

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
Employer - appellant

CASE NO.
UD812/2008

against the recommendation of the Rights Commissioner in the case of:

Employee - respondent

V
Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P Hurley

Members: Mr T Gill
Mr P Clarke

heard this appeal at Loughrea on 24th March 2009 and 23rd June 2009

Representation:

Appellant(s): Mr Brendan Kirwan BL, instructed by:
Ms Deirdre Lynch
Matheson Ormsby Prentice, Solicitors
30 Herbert Street
Dublin 2

Respondent(s): Mr Pat Flannery
Assistant Organiser, SIPTU
Forster Court
Galway

The determination of the Tribunal was as follows:

This case came before the Tribunal by way of an employer appealing the Recommendation of a Rights Commissioner ref: (r-052599-ud-07/POB).

Appellant's Case:

The appellant company (henceforth referred to as 'the company') is a third party transport company which transports fuel. The respondent employee (henceforth referred to as 'the employee') was a delivery driver who worked out of a depot in Galway. There were two incidents which led to the employee's dismissal for gross misconduct on 9 March 2007.

The company have an obligation to report all incidents to their customers. 'Failure to report' is listed as an offence under gross misconduct.

The first incident occurred on Saturday 3 February 2007 when the employee under delivered 3,000 litres of diesel to a filling station. The second, related, incident occurred on Monday 5 February 2007, when the employee delivered an overfill of 3,000 litres of gas oil to a different customer. Due to the mix of the two products, diesel and gas oil, this was considered a contaminated product, though the products are essentially the same they carry a different rate of duty.

The contracts manager (CM) gave evidence that the company accepts that the first incident may have been a mistake by the employee. The issue of contention was the non-reporting of the incident at the depot on Monday morning, 5th February 2007. CM contended that the employee would have known there was something wrong when the overhead gantry, used for filling the compartments in the tanker, stopped filling the container before the load was completed. The meter would have indicated 2,700 litres of product still remaining in the pipe. It was at this point that the claimant should have reported the incident immediately to the site supervisor or to the Dublin office if no supervisor was on site, however, the incident was not reported until the following day.

When the gantry pipe stopped filling the compartment the employee disconnected the pipe and connected it to another compartment. This freed up the hose and it completed unloading the remaining product, 2,700 litres. The employee left the depot and went to a customer in Castlebar, where he unloaded both compartments. Both the filling station on Saturday and the customer on Monday signed for their delivery and the company was unaware of any under or over delivery. If the incident had been reported immediately the client company would have suffered no loss, but in this case the Monday customer received an extra 3,000 litres of fuel, which they disputed receiving and did not pay for.

The employee submitted a defect report on Monday evening, which, CM contended, was intended to put the company off the scent. CM contended that the employee deliberately falsified the defect note by writing 'check foot valve' when he knew there was nothing wrong with the foot valve. If an employee believed that a tanker was broken he would write 'unserviceable' and would not continue to make deliveries in the tanker or allow other employees to make deliveries in the tanker. The defect note was left in an in-tray and was not seen until after the truck had gone out the next day.

The employee had no performance issues during the time CM worked in the company. He had three reported safety incidents before CM's time, but this was not unusual. An incident such as that described on Monday 5th February 2007 is classified as a safety incident according to the company's health and safety guidelines, due to the nature of the industry.

'Failure to report to the Company any spillage, contamination vehicle accident or customer complaint' is identified as an example of gross misconduct in the company's drivers' agreement, formed in partnership with the trade union SIPTU in 2004. Falsification of records was also identified as an offence under the gross misconduct heading. CM agreed under 5.4.2 the health and safety section of the agreement drivers must report all known incidents to their supervisors immediately.

CM did not accept that dismissing the employee was a disproportionate action. The company contend that it acted fairly and reasonably and that procedures were followed. The client company lost €2,500 worth of product and the company suffered damage to its professional

reputation. There was also a health and safety issue concerning the reported product on the truck and the differential of the weight of the truck and what was recorded on the bill of lading. CM heard the appeal of the employee's dismissal on 21 March 2007, and upheld the dismissal.

CM confirmed that the company notified the Galway staff in April 2006 of the need for two redundancies at the depot and sought volunteers. There was no agreement and by November 2006 the company's new client insisted on two redundancies by January 2007. There was one volunteer and one employee made redundant through a last in first out selection process.

The employee's supervisor gave evidence that the claimant came to his office at approximately 2.30pm to 3pm on Tuesday afternoon, 6 February 2007. The employee told him that he had made a delivery to Ennis on Saturday and might have brought back product by mistake. The supervisor could not see a mistake from the paperwork. The employee wanted it reported so the supervisor faxed what the employee wrote down to the operations manager in Dublin, who took the investigation from there. The employee worked on Monday 5th February 2007 and Tuesday was his rest day, as there was no truck available for him on Tuesday. The supervisor could not remember what time the employee arrived at the depot on Tuesday. The drivers took turns taking a rest day.

The supervisor had no previous difficulties with the employee. If the employee had not reported the incident it would not have been discovered until one of the customers contacted the company. Similar incidents had occurred in the past. Once identified the issue would be dealt with from there.

The operations manager (OM) gave evidence that when the Galway supervisor phoned him he asked for an incident report to be faxed to Dublin and for a copy of the bill of lading. The bill of lading confused OM. If there was still 3,000 litres of fuel on board on Monday the gantry would not be able to load a further 6,000 litres into the same compartment as the compartment only holds 6,000 litres. A high level alarm would shut down the gantry, but according to the bill of lading the employee loaded it.

OM explained that the sight glasses on the tanker are not an indication of content in the compartment; the bill of lading is the meter of what is in the tanker. It is the driver's responsibility to go through the correct procedure to ensure the delivery has been unloaded. The filling station employee is not trained in this procedure. A foot valve failure is very rare and a driver will know if that problem is occurring. OM believed that the employee set the hose to the compartment when in Ennis, but forgot to open the foot valve and the full order amount was signed for. If the employee had done the pre-load checks on Monday morning, he would have known that he had excess product on board. A meter overrun would account for no more than six litres.

OM sent the Dublin supervisor to investigate on 8th February 2007. He made his initial report later that week but OM was not satisfied. The report said that the product was transferred but he did not know how. The Dublin supervisor returned again the following week. When OM realised that 3,000 litres of product was involved and not a meter overrun he instigated the disciplinary process.

An investigatory meeting was held on 13 February 2007. OM notified the employee that the incident could lead to his dismissal. A disciplinary meeting was held on 1 March 2007 and reconvened on 9th March 2007. OM dismissed the employee that day on foot of that meeting. OM wrote to the employee on 13 March 2007 to confirm the decision made and notified him of his right to appeal. The company had turned down the employee's offer to pay for the product, as it was not a viable way to deal with employee errors.

OM explained that there were three trucks and six drivers in Galway, with four drivers on morning shifts. Due to the shift pattern there was one driver surplus each morning for a few months, the drivers took turns to come to the depot to cover, hence the claimant being present on Tuesday 6th February 2007.

Respondent's Case:

The first witness for the respondent, a previous employee and driver trainer, gave evidence that the trucks in use in Galway at the time of the employee's dismissal had an issue of retaining product, and did not drain as easily as other trucks. There was no specific training for operating those trucks.

The second witness for the respondent, a previous employee, gave evidence that it was difficult to assess how much product was inside the trucks. The trucks were bottom loading and the depot did not have the facility to 'dip' the containers to check the volume. A driver would have to travel to a top loading facility nearby to dip a container. The pre loading check involved checking the sight glasses, however there could be a reading of product in the sight glasses but only dregs in the container. A bucket was used to drain off the dregs. If the product came out at high speed it was obvious that there was more product than just dregs. The second witness stated that if the high level alarm activated it was the practice that a driver would use a short hose to transfer product into another container.

The third witness for the employee gave evidence that there were difficulties from time to time with the trucks regarding product coming back. It was a common enough occurrence to use the short hose to transfer product between containers. He also said that there was a fear of the redundancies proposed for the Galway depot in 2006.

The employee gave evidence that on Saturday 5 February 2007 the employee brought a delivery of petrol and diesel to Ennis. He unloaded the product, and checked that the sight glasses were empty with the filling station supervisor who then signed the delivery document.

On Monday 7 February 2007 the employee was filling a tanker at the depot at approximately 6.30am. While loading the high level alarm activated and the loading stopped. The employee believed that the pump had too much product in it and used the short hose to transfer the remaining product into another container. He had previously dealt with this issue in the same way. The employee thought the bill of lading would show the excess but it did not. He decided to go the delivery site in Castlebar and check the tanker when there.

When he got to Castlebar he got the tank, hoses and pump ready and checked the compartments. He discovered almost 3,000 litres extra in the container. Up until then he had believed it was a meter overrun, but he realised that with such a large amount it must have been left from the delivery to Ennis on Saturday. The employee decided that as all the product was diesel, the Castlebar customer could be billed for it and the Ennis customer credited, he proceeded to unload of the product. He did not consider the Revenue implications regarding the differing level of duty on each product.

The employee returned to Galway and tried to phone his supervisor twice on his mobile and the filling station in Ennis, but he could not get through. He expected to see his supervisor at the depot, but he was not there, so he went out on another delivery. His supervisor was not present when he went to collect his last load of the day. He last returned to the depot at 8.50pm. He filled in the

defect form, as he believed that the foot valve had not opened in Ennis, and left it for the supervisor to see the next day.

The next morning, Tuesday 6 February 2007, the employee was not scheduled for delivering. He arrived at the depot mid-morning and told his supervisor about the mix up in product. He wrote a note about what had occurred. The employee worked the next day. He met the Dublin supervisor on Thursday of that week to answer questions on the incident. He was not advised that it was a formal investigation. He met the Dublin supervisor again to answer more questions. On that occasion his union representative was out on a call and so the employee had no one with him. He was suspended on Monday the following week.

It was the employee's first disciplinary issue. He considered that he had reported the incident immediately. He agreed that in previous years he had reported incidents as shown in three incident reports shown to the Tribunal. He did not believe that the problem, which he encountered when filling the tanker, warranted going to find someone at 6.30am. The employee offered to pay for the lost product, but the company would not accept the offer.

When the employee commenced his employment he trained with other drivers for two weeks. He received no specific training relating to those particular tanks. The employee accepted that he had made a series of blunders.

Determination:

The Tribunal is of the view that in all the circumstances of the case the claimant was unfairly dismissed. The respondent's procedures were tainted with lack of procedural fairness insofar as the claimant was not informed of the formal nature of the respondent's investigation on 8th February 2007 or its potential consequences.

Given that the claimant's "offence" in relation to the incident under investigation was his first ever disciplinary issue and that the claimant reported the matter to the respondent with all due dispatch and given his cooperation with his employers, the Tribunal is unanimously of the view that sanction of dismissal was disproportionate and is found to be unfair.

In all the circumstances, including the period of the claimant's period of unemployment before commencing a new job, the Tribunal awards the claimant the sum of €20,000 (twenty thousand euro).

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)