

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

EMPLOYEE

- *claimant*

CASE NO.

UD1895/2009

RP2137/2009

MN1784/2009

WT793/2009

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 M. Gilvarry

Members: Mr. D. Morrison
Mr M. McGarry

heard this claim at Castlebar on 18th November 2010
and 2nd February 2011

Representation:

Claimant: Alan Ledwith BL instructed by T. Mullan & Co., Solicitors, Bowgate Street,
Ballinrobe, Co. Mayo

Respondent: Michael G Bohan & Co, Solicitors, 7 Teeling Street, Ballina, Co Mayo

The claims under the Redundancy Payments Acts, 1967 to 2007, the Organisation of Working Time Act, 1997 and the Minimum Notice and Terms of Employment Acts 1973 to 2005 were withdrawn during the course of the hearing.

The respondent company is a family business; they have three garages, with 47 employees. The claimant was based in the Swinford Garage as a sales person.

(DK) gave evidence on behalf of the respondent. The claimant was employed as a sales rep, his duties included appraising cars for trade in, sales processing, and his normal hours of work were Monday to Friday with some Saturdays. During the interview process the claimant was informed that they ran a tight ship, the importance of valuing a trade-in correctly, that he should consult with the other sales reps in the other garages regarding this. (PK) had spoken to the claimant regarding issues of competition and conflicts of interest. At this stage the claimant confirmed he was familiar with the company vehicle sales form.

The claimant's employment was largely uneventful until 2008. In 2008 the motor industry was changing, throughout the year the company would have meetings with their sales reps. Overhead costs were rising and all the sales reps were told the company would be monitoring the phones to make sure they were being used for business purposes. Vodafone provided them with a package that enabled them to do this. Initially the claimant's phone usage was brought to their attention by the receptionist, as she was finding it difficult to put customers through to him; the claimant seemed to be constantly on the phone on the forecourt of the garage. Graphs of the mobile phone usage of the users were produced in to evidence and these graphs were generated from the information provided by Vodafone.

Following the meeting in which they were told that the phones would be monitored the claimant's usage decreased; however they noticed he was still spending a lot of time on the phone. They also noticed while the mobile unit charges had decreased the calls were at the same level. Examples given were Jan 09 and Dec 08, they felt that the report was incorrect and that the claimant had diverted his company calls to his own mobile phone.

At a meeting on 20 March 2009 the claimant was confronted regarding his mobile phone use. The claimant had been advised to bring another person with him. (PK) told the claimant that he was unhappy with his excessive use of the phone and that they were still receiving complaints from customers that they could not get to speak to him. The claimant told them that he had diverted the company mobile to his own; he thought that this would cut down the cost to the company. At this meeting they also confronted him about trading and selling cars outside of work. From time to time vehicles would be traded in that would be sold to trade, the claimant from time to time would park trade ins behind the workshop and place sold signs on same. They would query this with him as there would be no paperwork (e.g. vehicle order form) to back up these sales, hence they would show that they were still in stock. As soon as a deal is completed the paperwork must be completed.

He gave an example of a Peugeot 406 which was traded in by a junior sales man DJ. The claimant instructed DJ to park this vehicle to the rear of workshop with a "sold" sign on it. There was no paperwork completed on this and when DJ queried this with the claimant he instructed him to complete the sale form. Following this they noticed a similar Peugeot advertised, and a copy of this advert was produced in evidence. They asked a (GMcL) to make contact about the car; he was present when the telephone call was made. It transpired that the phone number was diverted to the claimant's mobile phone. They confronted him about this at the meeting of 20 March. The claimant admitted he had advertised the car, and that he sold cars from time to time but he did not see anything wrong in this. He also admitted importing cars and selling them on company time. A document was produced in evidence showing calls to the UK. Previous to the incident with the Peugeot, they had a similar incident with a Mitsubishi Space star that was also parked at the rear with a "sold" sign on it. (JM) had a customer for it and he queried the "sold" sign, as there was no paperwork in place. The claimant told him it was sold to (KB) who is a trader and a former colleague of the claimant's. The car was later advertised for sale at a considerably higher price.

During 2008 the claimant had asked about trading in an Audi A4 that he had sold previously in 2006 as the owner had asked the claimant for a price. He told the claimant that they were not interested in part exchange. In 2009 he contacted a customer (TM) who had a service invoice outstanding. TM told him he had a warranty on the Audi that he had bought the car from the claimant. He checked their records and realised the garage had not sold the car but it had been purchased from the claimant.

Under cross-examination he confirmed that the claimant had been provided with terms and conditions of his employment. He also confirmed that (PK), (his father) had discussed “conflict of interest” with the claimant. He was referred to the company’s disciplinary procedure. The disciplinary procedures had been given to the claimant at the commencement of his employment but he did not sign for them. In early stage of 2008 (PK) had given the claimant a verbal warning. He went on to say that the claimant had received numerous verbal warnings; January/February 2008 about his punctuality and this was noted on his file (this file was not produced to the Tribunal).

They did not issue the claimant with a written warning or final warning as they felt on 20 March that he had gone too far. The trust had been broken between the two parties and the claimant was defrauding the company, this was also the reason that they did not follow the procedures to the letter. He was told on the 20 March in the morning that they had serious issues to discuss with him and he could bring a third party. It was the first time in thirty-six years in business that they had to dismiss an employee. They did not report the matter to the Gardai, but they did think what the claimant did was fraud. On 20 March they put to the claimant his usage of mobile/landline phone, a lot of this usage was in relation to the local credit union and GAA involvement and the import of vehicles, the advertisement of vehicles outside of work and his punctuality. At the end of the meeting the claimant was advised to go home and discuss it with his family because it was a serious matter. A further meeting took place on the 23 March and the claimant was told he would stay in employment, his office would be located on the showroom floor and he was informed he would be on probation for six months and would be monitored at all times. He was not in attendance when the claimant received his dismissal notice on the 30 March. He confirmed that all employees were made aware that mobile telephone calls were being monitored. He confirmed that the claimant was not suspended in relation to his mobile phone usage.

(DC), company accountant gave evidence of a price differential between an invoice form and a vehicle order form on a particular car sold by the claimant. The recorded price of the car on the vehicle order form was less than the amount recorded on the invoice form. The respondent company suffered a direct loss of €680 as a result of the forms not being correctly completed by the claimant.

(NK), director and company secretary gave evidence that she encountered huge difficulties with the claimant on an ongoing basis in relation to his paperwork following the sale of vehicles. She confronted him on a regular basis, at least once or twice a week in relation to documentation being incorrectly completed. She had no such difficulties with any other salesmen. She told the Tribunal that the claimant was always on the phone and could not take calls from customers as a result of the time he was spending on the phone. He also accepted calls in relation to his local credit union work while in the workplace. He held keys of cars in the respondent’s premises which were not the property of the respondent. He was slow in providing her with paper work in relation to car sales and this delay caused financial loss to the company.

She gave further evidence that the claimant failed to comply with company procedures in relation

to car appraisals. It was company procedure that the opinion of two other salesmen should be sought prior to giving an appraisal to a customer. The claimant did not follow this procedure. His punctuality was poor and he was regularly late for work. She gave evidence that she left the claimant's terms and conditions of employment in a sealed envelope on his desk when he commenced employment. The claimant's name was written on the envelope. She accepted that she did not personally hand this envelope to the claimant. She gave evidence to the Tribunal that an advertisement was placed in a dealer magazine offering for sale a Peugeot 406 car which was the property of the respondent. The advertisement contained the claimant's mobile phone number. The claimant was requested to attend a meeting on 20 March 2009 and was shown a copy of the dealer magazine in question. When it was shown to him the claimant admitted that he was selling vehicles from the respondent's premises on company time. He also admitted to using the company mobile phone for personal use. She was satisfied that the actions of the claimant amounted to gross misconduct.

Under cross examination she stated that she had discussions with the claimant on numerous occasions in relation to his poor work performance. She accepted that there were no minutes or written recordings of these discussions. She accepted that the claimant was not provided with agendas in advance of the meetings which occurred on 20 March, 23 March and 30 March 2009. The claimant was offered the opportunity of bringing a witness to these meetings but declined the offer. At the meeting on 23 March 2009 the claimant was placed on 6 months probation as the respondent was willing to offer him one more chance. By 30 March 2009 it was obvious that they could no longer retain the claimant in employment as his work performance had not improved. He was given two weeks notice and allowed to work out his notice. She accepted that the respondent should not have allowed him to work out his notice and should probably have dismissed him on 20 March 2009. She accepted that the company did not follow its own procedures and stated that the claimant was dismissed for theft. She confirmed that the decision to dismiss the claimant was arrived at by (PK), (DK) and herself on 23 March 2009.

Evidence was heard from two friends of (DK), (GMcL) and (MS) that they were asked by him to respond to the offer for sale in a dealer magazine of a Peugeot 406 car. This car was the property of the respondent. It was advertised under the same garage name as the garage-man who bought the Mitsubishi Space Star. They telephoned the mobile number on the advertisement and the person who answered their calls identified himself as the claimant. He discussed the price of the car and told them that it could be viewed at a nearby location in Claremorris separate from the respondent's premises. At no time during the telephone conversations did the claimant say that he was working for the respondent.

(PK) gave evidence that his business has been in operation for over 40 years. He hired the claimant as a salesman in 2006. He outlined to the claimant the nature of his duties and stressed to him that he was expected to be honest in the performance of his duties and not to "stroke him". This term is used in the business and is meant as though not to act in a dishonest manner. The claimant was a good salesman when hired initially but his paperwork needed improvement. During the course of his employment he began to spend an inordinate amount of time on his company mobile phone. He also dealt with issues relating to his involvement with his local credit union and his GAA club on company time. The witness was annoyed at these issues and confronted the claimant on numerous occasions about these issues.

Following a downturn in business in 2008 the company engaged in cost cutting measures. As part of these measures the company installed a device for monitoring company mobile phone calls. All employees were made aware of the introduction of this monitoring system. The claimant appeared

to be spending less time on his mobile phone following the introduction of this measure but the company later discovered that he was diverting calls from his company mobile phone to his personal phone. He gave further evidence that the claimant was regularly late for work. The claimant also refused to follow company procedures in relation to car appraisals.

The Tribunal heard further evidence in relation to the advertisement of the Peugeot 406 car in the dealer magazine. This car was the property of the respondent company. When this advertisement was shown to the claimant at a meeting on 20 March 2009 he admitted to his wrongdoing. A further meeting took place on 23 March 2009 and all the issues in relation to the claimant's work performance were discussed. The claimant agreed that he was going to change and he was placed on 6 months probation and his performance was to be monitored on a weekly basis. His performance did not improve and he was dismissed on 30 March 2009.

Under cross examination he confirmed that the principal reason for the claimant's dismissal was theft. He accepted that he did not record or document the work performance issues relating to the claimant and there was no record of any warnings placed on his personnel file. He accepted that he should have issued the claimant with a written warning but had never come across these issues in his 42 years in business. He gave the claimant the opportunity of bringing a representative with him to the meetings on 20 March and 23 March 2009. He did so on the mornings of the days in question. He accepted that he did not provide the claimant with an agenda in advance of those meetings. He could not recall telling the claimant to resign or be sacked at the meeting on 30 March 2009. The claimant was dismissed for gross misconduct. He was profiteering from his actions in relation to the Peugeot 406 car which was the property of the respondent company. He did not give the claimant the opportunity to appeal the decision to dismiss him and should have called in the Gardai at the time.

Claimant's Case

The claimant gave direct evidence that he commenced employment with the respondent company in January 2006 as a salesman. He was interviewed for the position by (PK) and (NK) and agreed a salary with the respondent on the commencement of his employment. He had over 17 years previous experience in the business. His job was to sell cars for the respondent and during his tenure of employment sold over 1,200 cars. He was never provided with any terms and conditions of employment and he did not have a discussion with (PK) about conflicts of interest during the interview process. He never received any written warnings during his time working for the respondent and was never informed that his job was in jeopardy. He often worked beyond his normal working hours sometimes working 6 days per week. He worked late into evenings regularly taking telephone calls from customers. He accepted that he arrived late for work on occasions but this was generally because he had to collect cars from customers on his way to work.

He told the Tribunal that issues in relation to incorrectly completed documentation/paperwork were never brought to his attention prior to the Tribunal hearing. He followed the respondent's procedures when completing the documentation and inputted the figures from the systems that pertained in the garage. He accepted that (PK) spoke to him and other employees concerning the need to reduce the amount of time spent on mobile phone calls. This was done as part of a general policy of reducing costs. He accepted that he diverted calls to his own personal mobile phone but only did so to avoid the abuse he was being subjected to by (PK) for using the company mobile phone. He confirmed that he engaged in the sale of an Audi A4 for his own profit. However he only did so after (PK) and (DK) informed him that they had no interest in dealing with the sale of the car. He did not view his involvement in this sale as any wrong as it was made clear to him that the

respondent company wished to have no involvement in the sale. When this was made clear to him he was satisfied that he could dispose of the car as he saw fit.

He was not afforded the opportunity of representation at the meetings on 20, 23, and 30 March 2009. He was not provided with agendas for the meetings in advance of the meetings. He was given no adequate notice of the first meeting and was told he'd find out what it was about when he came to it. He was never told he wasn't allowed to sell cars outside his work hours. He could only answer about the Mitsubishi Spacestar, he was totally innocent of any wrongdoing in this, and he only helped (DJ) to sell it to a garage-man friend (KB). He knew nothing about any Peugeot 406.

He stated at the meeting on 20 March 2009 that he was sorry if he had caused any offence. No reference was made to disciplinary procedures at these meetings. He was told by (DK) at the meeting on 23 March to "keep the head down" and he was on 6 months probation. At the meeting on 30 March he was told by (PK) "resign or I will sack you". He was never told that he was being dismissed for gross misconduct. He was allowed to work out his notice period. He found alternative employment in a garage in Co. Galway in June 2009 and remained there until November 2009. He earned €500 weekly plus commission while working at this location. This location was a 90 minute drive from his residence and it was not feasible to continue in that employment due to the commuting difficulties. He has been self-employed since January 2010 and earns €100 per week.

Under cross examination he denied that he had a discussion with (PK) about selling cars on the side at the interview process. He could not recall that (PK) said to him not to stroke him. He accepted that he held a TAN number which enabled him to import cars from Northern Ireland. He accepted that he did import cars from Northern Ireland while working for the respondent and also held a VAT number while he worked for the respondent. He denied that he had any act or part in the sale of the Peugeot 406 car. He could not recall receiving calls on his mobile phone in respect of this car and the advertisement on the dealer magazine did not contain his mobile number. He was not aware that the respondent had installed a device to monitor mobile phone usage. He accepted that he was a director of his local credit union and received personal calls in the workplace. He confirmed he had not sold cars in competition with his previous employer J.J.G.

He denied that he refused to take calls from customers and followed company procedures in relation to appraisals most of the time. He accepted that he did a deal on the Audi A4 car but only did so when it was made clear to him that the respondent did not want anything to do with the car.

Determination

This case involved issues relating to both procedural and substantive matters.

The onus of proof is on an employer who dismisses an employee to satisfy the Tribunal that they had good cause to dismiss the employee and that they acted reasonably in all the circumstances. This includes the right of the employee to have fair procedures applied in the disciplinary process; however procedural defects may not of themselves render a dismissal automatically unfair.

The Tribunal noted that the claimant freely admitted that he was carrying out a sideline business in selling cars, albeit by his own account only after completing his working day. He denied any wrongdoing in relation to the Mitsubishi Space star, and denied all knowledge of the Peugeot 406.

The Tribunal preferred the evidence produced by the respondents in this regard, and find on the balance of probabilities that the claimant had attempted to sell the Peugeot 406 and obtain a profit for himself.

The claimant denied ever having received the terms and conditions of employment shown by the respondent at the hearing. In any event these terms and conditions do not contain any conditions prohibiting the claimant from carrying out business on his own account.

Even without such an express term in his contract, an employee has an implied duty of fidelity and loyalty to his employer (see the remarks of Mr Justice Finnegan in the Supreme Court Case of *Berber-v-Dunnes Stores*);

“There is implied in a contract of employment a mutual obligation that the employer and the employee will not without reasonable and proper cause conduct themselves in a manner likely to destroy or seriously damage the relationship of confidence and trust between them. The term is implied by law and is incident to all contracts of employment unless expressly excluded. The term imposes reciprocal duties on the employer and the employee.”

The actions of the claimant in this regard were in clear breach of this duty; both in carrying on a competing business, and in his actions in attempting to sell his employer’s Peugeot 406 on his own account, and the respondent had ample justification for dismissing the claimant for what was clearly gross misconduct. The disciplinary process leading to the disciplinary action on the 23rd of March was flawed, but mere procedural flaws should not render a dismissal, which is clearly justified, unfair. Had the respondent dismissed the claimant at the meeting of the 23rd of March, the respondent’s decision to dismiss would have been reasonable “having regard to all the circumstances”.

However the respondent did not dismiss the respondent at that meeting. Instead the claimant was effectively put on a final warning with 6 months probation.

The Tribunal was not convinced by the respondents’ evidence in relation to events leading up to the actual dismissal on the 30th of March. The inescapable conclusion is that the respondents had second thoughts about the mercy given to the claimant, and decided to dismiss him after all.

The Tribunal therefore finds that the claimant was unfairly dismissed. The Tribunal however determine that the claimant contributed to an extremely large extent to his own dismissal.

The Tribunal determine that compensation is the appropriate remedy and award the claimant the sum of €2,820.00.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)