EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF: CASE NO.

EMPLOYEE UD578/2010
MN510/2010
against
EMPLOYER

under
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K.T. O'Mahony B.L.
Members: Ms. M. Sweeney
Mr. D. McEvoy

heard this claim at Cork on 6th April 2011 and 26th May 2011

Representation:

Claimant:
Mr David Gaffney, Coakley Moloney, Solicitors, 49 South Mall, Cork

Respondent:
Mr. David Farrell, IR/HR Executive, IBEC, Confederation House,
84/86 Lower Baggot Street, Dublin 2

Summary of Evidence

The respondent provides ground handling operations for customers at Cork airport. The claimant, who had previously worked for the respondent on two fixed term contracts, commenced employment on a permanent part-time basis with the respondent on 1 December 2005, working as a ramp agent and his duties included the positioning of steps to aircraft for the embarking and disembarking of passengers. He was dismissed on 2 November 2009.

A core policy of the respondent is the safety of its staff and passengers which includes the provision of safe equipment, in particular where passengers interface with it, and there is a strict policy requiring the immediate reporting of damage to equipment. The staff, including the claimant, had received extensive training in health and safety and members are well aware of the requirement to report damage. No one has ever been dismissed for reporting damage to equipment but two senior members of staff have been dismissed for failing to do so.

On the morning of 28 February 2009 a team leader (TL1) discovered that a side panel to a set of steps had been damaged. He informed the duty manager (DM), who inspected the damage. No one had reported damaging the steps. Later that morning the claimant, having heard about the damaged steps, informed DM that he might have caused the damage as he had brought a set of steps to the

equipment parking area earlier that morning. The damage was significant, comprising a four-foot gouge as well as a twelve-inch puncture. The ramp manager (RM) conducted an investigation into the matter. The operations manager (OM) was the note-taker at the investigation meetings.

Having viewed CCTV footage RM was satisfied that the damage had been caused due to an incident that occurred at 07.33 that morning, when the set of steps was being driven back to the equipment parking area. The three members of the team (including the claimant) who had used the particular steps that morning as well as the ramp controller and TL1, who had discovered the damaged steps, were interviewed as part of the investigation. The two other members of the team confirmed to the investigation that they had not noticed any damage to the set of steps while it was in use and also confirmed that it was the claimant who had returned the steps to the parking bay. The claimant while volunteering that he had parked the steps in the bay denied any knowledge of damaging them. He was unable to provide much assistance to the investigation as he had no recall of much of what he had done on the morning of 28 February - he could not recall *inter alia* the flights to which he had provided services or who had been his team members or the time he had returned the steps to the parking bay. His response to many questions put to him was that he did not "have a clue". The claimant's investigation interviews had been held on 11 & 19 March 2009.

The CCTV footage showed that as the driver tried to line up the set of steps it seemed to collide with the set of steps next to it; the driver got out to check, then reversed and left the area returning shortly afterwards to move both sets of steps and park them parallel to one another. While the footage was too unclear to enable identification of the driver, RM concluded by a process of elimination and the claimant's own admission that the driver of the tug was the claimant and that the damage to the set of steps had been caused when the set of steps was being returned to theparking area. The driver of the tug was wearing a hoodie and the claimant had been wearing onethat morning. The investigators assumed from the driver's actions at the time of the incident that hehad been aware that damage had been caused to the set of steps and that his action in returning andmoving both sets of steps was an attempt to conceal the damage. The leader of the team that hadused the set of steps that morning was of the view that if he himself had caused the damage hewould have known because the damage was severe. The claimant was summoned to a disciplinaryhearing to be held on 31 March 2009.

Due to the claimant's absence on certified sick leave from 1 to 10 April 2009 and from 24 April to 12 October 2009 the disciplinary hearing was not held until 19 October 2009. The letter summoning the claimant to the rescheduled disciplinary meeting informed him that he would be given every opportunity to discuss his failure to report damaging the equipment on 28 February and that due to the serious nature of his conduct disciplinary action up to and including dismissal may be taken against him. When an objection was raised to OM conducting the disciplinary hearing on the basis that he had been involved in the investigation OM offered to adjourn the hearing and get someone else to conduct it but the claimant and his trade union representative decided to continue with the hearing. The claimant and his representative raised a number of issues about the investigation, which included a comment amounting to an accusation having been made by RM, that one of his team mates was not qualified to comment on the extent of the damage and a request was made for documentation and to amend some of the minutes. OM made clear to the claimant that no employee had ever been dismissed for reporting damage to equipment but that there had been dismissals for failure to report damage. The claimant denied having caused the damage to the set of steps. His evidence to the Tribunal was that he could not have reported damage of which he was unaware.

At a further meeting held on 2 November 2009 OM furnished the documentation requested to the claimant as well as a report from the maintenance manager indicating that both he and the maintenance contractor believed that the driver would have been aware of damage occurring at the time of the impact. At this meeting OM informed the claimant of his decision to dismiss him and the reasons for his dismissal.

The reasons for his dismissal were more fully set out in OM's letter, of even date, sent to theclaimant:

> *Despite indicating to [DM] on the morning of the incident that it may have been you who caused the damage you have continued to deny any knowledge of the damage occurring or the incident since the investigation was undertaken and throughout the subsequent disciplinary process. I believe that your failure to report the damage to the aircraft steps and your negligence in allowing the steps to remain in service showed a reckless disregard of safety rules and exposed your colleagues and our airline passengers to significant risk of injury. I believe your failure to report the damage constitutes gross misconduct.*
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> *I believe that the relationship of trust between the employee and employer is irrevocably broken and I have no other option but to dismiss you on the basis of gross misconduct for failure to report aircraft equipment damage which is a serious breach of health & safety regulations.*

The claimant's appeal was heard on 16 December 2009 by the station manager. The claimant's trade union representative argued that the claimant's behaviour could not have amounted to grossmisconduct in that he had not intentionally failed to report damage because he was unaware of having caused it. While the station manager accepted that the driver shown on the CCTV footagewas not clearly identifiable he found that the assumption that it was the claimant was a reasonableone. The station manager noted that the claimant and his representative decided to continue with thedisciplinary hearing despite having initially raised objections to it being conducted by OM. Thestation manager did not feel that the sanction of dismissal was disproportionate in light of theserious consequences that could have flown from having damaged equipment in use by staff andpassengers. The decision to dismiss was upheld.

In his evidence to the Tribunal the claimant could not say for certain, because of the poor quality of the CCTV footage, whether it was he who had been driving the tug on 28 February.

Determination

In cases of alleged misconduct it is not the function of the Tribunal to establish the innocence or guilt of the dismissed employee. Its function is to determine whether "a reasonable employer in those circumstances in that line of business" would have dismissed the employee? (L*ooney & Co. Ltd. v. Looney* - ud 843/1984 and *Bunyan v. UDT (Ireland) Ltd.* [1982] ILRM 404 at p. 413).

Applying the reasonable employer test the Tribunal asks itself whether the employer in this case had a genuine belief, arising from a fair investigation, that the employee was guilty of the alleged misconduct and whether the sanction of dismissal was disproportionate. The Tribunal is satisfied that the extent of the investigation was sufficient in the circumstances. Arising from it RM established that the particular set of steps had been used for flight FR9842, that the claimant had returned it to the equipment pathe damage was seen for the first time when TL1 carried out his pre-inspection of the steps some two hours later. Further and in particular, the CCTV footage as

well as the fact that some damage had also been caused to the other set of steps provide cogent evidence of when the damage more than likely occurred. Although the quality of the CCTV footage was poor and the features of the driver of the tug were not identifiable the Tribunal is satisfied that RM's assumption, in the circumstances as outlined, that it was the claimant was a reasonable one. Given the extent of the damage, the actions and behaviour of the driver, both at the time of the impact and on his return to the parking area, it was also reasonable to believe that the driver was aware that damage had been caused. The letter from the maintenance manager also supports this view although the Tribunal gave much less weigh to this evidence. Accordingly, the Tribunal is satisfied that the respondent had a genuine belief, arising from a fair investigation, that the claimant was guilty of the alleged misconduct.

The Tribunal next asks itself whether the sanction of dismissal was disproportionate. The respondent was a safety critical company with the safety of its staff and passengers being paramount. The claimant failed to comply with its core policy requirement to immediately report the damage. The claimant's own evidence was that he had received extensive training, refreshers and briefings on health and safety and the reporting procedures for equipment damage. Damage to a set of steps can be a hazard and cause serious injury to passengers or staff. In the circumstances the Tribunal finds that the sanction of dismissal was not disproportionate.

While the claimant maintained that he was treated differently to another ramp agent who in September 2008 had delayed for six days in reporting the damage he had caused to the wing mirror of a tug and had not been dismissed. The Tribunal notes the nature of the damage in the latter case, that the employee eventually reported the damage and that the serious but lesser sanctions of demotion and a final written warning had been issued in that case. The employer is not only entitled to but must have a nuanced approach to the application of sanctions for misconduct of varying degrees.

The Tribunal rejects the arguments raised by the claimant on procedural grounds. OM had been the note-taker during the investigation meetings and it was not contrary to fair procedures that he should conduct the disciplinary hearing. Around mid-April 2009 the claimant had raised an issue about not being allowed to have his solicitor to represent him at the disciplinary hearing. In general, there is not an entitlement to have a legal representative at an internal disciplinary hearing.

For the above reasons the Tribunal finds that the dismissal was fair andAs the dismissal was for reasons of misconduct there is no entitlement to notice or payment in lieu under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)