

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE –**Claimant**

UD369/2010

against

EMPLOYER - **Respondent**

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal

(Division of Tribunal)

Chairman: Mr. P. Hurley

Members: Mr. G. Andrews

Mr. F. Dorgan

heard this claim at Castleconnell, Co. Limerick on 20 October 2011

and 21 February 2012

#### **Representation:**

Claimants:

Mr. Patrick Whyms BL instructed by Mr. Mark Murphy,  
Mark Murphy & Co. Solicitors, 99 O'Connell Street, Limerick

Respondent:

Ms. Sinead Mullins, IBEC, Gardner House,  
Bank Place, Charlotte Quay, Limerick

#### **Respondent's Case:**

The respondent has some 300 employees involved in various aspects of logistics and distribution in the Munster region and beyond. The claimant was employed as a driver of a rigid truck involved in the distribution of products for clients of the respondent from May 2006. On 15 January 2008 the distribution manager (DM) issued the claimant with a final written warning over four incidents that had occurred in the previous twelve months. This warning had duration of nine months in accordance with the respondent's disciplinary procedure. On 8 September 2008 DM issued a further final written warning, again with a nine-month shelf life, following an incident whereby the claimant was late returning from an overseas holiday as a result of which there was a no-show at work for two days. It is the respondent's position, that notwithstanding the claimant still being on a final written warning he was given the benefit of the doubt and not dismissed at that stage rather the final written warning status was extended by nine months.

On or around Friday 3 July 2009 the claimant was observed to urinate against the back wall of the yard of a customer who then refused to accept a delivery from the claimant but did not tell him the reason for her decision. On Monday 6 July 2009 DM received a call from the local representative of the refused product who informed DM of the incident of 3 July. On 7 July 2009 DM spoke to the claimant about this incident and the claimant accepted that this had happened. DM compiled a

memorandum of his 7 July meeting with the claimant on 14 August 2009. It is common case that DM told the claimant of his disappointment with the claimant's actions and that his behaviour was completely unacceptable and unhygienic. Although not reflected in the memo it is the respondent's position that DM warned the claimant on 7 July that this incident could lead to disciplinary action up to and including dismissal.

On 17 July 2009, when entering the car park of a small shopping centre, the claimant's truck was involved in a minor very low speed collision with a car which was leaving the car park. As a result of this incident the claimant and his brother (CB) who was accompanying the claimant became involved in a discussion with the driver of the car (DC) and her passenger (CP). During these discussions the claimant telephoned DM and DC called the Gardaí who later took statements.

DM spoke to DC by phone on 21 and 27 July 2009. On 28 July 2009 DC wrote to DM setting out her complaint against the respondent, in particular the claimant and CB, and demanding that the respondent reimburse her for the damage which she asserted they were responsible for. DC alleged that the claimant drove his truck in a careless and reckless manner. She further alleged that the claimant and CB had behaved in a threatening and bullying manner towards her. DC had obtained CCTV footage of the incident on 27 July 2009.

On 29 July 2009 DM invited the claimant to attend a disciplinary hearing on 31 July 2009. The three items for discussion and investigation were:

- Complaints received from customers, colleagues and members of the public regarding the claimant's behaviour and attitude at work
- The incident of 17 July involving the claimant's truck in a minor collision
- The carrying of a passenger in the respondent's vehicle without permission

The claimant was warned of the possibility of disciplinary action up to and including dismissal being taken. He was offered the opportunity to be accompanied at the meeting and a copy of the respondent's disciplinary procedure was included with the invitation.

The claimant chose to attend the meeting on 31 July on his own. DM was accompanied by the human resource manager (HR). The three issues raised were put to the claimant. During the meeting HR felt that the claimant was displaying aggressive behaviour and ended the meeting by telling the claimant that she felt that the incidents complained of were potentially gross misconduct. The claimant was suspended with pay while the situation was being investigated.

On 1 August 2009 DC sent a DVD of CCTV footage of the incident of 17 July to HR. On 7 August 2009 HR and DM met the claimant in order to advise him of their decision. The claimant was then shown the CCTV footage. HR described the footage as showing aggressive behaviour on the part of the claimant and CB towards DC. HR told the claimant that this behaviour along with the complaints from DC and the customer involved in the 3 July incident amounted to gross misconduct. The claimant was dismissed with two weeks' pay in lieu of notice. He was advised of the right of appeal of this decision and chose to exercise this right. The appeal, which upheld the decision to dismiss, was heard by the financial controller and a director of the respondent on 7 September 2009

The Tribunal heard evidence from the HR manageress. She was involved in disciplinary procedures with the claimant in January 2008 and in September 2008. The claimant was advised as to what was involved and advised that he could have a representative. The claimant was given a

copy of the disciplinary procedure. He was told that it could result in his dismissal. She spoke to the claimant and he said he chose not to be represented.

What had happened is that a customer in Naas informed them that the claimant had urinated in public. The customer refused to take the delivery because the claimant had urinated on the grounds of the premises. The claimant did not deny that this had happened.

They met the claimant regarding the second incident of 17<sup>th</sup> July. The claimant became aggressive at the meeting. He told them that they did not care. He did not believe that the accident was his fault; he believed that the other motorist DC crashed into him. She had phoned DC before she met with the claimant and DC said that she had stopped to make way for the claimant vehicle. The vehicle scraped her car. The claimant got out and became very aggressive. DC is of an elderly age and was upset. She put this to the claimant at the meeting and the claimant said that he spoke to DC in a civil manner. He denied that he caused the accident. It was also discovered that the claimant had his brother with him in the vehicle. She told the claimant that this was serious because of insurance implications. Another aspect of the accident was that DC had obtained cctv footage of the incident and sent it to her. She told the claimant this and the claimant told her that he did not care and did not want to see the cctv. The claimant then became aggressive and waved his hands. She told him that he was behaving aggressively and that he had said he had not behaved aggressively and that he was now behaving aggressively. She told him it could potentially lead to his dismissal. She told him that he was being suspended with full pay. He then left.

She wrote to the claimant on 5<sup>th</sup> August to attend a meeting. He attended a meeting on 5<sup>th</sup> August. DH who is the managing director was at the meeting. JH was not as he was on annual leave.

She showed the cctv footage to the claimant but he did not seem interested. She told the claimant that they believed that his behaviour had been aggressive. The offences were gross misconduct and that he was being dismissed. That his actions put the company into disrepute because of a logo on the vehicle. That his behaviour was threatening, aggressive. That he had used verbal assault and that he was negligent. She told the claimant that he would be paid in lieu of notice. The claimant shook hands and left.

She and JH made were the persons who decided to dismiss the claimant. The reasons were because she and JH had spoken to DC and they found her credible. They believed that the claimant had lied about the accident and that the claimant's brother was in the vehicle. The claimant had admitted urinating. Because of these matters they felt that the trust had gone.

The Tribunal heard evidence from one of the company directors. It was she who heard the claimant's appeal of his dismissal. She upheld the decision that he be dismissed.

### **Claimant's case:**

The Tribunal heard evidence from the claimant. He explained that he was delivering to a premises and he was asked to drive/go to the back yard. He waited twenty minutes and found he needed to go to the toilet. He did so near some rubbish. A door opened and a woman appeared. She refused to take the delivery. Some days later JH asked him if the incident had happened and he told him that it did. JH told him that it was not to happen again and he agreed. As far as he knew that matter was finished.

Regarding the incident that he carried his brother as a passenger he had never denied that it had happened. Regarding the letter of 14<sup>th</sup> August 2009 what he had meant was that he never carried

his brother for “favour or reward”.

The claimant explained the accident. He was driving very slowly and approaching the premises that he was making a delivery to. He heard a scratch noise at the wheel of his car. He got out and went to purchase a camera in a nearby chemist. The chemist had no cameras for sale. He eventually bought a camera for €10.00. He took photographs of the incident. He phoned the officeto report the incident and spoke to someone. The procedure of the company is to take photos andnot to take responsibility (admit liability). He did not confront the woman in question. He explained “It is not my duty to confront her”. It was not for him to say who was wrong or right. He was on his phone “all the time”. He was not shouting at the woman as he was speaking on hisphone. He did not shout at the woman or yell at her in a threatening manner. The Gardaí arrived totake details.

The claimant gave evidence as to the disciplinary process and meetings. He also gave evidence as to the appeal.

The claimant gave evidence as to his loss and mitigation of loss.

**Determination:**

The Tribunal in all the circumstances is of the view that the grounds on which the respondents justified the dismissal could not be characterised as gross misconduct. In the ultimate analysis the encounter of 17<sup>th</sup> July 2009 involved a matter of civil and insurance liability. It follows in the view of the Tribunal that the dismissal was not warranted and is not sanctioned by the Unfair Dismissals legislation.

However, in arriving at this conclusion the Tribunal is satisfied that the claimant’s credibility in relation to the events he described is in issue. The Tribunal is not satisfied that throughout his hearing the claimant gave a candid account of the events that occurred. The claimant’s evidence was in many respects evasive and often contradictory.

The Tribunal further find that the claimant did not maximise his efforts to mitigate his loss.

In these circumstances the Tribunal finds the claimant was unfairly dismissed. Accordingly the Tribunal awards the claimant the sum of €2,484.00 (two thousand four hundred and eighty four euro), under the Unfair Dismissals Acts 1977 to 2007.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

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