

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

EMPLOYER

- appellant

CASE NO.

UD1309/2008

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

EMPLOYEE

- respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr M. Gilvarry

Members: Mr. D. Morrison
Mr M. McGarry

heard this appeal at Castlebar on 11th September 2009
and 17th November 2009

Representation:

Appellant: Purdy Fitzgerald, Solicitors, Kiltartan House, Forster Street, Galway

Respondent: Ms. Martina Weir, SIPTU, Mayo No. 2 Branch, Moneen Road, Castlebar, Co. Mayo

The determination of the Tribunal was as follows:-

Appellant's Case:

The Manager of the appellant company was in the office at 5.30pm on the evening of the 14th of September 2007, when she received a phone call from an irate man complaining about two of the appellant's van drivers. The man who was driving a lorry complained that the van drivers had nearly caused an accident when he was overtaken going around a dangerous bend in the road. The respondent employee was driving one of the vans.

One hour later the manager received a further phone call from a lady complaining that again the vans had nearly caused an accident. The van had not yielded to a right of way sign causing the lady to emergency brake while the respondent's van cut across a car park at speed as if the vans were racing. The vans can be distinguished by age; the appellants van was quite old while the other van was new.

The manager informed the owner (her father) of the incidents. The respondent van driver arrived back to the premises at 6.30pm where the owner immediately suspended both the van drivers with pay pending an investigation. The respondent appeared for work on Monday following his suspension but was sent home. The respondent was issued with a letter dated the 17th of September 2007 informing him in writing of the suspension enclosing a copy of the company's grievance and disciplinary procedures. The appellant received a letter disputing the allegations dated the 16th of September 2007, which was also copied to his union representative.

During the course of the investigation 4 employees were interviewed using another member of staff to translate, she also wrote down their statements. A meeting took place on the 25th of September between the appellant and respondent with both their representatives present. The respondent's representative objected to the witness statements. The meeting concluded with the appellant outlining that they needed some time to consider their position but would contact the respondent by the 28th of September.

The respondent had been issued with and had signed the companies Safety Regulations. The appellant decided that the respondent had been driving dangerously and that;

“This behaviour is a serious breach of your Contract of Employment and constitutes gross misconduct – “serious contravention of Safety Regulations””

The respondent was informed of this by letter dated the 5th of October 2007. He was also informed of his right to appeal this decision and that the appeal should be lodged within seven days. The respondent appealed the decision. The appeal was heard by the company foreman who upheld the appellant's decision. The other van driver's employment was also terminated.

Cross Examination

A warning letter had been previously sent to the respondent concerning him clocking in another employee for work - that was the first disciplinary warning on his record. The witness statements were written down and translated to English by the translator as the appellant felt for clarity the witness statements should be taken in their native language. The appellant disputes that the respondent was terminated due to his request for the Terms & Conditions of his Employment and his request for overtime opposed to his breach of safety regulations. The foreman who heard the appeal was also present when the witness statements were being taken from the employees. The foreman had no input in the decision to terminate the respondent's employment that was made solely by the owner of the company.

An independent witness present in Kilmaine on September 14th 2007 gave evidence for the appellant company. At around 6 p.m. she and her sister were travelling a narrow country road. There was one car in front of them and two behind. A white van travelling at speed overtook her near a bend in the road. The van suddenly tried to overtake them and the car in front which caused her to brake suddenly.

In Kilmaine village she was in a line of traffic at a T junction. A white van in the line of traffic ahead of her pulled out suddenly causing a woman to brake her car suddenly in the road missing her by inches. The woman appeared very shocked and remained in the road for a few minutes. A second white van overtook her in the line of traffic and cut into a nearby car park. In the van she observed three men laughing. In the witness's view the vans were racing. She decided to follow the first van to get a contact number off it to ring the respondent company and make a complaint.

On cross-examination she said that it was the worst driving she had seen in her experience driving around the country as a sales representative. When asked she said that the first white van was travelling at speed and it took her 5 minutes to catch up with it and get the contact number. As she was driving her sister rang the respondent company to make the complaint. She stated she had not spoken to the woman who had to brake suddenly in Kilmaine village, as she wanted to get a contact number to make the complaint.

When asked by the Tribunal what she would have done if there was no contact number displayed on the van, she replied that she would have got the registration and contacted the Gardaí.

A part-time cleaner for the appellant company gave evidence. On September 17th 2007 she was called to a meeting to act as translator to the four employees present in both vans on the day in question. She translated their statements into English. She stated that she was very happy with the translations she submitted. She agreed that one of the employees present in the claimant's van on the day in question did change the wording of his statement two days later. She translated it. Originally he stated, *"I was in the van with the claimant. We left Athlone first but (the driver of the first van) overtook us. There was a traffic jam in Tuam and we went first out of it. In Kilmaine (the claimant) made a shortcut to be first again. I didn't see something dangerous. We yield all the cars."*

In his second statement he stated *"Coming back from Athlone with (the respondent in this case) I don't remember exactly where (the driver of the first van) overtook us. Traffic was busy in Tuam. We took not so busy road and came first of (the driver of the first van) out of town. (The driver of the first van), the van he drove was not so old as our, so (the driver of the first van) overtook us again on the place where road was straight. Coming on the junction to Ballinrobe in Kilmaine (the driver of the first van) was still ahead us. There were two more cars between his van and our one. The claimant turned right to car park but (the driver of the first van) and those two cars after him turned out on the Ballinrobe road first of us. The respondent did yield all the cars and turned out on the main road. A didn't see any dangerous situation on the road."*

Respondent's Case:

The respondent (employee) gave evidence. He commenced employment with the respondent in March 2001. He was dismissed on October 10th 2007.

On September 14th 2007 he stated that he had not been racing with the other van driver. He had overtaken a lorry but not on a bend. He stated that the driver of the first van had overtaken him on a couple of occasions, as they had stopped in Tuam, where the respondent overtook him. That evening he arrived back at the depot at 6.30pm. He spoke to the driver of the first van and told him he was not happy at his driving. The owner of the respondent company came into the yard and began shouting at the claimant saying there were two complaints received about his driving that day. The owner never spoke to the other driver.

On the Monday morning the owner told him to go to the Gardaí and discuss the matter of September 14th 2007. There were no complaints lodged with the Gardaí concerning his driving on September 14th and they had no questions for him. The owner of the company informed him in October 2007 that he was finished. He understood he was sacked. He attended two meetings, the investigation and the appeal hearing. He stated that he had been dismissed because he had taken a claim under the Payment of Wages Act, 1991 to the Rights Commissioners.

On cross-examination he stated he had left before the other driver around 5.00 pm from Athlone. He didn't spot the other driver until Mountbellew. The other driver overtook him on a number of occasions. When asked he said that he had not seen the other van in Kilmaine but later said that he could have seen him leaving. He admitted that he had made a shortcut through the car park in Kilmaine but had not overtaken cars waiting in line to turn at the T junction. He stated that he had not seen what had occurred when the female driver stopped suddenly but stated her car was blocking the road and this was why he drove into the car park.

The claimant gave evidence of loss. He obtained two months work for a construction company at the same rate of pay from June 2008 to August 2008. He then obtained relief driver work for a bread maker in November 2008.

Determination:

The appeal came before the Tribunal by way of an appeal from the Rights Commissioners. The Tribunal carefully heard and considered the evidence and submissions made on behalf of both parties. Dismissal was not in dispute and the onus was on the appellant to show the dismissal was not unfair.

The task of the Tribunal was to decide whether the employer had acted fairly and reasonably in dismissing the respondent.

The representative for both the appellant and the respondent skilfully presented their party's cases and the appellant's representative urged the respondent's case be dismissed based on the evidence heard before the Tribunal. However the correct approach in the Tribunal's view is to determine whether or not the dismissal was fair based on the information available to the employer as of the date of dismissal, or later internal appeal.

The Tribunal noted that neither the person who made the decision to dismiss nor the person who heard the appeal gave evidence before the Tribunal, and instead another witness was proffered to give evidence relating to the dismissal.

The decision to dismiss was justified by the appellant on the grounds of misconduct. The Tribunal felt the evidence heard before the Tribunal fell short of justifying the respondent's dismissal on those grounds, though warranting some disciplinary sanction. The Tribunal therefore determines the respondent was unfairly dismissed.

It then falls to determine the remedy and the tribunal considers compensation is the appropriate remedy in the circumstances of the case. The Tribunal was unhappy with the evidence of the respondent. The Tribunal was not persuaded the respondent had made adequate efforts to mitigate his loss. The Tribunal noted inconsistencies and contradictions in the respondent's evidence to the Tribunal. The Tribunal noted with disquiet that very significant information regarding a period of

employment was not disclosed in direct evidence and was only revealed on cross-examination.

The Tribunal also had to take into account the contribution made by the respondent to his own dismissal. Taking all these factors into account, the Tribunal upsets the Rights Commissioner recommendation and instead awards the respondent the sum of €1,400.00 (one thousand four hundred Euro) under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)