

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:**CASE NO.**

EMPLOYEE

- claimant

UD2457/09

RP1854/09

MN1615/09

Against

EMPLOYER

- respondent

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms N. O'Carroll-Kelly BL

Members: Mr. D. Winston
Mr J. Maher

heard this claim at Dublin on 24th August 2010 and 13th January 2011.

Representation:

Claimant: Mr. Marcin Szulc, Maguire McClafferty, Solicitors, 8 Ontario Terrace,
Portobello Bridge, Dublin 6

Respondent: Mr. Tim O'Connell, IBEC, Confederation House, 84/86 Lower
Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

Respondent's Case:

The respondent is a supplier of a range of construction materials including ready mix concrete. Each lorry driver is given his own lorry. Construction employees working on sites are taken through a toolbox talk on a weekly basis. The talk's main points include the speed limit within the site being 15km per hour, that all vehicles travelling within the site must have a flashing beacon, that all trucks must have reversing claxons, all vehicles must give way to pedestrians and mobile phones are not permitted when driving unless a hands-free kit is fitted.

The claimant was employed as a lorry driver. At approximately 2.40 pm on 15th January 2009 the Health & Safety Officer for the M50 construction site (PF) while parked in a lay-by witnessed a lorry driving at excessive speed. He followed the driver and had to accelerate to a speed of 80 kms

to catch up with the driver. He flashed his lights and blew his horn in order to try and get the lorry to slow down and stop. The lorry stopped at Junction 13. He spoke to the driver at the side window and asked the driver for his ID and safe pass. The driver refused to furnish them and drove off. PF gave the registration number to the safety manager for the M50 site and the project manager. He also contacted the respondent. He asked that a toolbox talk be given to employees and that the driver not be permitted back on the site. After the incident he completed an incident report.

The Health & Safety Group Manager (TR) conducts health and safety induction courses with all new employees in the company on a one-to-one basis. Each employee also receives a hard copy of the talk and signs on receipt of the booklet. In his absence his assistant conducts the courses. He explained the job, roles, health and safety. Following the induction there is ongoing interaction between management and employees. He also carries out safety audits on a regular basis.

Trucks are assigned to employees. All employees have a HGV licence. Each driver is assigned one vehicle. He will generally only drive that vehicle unless he is on holidays. The claimant signed for a copy of a toolbox talk which had been explained to him on 2nd October 2008. TR was asked to give a toolbox talk in the Tallaght and Lucan plants. On 21st January 2009 TR gave the toolbox talk to the claimant. The claimant accepted that these were the company's rules.

By letter dated 22nd January 2009 the claimant was invited to attend a Disciplinary Hearing on 26th January 2009. That letter outlined that he was allegedly driving at a speed in excess of 15 kms per hour and that the respondent viewed this as a serious breach of health and safety regulations. The claimant was afforded the presence of a representative at that meeting.

The Operations Director, (DMcK), the HR Manager (ML), the claimant and his representative DN attended the disciplinary meeting on 26 January 2009. The Plant Manager (DF) was also present in the room but took no active part in the meeting. The allegation of driving in excess of the speed limit on the M50 works site was put to the claimant. The claimant was informed that a written report and three verbal reports had been received by the respondent in relation to the incident. The claimant said he was not stopped and did not speak to anyone that day. However, both DF and TR had spoken to him in relation to the incident and he had been made aware of the seriousness of that incident. It was pointed out to him that there was a clear breach of Health and Safety Regulations.

The meeting was adjourned for approximately fifteen minutes. DMcC and ML went through the possible options available to them, considered not taking any further action but deemed that the incident was extremely serious. The claimant's response had been a contradiction to the respondent's evidence. The claimant was afforded a fair hearing. The claimant had been on both verbal and written warnings for the upkeep of his truck. When the meeting reconvened the claimant was informed that he was being dismissed and that he had a right of appeal.

By letter dated 29th January 2009 the claimant formally appealed the decision to dismiss him.

Prior to the appeal hearing Finance Director and Company Secretary (TMcC) read the claimant's file and spoke to ML, TR and DMcK. He conducted the appeal hearing on 11th February 2009. The claimant attended with his representative JM. TMcC had conducted appeal hearings before.

TMcC asked the claimant to outline his grounds of his appeal. The grounds of the appeal were that the claimant had not been stopped on the M50 site on 15th January 2009 and he was not speeding on the site and should not have been dismissed. There was agreement between them that a person

driving at that speed would be considered reckless behaviour. He reviewed matters after the hearing and conducted further investigations. He upheld the decision to dismiss the claimant. By letter dated 16th February 2009 he formally notified the claimant of this decision.

Claimant's Case:

JC who worked in the respondent company received a call from PF at approximately 16.00 on 15th January 2009. PF had stopped a truck driving at excessive speed on the M50 site and the driver had refused to give his name, safe pass and tacograph. The driver had referred him to the respondent's telephone number. JC subsequently spoke to DF at the Tallaght site. DF identified the driver of the truck as being the claimant. This driver was barred from the site. JC also contacted TR and discussed the series of events.

The claimant commenced employment on 6th September 2005 as a driver. During his tenure he had received warnings for the upkeep of his truck. He had worked on many sites and was eventually assigned to the Tallaght site. He had never received any warnings in relation to health and safety.

On 15th January 2009 he worked on the M50 site and delivered concrete there about five times that day. At approximately 5 pm that evening he received a telephone call from DF and was asked to go to his office. He was told there was an incident on the M50 site of a truck driving at excessive speed and was asked if he had driven that fast. The claimant said nothing like that happened and he had never been asked to produce his safe pass to anyone. He had been delivering concrete to the site between junctions 11 and 12. It was a very narrow stretch of road and he was aware of the speed limit of 15 kms per hour and adhered to this limit at all times. However, no signs showing the speed limit were on the road.

On 21st January 2009 the claimant was informed that he was requested to attend a disciplinary meeting on 26th January 2009 but by the following morning he had to furnish DF with the name of the person representing him. He firstly spoke to JAC who had represented other employees at hearings but he had to work. He then spoke to a colleague, DN who spoke English well who agreed to represent him at the disciplinary meeting. He was not furnished with any documents prior to the meeting and thus did not know what the meeting was about.

DMcK asked him what had happened on 15th January 2009. The claimant said nothing had occurred. DMcK tried to accuse him of speeding on a construction site and said that disciplinary steps had to be taken. The claimant contended that nothing like that had happened. At the conclusion of the meeting both he and DN were asked to leave. Approximately five minutes later they were asked to return and he was told he was being dismissed with immediate effect. He appealed that decision to dismiss him within five days.

The claimant attended the appeal hearing with his representative JM on 11 February 2009. The appeal was conducted by TMcC. The claimant contended that TMcC was arrogant and had no respect for him. TMcC only spoke to his representative. After approximately fifteen to twenty minutes TMcC told him that he was upholding the decision to dismiss him. He was formally notified in writing of this decision by letter dated 16th February 2009. With that letter copies of an incident report by PF, a site safety inspection report, a copy of his signature confirming that he received a toolbox talk on 2nd October 2008, and a copy of DF's report were attached. This was his first sight of these documents.

Following the claimant's dismissal he was in receipt in social welfare benefit and did not

secure work until 23rd December 2010. .

Determination:

The Tribunal has carefully considered all of the evidence given over the two-day hearing together with the documentation handed in during the hearing.

The Tribunal finds that the respondent's disciplinary procedures were not followed as thoroughly as they should have been. The claimant should have been given copies of the statements made in relation to the incident prior to the disciplinary hearing. That in itself is not a fatal flaw. Also, in the particular circumstances of this matter the claimant was not disadvantaged in any way by the respondent's disciplinary shortcomings. He was given details of the date, place and time of the offence and details of the offence itself. He categorically denied that it was him who was stopped on the M50 on the day in question. Based on the consistent denial of the offence none of the statements used at the disciplinary hearing would have been of use to the claimant as he stated that they related to someone else. They also contained no more information than was given to the claimant verbally prior to the disciplinary hearing. The Tribunal did not find the claimant's evidence credible.

The claimant's claim under the Unfair Dismissals Acts, 1977 to 2007 fails. The claims under the Redundancy Payments Acts, 1967 to 2007 and the Minimum Notice and Terms of Employment Acts, 1973 to 2005 also fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)+