

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIMS OF:  
EMPLOYEE

*-claimant*  
MN632/2010

CASE NO.  
UD672/2010  
RP929/2010

WT289/2010

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: Ms D. Donovan BL  
Members: Mr J. Hennessy  
Ms S. Kelly

heard this claim at Kilkenny on 28th September 2011 and 26th January 2012  
and 27th January 2012

**Representation:**

Claimant: Mr. Joe Le Cumbre, Barrymore Kiltoom,  
Athlone, Co. Roscommon

Respondent: Mr. Mark Dunne BL instructed by Morgan McManus,  
Solicitors, The Diamond, Clones, Co. Monaghan

**The determination of the Tribunal was as follows:**

**Background:**

The claimant was employed as a lorry driver with the respondent from January 2005. The claimant contends that he was unfairly dismissed from his employment with the company. The claimant was on a final written warning from the time of June 2009 for a period of twelve months in respect of a claim that he negligently caused an accident, damaged company property and failed to observe health and safety rules.

On 19 November 2009 the claimant's lorry was late being dispatched from the Dublin depot due to a delay caused by the late arrival of the UK ferry. This caused a delay of an hour and a half approximately. As the claimant drove the M7 motorway he stopped on the hard shoulder to accept a telephone call. He subsequently missed his exit from the motorway and was forced to exit at a later stage and make a U-turn. It was the company's case that the claimant's actions not only caused a delay but that they were also contrary to Road Traffic Regulations. Furthermore, and also contrary to the Road Traffic Regulations, it was the respondent's case that the

claimant had performed an illegal U-turn by crossing a continuous white line on a main road.

The matter was duly investigated and subsequently the claimant was brought to a disciplinary hearing where it was determined that he was in serious breach of road safety and the company safety rules, potentially causing loss of damage to the company, that he had undertaken an unauthorised stop and had been guilty of many other offences contrary to company policy. The finding was appealed by the claimant but was upheld on appeal. Due process was applied and it is denied that the claimant was unfairly dismissed as alleged.

#### Respondent's case:

The Tribunal heard evidence from the regional manager (JB) for the respondent that at the time of the claimant's employment he was regional manager for the south east. There are seven depot managers. The company delivers anything from envelopes up to a full freight. Sixty per cent of their business is in Ireland and the UK and the company guarantees a next-day service. They are the only company to deliver next-day to the UK. The ferries dock in Dublin port between 6.00 a.m. and 6.30 a.m.

JB had been the Dublin depot manager previously and the claimant worked under him at that depot. The claimant approached him as he was thinking of moving to Kilkenny because of family reasons. The respondent had just opened a depot in Kilkenny. He phoned the regional manager who told him that they had a vacancy. The claimant moved there as a driver. The claimant subsequently gained an articulated licence and was promoted to articulated driver.

All of the employees received documents regarding terms and conditions of employment. The drivers have a handbook and camera pack. The camera pack contained in a zip lock bag is in case of an accident.

The witness explained that if they did not give the customers the service then the customer would not pay them and would move to another carrier. The drivers were not permitted any unauthorised stops. There is no reason for a stop. The claimant attended an induction course and a re-induction course and signed a document that he did so.

The witness explained that the claimant came to Dublin and reached the depot / port at 7.00 am or 7.30 am. He arrived back to Kilkenny at 12.00 pm or 12.30 pm. The job was time dependent. The witness explained that on the day in question there was a high wind and the ferries were delayed getting to Dublin port. This meant the claimant left Dublin port at 10.00 or 10.30 am rather than 8.30 or 9.00 am. The trucks were running a little late. Everyone was aware of this problem. The claimant's first stop was the Horse and Jockey in Tipperary where the depot was situated.

The regional manager told the Tribunal that he had received a telephone call from another manager to say that the claimant was on the radio. The regional manager was in the depot and he looked at the claimant's GPS system and it showed that he was stationary. The GPS is accurate to within three inches and it shows where the drivers are.

He phoned the claimant and could not get an answer. He sent a text to the claimant's scanner to ask why he was stopped and got no reply. He phoned the claimant on his personal mobile and got through. He asked him why he was stopped and the claimant told him that he was not stopped but that he had missed his turn off because he had an ear infection. The witness explained that he could

not check the map of the scanner until later when it was downloaded. It showed that the claimant was stopped between 11.42 and 11.50 am. The claimant had also missed the exit for Abbeyleix and this added another 24 to 25 minutes onto the journey. JB told the claimant that he would be in Kilkenny the following day to discuss what happened; he told him that he wanted his version of events.

The following day he met the claimant who told him that he had an ear infection. He told the claimant that he saw from the data that he had missed an exit. JB raised with the claimant that he had said he was not stopped when the GPS showed that he was and he showed this information to the claimant. He asked the claimant if he realised how serious it was. The claimant then told him that he was on the radio and had won a prize on the Gerry Ryan show. He told the claimant that he knew that they were under pressure and that they were already an hour and a half behind schedule. The Cork driver was waiting a long time at the Horse & Jockey for him to collect the freight for Cork.

JB told the claimant that he did not understand how he could miss the exit for Abbeyleix as he did the journey every day from Tuesday to Friday. The claimant told him that he had an ear infection. The claimant said to him “do you realise how lucky I was to get the truck turned I did an illegal U-turn”. He could not understand this as there was a median at that place. It was forbidden to make U-turns over a solid white line. When he put matters to the claimant he said that the claimant told him that it “was probably a bad call” (a bad decision).

He referred the matter to Human Resources. He had no further involvement apart from one phone call from the claimant where the claimant told him that it was his fault that he was sacked.

During cross-examination the claimant’s representative put to the witness that he had serious misgivings regarding the minutes of the meeting. In answer to other questions the witness explained that as far as he was concerned the claimant lied to him in that he told him he had not stopped the truck.

Giving evidence a further regional general manager (JC) told the Tribunal that he had worked with the respondent company for over twenty years and has experience of conducting disciplinary hearings. Following from the investigatory meeting on 20 November 2009, he was tasked with conducting the disciplinary meeting on 6 January 2010. The minutes of this meeting were opened to the Tribunal. JC noted that the claimant had an active final written warning on file. At the meeting he explained to the claimant that his role was to consider the allegations against the investigation report and see whether or not the allegations should be upheld against the claimant.

At the meeting the claimant clarified that he had accepted rather than made a telephone call but accepted that he had pulled onto the hard shoulder of the motorway to accept the call. The claimant disputed the minutes of the investigation meeting which stated that the claimant had said that he, “..had to perform an illegal U-turn to get back to the Cork exit.” At the disciplinary meeting the claimant said that he did not recall ever saying that he had made an illegal turn. The claimant now stated that it was not an illegal U-turn. He also raised the issue that he had informed company management the night before that he was unwell.

The meeting was adjourned to allow JC to further consider some of the points raised by the claimant. In the intervening period JC retrieved the GPS co-ordinates from the lorry’s scanner to show where the U-turn had been performed. JC then drove to where the U-turn took place and took photographs of the road and location. According to the GPS co-ordinates the U-turn was done on a

main road on a continuous white line.

The disciplinary meeting was reconvened on 19 January 2010. Again JC informed the claimant that he was not permitted to stop on the hard shoulder of a motorway. The claimant said he was not fully aware of this and that he had thought you could stop there to take a telephone call.

JC showed the claimant the location on the grid scanner where it indicated that he had performed the U-turn. The claimant accepted that it was “about right” but that he had turned across a broken white line and just at the point where the continuous white line began. JC told the claimant that if this was the case then that was an even worse position to turn as it was coming off a blind bend.

JC concluded the meeting by outlining to the claimant which of the charges he was upholding. There were two allegations which he did not uphold

The witness reached a decision to dismiss the claimant for gross misconduct. A letter of dismissal dated 21 January 2010 was subsequently issued to the claimant detailing the grounds upon which he was dismissed.

During cross-examination JC stated he had taken into consideration the claimant’s service but while he had a duty of care to the claimant he also had a duty of care to the company and he was cognisant of the health and safety issues.

In reply to questions from the Tribunal, JC stated that had the claimant turned the lorry where he said he had, it would have been a legal turn. Where the GPS system said the turn was performed was not safe or lawful but where the claimant said was not safe but was lawful.

JC was aware of the claimant’s final written warning and the decision to dismiss the claimant was linked to this, as well as the gravity of the current incident.

Giving evidence the Divisional Director confirmed that he examined the investigation notes prior to conducting the appeal hearing on 5 February 2010. The minutes of the appeal hearing were opened to the Tribunal. The Divisional Director had read through the minutes of the previous meetings with the claimant who confirmed that everything was covered in the minutes. The claimant confirmed he had nothing to add to the minutes. The Director put it to the claimant that he had pulled in on a hard shoulder of a motorway and made an illegal U-turn. The claimant replied at the meeting that he did not recall stating that he had made an illegal U-turn. The Director informed the claimant that he would reflect on all of the issues before making a decision.

After cogitating on the issue the Director reached a decision to uphold the original decision as he felt the issues were very serious and the claimant was already on a final written warning.

The Group Health and Safety and Training Manager gave evidence that the claimant was provided with refresher training in June 2007 and March 2009. The Drivers Handbook was opened to the Tribunal and it was highlighted that one of the main duties of the claimant’s post entailed ensuring that all traffic laws and regulations were complied with.

The company’s health & safety statement and policy was also opened to the Tribunal. In particular the section of the policy detailing the duties of employees which included the duty of “drivers to follow the ...Drivers’ Handbook as a minimum standard of carrying out their duties.”

A section detailing vehicle security stated that a driver should remember to take particular care where he stops his vehicle and only stop where it is safe to do so. A driver should not make unauthorised stops. The Rules of the Road as published by the Road Safety Authority was also opened to the Tribunal.

The Human Resources Director gave evidence that her role was to ensure that correct procedures were in place and implemented. The respondent company prides itself on very high standards; it is difficult in the industry to compete on price but the company can compete on service and it had won a number of awards in this regard.

#### Claimant's case:

It was the claimant's evidence that when he initially transferred from the Dublin depot to the Kilkenny depot he had good working relationships with members of management. The claimant outlined how to his mind this changed with the arrival of a new general manager in either 2007 or 2008. The new manager asked the claimant to watch his back. The claimant stated that from the time the claimant told him that he did not work like that their working relationship deteriorated.

The claimant outlined the incident that had occurred in June 2009. He struck a compactor with the front grille of the lorry in the depot due to lack of lighting. The claimant reported the incident and the superficial damage that was caused to the lorry. The evening following this incident the compactor had been relocated and a light erected in the area.

The claimant was required to attend a disciplinary meeting on 8 June 2009 in relation to allegations of negligently causing an accident, damage to company property and failure to observe health and safety rules. The disciplinary hearing was chaired by the general manager with whom the claimant was experiencing difficulties. As a result of this meeting the claimant was issued with a final written warning letter dated 11 June 2009. The final written warning was to remain active on the claimant's file for a period of twelve months. The claimant appealed against two of the three allegations levelled against him to that particular manager chairing the disciplinary meeting. The appeal heard by the regional manager (JB) was unsuccessful.

On 18 November 2009 the claimant informed the Depot Manager that he had an ear infection and would not be in work the following day. However, another manager informed the Depot Manager that the claimant was required to attend work. The claimant was assured that he could finish early, and on that basis attended for work the following day although he was unwell.

On 19 November 2009 as he drove along the M7 motorway he received a telephone call and he pulled onto the hard shoulder in what he described as a "regrettable decision." After the telephone call which was from the Gerry Ryan Show and before resuming driving the claimant took something for the pain he was experiencing due to the ear infection.

As the claimant drove he then received a telephone call from the regional manager (JB) who asked the claimant why he stopped. The claimant confirmed that he was not stopped but was driving. The claimant did not deny that he had stopped but he had misunderstood that the regional manager was asking him about the time that he was stopped on the hard shoulder.

Subsequently, the claimant missed his exit from the motorway. He drove to a further exit and left the motorway, found a safe place and turned the lorry. The claimant stated that he knew the

capabilities of the lorry and where he could turn it. The claimant then re-joined the motorway and continued with the journey.

The claimant stated that he was informed that the meeting on 20 November 2009 was an informal meeting and had he known it was a formal investigation meeting he would have requested union representation to accompany him.

The claimant gave evidence pertaining to loss and his efforts to mitigate that loss.

During cross-exam the claimant refuted that he had turned the lorry at the point on the road indicated by the GPS information or that he had crossed a single white line to perform the turn.

### **Determination:**

Having carefully considered the evidence adduced at the hearing the Tribunal finds that the circumstances that led to the claimant being on a final warning did not warrant such. The Tribunal therefore finds that the respondent dismissed the claimant for causing delay, pulling in on the hard shoulder to take a telephone call and executing an illegal and unsafe turn.

The Tribunal finds that claimant did not substantially delay the delivery rather the delay caused by the claimant amounted to somewhere between 8 minutes and 10 minutes.

The Tribunal does not accept that the claimant being an experienced articulated truck driver made an unsafe turn irrespective of where he made the turn.

The Tribunal finds that the claimant did pull in on the hard shoulder to take a telephone call and whereas the Tribunal accepts that the claimant should not have done this the Tribunal finds that a lesser sanction than dismissal would have been appropriate particularly taking into account that the claimant turned in for work albeit that he was sick to accommodate the respondent.

Accordingly, the Tribunal finds that the claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds. The Tribunal accepts the submissions by Counsel for the Respondent that reinstatement would not be an appropriate remedy in the particular circumstances. The Tribunal awards the claimant compensation in the amount of €30,000. The claim under the Redundancy Payments Acts, 1967 to 2007, is dismissed as the two are mutually exclusive.

The Tribunal finds the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 succeeds and the Tribunal awards the claimant an amount of €2,545.40 (being the equivalent of four weeks' gross pay).

The claim under the Organisation of Working Time Act, 1997 is dismissed as no evidence was adduced in relation to holidays owed under this Act.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)