

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:  
EMPLOYEE – *appellant*

CASE NO.  
UD1297/2009

appealing the recommendation of the Rights Commissioner in the case of

EMPLOYER – *respondent*

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. J. McGovern B.L.

Members: Mr. F. Cunneen  
Mr. P. Trehy

heard this claim at Dublin on 31 May and 1 June 2010

Representation:

Claimant: Mr. Dessie Robinson, Assistant General Secretary IMPACT, Nerney's Court,  
Dublin 1

Respondent: XXXXXXXXX

The determination of the Tribunal was as follows:-

This case came before the Tribunal by way of the employee appeal of the recommendation of the Rights Commissioner reference number r-063965-ud-08/RG

#### **Respondent's Case**

The respondent's representative informed the Tribunal that the appellant was dismissed for misuse of a vehicle; failure to notify HR of an incident and breach of confidence and trust of his employer.

The area maintenance manager gave evidence. The claimant was a member of a crew that did steel shuttering for which he was the allocated driver for a specific van. The respondent's policy is that drivers do not swap vans. He received a copy of the respondent's Drivers' Handbook. Handbook. On a previous occasion the misuse of a vehicle had resulted in the dismissal of a driver and this was widely known by drivers.

On 26 July 2007 at lunch time the claimant took a van allocated to another driver. The claimant was not authorised to use this vehicle. The van was not a spare because there was no spare van. At 3.30pm the allocated driver of the van reported that his van was missing. The claimant had not returned and the area maintenance manager phoned him on his work mobile phone. The phone was not answered. He went out to look for the claimant because he was worried that the claimant might have had an accident. He was considering phoning the gardaí. Between 6.45 and 7.00pm two unmarked garda cars from the national drug squad arrived at the depot with a warrant to search the claimant's locker. The claimant was in custody and the van, together with the equipment in the van, had been impounded as evidence. The van and the equipment were detained by the gardaí until February 2010 and the Council had to expend some €19,000 in the meantime to replace them. The gardaí spoke to the area maintenance manager and to the depot manager. The next morning the gardaí returned and spoke to the claimant's colleagues. The gardaí indicated that there had been a quantity of drugs found in the van.

On 2 August 2007 the claimant arrived for work accompanied by his solicitor. The area maintenance manager suspended him with pay pending an investigation into the taking of the vehicle. He asked the claimant where he had been for the week. The claimant offered no explanation for his week away from work. His solicitor advised him to say nothing.

The area maintenance manager phoned the senior executive manager and informed him that he had suspended the claimant. Later when a new senior executive manager was employed he briefed him on the events.

It was a requirement of the respondent's code of practice that the claimant informed the respondent if he had been charged with an offence but this was not done. However, the area maintenance manager accepted that following the visit of the gardaí the respondent knew about the allegations.

The senior executive officer gave evidence. He took up the role on 1 October 2007. His remit was to establish the facts of the incident and write a report and HR would then decide on disciplinary action if it were required. The senior executive officer got a report from the area maintenance manager and from the Gardai. He also met with the claimant and his representative on 9 October 2007 wherein the claimant indicated that he understood he could take a vehicle in the manner he did. He did not interview the claimant's colleagues. The senior executive officer reported to the HR executive manager and recommended that the claimant be dismissed. The senior executive officer was not involved in the disciplinary process.

The personnel executive gave evidence. The respondent's disciplinary policy was drawn up in consultation with the unions and every member of staff receives a copy of the disciplinary policy. It was drawn up to be fair and reasonable. The actions listed under the heading Gross Misconduct are intended only as examples. The respondent also has a code of conduct that is given to all members of staff. The respondent is a large organisation and the members of staff are the respondent's public face. Many staff members have access to vulnerable people and to their homes so it is essential that they are trustworthy.

She learned of the incident from her assistant when she returned from holidays. She read the report of the senior executive officer and she spoke to him about the incident. Then she wrote to the claimant on 6 November 2007 telling him that the senior executive officer recommended his dismissal and had three grounds for his dismissal. The claimant was invited to attend a meeting under the disciplinary policy on 14 November 2007. The claimant was advised to bring a

representative to the meeting.

The meeting with the claimant was held on 21 November 2007. At the meeting the claimant did not say much. He spent a lot of the time staring out the window. The personnel executive felt that the claimant was given every opportunity to explain what had happened but was frustrating the case by not engaging with the respondent. Eventually the claimant said that he did not feel that he had misused the respondent's property by taking a van to go to the shop to buy lunch. He took the van nearest the gate. Section 12.1 of the code of conduct required the claimant to report the matter to a personnel officer if he was charged with a criminal offence. He said that he had phoned the area maintenance manager however there was no record of such a call. The claimant did not respond to the question of breach of confidence. The personnel executive did not place any restrictions on the meeting and she felt that she gave the claimant every opportunity to explain the incident. The claimant did not cooperate.

Following the meeting the personnel executive considered all the reports. She made the decision to dismiss the claimant but did not make that decision lightly. She issued a letter of dismissal on 3 December 2007 wherein she informed the claimant that he had a right to appeal her decision.

The HR executive manager gave evidence. She received the claimant's letter appealing the decision to dismiss him and an appeal meeting was held on 10 January 2008. An assistant accompanied her; and his union representative accompanied the claimant. She explained to the claimant that it was the final stage of the procedure and that it was important for him to explain what had happened in circumstances where one of the respondent's vans was impounded and the claimant had been missing from work for a week. The claimant said that his solicitor had advised him not to say anything. She felt that the respondent was entitled to an explanation but the claimant was not forthcoming. The claimant's representative said that he had phoned the area maintenance manager but the area maintenance manager said he did not receive the phone call. The claimant gave no reason for the respondent to maintain trust in him. The HR executive manager gave evidence that she felt that the appeal was conducted so as no restrictions were placed on the claimant in relation to the issues raised but the claimant did not raise any new information or even engage meaningfully with the process. On cross-examination she rejected the idea that she was not an objective party. There had been no discussion between her and the personnel executive in relation to the appeal.

The HR executive manager upheld the decision to dismiss the claimant following the appeal hearing. She sent a letter to the claimant to inform him of her decision on 4 March 2008.

A van driver gave evidence. He had worked in the same depot as the claimant. The van taken by the claimant had been allocated to him. It was generally known that he drove that particular van. At lunchtime the keys were put in a security box. At the time the van was taken he was in the canteen. He did not know if a colleague was sitting in the van listening to the radio. He had been given a copy of the Drivers' Handbook. He was unsure what incidents should be reported to the respondent.

### **Claimant's Case**

The claimant said that he had worked for the respondent for 9 years. Together with his regular hours he worked a considerable amount of overtime. Before the incident he had no disciplinary issues and held a good work record.

On the day of the incident he got a lift to work because his allocated van was being serviced. He went to a job away from the yard and returned to the yard at about 1.20pm. He had no cigarettes or

lunch so he told the yard supervisor that he was taking a van to go to the shop. He did not wait for the yard supervisor to reply. One of his colleagues was sitting in the van listening to the radio, so the keys were in the van. The van in question was the nearest one to the gate. It was not unusual for someone to take a van allocated to another driver. The claimant knew the driver to whom the van was allocated but did not ask his permission to take it. He had never been told not to take another van. He was aware of a driver being dismissed previously but in that case the driver took a van down the country and he did not consider this incident was the same thing. He did not go to the nearest shop because it does not have a great selection of food. The log sheet for the van was filled in with the name of the allocated driver. The claimant did not put his name on the sheet because it was only a 10-minute trip to the shop. He did not walk to the shop because it was too far.

The Gardaí stopped him at about 1.50p.m. He was surprised and shocked. He had never been in trouble before and does not have a criminal record. He had a copy of the Drivers' Handbook but he did not remember going on a course about it. He had glanced through the booklets given to him by the respondent but he was not aware that he had to report being charged. On taking the vehicle the claimant did not think he was doing anything wrong; he understood it to be common practice to take a vehicle as he did.

The Gardaí found a substance in the van. The claimant was arrested on Friday and detained until Wednesday. The van, together with the equipment on board, was impounded. When he was released from custody he phoned the area maintenance manager and asked him what he should do. He was told to come to work. He assumed that the Gardaí would have told the respondent about the incident so he did not report it himself. When he returned to work he brought his solicitor with him because he thought he was going to be dismissed. The claimant accepted that while he had been gone for a week he was in custody and not simply absent from work without a reason. The area manager knew he had been arrested and as his solicitor had told him not to talk, he kept quiet.

The claimant had been aware of the issues at all stages of the investigation and disciplinary process. He had a representative at the meetings. He accepted that he had breached the respondent's code of conduct. When asked about his lack of co-operation with the procedure the claimant said that he felt the respondent had already decided his fate. The claimant did not accept that he had used the respondent's property for personal gain because all he did was go to the shop. The claimant did not inform the respondent that he had been arrested and charged because he knew the information was passed on by the Gardaí.

## **Determination**

The Tribunal carefully considered all the evidence adduced. It is common case that the claimant was driving a van belonging to the respondent but allocated to another driver on 26<sup>th</sup> July 2007. Gardaí stopped the van and found an amount of a controlled substance in it. The claimant was arrested and the van and equipment contained thereon were impounded. The claimant was not prosecuted in relation to this incident.

The senior executive officer investigated the incident for the respondent. He recommended that the claimant be dismissed for gross misconduct. The claimant was given clear details of the grounds for dismissal and the recommendation that he be dismissed before he attended a disciplinary meeting, accompanied by his union representative. The respondent gave evidence that the claimant took the

van without permission, that he did not report the incident and did not contact his workplace for approximately a week after the incident. The respondent claimed that the level of trust and confidence required of one of their employees was gone. The van in question and the equipment contained thereon was impounded for up to 30 months at a cost to the respondent. The respondent maintained that the incident as a whole gave rise to gross misconduct on the claimant's part.

The claimant gave evidence that the taking of the van was normal course for employees in the yard.

He did not think that he was doing anything wrong. He had never been disciplined at work before and the incident of 26 July 2007 with the Gardai was a shock to him. He was aware of certain documents given to him by the respondent relating to the code of conduct. He gave evidence that he was aware of all of the issues during the course of the disciplinary process and the options available to him. He accepted that he had breached the respondent's code of conduct.

The Tribunal considers that the claimant was given the opportunity to explain what had happened and to raise any issues he chose at the meeting. The respondent is a large organisation and there is an obligation on an employee to make themselves somewhat aware of the documents provided to them relating to the code of conduct. The Tribunal accepts the evidence of the respondent that the level of trust and competence required of its employees was damaged irreparably by the claimant. The respondent adhered to proper procedures when investigating the matter and the Tribunal is satisfied that the claimant failed to co-operate with the disciplinary meeting. It was reasonable for the respondent to seek an explanation from the claimant for an incident that resulted in his absence from work for a week and in the loss of a vehicle and equipment for a longer period.

The Tribunal finds that the dismissal was not unfair. The recommendation of the Rights Commissioner is upheld. The claim under the Unfair Dismissals Acts 1977 to 2005 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)