EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:	**CASE NO.**
EMPLOYEE - appellant	UD520/10

against 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 P. McGrath BL

Members: Mr D. Peakin
Mr C. Ryan

heard this appeal at Naas on 31st May 2011 and 5th September 2011.

Representation:

Appellant: Mr. Gerard F Burns, Burns Nowlan, Solicitors, 31 Main Street, Newbridge, Co Kildare

Respondent: Ms. Mairead Crosby, IBEC, Confederation House, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

This case came before the Tribunal where the appellant was appealing against the recommendation of the Rights Commissioner (ref. R-074247-ud09/JT).

Respondent's Case:

The respondent is engaged in fields sales and marketing. The appellant was initially employed as a sales representative to the E account and was promoted at a later date to Business Development Manager. He was furnished with his contract of employment together with the respondent's disciplinary policy.

Staff are given a week's induction course followed by a compliance examination at the end of the course. Specific roles require a company car including the appellant's role. The employee must sign off that he his medically fit, has a full driver's licence and no more than four penalty points.

In the event of an accident the E account requires the completion of a vehicle accident report form, reporting the accident to the Line Manager and the Gardai. The appellant completed a vehicle accident report form in mid June 2008. An independent assessor completed a report on the vehicle's damage and the E account was invoiced for this in mid September 2008. There were inconsistencies between the appellant's version of events and that of the assessor and these were only brought to the respondent's attention in October 2008.

In mid October 2008 the appellant's Line Manager met with him and discussed the accident. The appellant indicated that while the car was parked at his residence it was struck by a third party vehicle resulting in significant damage. A passer by whom he knew called to the house the next morning and made him aware of the damage to his car. The appellant reported the incident to the Gardai.

There were discrepancies between the appellant's version of events and that of the assessor who said that the damage was not consistent with the accident as described by the appellant.

The assessor had 11 years experience in vehicle repairs. He was never requested to call to the scene of the accident. He was instructed by the E account to check the car at a car leasing garage. He was aware of an investigation taking place. While he received an accurate description by a member of staff in the garage he derived his own conclusions depending on how the car presented itself to him. He stepped back and took an overall view of the vehicle. His overall impression of the impact was that the front bumper was removed and there was substantial damage to the front panel driver's side. Concrete was lodged on the panel. The seat belts were in order and the airbags had not been activated. It was possible to start the ignition. The vehicle displayed no signs that it had been involved in an accident with another vehicle. As the radiator had not burst the vehicle could be driven. There was no debris. The wing liner on the wheel showed signs of melting and it suggested that the vehicle had been driven a good length for about five or ten minutes travelling at 20/25 mph. He was 100% happy with his assessment of the vehicle.

The appellant was invited to a disciplinary meeting on 21st October 2008 to discuss the allegation of driving a company car from the scene of an accident and subsequently submitting an inaccurate accident report form for same. He was furnished with a copy of his vehicle accident report form, the assessor's report and the note of his meeting with his Line Manager. He chose not to have representation at that meeting. At that meeting the appellant disputed the assessor's report. The assessor had said the bumper melted and there was no paint transfer. The appellant said he had moved the car after the Gardai had called and noted the damage. The appellant then contended thata tractor could have hit the car. The assessor's report suggested that the car had been hit by something else but the appellant denied this had happened. Scratches moved left to right. In conclusion, the appellant refuted the assessor's report. The meeting was adjourned and the respondent undertook to speak to the assessor to seek further clarification on the matter.

MB who was HR Generalist in the company at that time spoke to and sought further clarification from the assessor. The assessor was satisfied that the vehicle was not stationary. The wing liner had melted suggesting that the vehicle was driven a good distance. The scratch direction on the registration plate moved from passenger side to driver's side as with the scratches on the bumper.

The appellant attended a second disciplinary meeting on 29th October 2008 and again the appellant chose not to have representation. He disputed the additional information. His neighbour had been

building a house at that time and a concrete truck could have hit the vehicle. That meeting adjourned and the respondent again agreed to speak to the assessor.

MB contacted the assessor. The assessor responded that the vehicle was involved in a single vehicle impact. The marks, scratches and damage sustained by the vehicle were consistent with the vehicle hitting a wall. Concrete was imbedded in the front panel lower section as seen in a photograph in the original report. Due to the condition of the vehicle's wing liner, it was clear that the vehicle was then driven a distance.

The appellant attended a third disciplinary meeting on 10th November 2008 and again chose not to have representation. He again refuted the assessor's report. He still maintained a hit and run accident had occurred. He was asked to get a copy of the Garda report. The appellant said therewere skid marks outside his house.

In a letter dated 11th November 2008 DS wrote to the appellant under the company disciplinary procedure in connection with the allegation of 'damaging/writing off a company car and subsequently submitting an inaccurate accident report form for same'. The respondent deemed thisto be an act of gross misconduct by falsifying a vehicle accident report form. The appellant wasultimately dismissed. He was offered a right of appeal. As the company had delved into the investigation the information that came to light had slightly changed.

After that third disciplinary hearing the appellant e-mailed the Head of HR with new information. The appellant had been told that one of the guests at his party on 14th June 2008 had driven and crashed his car unknown to him and there were witnesses. The appellant said he had passed out at 11 pm approximately. K, a colleague had advised him to find out who had driven his car. A guest P said she saw a man driving the car but did not see him return the car.

The two witnesses were interviewed. K said that the appellant had been too drunk to drive the car. K had asked the appellant if he was sure that someone else did not drive the car. The appellant thought about it and spoke to those who had attended the party. Another witness P said she saw a man driving the car but did not see him return the car.

Restitution to the company such as a salary reduction was taken into account before the final decision was taken to dismiss the appellant.

AL is Head of HR and is in this role five and half years. She conducted two appeal hearings. Inadvance of the first appeal hearing she read through the appellant's file. The first appeal hearingtook place on 24th November 2008 with the appellant and his Line Manager present. He said hisonly defence was the garda report and asked for something in writing from the company in order toobtain the garda report. That meeting concluded with AL promising an outcome within seven days.

The second appeal hearing was conducted on 19th December 2008. AL, together with RC, HR Coordinator, National Sales Manager, JA and the appellant attended the meeting. RC, HR Co-ordinator chaired that meeting, as AL was unwell. He had secured information from the Gardai such as the date, time and location of the vehicle on the day of the accident. He had indicated that this information was important. He said someone else had been driving the car and his colleague K had told him to check this out. In his defence the appellant said he had passed out at 11 pm that night and it had only come to light the previous weekend that a friend saw someone driving the car. He said there had been glass and debris next to his car and skid marks. He had not reported this to

the Gardai but said he would do so. It was deemed to be a very serious offence. The meeting concluded. The respondent had a reasonable belief that the appellant had driven a company car from the scene of an accident.

Clause 19 of the E account asset policy clearly states that it is the responsibility of the agent to ensure that the vehicle is left in a safe and secure environment with the vehicle locked and the alarm fully armed whenever left unattended. AL deemed it to be a serious accident and was construed as gross misconduct. The appellant had declined representation at the appeal hearings and had been encouraged to bring a representative with him.

AL and JA were the decision makers on the outcome of the appeal hearing. On AL's instructions, RC signed a letter dated 22nd December 2008 indicating that the sanction of dismissal would still apply. The letter outlined that the appellant allegedly drove a company car from the scene of an accident and subsequently submitted an inaccurate accident report form for same. The sanction was final and not subject to further appeal. The appellant had falsified a report.

Appellant's Case:

The appellant commenced employment as a Sales Representative on 20th August 2007. After a short period he was promoted to Business Development Manager and was seconded to the E account. To celebrate his promotion he held a party in his house on 14th June 2008.

There are no street lights on the road where he lives and horse stables are located beside his house. At that time construction work was ongoing in the vicinity.

Fifteen people were invited to his party and they all had access to his car keys. He trusted his guests. He consumed a considerable amount of alcohol that night. He had parked his car in his driveway that evening. The following morning he discovered his car was half parked on the footpath and half on the road. Skid marks were visible on the road. His car was damaged. He drew his own conclusions that the car was damaged as a result of a hit and run. He called the Gardai who came to the scene of the accident. He informed his Line Manager the next day of the accident. He completed the accident report form on 18th June 2008. At that time no one in the company questioned his version of the accident.

The first indication he had that the company had concerns was when he received a letter dated 15th October 2008 inviting him to a disciplinary meeting on 21st October 2008. That letter outlined the allegation as follows: "allegedly driving a company car from the scene of an accident and subsequently submitting an inaccurate accident report form for same". He never believed his jobwas on the line.

The appellant duly attended the disciplinary meeting on 21st October 2008. He was questioned on the accident report form. He believed the car was involved in a hit and run accident. He disagreed with the assessor's report. The appellant contended that he did not drive the car on the night of the accident. As it was a hazard on the road he drove it back into the driveway. He believed the accident report form he completed was accurate.

He never thought he would be dismissed. It had been a very busy time at work. He was shocked when he read the assessor's report and did not believe it. He contended that he was a top performer in his team at work. His focus was on his job. He did not believe he had done anything wrong. He was happy in his role and saw himself being promoted to a higher position in the company in the

future. He believed the company had really misjudged him. He had never been disciplined before. He had worked for eleven years in management. The company failed to understand him.

By letter dated 11th November 2008 he was formally dismissed and offered a right of appeal. He appealed that decision on 17th November 2008 as he felt he had been unfairly dismissed. He was invited to an appeal hearing on 24th November 2008. He decided to carry out his own investigation and came into touch with P and K (a colleague) who were at his house party. P said she had seen somebody in his car on the night in question.

In conclusion the appellant could only say that someone had possibly gone to the shops and used his car, crashed it and left it outside his house.

Since his dismissal he has attended many interviews but was unsuccessful in securing alternative employment. In September 2010 he enrolled in a college in Dublin and has completed his first year in music management and media production.

Determination:

The Tribunal has carefully considered the evidence adduced in the course of this two-day hearing. The appellant was dismissed for gross misconduct by reason of the events, which gave rise to the "writing off" of a company car, which had been entrusted to the appellant in the course of his employment with the respondent.

In particular the company found that it had good reason to believe that the appellant had inaccurately filled in an accident report form. In reaching this decision the company accepts that the filling in of this form was deliberate falsification of the facts and not just a mistaken understanding of what had happened.

Additionally, the respondent variously relied upon the fact that the company car was "written off" and was also driven by the appellant (or another) from the scene of an accident, which involved a head on impact with a solid object such as a wall or bollard. In coming to this last conclusion the company relied on the evidence of an independent insurance assessor whose examination of the vehicle revealed that the car was not involved in a car-on-car impact but could only have been involved in an impact with a wall (evidenced by the presence of masonry on the body of the car).

Further, the assessor's report concluded that the vehicle had to have been driven a significant distance post-accident as the level of plastic melting (in the wheel arch) suggested considerable and prolonged friction which could only have occurred after the car had been driven in its post accident state for at least 10 or 15 minutes at a speed in excess of 25 miles per hour.

The company cannot fairly conclude that the appellant drove the car post accident although this allegation did arise in the course of the investigation/disciplinary process. However, the appellant does appear to have provided any one of a number of people the opportunity to take the keys to the car and drive the car on the night that the damage was done.

The appellant has given consistent evidence of the fact that on the night of the damage being done, the appellant was having a house party to which he had invited up to fifteen people. The appellant did not give permission to any one of his guests to drive his car though accepts the premise that the

keys were readily available to any one of the guests to take and use.

The appellant has no recollection of the events of that evening insofar as they related to the car. The evidence has always been that on the morning after the party he only then realised that significant damage had been caused to his car. To his credit the appellant called the Gardai and as soon as reasonably practicable notified his place of work of the damage.

In the course of his evidence before the Tribunal the appellant indicated that at the very least he knew that the car was in a different position on the morning after the party than it had been on the night before. The appellant indicated that he had left his car in the driveway but that he then found it in an extremely damaged condition on the roadway in front of his home.

For reasons which have at no time been satisfactorily explained the appellant did not initially detail the fact that he knew the car had been moved overnight and in fact he formed the impression that the car had been the victim of a hit and run in that stationary position outside the house. This was the basis of the accident report form that he submitted to his employer, as was his obligation under the terms of his employment.

The appellant's explanation as it now stands for what happened that night is that a guest in his home took his car, wrote it off and then returned the car to the front of the appellant's home and put the keys back. This may seem a possible explanation but one which the company could have had no inkling of based on the initial accident report form which failed to indicate the presence of persons at the appellant's home any one of whom might have taken the car.

The Tribunal finds that the appellant could have been in no doubt as to the seriousness of allowing a car (having a value of up to €14,500.00), which was in his care to be written off. The E account's asset policy clearly states that a serious accident which can be construed as gross misconduct could result in termination of employment and the letter inviting the appellant topartake in a disciplinary process dated 15th October 2008 clearly states that any disciplinary actionwhich might be taken may include dismissal.

The appellant's legal representative quite fairly points to the fluidity of the allegations being made against the appellant. In addition to the allegation that the accident report form was inaccurate, the company also alleged at different stages that the appellant had driven the car from the scene of an accident and/or had written off the company car. In addition, the respondent ratchets up the allegation to falsification of a company document in the body of its letter of 11th November 2008,which confirmed the post disciplinary dismissal.

However, the Tribunal cannot on balance find that the appellant's explanation stands up to scrutiny and the appellant had a company asset of some considerable value, which was destroyed whilst in his care.

The Tribunal does accept that there were some technical flaws to the disciplinary and appeals process however these flaws do not impinge on the overall reasonableness of the outcome of the process. The appellant's actions amounted to gross misconduct and the relationship of trust between employer and employee was irreparably damaged.

The Tribunal affirms the recommendation of the Rights Commissioner under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)