

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO:

EMPLOYER

UD736/2010

- appellant

against

EMPLOYEE

- respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey BL

Members: Mr. L. Tobin
Mr. S. O'Donnell

heard this appeal in Dublin on 30 September 2011
and 28 November 2011

Representation:

Appellant: Mr. John Barry, Management Support Services (Irl) Limited, The Courtyard,
Hill Street, Dublin 1

Respondent: Conor Power BL, 42 Great Western Square, Phibsborough, Dublin 7

This appeal came before the Tribunal by way of an appeal from the former employer against a decision by a Rights Commissioner reference number r-083383-ud-09/EH.

The decision of the Tribunal was as follows:

Background:

The respondent (employee) in this case was employed as a Vehicle Inspector at the appellant's (employer) Cahir centre. The appellant was involved in the inspection of vehicles to ascertain if they were roadworthy. The vehicles were put through a visual test and then a 3

stage inspection; the first 2 stages were computer based. The final stage was a visual test. The vehicle was lifted off the ground and examined. The information would be collated and the vehicle would either pass or fail. If the vehicle failed the customer would be informed what the problem was. The vehicle would be re-tested when repaired at a later date.

Appellant's Case:

A Vehicle Inspector (JF) from the appellant's Blarney centre gave evidence. He explained that he worked in the Cahir centre on the night shift as Team Leader at the time of the incident. The respondent worked the day shift but their shifts would overlap.

On the evening of May 7th 2009 he was working in the Cahir centre. The respondent entered the test centre. He approached him and asked him to look at a car as it had failed the test the previous week, he had the replacement part but felt when he had examined it, the part did not need to be replaced and the car should not have failed the test. The car was not booked in to be retested but the witness said that he would look at it as a favour. He looked at the test results for the previous week and found it had failed because in the steering linkage. It had also failed the "side slip" stage.

He brought the car into the centre, put it up on the lift and re-examined the steering wheel and found there was sufficient wear on the steering part to warrant a failure. He told the respondent that the original report was correct and the car should fail the test. The respondent was not happy. The witness called over the Vehicle Inspector (MK) who had originally tested the car. MK tested it, agreed the part was worn and said that he and the Team Leader (KM) had agreed it was a fail. The witness asked the respondent to test it himself; he did and said it was fine.

The respondent got very aggressive and threatened them that he would "go to Dublin", "would make it very difficult" and "would go to the media". The conversation was heated on both sides. He said he would encourage the car owner to go the whole way with it. This went on for about 10 minutes. The witness said that everyone could hear what was going on, even the customers. He asked the respondent to go outside but he didn't, however, eventually he walked away. The witness and MK discussed the matter at length and decided that because of the threats that had been made and the hassle it would cause, they agreed to pass the car. He told the respondent. The car was brought back in for the re-test. The witness deleted the defect off the system and changed it to pass. He gave the report to the respondent, who then walked to the car and drove off.

The witness and MK discussed the matter through the rest of the shift. He felt it was wrong what they had done and he felt he had been coerced into passing the car. The following day he decided to speak to the day shift Team Leader (NOB) and told him what had occurred. He was asked to fill out an incident report with MK, which they did. He also gave a statement.

On cross-examination he said he had not told the respondent to change the part before re-testing the car. When asked he stated he had given 2 statements but did not know why they were needed. NOB said that he would speak to the respondent. When asked why there seemed to be differences between the contents of the joint incident report and his statement he replied that his statement was in more detail to what had occurred. He told the Tribunal that he had met his Supervisor on 2 occasions concerning the incident. These meetings were within 10 days of the incident.

He disagreed his complaint was about bullying and harassment. When put to him that it was the customer who drove the car home and not the respondent, he replied no. When asked why the report did not give more specific reasons why the car had failed the test he replied that that particular section of the car was quite complex. The customers' mechanic would be able to give them a more detailed report when determining what part had to be replaced. He explained that the "side slip" test had not been completed in the first test.

NOB in his sworn evidence stated that he was the test centre team leader.

When he arrived for work on Friday morning a customer told him an incident had occurred in the centre on the previous evening, He was not aware of anything because the day staff were not present at the time.

JF asked if NOB would speak to him on the Friday evening and waited until the other members of staff had left. He said that the respondent had come in with a car on the previous evening and queried the decision of the tester, things got heated and the respondent was asked to leave. NOB asked that a written complaint/statement be given on the incident.

NOB asked the respondent what had happened, at first he denied the incident but when shown the complaint letter then admitted it. NOB ask him to apologise but the respondent said he had nothing to apologise for. NOB then rang the regional manager GL and left it in his hands, he had no further involvement.

Under cross examination NOB stated that he had no further contact with the customer who told him about the incident. When he asked for the statement it was for documenting the incident. An apology may have gone some way to resolving the issue

MC who was responsible for countrywide training stated that he had trained both the vehicle inspectors and had no difficulty with their work. When he returned from annual leave both inspectors approached him and explained what had happened. He took separate statements from both. MC passed the matter to the HR section NOB and GL who was regional manager.

JL regional manager and health and safety manager for the appellant company stated that he received a telephone call from NOB advising him of the incident. He arranged to meet the respondent in the canteen. He read the statement he had received and the respondent denied all of the content of it.

JL wanted more information and arranged for the car to come back in and be re-tested. It was confirmed by POH and two other employees that the car should not have been passed.

JL discussed the issue with the HR section and a meeting with the respondent was called for on 26th May.

The respondent, a HR representative, TC and JL all attended the meeting. The respondent

JL felt that it was a breach in the code of integrity of the company and the respondent was prepared to argue with his colleagues. The respondent also called to the car owner's house, something which should not be done. If a car fails there is an appeals process through the centre and also through the A.A. It is a complete conflict of interest for an employee to get involved.

Under cross examination JL stated that he became aware of the situation on the Monday, following a telephone call from NOB. He arranged to meet the respondent the following week, 12th May. They had a meeting in the canteen and arranged for the car to come back into the test-centre. The owner of the car was advised that he could go to another test centre and could appeal any decision if he wished. No notes were taken on the day.

A copy of procedures were not sent to the respondent but procedures were followed. JL stated

that they did not go out to sack anybody but things happen. The crux of the issue was that the car was a fail and the respondent got it changed to a pass. Asked if the respondent worked on the car JL said he didn't know but had a suspicion he did, asked if that was why he was sacked JL said no but it was one of the reasons, there was a code of ethics to follow. The decision to dismiss the respondent was not taken at the meeting of the 26th, a few days later maybe, after discussions with HR. Asked if the respondent bullied or harassed anybody JL said "it's what the guys used in their complaint. The letter of dismissal dated 4th June was signed by Ms B from HR and JL said he dictated the letter but may have been out so was unavailable to sign it.

EK general manager in his evidence stated that a code of integrity had to be maintained. It is entirely forbidden to test for friends or family. It is a very serious issue if a certificate is issued for an unworthy car. He received the appeal from the respondent dated 9th June 2009. An appeal meeting took place on 15th July 2009. The meeting was a short one and was attended by the respondent, his trade union official, Ms G from HR and EK. No notes of the meeting are available and Ms G has left the company. The respondent made a high level appeal and said his behaviour was not acceptable, it was a one off mistake but he was under pressure, it was a small community. He expected a slap on the wrist but not on of this consequence. His union representative interjected and said it was a mercy appeal. EK was surprised, it was in direct opposition to the appeal letter which asked for all correspondence relating to the affair and said that the original decision was unfair and extreme. It was only at this appeal meeting that admissions were made. Under cross examination EK stated that while he didn't have notes of the appeal meeting he clearly recalled what happened, the meeting was 15/20 minutes at the most, the respondent apologised for getting involved in something he should not have done. The respondent was fully aware of the process and everything is based on trust. The two individuals who made the complaint were only doing their job. Asked if he received a letter from the respondent dated 5th August, he said he did. There were no persuasive points in it, at the appeal meeting the claimant put his hands up.

MF the car owner in his evidence stated that he asked the respondent if he could get the car tested sooner than the date given by the test centre. It was arranged for a Sunday and failed on the first attempt. MF's son checked the car for the fault and thought it was ok, they asked the respondent for his opinion. RC called to their house and said he'd book the car in again for the Thursday night. MF's son brought the car in and it passed. His son then drove the car home.

MF then received a phone call from JL asking that the car be taken back in again. He co-operated and on the 3rd test the car failed again. A tie-rod was put in the car and it passed the test on the 4th occasion. The respondent never did any work on the car and nobody ever asked MF if he had done so.

Under cross examination MF stated that he did a bit of work on cars but this particular one was his own, he did ask the respondent to look for a cancellation and the respondent did call to his house and say the car seemed ok.

Respondent's case:

RC said he had worked for the appellant company since 1999. He had no issues until the incident in question. He knew MF well and their sons were in the same class at school.

MF rang him and asked if there was any chance of an early test/cancellation. It was arranged for Sunday 3rd May. The car failed and on the Tuesday he received another call from MF saying they could not find any ware on the rack and pinion, RC called to the house and thought himself there was not enough ware for a fail. There was a lot of media coverage at the time about cars failing for no good reason or stupid fails.

On the Thursday night the car was in for re-test. RC waited on the car to come in, he was chatting to the lads as normal. JF brought the car in and put it up on the ramp, he and MK look at it. MK said within 2 months this would be a fail. RC told them the test is on the day, not 2 months hence. Both JF and MK got under the car and JF said the bushing was worn. RC asked "how could he know that when he couldn't see it"? he also told them about the bad publicity being received by the centres. He was not aggressive and did not shout at anybody. The lads said they would pass the car and put it down as a "goodwill gesture or customer complaint".

The certificate was given to AF (son of MF) and the next car was brought in. RC did not get the certificate and did not drive away in the car. At no time did he mention "going to Dublin" with a complaint. He did not test the car or go near it.

RC thought no more about it. On the following Monday morning NOB told him that he had been informed by JL of an incident on the Thursday night but nothing more.

The next he heard was when JL came in on the 19th May. It was most definitely not the 12th.

JL came into the centre and said he wanted to speak to him. He didn't know what was happening. The meeting was in the canteen and he told JL car should be independently accessed, told him he wasn't happy.

Another meeting was arranged for 26th May. After seeing the statements for the first time he was confused and could not believe what was being done to him. JF had twisted everything he had said. RC stated that he did not undermine anyone, he was sorry he got involved with the customer but he didn't benefit in any way. He wouldn't really have done anything different.

Bullying was never mentioned.

At his appeal meeting he thought things were looking positive, he said that he was sorry for getting involved but never bullied anyone – no admission of bullying ever.

Under cross examination RC said he had no problems with his work colleagues, often second opinions were looked for and often views differed. Asked why he did not arrange the first test through NOB the centre manager he said Sundays were done by non-core staff and were slacker, he had arranged it on the Friday with K who would be there on the Sunday.

When he called to AF's house the car was on a jack, all he did was shake it and he genuinely felt there was not enough ware on the rack and pinion to cause a fail.

He did want to point out to the lads in the centre what they were failing and to fail things properly, he felt they were not all singing from the same hymn sheet.

Asked why two very different stories were emerging he said he didn't know. He did not recall NOB challenging him about the incident. He was shocked about the allegation of bullying but did not do anything about it. JL did ask he wanted someone else to look at the car, he did suggest a man but he was gone to dinner so didn't object to NOB doing the re-check. When NOB failed the car and said the bushel was worn he knew he couldn't see the part and thought he would have given it the benefit of the doubt.

Told that 4 people had failed the car he was asked if he believed them, he replied no.

Determination:

The Tribunal having carefully considered the evidence adduced at the hearing find that the decision to dismiss the respondent was excessive. Undoubtedly his behaviour merited a sanction but the nature of the investigation and the manner in which it was carried out was seriously flawed. The procedures followed were unfair, in that he was not given all relevant statements in a timely fashion. The conflict of interest document referred to by the employer as a basis for the dismissal was not relevant to the reasons given by the company for the dismissal.

The Tribunal finds that the accusation of bullying was not substantiated and in any event was not put to the respondent until mid-way through the investigation process. There was an inordinate delay between the meeting of 2nd June at which he was dismissed and the appeal meeting of 15th July. There was a further delay in not issuing the appeal decision until 21st August.

Furthermore and more importantly, it is quite clear from the appeal decision that no consideration was given to the letter sent by the respondent in the intervening period, setting out his position.

The respondent's behaviour and attitude was inappropriate and contributed substantially to the company's decision to dismiss. At the hearing it was indicated by the respondent that compensation was the preferred remedy in this case.

The Tribunal having considered all of the above awards the respondent the sum of €25,000 and varies the Rights Commissioners decision accordingly.

Sealed with the seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)