EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:	**CASE NO:**
EMPLOYEE	UD1181/2010
	RP1610/2010
- claimant	MN1143/2010

against

EMPLOYER ***- respondent***

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
MINIMUM NOTICE OF TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan

Members: Mr. M. Carr
Mr. O. Nulty

heard this appeal at Cavan on 1 December 2011

Representation:

Claimant: Colm McGovern, Mel Kilrane & Company, Solicitors, Main Street, Bailieborough, Co. Cavan

Respondent: Joan H. Devine & Co., Solicitors, Bridge Street, Stokestown, Co. Roscommon

The decision of the Tribunal was as follows:

Background:

The respondent's business involved the testing of roadworthiness of commercial vehicles. The claimant was employed as a full-time tester with the respondent since December 2007. A part-time tester was also employed. The claimant was overseen by a Competent

Person (BD) who was an employee of the respondent company. This testing and licensing of vehicles was policed, authorised and overseen by Cavan County Council "the Council". An Authorising Officer attended the premises on regular occasions to inspect the testing of vehicles.

Respondent's Case:

BD gave evidence. There had been a previous incident concerning the claimant testing a commercial vehicle in 2008 and the Authorising Officer from the Council agreed he should be retrained at an expense to the respondent of €1,600.00.

On April 21st 2010 the Council's Authorising Officer attended the premises. He spoke to BD and informed him the claimant had passed a commercial van than had not been roadworthy. This vehicle had since been partly burnt out, was located in Wexford and was under investigation by an insurance company. The Claimant was no longer to test or certify vehicles. The vehicle had failed its first test and passed the retest. The Authorising Officer (LW) from the Council informed him the claimant's testing licence was suspended and under investigation. The claimant came into the office and was very irate. BD asked him to leave. The witness rang one of the co-owners (DD) to come to the office.

On cross-examination he stated that testers did complete refresher courses but the claimant had to be retrained in 2008. He explained to the Tribunal that the Authorising Officer had suspended the claimant. When asked who from the company had suspended the claimant he replied that the claimant had entered the office, asked what was going on and again was very irate. He explained that as he was trying to speak to the Authorising Officer and asked the claimant to leave.

He told the Tribunal that he had asked the Authorising Officer for written confirmation of the suspension and to the date of the hearing (December 1st 2011) had not received any. The claimant had been on the premises after April 21st 2010 requesting information regarding the vehicle in question and the witness told him where he could retrieve it.

Some weeks later he was overseeing the initiation of a new tester when the claimant arrived on the premises. The claimant assisted with the perusal of the company's computer system and other technical equipment for about one and a half hours.

The Authorising Officer from the local County Council gave evidence. He informed the Tribunal that he was a qualified fitter mechanic and Authorised Officer for the County Council.

He explained that he oversaw, on behalf of the Council, the testing of commercial vehicles, which was similar to the N.C.T. Spot checks were carried out on all premises within his remit. He had observed the claimant carrying out his tasks in the past.

He received a complaint from the Road Safety Authority (RSA) concerning a commercial

van that had been passed by the respondent company and the claimant. The insurance company involved with this van had made the complaint to the RSA that the van was unroadworthy but had passed the vehicle test. An investigation into the matter commenced on April 1st 2010 and the witness had attended the site in Wexford to examine the said vehicle, which was later removed to Cavan. The vehicle was two-thirds burnt out but the substandard welding was still visible.

On April 21st 2010 he attended the respondent's premises and spoke to BD. He informed BD he was suspending the claimant's vehicle testing certificate. When asked had the vehicle in question been expertly inspected he responded that he, a member of the R.S.A.and a representative from the insurance company had inspected it. No documentation was offered of this to the Tribunal on the day of the hearing.

On May 17th 2010 he again attended the respondent's premises to observe the new vehicle tester the respondent had hired and noticed the claimant at the door. It appeared the claimant was assisting with the testing of the vehicle. He spoke to one of the co-owners (AD) and asked was the claimant assisting with the test even though his testing certificate had been suspended pending investigation. AD informed him that theclaimant was not assisting.

Two days later he received a letter from the claimant's solicitor which he handed over to the Council's legal team.

One of the co-owners (DD) gave evidence. She again explained that the claimant had to be retrained at the expense of the respondent on the verbal notification from the Council. A lorry had been passed but was later found to be faulty and the claimant was the tester.

On April 21st 2010 BD asked her to come down to speak to him. LW was present. BD informed him that an incident was under investigation and the claimant's testing certificate was suspended. She asked LW if the suspension of the claimant's testing certificate could be postponed for a couple of weeks as vehicles were booked in for thefollowing two weeks. LW said no. She asked LW was there any other way around thisbut LW said no. She went back to the office and observed the claimant on his mobilephone. He told her it was totally unfair.

When asked she said she knew nothing about anyone offering to contact the claimant later that day with an update. At around 4.00 p.m. the claimant said that he could no longer handle the situation and left. BD showed the documentation regarding the van.

On April 23rd 2010 the claimant came to the office to get his wages. His P45 was not in the wage envelope. There had been no intention to dismiss the claimant. The claimant informed her that his solicitor was writing to the Council. He said they could not suspend him, they were not his employer. The following week the claimant contacted the office requesting a letter stating why the Council had suspended him. She spoke to LW who informed her he had handed over the matter to the Council's legal team.

The claimant continued to frequent the premises. He retained the use of the company van. When asked she stated the claimant was given any information he requested regarding the matter. A week or so later he rang the office requesting his P45. He needed it for the Department of Social Welfare. His daughter was to pick it up a couple of days later but did not. It was posted out to him.

Two P45's were submitted to the Tribunal for their perusal. Each P45 had a different date of termination. The pro-forma version had a date of April 23rd 2010. The second version had a termination of April 30th 2010. When viewed by the witness she stated she could not understand why there were two P45's with two different dates.

On April 27th 2010 she went into the canteen. The other co-owner (AD) and the claimant were present. AD asked the claimant if he wanted to do some driving on the company's buses but the claimant replied that he was alright for work.

On April 27th 2010 she issued a letter stating:

"Due to a verbal warning from (LW) from Cavan County Council we are not in a position to allow you to test. This suspension is presently being carried out and is under further investigation at the moment by Cavan County Council."

When asked she stated that she had spoken to LW about the matter on a number of occasions. On several occasions she stated the claimant had not been dismissed by the respondent. She agreed that her letter of April 27th 2010 did mention the phrase "suspension". She told the Tribunal that she had pleaded with LW regarding his testing certificate being suspended.

The witness was shown a copy of the claimant's income levy statement which stated his date of cessation of April 23rd 2010. The witness said she could not understand why it had that particular date. When put to her that the meeting of April 27th 2010 between AD and the claimant had not taken place she replied that it had. When asked had she interviewed the claimant regarding the investigation she replied that they had chatted on a number of occasions. The claimant had no written contract of employment and there was no grievance procedure in place.

She explained that when the claimant had been hired the claimant already has testing certificate. No documentation of this or the certificate issued by Cavan County Council in relation to the claimant or the suspension of same could be submitted to the Tribunal. Neither she nor AD had written to the claimant to come into the office to discuss the matter.

The other co-owner (AD) gave evidence. He told the Tribunal that he had no involvement in any matters that had occurred on April 21st 2010. He was informed the following day. He spoke to BD, DD, LW and the claimant about the situation. The claimant came to see him. He was very angry that BD had allowed his dismissal to takeplace over his head. He told the claimant that BD was being directed by LW

as his "boss" when it came to the testing centre. LW directed the test centres and the testers onbehalf of the Council. The claimant told the witness that he felt he was getting very littleback up from BD and DD concerning the situation. He told the Tribunal that the claimantand LW had had a run-in in the past.

The Council retrieved the van in question and the witness viewed it. LW pointed out the major defect. On April 27th 2010 he had been talking to the claimant in the staff canteen. DD came in. He offered the claimant a job driving buses. The claimant said he could not do it due to his health. The claimant said that he had some work driving. He spoke to LW regarding the matter and was told he, LW, was dealing with it.

He told the Tribunal that he thought the RSA would bring the situation to a head. He said the claimant knew he wanted the claimant to return to work and as soon as the suspension was lifted the claimant would get his job back.

When asked he said that they had to comply with what the Council had done regardingthe claimant's testing certificate or they would lose their licence. When asked he saidthat he had not been present on April 21st or 23rd 2010. On April 27th 2010 the claimantcame to see if he would go with him to view the van in question but the witness couldnot. He told the claimant to fill the van with company fuel for the trip. When put to himhe said that he was aware the claimant had suffered with his back and therefore could nottake a job driving a bus.

He explained to the Tribunal that he had asked the claimant to show the new tester the company equipment but that the claimant had not tested the vehicle on May 17th 2010. LW attended that day and spoke to the witness. After this conversation the witness asked the claimant to leave the premises.

When asked by a member of the Tribunal if he had considered re-training the claimant as had been done in the past he replied that LW had said it had been already done once and would not be done again. No other alternative work was offered to the claimant.

The person who oversaw the administration work for the respondent gave evidence. On April 23rd 2010 she printed out the pro-forma P45 which had a cessation date of April 23 rd 2010. A second P45 was then completed by the witness which had a cessation date of April 30th 2010. The claimant rang the witness to say his daughter would pick up the P45 and she did. The chairman of the Tribunal pointed out to the witness that DD had given evidence that the P45 had been posted out to the claimant. She stated that his P45 had not been in the envelope with his wages.

Claimant's Case:

The claimant gave evidence. On April 21st 2010 LW arrived after lunch. He went to the office where LW informed him he was suspended and was not to test or sign any certificates. BD was present and he, the claimant, told him LS could not do this. BD saidhe had to do what LW said. He told LW he did not have the authority to do it. LW

toldhim "I can, I have and you are". He left the office and contacted his solicitor. He askedLW to speak to his solicitor on his phone but he would not. He turned to BD and againsaid LW could not do it. BD replied he had to do what LW said. The claimant got veryirate.

Fifteen to twenty minutes later he spoke to DD who told him to wait and she would look into it. She returned about twenty minutes later. He asked what would happen now and she replied that if he could not test vehicles he could not work and would not get paid. She said there was nothing they, the respondent, could do. LW could shut them down and they would have to let him go. He was told that he would be contacted later with written confirmation of his suspension. He left and contacted his solicitor. He rang BD but there was no other information from LW. BD said there was nothing he could do. He contacted the centre the following day but there was still no more information.

On April 23rd 2010 he contacted DD and was informed there was no further information but that his wages were ready for collection. He went to the office and the respondent's last witness handed him an envelope containing a full week's wages (even though he had not worked it), his P45 and his income levy certificate. He informed his solicitor whathad occurred. He contacted the respondent daily. BD told him he could not work if hecould not test vehicles. The following week he received a further week's wages.

On April 27th 2010 he met AD in the canteen. He asked AD what the situation was and said he felt the respondent company should be fighting his case with the Council. He also stated that there should have been some form of written notification. The mention of working on the buses had been mentioned but he did not think he answered AD about it.

Three weeks later AD contacted him to ask him if he would come to the centre and give a hand showing a new tester the layout of the test centre. He went to the test centre. AD asked would he be willing to stay on a little longer which he did. LW arrived and said he, the claimant, should not be on the premises. LW and AD spoke. AD went to the claimant and told him his hands were tied and that he had to leave.

The claimant gave evidence of loss. To date his testing certificate was still suspended.

On cross-examination he agreed he had retrained in 2008. The claimant gave evidence of his certification of light and heavy goods vehicle testing he received from the Dublin Institute of Technology (DIT). He explained that no licence for him to test vehicles had been issued by the Council. When his test certificate was suspended all tests for the following weeks had to be cancelled.

When put to him that his daughter collected his P45 he replied that his daughter had collected his P60 three weeks before the day of the hearing. His P45 had been in the envelope with his wages on April 23rd 2010. He agreed he had the company van and when he asked AD did he want it back, AD replied that he wanted the whole package back.

Determination:

The claimant was employed as a full-time tester with the respondent since December 2007. This testing and licensing of vehicles was policed, authorised and overseen by the Council. An Authorising Officer attended the premises on regular occasions to inspect the testing of vehicles.

On April 21st 2010 the Council's Authorising Officer attended the premises. He spoke to BD and informed him the claimant had passed a commercial van than had not been roadworthy. This vehicle had since been partly burnt out, was located in Wexford and was under investigation by an insurance company. The Authorising Officer informed him the claimant's testing licence was suspended and under investigation.

The facts are generally in agreement between the parties and the question to be decided is:
i) The validity of the alleged ground to justify dismissal namely the Authorising Officer suspending the claimant's vehicle testing licence.
ii) Whether the respondent properly investigated the alleged grounds:
iii) Crucially the fairness of the procedures adopted during the course of this investigation and
iv) the reasonableness of the conclusion.

Undoubtedly the sole reason for the dismissal of the heretofore blemish free claimant was the intervention of the Authorising Officer suspending the claimants testing licence. When challenged by the claimant that he did not have authority to suspend him the Authorising Officers response was that "I can, I have and you are" was arbitrary, capricious and a blatant disregard for the rights of the claimant.

The suspension of the licence was verbal and not supported by any documentation at any stage. (While it does not concern the Tribunal in the instant case it seems clear from a Departmental Circular as to how such suspension should be handled and that the Council did not deal with it remotely as it should have according to the Circular).

Instead of investigating the matter fully and following a fair and just procedure in particular affording the claimant every input into saving his job the respondent accepted the suspension as a virtual dismissal and abdicated its responsibility towards the claimant.

The Tribunal acknowledges the dilemma in which the respondent found itself and the importance to it of the Authorised Officer granting the testing licences. This however did not justify dismissing the claimant.

The dismissal of an employee brought about through pressure from third parties whether customers, client's fellow employees or others may be justified provided the employer acts fairly and handles the procedure and investigation properly. The Tribunal's view as stated in Merrigan V Home Counties Cleaning Ireland Limited is that "the job of an

employee cannot be at risk on the mere whim of a third party to the employment relationship"

The employer will be expected to show that they have conducted an investigation into the reasons for the pressure. If the enquiry reveals no valid reason for the pressure to try and persuade the party exerting the pressure to change their mind.
The claims under the Redundancy Payments Acts, 1967 to 2007 and the Minimum Notice and Terms of Employment Acts, 1973 to 2005 are dismissed.

Section 6(3) of the Unfair Dismissals Act 1977 as amended by Sections 5(b) (a) of the 1993 Act states that

> "in determining if a dismissal is an unfair dismissal, regard may be had, if the rights commissioner, the Tribunal, or the Circuit Court, as the case may be considers it appropriate to do so
>
> to the reasonableness or otherwise of the conduct (whether by act or by omission) of the employer in relation to the dismissal".

The Tribunal determines that for the reasons stated the Respondent did not act reasonably and accordingly determines that the dismissal was unfair.

Having regard to the satisfactory employment history of the claimant the Tribunal determines that re-instatement is the most appropriate remedy.

Sealed with the seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)