

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:
EMPLOYER
-appellant

CASE NO.
UD2128/2009

against the recommendation of the Rights Commissioner in the case of:

EMPLOYEE *-respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan

Members: Mr. A. O'Mara
Mr P. Trehy

heard this appeal at Navan on 20th April 2011

Representation:

Appellant: In Person

Respondent: Woods Ahern Mullen, Solicitors, 3rd Floor, Elgee Building, Market Square,
Dundalk, Co Louth

This appeal came before the Tribunal by way of an employer appeal of the Rights Commissioner Recommendation ref: r-072507-ud-08/JW. The respondent shall hereinafter be referred to as the employee and the appellant as the employer.

Appellant's (employer) Case

The employer is engaged in the service industry, supplying and collecting skips. The employee was hired as a driver responsible for collecting and delivering skips to customers. The downturn in the economy has only impacted on the construction vehicles. There are 12-15 drivers. The employee would still be in employment if not for his behaviour.

The General Manager (BMC) gave evidence that it was the practice that drivers got their instructions (dockets) in the morning, completed their assigned workload then, time allowing, returned to the premises to receive the next set of instructions. It was brought to BMC's attention that the employee was not returning to the premises after his initial workload was completed and turning off his phone rendering him un-contactable. This had a severe impact on the business as the

dispatchers were making commitments on deliveries based on the employee being available only to discover he could not be contacted. In the company Saturday shifts were operated on a rota basis. The employee refused to take part in the rota system and work on a Saturday. The employee was spoken to on numerous occasions by a supervisor and then BMC about the need to change his behaviour.

The employee was given a verbal warning regarding his behaviour. This verbal warning was confirmed in writing on the 24th of July 2008 and given to the employee with his wages, as was standard practice with all written communication from the employer. The employee was based in Cappagh County Dublin and Slane county Meath. This witness gave evidence that the warning letters were sent to the company head office in Navan and given to the employee with his wages.

The employee was given a written warning on the 18th of August 2008 regarding his behaviour, which included the statement, *'I must stress to you again that this will not be tolerated should it happen again, you will be instantly dismissed.'* The employer's issue with the employee was not the amount of hours the employee was working but his failure to return to the premises and the fact that he turned off his phone. This witness gave evidence that a further written warning "would have been given" to the employee on the 22nd of September 2008.

As the employee's behaviour did not improve and he consistently failed to return to work and turn on his phone BMC made the decision to dismiss the employee. On the 24th of October 2008 BMC spoke to the employee, outlining all the issues and that as a result of his behaviour he was being dismissed. This was confirmed by letter of the 24th of October 2008 enclosed with the employee's wages as normal. The company did not believe an investigation was appropriate as the employee's behaviour was ongoing not a one off incident.

In cross-examination BMC gave evidence that he did not personally give the warning letters to the employee and he was unable to produce a witness who actually gave these letters to the employee. It was put to him that the employee would be denying that he ever received the warning letters. BMC was unable to provide the name of the person who gave the letters and his response was that "they would have been given [to the employee] with his wages". In response to questions from the Tribunal BMC confirmed that the first warning letter was given on the 24th of July 2008 and the remaining letters were given on the 18th of August and the 22nd September 2008.

The employee's supervisor (DB) gave evidence that he had to speak to the employee once or twice a week about his behaviour as his phone was regularly switched off and he failed to return to 'base.' The employee's behaviour got so bad that DB reported it to BMC. The witness does not recall the employee informing him that the Gardaí had stopped him and asked to see his tacograph.

Respondent's (employee) Case

The employee was based mainly in Cappagh and collected his wages in Cappagh at the time when the "the warnings" were allegedly given. The employee occasionally received documents attached to his payslips but did not receive any of the warning letters. He was not aware that his job was in jeopardy. The employer had never raised an issue over his conduct or performance. On occasion DB would say things to him in the office but nothing serious enough to be construed as a warning.

The employee was stopped by the Gardaí and informed he should have a tacograph. The employee informed DB of this and it was organised to have one installed. As a consequence the employee

only worked on Saturdays if he had not reached the 55 hours allowed.

The employee received a phone call from BMC on the 24th of October 2008 where he was informed that, ‘things were slowing down and getting bad and he had to let him go.’

Determination

No direct evidence was given to the Tribunal that the warnings were given to the employee. BMC gave evidence that the warnings “would have been given to him”. The employee denies receiving any warning. The Tribunal prefers the evidence of the employee in this respect.

The employer did not follow the disciplinary procedure as set out in the employee’s contract of employment, which states,

‘in all dismissal cases a full investigation will be carried out and you will have the right to put your case and be accompanied by another staff member or appropriate representative and the right to appeal against the decision to (EW), Managing Director.’

The Tribunal is not satisfied that a full investigation was undertaken by the employer. The employee was not advised of his right to be accompanied at any such disciplinary meeting nor was he advised that he had the right to appeal.

In circumstances where the employer did not have a grievance procedure or did not follow it (as in this case) the procedures for dealing with disciplinary matters must comply with the general principles of natural justice and fair procedures, as set out in **S.I. NO. 146 OF 2000 Code of Practice Grievance and Disciplinary Procedures**, include:

- That details of any allegations or complaints are put to the employee concerned;
- That the employee concerned is given the opportunity to respond fully to any such allegations or complaints;
- That the employee concerned is given the opportunity to avail of the right to be represented during the procedure;
- That the employee concerned has the right to a fair and impartial determination of the issues concerned, taking into account any representations made by, or on behalf of, the employee and any other relevant or appropriate evidence, factors or circumstances.

The actions of the employer in this matter fall far short of what is required of a reasonable employer. Indeed Section 5 of the Unfair Dismissals (Amendment) Act 1993 provides that the reasonableness of the employer’s conduct is now an essential factor to be considered in the context of all dismissals. Section 5, inter alia, stipulates that:

“..in determining if a dismissal is an unfair dismissal, regard may be had.....to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal”.

Accordingly having considered the totality of the evidence the Tribunal is not satisfied that the

employer acted reasonably and therefore dismisses the appeal under the Unfair Dismissals Acts 1977 to 2007. Consequently the Tribunal upholds the Rights Commissioner Recommendation **ref: r-072507-ud-08/JW**.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)