

**CORRECTING ORDER
EMPLOYMENT APPEALS TRIBUNAL**

CLAIM OF:

CASE NO.

Employee -**Claimant**

UD170/2008

against

Employer –**Respondent**

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. O'Leary B L

Members: Mr. D. Morrison
Mr G. Hunter

heard this claim at Letterkenny on 11 September, 16 & 17 December 2008
and 24 & 25 February and 18 May 2009

Representation:

Claimant: Mr. Dessie Shiels, Solicitor, 16 Academy Court, Letterkenny, Co. Donegal

Respondent: Ms. Marguerite Bolger B.L. instructed by
Ms. Deirdre Mulligan, McCann Fitzgerald, Solicitors,
Riverside One, Sir John Rogerson's Quay, Dublin 2

The determination of the Tribunal was as follows: -

Determination

This order corrects the original order dated 5 November 2009

The second line of the determination of the Tribunal which states, "The Tribunal is surprised that MC was not called to give evidence in this case" should read, "The Tribunal is surprised that XXXX, the chairperson of the respondent was not called to give evidence in this case"

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

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The determination of the Tribunal was as follows: -

The respondent is a rural transport company, operating partly under the rural transport initiative of the National Development Plan and funded by the Department of Transport, in the Gaeltacht and Island areas. This is one of 34 such services around the country. Because of the island services it is not possible for the respondent to sub-contract those services and the respondent has a fleet of five buses. The claimant was appointed as transport co-ordinator of the respondent from December 2002. The respondent is a subsidiary of another company (AC), which was awarded the contract to provide the service by Pobal, and the respondent was set up for the purpose of delivering the service. Part of the Claimant's duties included driving the buses when staff absences demanded it. The manager of AC (MC) was the person to whom the claimant reported and acted as managing director of the respondent. There is a dispute between the parties as to whether the claimant had managerial responsibilities within the respondent but the respondent regarded the claimant as the project manager. The board of the respondent is made up of three persons representing the area and two islands served by the respondent, MC being one along with a representative of the Department of the Gaeltacht and a representative of Udaras Na Gaeltachta.

The employment was uneventful until some time in October 2006 when MC had been informed that someone other than an employee of the respondent had driven the respondent's buses. She asked the claimant about this allegation. The claimant denied the allegation and this was accepted by MC. This issue was raised again in May 2007 and on this occasion MC was not satisfied with the response from the claimant. As a result of this MC conducted an investigation into the question of who was insured to drive the respondent's buses and discovered that two non-employees had been on the list of insured drivers. An administrator had been appointed in the preceding months to assist the claimant in her duties.

A board meeting, at which the claimant was present, was called for 31 May 2007 to discuss the concerns that MC had in regard to the operation of the respondent by the claimant but, in the absence of two members including the chairperson, this meeting could not proceed and a further meeting was arranged for 5 June 2007. At this latter meeting MC told the board that she had reason to be worried about the respondent's operational system. One of the respondent's buses had been parked at the home of the chairperson and it transpired that the chairperson's sister (CS), who was an employee of a company (HC) of which the claimant and her husband are directors, had been driving the bus. The chairperson initially took exception to this and said that she inferred that MC had a grudge against her family. This inference was later withdrawn at the request of the Udaras Na Gaeltachta representative on the board (UR). MC then told the board how both CS and another driver (AD) had been added to the list of insured drivers for training purposes. The claimant's explanation was that the two people had mistakenly been added to the respondent's list of drivers when they should have been on HC's list of insured drivers. It was decided that no one other than the respondent's staff would drive the respondent's buses.

The claimant had previously been asked to provide a timetable for the service offered by the respondent. She produced the respondent's information leaflet that was not considered to meet the requirement of a timetable. It was decided that the claimant was to produce a separate sheet for each service.

There was discussion of the role of HC in providing bus support. The claimant's position was that this was on a pilot basis and therefore the requirement to go out to tender for such provision of service was not necessary. The respondent's position is that MC, who along with the claimant was co-signatory of cheques, was not aware that HC, which was only identified by its initials, was a company of which the claimant and her husband were directors. There was also a discussion as to whether the claimant allowed MC access to the accounts on the computer in the respondent's office.

It was decided to bring in a consultant to look at the current state of affairs within the respondent and the report of the consultant to be sent to Pobal. In the interim HC was to continue on a temporary basis to do the particular journey they had been involved with.

A further meeting of the board, with the claimant in attendance, was held on 29 June 2007. The claimant complained of not receiving the minutes of the previous meeting but the respondent's position was that as well as the minutes being e-mailed to her a hard copy had been left on her desk. The timetables were still not available and when MC complained that this was the fourth time they had been sought the claimant complained that she was tired of being bullied by MC and gave five examples of this.

- MC wasn't speaking to her. MC had gone to a meeting in Sligo with her and never spoke to her

- MC sent the consultant to her without notice
- MC sent a colleague from AC to her for an audit
- MC did not send her a copy of the minutes of the 5 June 2007 meeting
- MC was opening the post and had said that she would continue to open the post

The consultant, appointed arising out of the 5 June 2007 meeting, had been to the respondent on 16 & 17 June 2007 but those dates were of his choosing.

The claimant agreed with the consultant that AD was put on the respondent's insurance to allow him undergo his D1 licence driving test using the respondent's bus. It further came to light that the respondent account had paid an invoice for driving lessons for CS and the brother of the claimant's husband (HB) neither of whom had worked for the respondent.

The consultant made his report which was dated 11 July 2007 to the Board. He had visited the respondent on two occasions, 16 & 17 June 2007. The claimant had confirmed that she was operating under the terms of the NDP manual for accounting procedures and practices. The findings of the report can be summarised as follows: -

- Proper personnel files were not maintained
- There were no proper files held on each of the vehicles owned by the respondent
- Drivers not completing signing off sheet
- No quotations obtained in respect of new vehicle and claimant acted as guarantor for the agreement
- Fuel receipts did not show vehicle to which they related and were unsigned
- Repairs to vehicles at one garage. No record of quotations from other garages in relation to the work. No mileage on invoices. One invoice has both the respondent and HC on it with both deleted
- Licences not available for all routes and no paperwork to support the claimant's assertion that Pobal had some arrangement whereby licences not required for all routes. Licences that were held not shown to consultant. Timetables provided not up to date
- No file held on HC the only subcontractor used by the respondent. Serious conflict of interest as claimant is a director of HC
- CS added to respondent's insurance for driving on 21 September 2006 following request from the claimant, AD added on 27 February 2007. The claimant told the consultant that they were added in error and should have gone on HC's insurance. CS and AD were deleted from the respondent's policy on 5 June 2007 as confirmed in an email from the respondent's insurer to the claimant. The words "by you" as included by the insurer were omitted from the version presented by the claimant which made it appear that the error was the insurer's and not the claimant's
- Two drivers CS and HB had obtained driver training for which the respondent was invoiced and paid. The claimant confirmed to the consultant that neither driver had worked for the respondent and the training should have been invoiced to HC
- No file held in relation to banking
- No mention of the use of the subcontractor HC in the respondent's return programme of activities for 2007. The route on which the subcontractor is used is shown as being operated by the respondent's own community bus (OCB). Monies paid to HC shown under leasing and not subcontracting
- The authorisation and claiming of travel and subsistence should be examined and a procedure put in place
- No asset register maintained by the respondent

The consultant concluded that he was of the opinion that the respondent's affairs were not carried out in accordance with the NDP manual of accounting procedures and practices. The conflict of interest issue was serious as the claimant appeared to have authority to provide work for HC and it could appear that there was too close a relationship with HC. He suggested that a sub-committee of the board be set up to monitor the day-to-day activities of the respondent and report to the board, as it appeared that the board was not made aware of many of the issues in the report.

The consultant met the board, without the claimant, on 16 July 2007 and opened his report to the board. After taking questions on the report the consultant left the meeting and the board took the following decisions: -

- To support and stand by MC in connection with her work responsibilities in relation to the allegations of bullying made by the claimant to MC at the meeting on 29 June 2007. It was agreed that serious bullying allegations were never made against MC, as a member of the board would have to be aware of same.
- MC would liaise with Pobal to keep the service going
- It was understood that the claimant's role in the respondent was unworkable and it was agreed that the claimant be given an opportunity to respond to the consultants report to the board. A letter was drafted and sent to the claimant inviting her to a meeting with the board on 23 July 2007. MC was to take legal advice around the case and the consultant was to suggest a solicitor to approach
- AC was to act as interim management on behalf of the respondent
- HC would not be following up on any of the services
- It was decided to wait until the claimant returned to work following a period of sick leave before taking any action on the question of the password for the accounting package

At the claimant's meeting with board on 23 July 2007 it was agreed that MC would not take part in the meeting when the claimant was present. In relation to the matters raised in the consultant's report the claimant's replies can be summarised: -

- The claimant did not think that she was responsible for keeping personnel files
- Whatever the consultant asked the claimant for he received. The files for the buses were kept on the buses. There were quotes for the purchase of the most recent bus, the respondent had the purchase invoice and board approval was in the minutes. New files would have to be kept in accordance with new health and safety regulations. She accepted it was her responsibility to get the drivers, however unwilling they were, to adhere to sign off sheets. The claimant accepted it was her responsibility for implementing the conditions of insurance referred to in the consultant's report
- The claimant accepted that she did not get quotes for the lease agreement. She did not realise that as a non-director she should not have signed as guarantor
- She accepted there was a weakness in the system of recording fuel purchases
- She accepted that quotations had not been sought in relation to the repair of the buses and that this was against Pobal policy
- The consultant was not shown the route licences because he did not ask to see them
- The claimant accepted that it was a serious conflict of interest to use an HC bus
- The claimant gave a word processing difficulty as the reason for the missing words "by you" in insurance matter. She accepted there was a big difference in the e-mail with those words omitted
- The claimant accepted that no driver training estimates had been obtained from other suppliers in conflict with Pobal rules. Monies paid out for training non-respondent

- employees had been refunded the previous week
- The claimant did not think that banking was part of her role
- The claimant accepted that she had put OCB for the route serviced by HC because the tendering process had not been followed
- The claimant accepted that there was no supporting documentation for the travel and subsistence claims
- As the respondent had charitable status it did not need an asset register

In conclusion the claimant told the board that several things in the report were not part of her responsibilities. These were implementation of the NDP manual of accounting procedures and practices, looking after drivers and bank affairs. The claimant felt there were a lot of weaknesses in the board and in its representation.

After the claimant left the meeting there was a discussion between the board members at the end of which it was decided to suspend the claimant with pay pending legal advice, further inquiries being made and discussing the matter with Pobal. The letter conveying this information to the claimant was given to her on 29 July 2007.

On 15 August MC wrote to the claimant about a standing order by which the claimant had been paid from April 2006. The claimant replied on 20 August 2007 that she had met with MC and the chairperson on 25 January 2007 to discuss the programme of activities and that on that occasion MC had recommended that the claimant increase her wages. The initial smaller amount had been in regard to tax credits paid to all the respondent's employees.

Following the resignation of the chairperson UR wrote to the claimant on 20 September 2007 explaining that the board had not been satisfied with her responses on 23 July 2007 and in addition set out details with regard to significant discrepancies between income received, amounts declared for income tax purposes and remuneration approved by the board. UR referred to the correspondence of 15 and 20 August 2007 and sought to discuss the matter with the claimant at a meeting on 25 September 2008. Two other matters were also mentioned, the purchase of phones and satellite navigation systems and the copies of draft accounts given by the accountant to the claimant before she was suspended.

Following the involvement of the both parties' solicitors a copy of the respondent's bullying policy was supplied to the claimant on or about 27 September 2007. The parties met on 17 October 2007 but little or no progress was made as the whole of the time was devoted to procedural matters. The claimant held the position that she required more detail of the allegations against her and the respondent's position was that the claimant had adequate details of the allegations against her.

On 25 October 2007 a member of the board (MB) wrote to the claimant on behalf of the board and set out in a six-page letter, with a 42 page appendix (Pobal's interim audit report on the respondent) the following areas of complaint against the claimant: -

- Wages/Expenses issues
- Conflict of interest/tendering procedure
- Purchase of communications equipment
- Cash lodgements
- Motor Insurance
- Fees for driver training

The claimant was given until 31 October 2007 to reply in writing to the allegations against her. On 30 October 2007 the claimant's solicitor wrote to the respondent's solicitor stating that the claimant was likely to have replies prepared by 2 November 2007. In the event the claimant replied to the allegations against her in a six-page letter dated 1 November 2007. As part of the board meeting on 14 November 2007 the board in the absence of MC considered the claimant's response and found it to be unacceptable and decided to dismiss the claimant. MB wrote a ten-page letter to the claimant on 21 November 2007 setting out the respondent's attitude to the claimant's response to the allegations of 1 November 2007 and this letter concluded by terminating the claimant's employment with immediate effect without payment of notice on grounds of gross misconduct.

Determination

It is clear to the Tribunal that the administration of the respondent company was run in a very loose fashion. The Tribunal is surprised that MC was not called to give evidence in this case. The Tribunal is fully satisfied that the claimant was fully aware of all the allegations made against her and given an adequate opportunity to respond to those allegations. The Tribunal is satisfied that the respondent was entitled to draw the conclusion that the addition of CS and AD to the list of drivers insured to drive the respondent's buses was not accidental. CS and HB had obtained driver training for which the respondent was invoiced and paid for at the behest of the company in which the claimant was a director. The Tribunal finds that it was reasonable in all the circumstances for the respondent to conclude that these actions amounted to gross misconduct entitling the respondent to dismiss the claimant summarily. The fact that the respondent was poorly managed could not excuse the claimant in this regard because she was part of the management structure. Her managerial authority is demonstrated to the Tribunal by the facts that she was able to perform the functions complained of by the respondent. The procedure used by the respondent in this case could have been implemented in a more efficient manner. The allegations of bullying made by the claimant against MC were made during the investigation into the claimant's work practices. These allegations had no import into the facts used by the respondent in dismissing the claimant. Accordingly the Tribunal is satisfied that the claimant was not unfairly dismissed and the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

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Employment Appeals Tribunal

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(Sgd.) _____
(CHAIRMAN)