EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE - claimant

CASE NO.
UD1163/2009
MN1176/2009

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. N. O'Carroll-Kelly BL

Members: Mr. J. Goulding
Mr. F. Barry

heard these claims in Naas on 6 April 2010

Representation:

Claimant(s) :
Ms. Rebecca Mac Cana BL instructed by
O'Carroll & Company, Solicitors,
19a Merchants Road, Galway

Respondent(s) :
No legal representation

The determination of the Tribunal was as follows:-

The claimant claimed that his employment which had commenced on 26 February 2008 ended on 12 March 2009 when he was summarily dismissed for no good reason and without any notice.

The respondent contended that the claimant had not been unfairly dismissed.

The Tribunal heard from the respondent's transport manager (hereafter referred to as T) who made a statement that, at about 7.15 a.m. on the morning of 12 March 2009, he received a phone call from one of the respondent's clients that one of the respondent's drivers had smashed through the entrance barrier to the client's premises. At that stage none of the respondent's drivers had

contacted T regarding any incident despite the fact that T's mobile phone was switched on "24/7". T advised the client that he would investigate the issue immediately. The client also advised that there was a video recording of the incident. A driver name and vehicle registration number were also available. T then went to the client's premises to conduct his investigation.

On arrival at about 9.00 a.m. T approached the claimant and asked him both to explain what had happened and why the claimant had not let T know what had happened.

T then met the client and saw the relevant video recording in which he could clearly identify the claimant in a vehicle crashing through the barrier. The claimant subsequently got out of the cab, picked it off the ground and moved it out of sight as if to conceal it.

Having established the facts, T then met with the claimant again at 9.30 a.m. in the cab of the truck and told the claimant what he had seen on the video. The claimant admitted his fault in this incident and T told him that this was a very serious situation for the respondent. T met with the claimant for approximately forty-five minutes. They had an exhaustive conversation.

According to a document (which the claimant had signed) regarding heath and safety in the workplace the respondent's employees were obliged to comply with all relevant statutory provisions and to take reasonable care to protect the safety of themselves and others who might be affected by their acts and omissions. If an employee had an accident it was to be reported to the employee's supervisor/manager immediately no matter how small or insignificant it might appear to be. It was a disciplinary offence to fail to report an accident.

T first outlined the findings of his investigation. He then gave the claimant the opportunity to respond. The claimant's response was that he admitted the facts outlined by T to him. Following careful consideration and a reasonable evaluation of the facts, T decided to terminate the claimant's employment for gross misconduct contrary to the terms of the claimant's contract of employment. The said contract stated inter alia that an employee could be dismissed for incompetence or poor work performance, failure to carry out reasonable instructions or some other substantial reason.

The claimant's general terms and conditions gave examples of serious breaches of company rules, customs or practices which could result in an employee being dismissed. These included: inappropriate use of company property; serious breach of company safety rules; neglect which causes unacceptable loss to the company's clients' property; any other serious breach of procedures leading to a loss of trust and confidence in the person as an employee; and behaviour which renders the continuance of employment of the employee untenable.

In T's opinion the claimant's driving had, on the occasion in question been reckless to the point of constituting gross misconduct. As a driver the claimant was obliged at all times to be in a position to stop as needed. He considered that, based on the facts, he could not have trust or faith in the claimant as a competent H.G.V. driver and that the claimant had thus disqualified himself from continuance of his employment. The company had had to deal with similar incidents in the past and T's decision was in accord with those previous decisions.

At the end of the conversation T said that he was sorry as to the outcome but that he would have to let the claimant go and that, if the claimant wished to take the matter up with the respondent's managing director (hereafter referred to as MD) he was free to do so.

Addressing the Tribunal, T said that the claimant had said that it would be all right until the next day but that the client had reported the incident before the claimant and that, if T had known, he would have been there. Therefore, he told the Tribunal that it would have been better if he had known.

The Tribunal stated that, as transport manager, it was his job “to do the hiring and firing” but that he had had a discussion with MD who had told him to investigate whereupon he told MD what had happened.

T got to the claimant at about 9.30 a.m. on 12 March 2009. They spoke for about forty-five minutes. T had seen the DVD at that stage. The accident had happened at about 11.00 p.m. the night before. T first heard about it the next day despite the fact that his phone was always on. T stressed that the claimant could have discussed T’s decision with MD and that the claimant had had that opportunity. T said to the Tribunal that he had told the claimant this. The respondent’s disciplinary procedure stated that at every stage of the formal procedure the employee had the right to appeal to a higher level of management against any disciplinary action imposed.

T stated that the claimant could have appealed to him or to MD. Asked if he and MD had both decided to dismiss, T replied that it was his decision and that he had just let MD know that he was on his way to the client’s Naas depot to investigate. Asked if he had gone back to MD about the decision to dismiss, he agreed but said: “He more or less left it to me.” Asked what would have happened if MD had disagreed, T replied: “I’d have to talk to him again.” T then added that the claimant had not appealed.

In cross-examination it was put to T that the claimant would say that, after the 11.00 p.m. incident on 11 March, he was, at midnight, meant to drive to Listowel and that he delivered in Listowel at 8.00 a.m. on 12 March after which he drove back to the Naas depot. T replied that this was not possible but admitted that he was not sure of the time that he had spoken to the claimant. Regarding the delivery to the client’s Listowel store, T said that the Naas depot was a distribution centre and that drivers making night deliveries from there would have keys to stores.

It was put to T that the claimant could not deliver in Listowel before 8.00 a.m. because of a local rule forbidding delivery before that time. T did not dispute this.

The claimant’s representative told T that the claimant would say that he had tipped the Naas depot barrier but had not smashed it. T replied that the claimant had broken the barrier, had picked it up and had thrown it behind a wall. The representative said that the claimant would say that he had not got out of his vehicle but had driven through and had reported the incident to two people i.e. a client manager (hereafter referred to as B) and to the respondent’s transport manager. T replied: “That’s me! He did not report it to me that night.”

It was then put to T that a report had been made to a named respondent employee (hereafter referred to as H). T rejected this saying that H would have reported it to him and that he had spoken to the manager who had had showed him the DVD. T asserted that it had been the claimant who had crashed through the barrier and that it was all on the DVD. T stated that the claimant had not stopped for long enough for the barrier which he (T) had seen at 9.00 a.m. on 12 March when he saw that part of it “was all bent”. T agreed that the barrier was at the level of the indicators of a lorry’s cab and stated that the claimant had not waited for the barrier to open. He insisted that this had been an inappropriate use of company property and, therefore, gross misconduct and that MD

could have overruled him if MD had wanted.

Regarding H, T said that he had spoken to him on the morning of 12 March. H said that the claimant had hit the barrier. T told the Tribunal that everybody on that night knew that the claimant had hit it but that he (T) had not known and that the claimant had never told him that he (the claimant) had told people about the incident.

Asked if the claimant was "gone" once T saw him hit the barrier on the DVD, T said yes. Asked for his record of his conversation with the claimant, T said that he did not have a record of it, that the incident had been plain to see and that it had cost €2.5k to fix the barrier. T repeated that he did not accept that the claimant had spoken to H saying that H would have told him (T), that T was the manager and that the claimant had not reported the incident to him. Asked if the claimant would have been dismissed if the claimant had reported the incident to him on that night, T said no but that he "would have been in" if the claimant had told him.

Asked if the claimant had been dismissed for hitting the barrier or for not reporting it, T replied that the claimant had been dismissed for hitting the barrier but that he should have reported it. T stated that, instead of the client ringing him to tell him what had happened, he could have told the client.

The Tribunal now viewed the DVD which showed a lorry hit the barrier. Regarding the allegation that the barrier had been picked up and put behind a wall, T said that it was found the next day.

Giving sworn testimony, MD said that somebody had lifted the barrier and had put it behind a wall. He said that it had been up to T as to what was to be done.

Asked if there had previously been incidents with the barrier, MD said that two drivers had been banned from the site in the preceding fortnight and that one had to stop at the stop barrier. It was put to him that there was a new system of going in, waiting for a barrier to lift and then driving. He replied that the new system was that one had to wait for a gate to lift, that the claimant would have gone through about ten times without any problem with respect to the new system and that the claimant had been dismissed for not stopping at a stop sign.

When it was put to MD that the claimant had stopped MD replied: "He took off before he should have." MD added that T had said that the barrier had broken and that the client could take a very dim view of the respondent not knowing at 11.00 p.m. on 11 March that the respondent's driver had hit the barrier. MD stated to the Tribunal that the claimant had hit the stop sign but had not told the respondent. MD said that H had never told the respondent and that H would have done so if he had been told. The respondent had seen the claimant on the client's DVD.

Rejecting a suggestion that the claimant could not appeal to him, MD replied that the claimant had his number and could have rung him. MD said that T had not rung him after his investigation.

Asked how a "tip" could have been "a deliberate serious breach of company rules" such as would constitute gross misconduct under the claimant's terms of employment, MD replied that a big lorry does not "tip" anything, that this had been gross misconduct and that, although damage to the lorry was minor, to hit the barrier would be serious even if the contact did no more than knock paint off.

Asked how "tipping" the barrier could be considered to be "malicious damage" as mentioned in the claimant's terms of employment, MD, referring to intent to conceal, said that the damaged barrier

had been picked up and had been put behind a wall. MD asked the rhetorical question why would someone other than the claimant walk back and pick up a barrier that the claimant had broken.

MD confirmed that the DVD had shown that the barriers mechanism had functioned successfully after it had been struck but he said that the barrier had sustained damage such that, as far as the client was concerned, the barrier had to be replaced. The respondent paid €2,690.00 to fix the barrier.

MD confirmed that the dismissal of the claimant had been done by T.

Giving sworn testimony, the claimant said that he had been driving lorries for the nine years since he had been twenty-five and that, after doing some weekend work for the respondent (because the respondent had not had many weekend drivers), he had become a fulltime employee of the respondent in February 2008. He had been laid off by a major company and the respondent gave him a job right away.

Regarding 11 March 2009, the claimant said that he had started work at 6.00 p.m., had done a run to Fonthill and, just after 11.00 p.m., had returned to the respondent's client's Naas depot where he had waited for a gate to open. Another truck came out. That truck's out barrier was up. The claimant thought that he also could drive on. He felt the bar of the barrier when he passed. He reported this to B from the client company who said that he would be okay and that there was no problem. In addition, The claimant told H who was a manager for the respondent. Also, the claimant called T who said that they would sort it out the next day. He did not hear from T for the rest of the night.

Asked about the fact that T could be contacted "24/7", the claimant replied that he had told H right away, that B knew, that other men knew and that T had said that there was "nothing we can do now". At about midnight the claimant drove off to Listowel but did not go into Listowel itself because of the danger of the freezer in his lorry disturbing local residents. The claimant slept until about 7.00 a.m.. The delivery time was 8.00 a.m.. T called the claimant, said that he had hit the barrier in Naas and that the claimant was dismissed. The claimant said that another lorry had been going out and that he (the claimant) had made a mistake with the barrier. It would take about three-and-a-half hours to get back to Naas. It would have been "a sackable offence" if the claimant had gone right into Listowel before the permitted delivery time.

The claimant said to the Tribunal that he had got no training at all from the respondent and that he had got no contract but that he had been told to sign a contract in order to be able to work for the respondent. Gross misconduct was not explained to him. H said that he could not do anything for the claimant. Nobody said anything about an appeal. T had just said that the claimant had knocked the barrier and that he was dismissed.

Stating that the barrier had been down about three times before, the claimant said that other contractors worked for the Naas client and that one could not see the barrier looking down from the cab of a lorry. When the claimant saw the out bar up he thought it was safe to go in. He had not meant to hit the barrier. He tried to explain to T. When he (the claimant) had felt the bar hit his cab he had "eased off" and had let his lorry roll back off the speed ramp. He had been "going fairly slow". He never got out of the cab but reported the incident to H from the respondent. B (the client's night manager) said that the claimant had hit the barrier.

Regarding picking up the barrier and placing it behind a wall, the claimant said to the Tribunal that he had not touched it but that it had been gone the next day. Asked about the fact that he had not rung MD, he said that he had only ever got one call from MD and that all the drivers' contact was with T.

On the subject of his efforts to mitigate his post-dismissal financial loss, the claimant said that he had looked for work as a lorry driver but that "it's nearly impossible now". He was out of work. He had sent letters to hauliers but had not heard from them. Hauliers said that they were letting their own drivers go. He had known that a job with the respondent would have been steady work.

In cross-examination the claimant was asked if another employer would have given him another chance if he hit a barrier thinking that the barrier's bar was up. The claimant replied that it had been a mistake and that he had never had an accident before. Asked what if a child had been there, he replied that he would have been more aware at a zebra crossing and that, in the case in question, he had just been waiting for the barrier to go up.

It was put to the claimant that he had assumed that he could go because the adjoining barrier came up. He replied that he did look around but, being sure that his barrier was up, had made a mistake.

The claimant denied that the alleged conversation with T in his cab had ever taken place.

At the end of the hearing MD submitted that the respondent had to be "sure", had no margin for trouble at stop signs and could not take that chance.

Determination:

Having carefully considered the evidence adduced, the Tribunal appreciates the respondent's anxiety to retain its relationship with a major client but does not accept the respondent's version of the event. The DVD showed that the claimant's lorry did make contact with the security barrier. It was clear from the footage that the claimant mistook the exit barrier for his barrier. It was impossible to see the entrance barrier from the lorry's cab and when the exit barrier went up to its full vertical position it was positioned in almost the same spot as the entrance barrier when it was fully vertical. The Tribunal accepts that the barrier may have had to be replaced but does not accept that the claimant deliberately damaged it. Furthermore we do not accept that he removed it and hid it behind a wall.

After hearing different versions of the events that followed the barrier incident and the times at which they might or might not have occurred, the Tribunal is not satisfied that the respondent's investigation and procedures were sufficient to justify the claimant's dismissal for gross misconduct following this one incident. There was no evidence that the claimant had ever received a warning from the respondent or that a sanction other than dismissal was considered on this occasion whether or not the claimant had fully and properly reported the incident to the respondent without delay.

The Tribunal is satisfied that the incident involving the barrier was an accident, that the respondent's procedures were flawed and that there was no adequate investigation. The Tribunal

accepts that the claimant did all he could to mitigate his loss. In finding that the claimant was unfairly dismissed within the meaning of the Unfair Dismissals Acts, 1977 to 2007, the Tribunal considers compensation to be the appropriate remedy in all the circumstances of the case and unanimously deems it just and equitable to award the claimant the sum of €29,000.00 (twenty-nine thousand euro) under the said legislation.

In addition, the Tribunal allows the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, and awards the claimant the sum of €750.00 (the equivalent of one week's gross pay) under the said legislation.

Sealed with the Seal of the

Employment Appeals Tribunal

This ________________________

(Sgd.) ________________________
(CHAIRMAN)