resume a career with the respondent, no further instance of wrongdoing would occur, DS was disposed towards affording the opportunity sought by the claimant.
6. The opportunity afforded was to be on the basis that no new information must come to light in relation to any wrongdoing on the part of the claimant.
7. The following conditions were to apply
 - 7.1 The claimant was to revert to his appointed grade as Grade A supervisor
 - 7.2 The claimant was assigned to a monitor nominated by the Chief Civil Engineer in order to ensure that the claimant was effectively monitored and coached for the first 2 years of his return
 - 7.3 His personal file was to be endorsed with a Final Warning, which was to remain for the first 2 years of his return. During this period, should new evidence of past wrongdoing emerge which was not currently available or any breach of any element of discipline, there will be a mandatory sanction of dismissal.
 - 7.4 During the first 2 years of his return the claimant was ineligible to be placed in any promotional position, either appointed or acting.
 - 7.5 The claimant was to be deployed in a post assigned at the discretion of the Divisional Engineer, Dublin and endorsed by the Chief Civil Engineer
 - 7.6 The claimant was to pay the sum of €100,000-00 in financial recompense to the respondent.

The events that led to the dismissal took place before the Ad Misericordiam appeal when the claimant was working as civil supervisor, or inspector, on the site of the new Docklands Station from the early part of 2006 until his suspension on 6 July 2006 for the incident which led to his reinstatement following that appeal. However the respondent did not become aware of any problem associated with the claimant's time at the Docklands Station site (the site) until an audit of the records of the site project.

The respondent's position was that the claimant had signed off on invoices which purport to show that in excess of 600 truck loads of spoil, representing some 11,000 tonnes of material were removed from the site, by a particular contractor (PC), at a cost to the respondent of some €250,000-00 when the respondent's investigations suggested that some 23 truck loads representing 409 tonnes of spoil was the limit of PC's involvement. The claimant's direct supervisor, who was also the subject of disciplinary action arising from the audit, had approved the invoices. The

claimant provided explanations for some 300 truckloads of spoil being removed from the site by PC on the basis that a large part of the work was done in March 2006 to enable a ministerial visit to the site to be promoted in an advantageous manner. PC did not win either of the tenders for the removal of both hazardous and non-hazardous spoil from the site. The claimant had signed off on a series of invoices submitted by PC for trucks taking loads to the tip. The claimant's position was that those relating to the ministerial visit in early March 2006 were involved in the transport of the spoil from the site to the Point Depot which is approximately 1 km from the site as opposed to the tip which is some 60 km from the site thereby allowing much more than the two loads per day per truck which can be achieved to the tip. The claimant accepted that the invoices did not reflect that the spoil was taken to the Point Depot on that occasion but stated that he had used his discretion in the need to achieve a result for the ministerial visit. Under cross-examination the claimant conceded that, contrary to his direct evidence, he had nominated which contractors were to be used for particular operations at the site.

In early November 2007 DS advised the claimant in the presence of UO that in accordance with condition 7.3 of the appeal outcome of March 2007 it was the intention to dismiss the claimant. The claimant was given the opportunity to challenge the decision. At a second meeting with DS on 16 November 2007 the claimant was given the documentation on which the respondent had formed the view that he should be dismissed. The claimant was given two weeks to challenge the decision to dismiss him. After being granted a one week extension to 6 December 2007 to respond to the decision the claimant provided a conflicting report, in the preparation of which he was assisted by his direct supervisor at the time of the incidents complained of, which was given to the chartered engineer (CE) who prepared the report on which the recommendation to dismiss was based on 20 December 2007. CE issued his detailed response to the claimant's report on 23 January 2008. Once DS had verified that CE's response was that the claimant's report did not substantially contradict the allegations against him DS dismissed the claimant on 25 January 2008.

For the respondent's case the Tribunal heard evidence from DS, the respondent's environmental officer from the site, CE, the manager of the respondent's cost audit and effectiveness unit which looked into the activities at the site as part of an audit of plant hire in the respondent's Dublin division. For the claimant's case the Tribunal heard evidence from the claimant, a contractor's excavator driver from the site, the charge hand from the site, UO and the claimant's direct supervisor.

Determination

This is not a case which turns on a single incident or event and it is not for the Tribunal to decide if the allegations against the claimant are proven, rather it is for the Tribunal to decide if it was reasonable for the respondent to conclude that on the balance of probability the claimant was involved in the invoicing of and payment for work that was not done. The Tribunal is satisfied that it was reasonable for the respondent to conclude from the extensive audit carried out on the operations at the site that there a serious discrepancy between the amount of material removed from the site and that invoiced by PC. The Tribunal is further satisfied that it was reasonable for the respondent to conclude that the claimant was involved in this discrepancy. The Tribunal is fortified in this view by the claimant's concession, when challenged in cross-examination, that he did have input into the selection of contractors for particular operations including the removal and loading of material from the site. The Tribunal is further fortified in this view by the absence of any invoices to back up the claimant's assertion that, in preparation for the ministerial visit, he used his discretion to send material from the site to the Point Depot and later from there to the tip.

The allegations raised against the claimant arising from the audit of operations at the site were put to the claimant in early November 2007. He was well aware that, as a result of 7.3 of the Ad Misericordiam appeal, any finding against him would result in dismissal. The claimant was afforded the opportunity to respond to the allegations and once CE confirmed that the claimant's response did not substantially contradict the allegations he was dismissed. The Tribunal is satisfied that the claimant was afforded fair procedure in this regard and is not persuaded by the argument on behalf of the claimant that an independent third party engineer should have prepared a report into the allegations against the claimant. Accordingly the Tribunal finds that the dismissal was not unfair. It follows that the claim under the Unfair Dismissals Acts, 1977 to 2007 must fail. The claimant having been dismissed by reason of misconduct the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 also fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)