EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:		**CASE NO.**
EMPLOYEE	- appellant	UD2330/2010

against the recommendation of the Rights Commissioner in the case of:

EMPLOYER

- respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. McGrath BL

Members: Mr J. Horan
Mr. N. Dowling

heard this appeal at Naas on 16th July 2012.

Representation:

Appellant: Mr Conor Power BL, instructed by Moloney & Company, Solicitors, Unit 5, Lawlor's Commercial Centre, Naas, Co Kildare

Respondent: Mr. Tim O'Connell, IBEC, Confederation House, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

This case came before the Tribunal by way of the employee (the appellant) appealing against the decision of the Rights Commissioner (ref. r-089611-ud-10/RG).

Respondent's Case:

The respondent is a haulage business and works exclusively for company K for aggregates and the cement industry. D.McK is one of the company directors and ML is HR Manager. It employs sixteen drivers. The appellant was employed as a truck driver and drove a three axle truck and trailer. The appellant worked from depot C in Co. Meath.

Because the area is residential there is a need to drive slowly. A memo issued to all drivers that company policy was that speed must be kept to a maximum of 40 kms per hour or less if need be. Company policy was legal loading.

It came to the respondent's attention that the appellant had been speeding and three

separate complaints were made. No formal complaints were logged in the company. Both D. McK and BO, Transport Manager met with the appellant on 2nd November 2009 to discuss the alleged incidents. At the conclusion of that meeting the appellant was suspended on full pay for five days pending an investigation into the allegations. The investigation was carried out by D.McK and BO.

During the appellant's suspension the appellant's truck was examined by Volvo and a mechanic. The brake pads needed to be replaced and also the truck needed four new tyres. The respondent came to the conclusion that the appellant had been driving very harshly, perhaps skidding and been driving too quickly.

In ML's presence on 9th November 2009, BO telephoned the appellant and invited him to a disciplinary meeting the next day, 10th November 2009. During the course of the conversation the appellant indicated that he would bring a representative MH to the meeting. At the commencement of the meeting the appellant explained that his representative was unable to attend but that he was willing to proceed with the meeting on his own.

D.McK outlined the issues to the appellant which were that the respondent was concerned with the appellant's driving and the condition of the tyres on his truck which indicated excessive driving speeds. The respondent had a reputation to keep. D. McK said that he could not allow the appellant back on the road as it was unsafe to do so and that they might have to consider ceasing his employment.

The appellant contended at that meeting that he had worked for hackers all his life and was always against the clock. He was used to driving in the shortest time and using the shortest route. He knew it was a mistake to bring this with him to his current job. He knew it was wrong but explained he could change if given another chance. The appellant said he set the cruise control on his vehicle to 40 kms per hour.

D. McK told the appellant that he should not be setting the cruise control and that he should control his own driving. The company had a zero tolerance when it came to dangerous driving.

A decision was taken to terminate the appellant's employment and he was offered a right of appeal within 5 days. D.McK discussed the wording of the dismissal letter with ML and she subsequently signed the letter on 10th November 2009.

Appellant's Case:

The appellant commenced employment in June 2008. He was employed as a truck driver. His hours of work were 6.00 a.m. to 4 pm. He previously worked for a haulage company and had long and constricting hours of work. He had never seen or signed a contract of employment.

After several months working for the respondent the Plant Manager, PMcD spoke to him concerning his excessive speeding. He was told that there was a 40 kms per hour speed limit on the surrounding roads and that he was to take his time. PMcD told him that once he was off the residential road he could drive at a faster speed. He adhered to this instruction and kept his speed down after that. He was cautious and careful and never received any other complaints.

While driving he had never been stopped on the road by PMcD.

On the morning of 2nd November 2009 BO telephoned him and asked him to drop into his office to collect an insurance disc. The appellant was asked to return later that afternoon as both BO and DMcD wanted to talk to him. They told him that three complaints had been received in relation to his dangerous driving. At the conclusion of the meeting DMcD told him that he would have to investigate the complaints and he was suspended with pay for five days.

The appellant received a telephone call the following Tuesday from BO inviting him to a disciplinary meeting. He could bring a representative with him if he so wished. He attended that meeting without his representative as he was out of the country. The appellant wanted to get to the bottom of matters.

The concerns in relation to his driving were raised with him again and the condition of the tyres on his truck. It made no sense to him that the tyres could have worn down so quickly. The appellant contended that he drove very carefully on the narrow roads and never overtook another truck. He never drove excessively on the surrounding roads.

The appellant was never given any witness statements in advance or during the course of the disciplinary meeting. He had never had any accidents while driving the truck. The appellant contended that it was towards the end of the meeting that he was told that his employment was being terminated.

DMcK's brother was nominated to hear the appellant's appeal. The appellant felt that he would not be independent, saw it as a waste of time and so chose not to appeal his dismissal. Subsequently, he sought legal advice.

Since the termination of his employment the appellant has secured one to two days work every two to three weeks.

Determination:

The Tribunal has carefully considered the evidence. This matter comes before the Tribunal by way of an appeal from the findings of the Rights Commissioner dated 3rd June 2010.

The fact of dismissal is not in dispute and the onus therefore rests with the respondent to show that it acted fairly and reasonably in all the circumstances.

The appellant's manner of driving in the environs of the workplace came to the employer's attention by way of a number of complaints made by fellow employees and/or local contractors with whom the company had a long standing and trusting relationship. The Tribunal does not doubt that genuine concerns were raised but in conducting an investigation, however, the respondent failed in many respects to follow any reasonable and/or fair procedures. It was generally accepted that the roads in and around the haulage depot came under a particular and localised agreement with the residents. The expectation on the truck drivers driving under the company logo was that they would drive well under the speed limit and at a speed no greater than 40 kms per hour.

The appellant agreed that he knew that this agreement existed and that he had been picked up on driving at a greater speed in the first month of his employment. The appellant maintains that he had not gone above the agreed speed limit thereafter and the suggestion appears to be

that his speed never went over 40 kms per hour and was much less allowing for oncoming traffic and for the particular bends and quirks in the road.

On 2nd November 2009, some year and a half after the appellant had commenced employment he met with the plant manager and Director who told him he was being suspended without pay for five days by reason of the need to investigate the complaints raised.

The Tribunal has to find that the procedures applied were inadequate insofar as there is no evidence to suggest that it was made known to the appellant at this point that the disciplinary investigation and meeting due to take place in five days could lead to a dismissal for gross misconduct. It is noted that had the HR Manager not been away this fact might have been made known to the appellant but in the event the Tribunal cannot be sure that this appellant knew that the disciplinary he was being charged with could lead to the termination of his livelihood.

The appellant was sent home for the five day period and the respondent commenced an investigation that was inadequate in all the circumstances. It is not clear why, after the return of the HR Manager, the suspension was not continued to allow correct and adequate procedures be applied.

A further five days would have given the HR Manager an opportunity to ensure correct statements be taken and comprehensive background investigations be conducted. This was not done. There can be no excuse for proceeding with a disciplinary meeting for gross misconduct in the absence of same and particularly where the possible outcome of the meeting might be the termination of employment.

The respondent emphasised the fact that they had offered that the appellant be allowed bring representation to the meeting scheduled for the 10th November 2009. The friend and haulier that the appellant had intended bringing was unavailable and the appellant indicated that he was happy to proceed in the absence of this person.

The Tribunal in assessing these facts must give due consideration to the fact that it had not been made clear to the appellant that there was a possibility of him losing his job at this meeting. The Tribunal notes the appellant had no disciplinary history with the company. Further the Tribunal must give consideration to the fact that at this meeting of the 10th November 2009 the appellant was effectively told that complaints had been made, and these had been believed in full. There is no evidence to suggest that the facts were in any way teased out with the appellant who, it is noted, had no idea which parties had even made said complaints, where they related to, and when they related to. The full details were never revealed to the appellant. It is also quite clear to the Tribunal that the appellant was not then in a position to analyse the findings made by the respondent, to request time and/or to seek time to refute these vague allegations.

Instead the appellant's employment was terminated at the meeting with a letter confirming same dated that same day.

The Tribunal finds that the respondent is quite correct in reacting to any allegation of careless and/or dangerous driving by any of its drivers. However, the allegations made have lacked a certainty required to allow a man lose his job over them. The respondent failed to allow the appellant the benefit of any fair and reasonable procedures in this process.

The Tribunal upsets the recommendation of the Rights Commissioner and awards the appellant €25,000.00 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)