

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:  
EMPLOYEE

*-Claimant*

CASE NO.  
UD2020/2009  
RP2274/2009  
MN1901/2009  
WT863/2009

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: Mr. D. MacCarthy S.C.

Members: Mr. J. Browne  
Mr. A. Butler

heard this claim at Wexford on 1st July 2010

### **Representation:**

Claimant: Mr. James Kavanagh B.L. instructed by O'Brien & Associates, Solicitors,  
Mill House, Henry Street, Limerick

Respondent: Mr. Brendan McCarthy, 36 Deerpark Road, Mount Merrion, Co. Dublin

### **The determination of the Tribunal was as follows:**

#### Claimant's Case:

The claimant was employed as an international lorry driver. He was suffering from a kidney infection during March 2009. On the 12<sup>th</sup> March 2009 he was delivering to a customer in England. He had been driving for a number of hours and he enquired about using toilet facilities when he arrived at the customer's premises. The claimant understood that only the customer's employees could use the toilet facilities on site. Due to the kidney infection the claimant urgently needed to relieve himself and he urinated onto pallets in the customer's yard. A supervisor observed the claimant and became irate. The claimant explained to the supervisor why he had needed to urgently relieve himself.

Subsequently, the claimant received a telephone call from Mr. S of the respondent. The claimant

was asked to attend at the respondent's office. They met on the morning of the 19<sup>th</sup> March 2009. Mr. S informed the claimant that the respondent had lost the contract with the customer due to the claimant's actions. The claimant admitted the incident and apologised for it. He also explained to Mr. S about the kidney infection and that there were no toilet facilities available to him. The claimant had not attended a doctor regarding the kidney infection but he was taking medication.

Later that day Mr. S informed the claimant that a decision had been taken to dismiss the claimant from his employment for gross misconduct. The claimant had not expected to be dismissed; he thought he would receive a verbal or written warning. The claimant gave evidence relating to loss.

During cross-examination the claimant accepted the respondent's minutes of the meeting of the 19<sup>th</sup> March 2009 to be an accurate account of what had been said between the parties. It was put to the claimant that the minutes did not state that the claimant had informed Mr. S that he was suffering from a kidney infection.

It was put to the claimant that there were toilets for his use at the customer's premises. The claimant denied this, stating he had not been allowed to use the facilities.

#### Respondent's Case:

Mr. S of the respondent was informed of the incident. The customer in question delivers food items to large retail outlets in England. Mr. S spoke on the telephone to the customer's Site Supervisor on the morning of the 19<sup>th</sup> March 2009. The Site Supervisor had stated that the claimant was witnessed leaving the cab of his lorry and urinating on a number of pallets that were in the yard, without asking if there were toilet facilities and that the incident was unacceptable.

When Mr. S met with the claimant on the 19<sup>th</sup> March 2009, the claimant accepted the incident had occurred and that his actions had been unacceptable. The claimant stated that he was driving for a number of hours and had needed to relieve himself. He did not inform Mr. S that he was suffering from a kidney infection. Mr. S informed the claimant that the respondent had been banned from the customer's site and that he would be informed of the respondent's decision in due course.

Later that day Mr. S informed the claimant that his actions were completely unacceptable, a health hazard and that he was dismissed for gross misconduct

During cross-examination Mr. S accepted that the pallets were exposed to the elements but he stated there was a difference between that and what the claimant had done. It was put to Mr. S that during the telephone conversation with the Site Supervisor, Mr. S had advised him that the respondent was taking disciplinary action against the claimant. Mr. S confirmed this and stated that the Site Supervisor had informed him that if disciplinary action was taken against the claimant then the respondent's other drivers could deliver to the premises.

In reply to questions from the Tribunal, Mr. S confirmed that during the morning meeting with the claimant he had stated that the Site Supervisor had been informed that disciplinary action would be taken against the claimant. Mr. S confirmed that a letter confirming the dismissal was issued to the claimant on the same date.

**Determination:**

Section 6(7) of the Act, as amended by Section 5 of the Act of 1993 provides

*Without prejudice to the generality of subsection (1) of this section, in determining if a dismissal is an unfair dismissal, regard may be had, if the rights commissioner, the Tribunal or the Circuit Court, as the case may be, considers it appropriate to do so-*

*(a) to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal*

The Tribunal is of the view that the conduct of the claimant amounted to a substantial ground justifying dismissal, but also has “regard” under Section 6(7) to the conduct of the respondent “in relation to the dismissal”. It is clear to us that the respondent had given an undertaking to its customer that disciplinary action would be taken against the claimant, and this undertaking was given before hearing the claimant’s version. Moreover, the respondent did not consider alternatives other than the dismissal of the claimant.

The Tribunal considers it “appropriate” under Section 6(7) to find the dismissal unfair. The Tribunal also notes that the claimant did not have any documentary evidence to support his contention that he was suffering from a kidney infection.

Because a “substantial ground justifying dismissal” has been shown, and the dismissal is found to be unfair only under Section 6(7) the Tribunal considers it “just and equitable having regard to all the circumstances” to make a very modest compensatory award. We award compensation in the sum of €750 under the Unfair Dismissals Acts, 1977 to 2007.

The Tribunal dismisses the claim under the Redundancy Payments Acts, 1977 to 2007, having found that an unfair dismissal occurred.

The Tribunal finds the claimant is entitled to the sum €1,589.06 (being the equivalent of two weeks’ gross pay) under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

The claim under the Organisation of Working Time Act, 1997 was withdrawn.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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