

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

EMPLOYEE
–**appellant (employee)**

UD1944/2009

against a recommendation of a Rights Commissioner **R-072359-UD-08/PB**
In the case of

EMPLOYER
–**respondent (employer)**

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Herlihy

Members: Mr. B. O'Carroll
Mr. T. Kelly

heard this claim at Limerick on 10 February
and at Castleconnell on 26 May 2011

Representation:

Claimant: Mr. Eamonn Dillon, Michael Glynn & Co. Solicitors,
98 O'Connell Street, Limerick

Respondent: Mr. Ambrose Downey, IBEC, Gardner House,
Bank Place, Charlotte Quay, Limerick

The determination of the Tribunal was as follows:

This case came before the Tribunal as a result of an appeal by an employee (the appellant) against a recommendation of the Rights Commissioner under the Unfair Dismissals Acts, **R-072359-UD-08/PB**, in the case of an employer (the respondent).

The appellant had been employed from October 2004 as a truck driver in the respondent's metal processing operations. Essentially this involved the claimant in collecting material purchased by the respondent and delivering this material as directed by management. Some 70 to 80% of the collections made by the respondent involved delivery of the material to Limerick Docks (the docks). In March 2007 the claimant received both a verbal and a written warning following two separate incidents relating to damage at a collection site and collection of incorrect material. These warnings were both spent at the time of the incidents that led to the dismissal and played no part in

the decision to dismiss.

At around 4-30pm on 7 October 2008 the transport manager (TM) received a phone call from a general operative (GO) at the docks to complain that the appellant had been speeding along the wharf in an area where a vessel was being unloaded. GO made threats against the appellant and his truck to TM and the appellant's way was blocked by means of a forklift truck (FLT) being parked across the wharf. The appellant was still at the docks, his first and only visit of the day, when GO phoned him to tell him to complain about the appellant. The appellant's position is that GO had accused him of having been speeding all day.

A check by TM of the respondent's Global Tracking system (GT) revealed no suggestion that the appellant had been exceeding the 20kmh speed limit on the docks. TM conveyed this information to GO. TM then phoned the appellant while he was still blocked by FLT, told him of GO's complaint and told the appellant to be on his best behaviour. FLT was moved shortly after this time and the appellant completed his work for the day. A check of the tachograph of the appellant's truck confirmed that the appellant had not been speeding at the docks.

At around 11-45am on 8 October 2008 the appellant was driving along the wharf when an incident occurred whereby the elbow of a second general operative (GO2) came into contact with the door of the appellant's truck. GO2 was working with GO and is the son of the FLT driver. The respondent's position is that the appellant was not taking due care and attention when driving along the wharf and hit GO2 who was engaged in his normal activities. The appellant's position is that GO2 was some 2 metres from the path his truck was taking and instituted the incident by backing into the truck.

At around 12-45pm the supervisor from the docks (TS) phoned the respondent and told TM that the appellant was banned from the docks for speeding. When TM pointed out that the evidence showed that the appellant had not been speeding TS then stated that the appellant was banned for working in an unsafe manner. Shortly after this TS phoned again and spoke to the respondent's health and safety manager (HS) to inform her of the elbow incident. As a result the appellant was suspended with pay awaiting further investigation. HS attended the docks to take part in the investigation and as a result GO2 attended the respondent's nominated doctor on 8 October 2008 and was passed fit for work. GO2 told the Tribunal he had been shocked by the incident

The appellant's position is that he had been alert to the possibility of trouble following the incident the previous day and was driving in a very careful manner at the time of the elbow incident. Following the incident he had been subject to a barrage of threats from both GO and GO2 and for that reason he had not got out of his cab but had turned off the truck engine. It is common case that the appellant asked TM to ask the docks to check the CCTV footage of the incident. It is further the appellant's position that he also made this request of HS.

On 9 October 2008 the assistant engineer (AE) from docks wrote to HS confirming that the appellant was banned from the docks as a result of the elbow incident. HS and the general manager (GM) conducted an enquiry into the situation at which the appellant chose not to be accompanied. This was further complicated by the impact of a serious reduction in metal prices which resulted in the respondent having to embark on a collective redundancy process resulting, inter alia, in the loss of five of the respondent's 30 driving positions. The human resource manager (HR) was responsible for the implementation of the collective redundancy and was involved, along with TM, in the consideration of redeploying the appellant to a duty that would not involve him going to the docks. The respondent's position is that it was decided that as such a high proportion of their work

involves visits to the docks it was not feasible to organise the work in such a way that the appellant would not need to visit the docks.

HS and GM reported back to a director (AD) who told the Tribunal that he had approached the docks with a view to getting the appellant's ban lifted. The docks response was that the respondent was a tenant and not the landlord. On 20 October 2008 AD wrote to the appellant in the following terms

Notice of Termination of Employment

It is with regret that we inform you that your employment as driver with the respondent is to be terminated by reason of dismissal. This is effective from 16 October 2008 @ 12-30pm. Your dismissal is in accordance with company disciplinary procedures and following an investigation into all relevant facts relating to this issue. Having been banned from entering the docks area by the Port Authority, you are no longer able to perform your duties of employment and therefore your contract of employment with us has been frustrated and accordingly we have no option but to take this course of action. We have made all reasonable representations on your behalf to have this ban removed in an effort to avoid this situation.

Please note that this decision, taken in agreement by the full disciplinary panel is subject to your right of appeal to the managing director in accordance with our disciplinary policy and procedures. Be assured that this matter was not taken lightly but with due respect to you, other employees, the board and most importantly the needs of the company. All outstanding payments for wages, holidays etc will be forwarded along with your P45.

The appellant's position is that he felt he got such an awful raw deal from the respondent over being dismissed that he saw no point in appealing this decision to the managing director and no such appeal was lodged.

Determination

The respondent first became aware of a problem involving the appellant and the docks on 7 October 2008 when GO phoned TM to complain that the appellant was speeding. TM took action to ascertain that the appellant was in fact not speeding and passed this information to GO. TM then spoke to the appellant and warned him to be on his best behaviour. Whilst TM regarded the matter as closed, this was obviously not the case as the next day TS phoned TM to state that the appellant was banned for speeding even though he had not been speeding. Considering that GO made threats against the appellant on 7 October it would have been better for TM to have contacted a more senior person at the docks than GO about this incident. It is not for the Tribunal to form an opinion about the elbow incident itself. The enquiries into the elbow incident are of interest. HS, who was not able to give evidence to the Tribunal, visited the docks as a result of the elbow incident and her involvement resulted in GO2 being sent to the respondent's doctor. The incident and near miss forms compiled by AE have no version of events from the appellant's point of view yet HS must have been aware that the appellant had an entirely different view of the elbow incident. In those circumstances it is hard to understand why HS did not intercede both on behalf of her employer and the appellant. It is common case that the appellant asked TM to ask the docks to get the CCTV footage of the elbow incident. HR and AD both told the Tribunal that no such request was communicated to them in this regard. It may be that no such

footage ever existed, the fact remains that the question was never asked of the docks despite the appellant having requested it. In such circumstances the Tribunal is satisfied that the respondent failed to carry out a full and fair investigation into the totality of the allegations laid against the appellant, which led to his being banned from the docks. The respondent further sought to rely on the doctrine of frustration of contract for dismissing the appellant. The Tribunal cannot accept this explanation for the decision of the respondent to dismiss the claimant. An incident occurred during the course of the employment, which, quite properly, required investigation and could conceivably have resulted in serious sanction being imposed on the appellant. The action of the docks in banning the appellant was not a supervening event; rather it was a step in the overall process, in which the respondent should have played a greater part. For all these reasons the Tribunal is satisfied that the appellant was unfairly dismissed. Taking into account all the circumstances of this case the Tribunal determines an award of €20,000-00 under the Unfair Dismissals Acts, 1977 to 2007 is fair and equitable.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)