

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

EMPLOYEE - *claimant*

UD1200/2009

against

EMPLOYER - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan
Members: Mr. A. O'Mara
Mr N. Dowling

heard this claim at Navan on 25th March 2010
and 18th June 2010

Representation:

Claimant(s) : Mr. Brian Fitzgerald, Warrenstown, Kilcock, Co Meath

Respondent(s) : Mr. Brian Morgan, Morgan McManus, Solicitors, Law Chambers,
The Diamond, Clones, Co. Monaghan

The determination of the Tribunal was as follows:-

Respondent's case

The respondent's national training and risk manager gave evidence that he presented a re-induction course to a number of employees on 5 November 2007. Four employees including the claimant attended the course. The course dealt with standard operational procedures including company vehicle security which is of paramount importance. The employees were taken through check lists at the re-induction course and the claimant signed off on that check list. The duration of the course was one hour and no documentation was given to employees on the course. The witness gave further evidence that all employees receive an induction course at the commencement of their employment. He was not present at the claimant's induction course as he commenced employment with the respondent after the claimant. He attended the claimant's disciplinary hearing on 28 October 2008 but the hearing did not proceed as the claimant did not have representation on that day. He had no further involvement in the disciplinary process.

The next witness gave evidence that she is the Human Resources manager of the respondent company. The company found inconsistencies in the manner in which induction courses were carried out. Accordingly re-induction courses were carried out to ensure that all employees were au fait with company policies and procedures. The company's policy document is not given to employees but is available to them. It is placed on the notice board in each of the company's twenty depots.

The claimant was given a drivers pack and it was impressed on him that vehicle security was of paramount importance. Company vehicles are not insured if the vehicle keys are left in the vehicle when it is unattended. Serious misuse of a company vehicle is considered by the company to be an act of gross misconduct. The claimant was furnished with a contract of employment which contained details of the company's disciplinary procedures, but he did not sign this contract. The claimant received an induction course on the commencement of employment and the duration of that course was 1.5 hours.

The next witness gave evidence that he commenced employment with the respondent company in 2006 and that he is the general manager of the Dublin depot. He carried out an investigation into the theft of the claimant's company vehicle on 23 October 2008 which had been stolen the previous day. The claimant had completed nine deliveries and one collection prior to the theft of the vehicle at 12.35 pm on 22 October 2008. The vehicle was a 7.5 ton vehicle and normally carried eight standard sized pallets. It was carrying 60% of its capacity on the day it was stolen. The claimant left the depot in the company vehicle on the morning of 22 October 2008 at 7 am and the vehicle was carrying goods valued at €20000.00. The vehicle was valued at €15000.00. When the vehicle was recovered there was no damage to the vehicle but goods to the value of €200.00 had been stolen from the vehicle.

Under cross examination the witness confirmed that the claimant was very reliable and a good worker. The company never had any difficulties with the claimant's work performance prior to the incident on 22 October 2008 concerning the company vehicle. The witness interviewed the claimant as part of the investigation and did not interview any other person. The claimant left the vehicle's keys in the ignition unattended and this action amounted to gross misconduct. The claimant was offered representation at the investigation meeting but declined the offer. Following the conclusion of the investigation the witness reported his findings to the Human Resources department and this concluded his involvement in the investigation.

The Director of Retail of the respondent company gave evidence that he was asked to carry out a disciplinary hearing into the incident involving the theft of the claimant's company vehicle. He has 44 years experience in the industry and has held senior management positions for 40 of those years. He has chaired 4 disciplinary hearings previously while working for the respondent. He was satisfied that the claimant knew the seriousness of the situation as he was an experienced driver and all drivers are aware that security is of paramount importance in the business. The claimant admitted to leaving the keys in the ignition of the truck and the witness based his decision on what occurred on the day of 22 October 2008. He came to the conclusion that the correct sanction to impose was dismissal because of the inherent dangers involved in leaving the keys in the ignition. He took into account the whole safety aspect and concluded that the offence was so serious that it was a dismissable offence.

During the course of the investigation he focussed on the seriousness of leaving the keys in the unattended vehicle. He told the Tribunal that the value of goods stolen from the vehicle was in the region of €3000 but this was not the primary concern. He focussed on the concept of what

happened and what could have happened arising from leaving the keys in the vehicle. He did not consider any other form of sanction. The claimant was given the right to appeal the decision and exercised his right of appeal.

The next witness told the Tribunal that he is the Regional General Manager of the respondent company and he conducted the claimant's appeal hearing. He received the minutes of the disciplinary hearing and he could not understand how the assessment made by the Director of Retail was an incorrect decision. He accepted that the claimant was a good employee and a good driver. He took into account that the claimant had never previously been sanctioned but ultimately upheld the decision to dismiss the claimant.

Under cross examination he accepted that the claimant did not deliberately leave the keys in the ignition so that the vehicle could be stolen. He agreed that the claimant made no effort to conceal any of the facts from the company. He could not confirm to the Tribunal if the rear of the truck had been forced open following the theft and could not confirm if the engine had been left switched on by the claimant when he left the vehicle unattended.

Claimant's Case

The claimant gave direct evidence that he commenced working for the respondent company in February 2005. Within 3 days of commencing his employment he was working on his own delivering goods from his company vehicle. On 22 October 2008 he went to the depot and from there made his first delivery in Dundalk. A pallet of goods was incorrectly loaded on the vehicle and this caused a delay for him. He made a further delivery and a collection in Dundalk and went onto Drogheda where he made further deliveries. His next delivery due was a small delivery in Balbriggan and these goods were in the cab of his truck. He was behind schedule at this stage as he was due to make a delivery in the Naul between 1pm and 2pm and had further deliveries to make in the afternoon. He arrived in Balbriggan at 12.40 pm and made his delivery which took less than 5 minutes. He left the keys in the ignition of the truck when he made his delivery and when he returned his truck was gone.

He immediately contacted the company and the Gardai. When the Gardai arrived at the scene he helped them search for the truck. The searched the immediate area around the M1 motorway and returned to Balbriggan at 1.20 pm. He then continued searching around the Balbriggan area on his own. At 2pm he found the truck in Balbriggan and informed the Gardai. The rear of the vehicle was wide open and the Gardai arrived and inspected the vehicle. The vehicle was then taken to a garage and he eventually drove the vehicle back to the depot at 9pm. He went to work the following morning and made some deliveries. In the afternoon he was asked to make a statement about the incident of the previous day. He made a statement and was suspended on full pay pending the outcome of an investigation.

Under cross examination he confirmed that he received a drivers pack on commencing employment with the respondent. This pack contained basic accident information. He also confirmed that he attended a re-induction course in November 2007 in relation to the drivers handbook and the company's standard operating procedures. He could not recall if a slide was shown on that occasion in relation to vehicle security. He accepted that drivers were sometimes followed by other company drivers as part of the company's safety and security measures.

He agreed that the theft of his company vehicle on 22 October 2008 was a serious issue. He knew that he had done something that was not absolutely right but he did not deliberately leave the keys

in the ignition. He accepted that it was wrong to do so and it was a terrible mistake. He was not thinking of the possible consequences when he left the keys in the ignition. Since his dismissal he has applied for work with many different companies. He has also registered with FAS. He has only worked for 3 months since his dismissal and received €500 per week for that work.

Determination

The claimant commenced working with the Respondent as a delivery driver in February 2005. His work involved distributing and collecting parcels to/from various businesses.

The company never had any difficulties with the claimant's work performance prior to the incident on 22 October 2008 when, during a course of a delivery to a business premises, he left the keys of the company vehicle in the ignition resulting in the vehicle and its contents being stolen.

The Respondent instituted disciplinary proceedings and concluded that claimant's action amounted to gross misconduct and, after a disciplinary hearing, dismissed him from his position. The respondent was satisfied that the claimant knew the seriousness of the situation as he was an experienced driver and all drivers were aware that security is of paramount importance in the business.

The respondent came to the conclusion that the correct sanction to impose was dismissal because of the inherent dangers involved in leaving the keys in the ignition while accepting that the claimant did not deliberately do so. The respondent took into account the whole safety aspect and concluded that the offence was so serious that it was a dismissible offence.

During the course of the investigation the respondent focussed on the seriousness of leaving the keys in the unattended vehicle which led to it being stolen. While the vehicle was recovered with minimal damage conflicting evidence was heard from the respondent concerning the value of goods stolen from the vehicle. The General Manager told the Tribunal that the value of stolen goods was €200 whereas the Director of Retail who carried out the disciplinary hearing told the Tribunal the value of the stolen goods was €3000. The respondent's position was that the value of goods stolen from the vehicle was not the primary concern but instead focussed on the concept of what happened and what could have happened arising from leaving the keys in the vehicle. The Tribunal notes that no other form of sanction was considered by the Respondent.

The claimant was given the right to appeal the decision and exercised his right of appeal to the Regional General Manager (RGM). While the RGM took into account the fact that the claimant was a good employee and a good driver, having never being previously sanctioned, nevertheless he upheld the decision to dismiss the claimant.

At all stages the claimant admitted leaving the keys in the ignition and that it was a "terrible mistake" to do so.

The Claimant was dismissed for gross misconduct and the Tribunal notes that he did not receive any previous warnings. It is not possible to provide a list of the types of conduct which will be judged by the Tribunal as being so serious as to justify dismissal without prior warnings. A list will depend on such factors as the nature of the work involved and the level of responsibility of the Employee in question. Misconduct must be measured in the context of the Employee's act not just its consequences or potential consequences to the Employer. The reasons for the act have to be evaluated and put into the context of his Employment and responsibility. It is well established that each case of unfair dismissal must be judged on its merits and what may justify dismissal in one situation may not in another. The role of the Tribunal is not to establish an objective standard but

to ask whether the decision to dismiss came within the band of responses a reasonable Employer might be expected to take having regard to the particular circumstances of the case.

The Tribunal accepts that the negligent act of the claimant was serious and that the consequences could have had serious repercussions for the Respondent.

Did the Respondent's action in dismissing the Claimant for gross misconduct arising out of this incident come within the band of responses a reasonable employer would have taken having regard to the particular circumstances of the case? As regards the fairness or reasonableness of the sanction – that is to say dismissal, the Tribunal gave the matter grave and anxious thought. The Tribunal determines that a reasonable employer would not have dismissed the claimant for the claimant's serious, though unintentional, act. A reasonable employer would have taken the claimant's previous unblemished record into consideration and considered a less serious penalty.

The Tribunal does not accept that the penalty of dismissal was proportionate to the misconduct. The task of the Tribunal was not to consider what sanctions the Tribunal might impose but rather whether the reaction of the Respondent and the sanction imposed was a reasonable course of action for the Respondent to take in the circumstances.

The Tribunal takes the view that the respondent's treatment of the claimant was not how a reasonable employer would treat an employee in the circumstances. For all the reasons set out herein the Tribunal determines that the claimant's dismissal was unfair. However the Tribunal also takes the view that the claimant contributed significantly to his dismissal.

The Tribunal determines that compensation is the appropriate remedy and, taking account of the contribution made by the claimant to his dismissal, awards the claimant compensation in the amount of €26,500 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

