

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NOS

Employee – *claimant*

UD1315/2008

MN1215/2008

Against

Employer – *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: Ms. P. McGrath BL

Members: Mr. M. Kennedy
Mr. B. Byrne

heard this claim at Dublin on 26 March ,18 and 19 May 2009

Representation:

Claimant: Ms. Rosemary Mallon BL instructed by David H. Christie of Christie & Gargan Solicitors, Unit 2 Stewart Hall, Parnell Street, Dublin 1

Respondent: Mr. Mark Connaughton BL instructed by Elaine Mettler of Arthur Cox, Earlsfort Centre, Earlsfort Terrace, Dublin 2.

The determination of the Tribunal was as follows:-

The fact of dismissal was not in dispute.

Respondent's Case

The claimant was dismissed because he facilitated unauthorised access to the respondent's premises on 29 May 2008. He again facilitated unauthorised access on 30 May 2008, when 2 loaded trucks were stolen. The trucks were recovered but the goods were not. The goods were valued at about €16k. The disciplinary procedure was opened on 8 July 2008 and the claimant was dismissed on 9

July 2008. The claimant appealed unsuccessfully against his dismissal.

The HR manager gave evidence. The respondent is a wholesale cash and carry food service business. It employs 26 drivers and up to one hundred office staff. The claimant was employed as a driver. Drivers start work at about 6.00am. Each driver makes deliveries to between 7 and 11 customers each day. In the morning each driver collects his route sequence and documents, then collects the keys to the truck and inserts a tachograph in his truck. The older trucks have tachographs that use paper discs. The more modern trucks have electronic tachographs. At the start of the working week drivers are given a pack of 6 tachograph discs. The trucks are loaded over night by dedicated loaders.

On 30 May two drivers could not find their vehicles. When the supervisor could not find the vehicles he contacted the transport manager and phoned the Gardaí at about 6.20am. The respondent did not investigate the loss of the vehicles until the Gardaí had finished their investigation.

On 8 July 2008 the claimant was called to a meeting with the transport manager and the HR manager. The transport manager handed the claimant a letter inviting him to an investigative meeting the following day, after reading it aloud.

On 9 July 2008 the meeting was rescheduled to enable the claimant's colleague to accompany him to the meeting. No documents or statements were given to the claimant before the meeting. The claimant was told it was not appropriate for him to bring a solicitor to the meeting as it was an internal matter. The claimant was shown CCTV pictures of himself arriving at work at 5.40am on 29 May 2008. The claimant confirmed his identity on the CCTV footage. A non staff member follows the claimant in the gate at 5.42am. At 5.44am a security guard challenges the intruder and he leaves.

The claimant was shown CCTV pictures of himself and 2 others at the gate at 5.33am on 30 May 2008. The claimant goes to the transport office and then gets into his vehicle. He drives up close to the vehicles that were later stolen and reverses his vehicle away from them. The claimant re-enters the transport office. Two intruders get into the vehicles. One has trouble releasing the air brakes and finding reverse gear on the vehicle. At 5.51 the vehicle are driven away.

When the stolen vehicles were recovered the ignitions had not been tampered with. The keys were gone from the transport office. The claimant said that a security guard told him that the keys had been in the stolen vehicles and that the theft was an inside job. When she and the transport manager spoke to the security guard he informed them that he did not speak to the claimant about the theft of the vehicles.

She believed the claimant drove his vehicle up behind the vehicles that were later stolen to check the registration numbers and then returned to the transport office to take the keys. The claimant was not given an opportunity to challenge the allegations against him neither was he asked if he wanted to call witnesses.

The meeting was reconvened at about 4.20pm. The claimant wanted the matter concluded. The letter of dismissal was read to the claimant. She was involved in the decision to dismiss. She accepted that the allegation that he had doubled back to get the keys of the stolen vehicles was not put to the claimant.

She looked at all the CCTV footage evidence for the day of the theft with the transport manager. The only formal meeting they held was with the claimant. The claimant's alleged misconduct was not clearly defined in the dismissal letter he was given. The meeting at which the claimant was dismissed was quite short, no more than 20 minutes to half an hour.

The transport manager gave evidence. On the day of the theft of the vehicles he looked at the CCTV with the supervisor. He did not look at the CCTV for the 29 May for another 3 days. He also met the Gardaí. After viewing the CCTV he believed that the claimant had facilitated the removal to the vehicles. He did not prejudge the issue. The claimant was called to meeting to find out if he had a reason for his actions. On 8 July he read the letter to the claimant and gave it to him. He did not give him any other documents.

Tachographs are given to drivers for a week. The drivers hold the tachographs for 21 days and then return them to the respondent. The claimant did not return the tachographs for 29 and 30 May.

The security guard reported seeing the Thursday intruder hanging around outside the premises on the afternoon of the day the vehicles were stolen. He did not investigate this further.

The security guard gave evidence. On 29 May he saw the intruder walking along by the building. When he approached the intruder he was looking for the seed potato depot. The security guard did not accompany the intruder off the premises because he had to attend to a fire alarm. Someone had opened a door.

On 30 May he came to work at 5.30am. He checked the warehouse and the offices. He opened the big gate between 5.45 and 5.50am and stayed out by the gate watching comings and goings. He was in the gents when the two trucks left. He would not know if the keys were left in the trucks because he does not work nights. His only conversation with the HR manager and the transport manager was in July.

The second security guard gave evidence. He looked at the CCTV of the suspicious persons who came in, went out and turned left on the 29 May. There are 104 cameras on the site. On the morning of the theft not many trucks left. The claimant drove his truck out at 5.48.15am. He recognised the driver as the claimant from his cap. There were no markings on the truck.

Claimant's Case

The claimant gave evidence. He lost his driving licence on 6 December 2008 and so he can no longer work as a driver. He did not facilitate the removal of the trucks. The Gardaí did not interview him.

The 30 May was a Friday. Usually he only has 7 or 8 deliveries on a Friday. That day he had no tachograph in his pocket. He turned the truck around. He got a tachograph from a box on the table in the office. He filled it out in the office. He put his name, registration number and mileage on it.

At the meetings on 9 July he did not understand what he was being accused of. He was not asked if he was turning the truck to check the registrations of the trucks. He was shown some CCTV footage and asked questions. He could not believe they thought he was involved in the theft. On 29 May a man asked him for directions. On 30 May he went back to office to get a tachograph. He had left the ones he as given at home. It is easy to fit the disc. He did it all the time. At the end of

the day he took the tachograph home with him. He returned it the following week. The Monday was a Bank Holiday so it was Tuesday he returned it to the office.

At the appeal meeting he expected to get his job back.

Submission for Respondent

The claimant facilitated the removal of 2 trucks by thieves. His patterns of activity singled him out. His explanations were unsatisfactory. There is a conflict between what the claimant said and what the security guard said.

The claimant said he did not recognise the intruder on Thursday who was looking for directions to the vegetable distributor. The seed potato depot can be seen from the gate of the respondent's premises.

The case is circumstantial. Is the decision of the respondent sustainable on the findings? Did the respondent have grounds for its findings?

The case of *Mooney v An Post* suggests that investigation and disciplinary process roles taken by the same people is not a flawed process.

In relation to legal representation, the claimant's contract provides for a colleague to represent him. According to *Hardiman J.* only in exceptional circumstances is legal representation required in legal dispute.

It is alleged that the process moved seamlessly from investigation to disciplinary process. In reality there was one process. The claimant was questioned about the theft of vehicles and all the questions directed towards finding a link between him and the theft. The respondent moved quickly on the information it had.

If the Tribunal finds that the claimant was unfairly dismissed, it should consider the claimant's contribution to the outcome. Also the claimant would have lost his job in December 08.

Submission for claimant

It was unfair to the claimant that the HR manager and the transport manager were both the accusers and the decision makers. No allegation was put to the claimant during the disciplinary action. The letter of dismissal was written before the investigation meeting.

What was the actual evidence? Claimant moved quickly on the day of the theft. It is a coincidence that a man walked in behind him on the Thursday. After the meeting with the security guard it was not put to the claimant what he had said. Three cars drove in while the trucks were driven out. The security guard was not at the gate at the relevant time. But the claimant was the only person investigated. The loaders had access to the keys to the trucks for 8 hours yet they were not questioned or the CCTV examined.

There was prejudgement. The claimant was not given the opportunity to defend himself. At the appeal the onus was on the claimant to persuade the respondent to overturn the decision.

The burden of proof is on the respondent. The claimant does not have to prove his innocence.

Determination

The Tribunal carefully considered the evidence adduced in this hearing. The employer does not appear to have looked at any employee other than the claimant as having been the “insider” facilitating the theft of two good laden trucks. From an early stage all investigations honed in on the claimant’s behaviour and this was described as unusual and suspicious on the two dates of the 29th and 30th of May 2008.

The police investigation having yielded no result, the employer company launched in to its own investigation and disciplinary process as against the claimant. The same was conducted with much haste and is seen by the Tribunal as having been incomplete, unfair and largely speculative. There can be no justification for having a pre-prepared letter of dismissal at a disciplinary meeting and then claim the matter was not prejudged. The Tribunal cannot reconcile this contention. Additionally the claimant was not told of certain evidence known to the employer (i.e. the security guards evidence) and the claimant was not afforded an opportunity of contacting a solicitor in the circumstances where an allegation of theft was being made against him.

The Tribunal also notes that a company the size of the respondent can and should have provided separate personnel to conduct on the one hand a fulsome investigation and on the other hand the disciplinary process.

Most disconcerting is the fact that the company came before the Tribunal presenting a most fulsome case with the aid of video footage, tachograph reports, oral statements, independent assessment and any number of witnesses. The Tribunal notes that considerably more effort was put in to the presentation of this case before the Tribunal than was ever put to the claimant in the course of the disciplinary process, which ultimately resulted in his summary dismissal for gross misconduct.

In conclusion the Tribunal finds the employer to have acted unreasonably and the dismissal was unfair in all of the circumstances. In assessing losses the Tribunal has to take into account the fact that the claimant was put off the road in and around December 2008 and could not have continued in employment of the employer as a driver. No blames attached to the employer in this regard.

The Tribunal awards the claimant compensation of €15,105.00 under the Unfair Dismissals Acts, 1977 to 2007. The appeal under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 succeeds and the claimant is awarded €1,590.00 as compensation for two weeks’ notice.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)