EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
EMPLOYEE - **claimant**

CASE NO.
UD1182/2008
RP1015/2008

MN1091/2008
WT483/2008

MN1091/2008

WT483/2008

Against

EMPLOYER – **respondent**

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr. G. Phelan
Dr. A. Clune

heard this claim at Ennis on 23 February

and 28 & 29 September 2009

Representation:

Claimant: Mr. Gearóid Howard, Crimmins Howard, Solicitors,
Dolmen House, Shannon, Co. Clare

Respondent: Mr. Loughlin Deegan, IBEC, Confederation House,
84/86 Lower Baggot Street, Dublin 2

(*The evidence of this case was heard with the assistance of a Tribunal appointed interpreter***)**

The determination of the Tribunal was as follows:

At the outset the claims under both the Redundancy Payments Acts, 1967 to 2007 and the Organisation of Working Time Act, 1997 were withdrawn.

Respondent's Case

The claimant, a skilled electrical winder, was recruited from India by the respondent in 2001 to work in their specialist business manufacturing and refurbishing electrical motor parts for the aviation industry. Every job is unique and requires a work instruction as well as drawings. The documentation is in English and a work instruction could run to around 15 pages. Because of the nature of the aviation industry, the work is done to a high standard and the workers sign off on completed work. Thus, a high standard of trust is reposed in the workers. The claimant, like other workers hired from India, was interviewed over the telephone to ensure that he had the required language skills. After his recruitment, English courses are made available for those wishing to attend them.

The claimant was placed on light duties for a time in 2006 due to an injury. He was promoted through the respondent's grading system four or five times before the incident that led to his dismissal. At each promotion the respondent was satisfied that the claimant's level of English language skill was adequate for the completion of his duties. The claimant trained other employees through the medium of English. In 2007 the claimant acquired a taxi licence and began to drive a taxi. This was with the respondent's approval as long as it was not done during the claimant's normal working hours. He displayed his business card in the workplace. The claimant obtained the PSV licence, in order to drive a taxi, through the medium of English.

On 17 April 2008, the claimant went on sick leave suffering from an infected hand resulting from a non-work related injury. The respondent operates a sick pay scheme whereby the first three days of absence are unpaid. The respondent's disciplinary procedures, sick pay procedures and grievance procedures are on the company intranet to which the claimant had access on a daily basis. The sickpay scheme includes a provision whereby, if abused, it could result in dismissal. After three days on sick leave, the claimant received sick pay.

It is the respondent's position that on 25 April at around 2.00pm the Production Manager (PM) saw the claimant in his taxi, queuing in the local taxi rank for around 25 minutes and eventually picking

up a fare. On Monday he informed the Plant Manager (AM) and the HR Manager (HRM). On the morning of 29 April 2008, the claimant was still not at work and PM along with AM went to the town centre where they saw the claimant in his taxi queuing in the taxi rank for around 45 minutes but when he was near the front of the queue he left. PM and AM returned to the town centre that afternoon where they again saw the claimant in his taxi queuing in the taxi rank and when he got to the top AM approached him and he confirmed to AM that he was taking a fare. The three occasions on which the claimant had been observed working were during his working hours. The claimant was invited to an investigative meeting on Thursday 1 May 2008.

At the meeting on 1 May 2008 the claimant was represented by his union representative (UR) and AM, PM and HRM were present on behalf of the respondent. AM explained that they were there to conduct an investigation into something that the company considered "a serious breach of company policy". When AM put the events of the afternoon of 29 April to the claimant he replied that it was boring at home, that he had been to the doctor on 28 April and he had told him that he could do light work. When the two earlier incidents were put to the claimant (one being Friday 25 April which was prior to his alleged visit to his doctor) he initially denied them. PM had no doubt thatthis answer from the claimant was not true and that the claimant had been working in his taxi on theFriday. When the details were put to the claimant a second time he admitted to them andapologised. AM explained that the breach ranked as the second most serious breach of companyrules in the history of the company. The first time PM saw the claimant's medical certificate of fitness to return to light duties was on Thursday 1 May 2008 when he came to the meeting. Theclaimant did not indicate that he had a problem understanding English, or express dissatisfactionwith the timing of the meeting nor ask for more time. He raised no complaint about the meetingbeing conducted in English.

A disciplinary meeting was held on 6 May 2008 with the same people present. HRM read the minutes of the previous meeting to which the claimant replied "O.K." AM explained that the April investigation had taken place because the company had received unconfirmed reports that he had been seen driving his taxi during an earlier absence in January 2008. AM then outlined that this breach constituted gross misconduct and a flagrant disregard for company policy. The claimant was given an opportunity to make any additional comment. The claimant proposed that he could work without pay as a penalty. AM afforded the claimant a further opportunity to speak to his case.

After the second meeting PM came to the view that there had been a breakdown of trust, which is so vital in the particular employment. The dismissal of the claimant was confirmed to him by letter dated 8 May 2008, which was opened to the Tribunal. The European Manager and the Financial Controller conducted the appeal on 28 May 2008 and at this stage the claimant, who was accompanied by UR and a union official, brought an interpreter with him. The appeal was unsuccessful.

PM confirmed that on 25 April 2008, he saw the claimant in his cab in a queue of taxies adjacent to the public car park at the local town centre. He was aware that working while on sick leave was a serious breach of the respondent's policy which could result in dismissal. However, he did not warn the claimant that he could be fired for working while out on sick leave from the company because it never came up in conversation. The decision to dismiss the claimant was the "collective decision" of the three managers who had been present at the meetings of 1 & 6 May.

PM agreed that he had been the whistle-blower in reporting the breach of the respondent's procedures, and he had also been part of the investigation team into the breach and he had been on the committee that decided to dismiss the claimant. PM had not called the claimant in after 25 April

because he had wanted to investigate the matter further. He had no doubts however about what he had seen on 25 April 2008 in the local town centre.

The option of dismissal was considered because the breach of being on sick leave and earning an income working in one's own business at the same time was very serious and a gross abuse of the respondents' procedures. Such behaviour could not be encouraged but the dismissal of the claimant had not been done as an example for others.

Claimant's Case

In coming to Ireland, the claimant had to apply for a visa. However, his brother who is also employed as a winder completed the visa application form for him, as he did not understand it. His brother also assisted him in another job application, and his Curriculum Vitae was created for him with the assistance of another person.

There were about seven other Indian nationals employed by the respondent when he commenced his employment and he received help from these others on how to do things. The respondent provided no induction when the claimant commenced employment with them. He received the respondent's rulebook, which he just kept but did not read. The book was in English only.

A computer was given to the claimant at his work desk three or four years after his employment commenced. A log on/off facility and the respondent's procedures were on the computer. Though the claimant could read all of the information on his computer, he did not understand all of it. From his experience, he had no difficulty with drawings or measurements but if he got stuck, he asked others for help.

The claimant was promoted four times within the respondent's organisation. He had been told during these promotions that English was a problem for him. The claimant's last review had been in 2004 and was completed by PM and HRM. He was told that the respondent was happy with how he was doing his work but that his English needed to improve. He was sent to do an English course for which he received a certificate.

At the meeting on 1 May 2008, the claimant gave two answers about the allegation that he had been driving the taxi on 25 April 2008. Initially, he had denied that he had been driving on that date but when the respondent had put pressure on him and said that all they wanted from him was a "yes", he had agreed that he had been driving. However he had only driven his taxi on 29 April. The claimant had been helped by a union representative at the meeting on 1 May 2008. He had not been warned that he could lose his job over the driving incident. After the picture had been taken of him driving his taxi, the claimant knew that he was in trouble but he had not known that it would go as far as being dismissed from his job. It was at the meeting that he felt he could lose his job and so had apologised.

A friend who already had a PSV taxi licence helped the claimant prepare for the PSV examination. The friend explained the types of questions that might be asked. On the day of the examination, the claimant gave all of the information that he knew and he got help in relation to the questions that he could not answer. He could see what the other applicants had written. People from his country always help each other. The claimant was aware that if he did not complete that examination, he would fail. He did not see the PSV question paper in advance of doing the examination.

The claimant confirmed that AM had told him three times at the meeting on 1 May 2008 that

working while on sick leave from the respondent was a serious issue, but he was not told what the outcome of the process could be. He agreed that at the meeting, he had admitted to driving his taxi only on 29 April 2008 but he had only been driving for an hour on that day. He had also admitted at the meeting to driving on the previous Friday but only because he had been put under pressure to answer "yes" or "no" and had not been given a chance to think about it. When put to the claimant that there had been a recess during this meeting and he had been given the opportunity to change his story, he contended that the only day that he had driven his taxi was on 29 April, the day the photograph was taken of him in his taxi. The claimant agreed that there had been a recess during the meeting during which he had stayed in the room with his union shop steward.

On 8 May 2008, the claimant was informed that he was being dismissed with a goodwill payment of four weeks pay. This was not a meeting and he was just informed of the decision, the letter of dismissal dated 8 May 2008 being read to him. The claimant confirmed that, on 8 May 2008, he had not indicated that he had not understood or asked for the assistance of an interpreter.

Determination:

The Tribunal is satisfied that the claimant's competence in the English language was more than adequate for him to be able to participate in the investigative and disciplinary meetings and to respond to the allegations against him.

The function of the Tribunal is not to substitute its decision for that of the employer. Its function is to determine whether in all the circumstances the employer's decision to dismiss was reasonable or whether the decision came within the band of reasonable responses of the reasonable employer. The Tribunal is satisfied that it was reasonable for the respondent to conclude that the claimant was driving his taxi for reward on both 25 & 29 April 2008. This was at a time when the claimant was on certified sick leave and in receipt of sick pay from the respondent. In such circumstances it was reasonable for the respondent to conclude that the bond of trust with the claimant had been broken so as to justify his dismissal. In all the circumstances of this case the Tribunal is satisfied that the sanction of dismissal comes within the band of reasonable responses of the reasonable employer.

The claimant complained that he had not been informed that the disciplinary action could lead to dismissal. The respondent's sick scheme provides that abuse of the scheme will be subject to disciplinary procedures up to and including dismissal. The claimant utilised the sick scheme and was on notice of this clause in the scheme. At the meetings on 1 & 6 May 2008 management made clear to the claimant that it was considering his breach to be serious and in the disciplinary meeting it informed him that it constituted gross misconduct. The claimant was told the charges against him and given more than one opportunity to answer those charges. In all the circumstances the Tribunal does not find that the dismissal was procedurally flawed.

Accordingly, the dismissal was not unfair and the claim under the Unfair Dismissals Acts, 1973 to 2007 fails.

As this was a conduct based dismissal the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN