

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

EMPLOYEE – claimant

UD1518/2009
MN1512/2009

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: Mr P Hurley

Members: Mr T L Gill
Mr T J Gill

heard this claim at Loughrea on 1st July 2010

Representation:

Claimant(s): Mr Michael Kilcoyne
Sectoral Organiser, SIPTU
Galway No 1 Branch, Forster Court, Galway

Respondent(s): In person

The determination of the Tribunal was as follows:

Respondent's Case:

The HR Director (HRD) for the respondent company, a car tyre and servicing company, gave evidence that he was contacted by their contracted security firm to inform him that one of the company's premises in Galway was being opened out of hours. This was happening on a regular basis between November 30th 2008 and January 26th 2009. The security firm provided a written breakdown of the alarm being deactivated and reactivated. The deactivated periods ranged from twenty-six minutes to over six hours. The HRD then got the reports from the tracking systems installed in their company vehicles. The claimant's vehicle reports matched the times in the security reports.

The HRD went to meet the claimant in the Galway branch on February 24th 2009. He showed him

the sheets containing the reports. The claimant initially denied that it was him and then said that he was getting tools. The claimant said the HRD had the facts. The HRD gave the claimant a letter dated 24th February 2009, which stated that he was suspended with pay from that day and that he was to attend a disciplinary meeting on February 27th 2009. It stated that the purpose of the meeting was to “put before you the findings of our investigation in relation to the allegation that you have engaged in gross misconduct. In particular that you have been repeatedly on our premises without permission.” The letter stated that a possible outcome was dismissal and stated that a copy of the disciplinary policy was enclosed.

The claimant attended the disciplinary meeting with his trade union representative. The witness went through all of the deactivation and reactivation times and the vehicle tracking sheets. The claimant admitted it. He apologised and said it wouldn't happen again, but never explained why he was on the premises. His representative said that the company did not have proof that the claimant was on the premises. After the meeting the HRD decided to dismiss the claimant. He wrote to the claimant on March 4th 2009 and informed him that he was being dismissed for gross misconduct with immediate effect. No appeal was made.

The witness contended that all employees get a copy of the disciplinary procedure on commencement.

During cross-examination the witness stated the claimant had been employed for 1½ years and that there was no problem with his performance. His role was repairing vehicles and after hours repairs. He could take the vehicle home with him. The company provided heavy tools for fixing trucks, but the employees provided the rest. Employees had their own toolboxes. The claimant was a key holder in the event that he needed to access the premises to carry out the mobile breakdown service, but the occasions cited were not part of the job. To his knowledge nothing was taken from the premises. There is no CCTV installed on the premises.

The witness stated that on February 24th 2009 he went to the branch and asked the claimant for an explanation. He told him that he was suspended with pay and later posted the letter to him. He contended that he had enclosed the disciplinary procedure. The disciplinary procedure did not specifically state that entering the premises without authorisation was gross misconduct. The claimant's right to appeal was not stated in the dismissal letter, but it was contained in the disciplinary procedure.

The claimant never explained to the witness that he was entering the premises to collect his tools so that he could work down the road for his friend in the evenings. Neither did the claimant put forward that the manager of the premises had given him permission to come on to the premises after hours. When the witness spoke to the manager he was surprised and didn't know why the claimant was there.

The witness did not know if the claimant was replaced. The company has 200 employees. He denied that he took the opportunity to reduce staff numbers.

Claimant's Case:

The claimant gave evidence that he worked for the company for 1½ years. He bought his own tools when he started. The company gave him a toolbox, which he paid for over time. It was a large box on wheels. He repaired vehicles and responded to breakdown calls. Usually his van was fully

loaded but sometimes he had to go to the premises to get tools.

He sometimes helped his friend who had a panel beating business a couple of hundred yards down the road. He went to the premises and took his tools to his friend's garage. He could see the respondent company's premises from there and so he left the alarm off while he worked at his friend's place.

On February 24th 2009 his manager told him that the HRD wanted to speak to him. The HRD asked him if he opened the premises and he said no. The HRD said he had proof and showed him the sheets. The claimant then said yes that he came to get his tools. When the HRD asked him if he had opened the premises he thought that he meant was he working on the premises. When he was shown the sheet he said yes, he opened the premises to get tools. He knew the van had tracking. The HRD then handed him the letter. He did not receive it by post. The disciplinary procedure was not enclosed. The HRD told him that he was suspended and that he could go home.

He apologised at the meeting on February 27th because the trade union representative who represented him at that meeting told him to.

He told his manager that he was going to take his tools in the evening. He contended that he told him every time he did it. He contended that he told the HRD at the first meeting that he went to the premises to get his tools.

During cross-examination he confirmed that he did not clarify with the HRD that the manager was aware of him getting his tools in the evening. He explained that he would go to the premises and take a drawer of tools from his toolbox and carry it to his friend's premises to use and then bring it back. The claimant gave evidence of his loss.

A witness for the claimant gave evidence that the claimant came to him one day in a shocked state and showed him a letter. He came to him for assistance in reading the letter, as his English was not fluent. He said that the letter had been given to him. Only the letter was enclosed, there was no disciplinary procedure enclosed. He put a post-it on the letter, which he had dated February 24th 2009.

Determination:

The Tribunal finds that the procedures used to dismiss the claimant were clearly defective in that the letter of 24th February 2009 informing him of his suspension and of proposed disciplinary proceedings was dated on the same day that the claimant was confronted by the HRD.

The Tribunal is strengthened in this view by the conflict of evidence regarding the delivery of this letter to the claimant. The company states that this letter was posted enclosing the company's disciplinary procedure. The claimant states that the letter was hand delivered on February 24th 2009 and did not contain a copy of the disciplinary procedure. An independent witness gave evidence that on the day the letter was hand delivered to the claimant that the claimant came to him for informal advice and that the letter did not contain a copy of the disciplinary procedure.

There are, however, anomalies in the claimant's case which tend to substantially qualify or mitigate against the unfairness of the procedures. These are the absence of two witnesses, the claimant's friend who ran the panel beating garage and the manager of the company's premises and, in

addition the failure of the claimant to claim, when initially confronted or at follow-up meetings, that his presence on the premises after hours was authorised by the manager.

Taking the claimant's conduct into account the Tribunal considers that a fair award, under the Unfair Dismissals Acts, 1977 to 2007, to overcome the defect in procedures is €2,000 (two thousand euro). Accordingly the Tribunal awards the claimant €474.64 in respect of one week's notice under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)