

## EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:  
EMPLOYEE *-claimant*

CASE NO.  
UD850/2010  
MN810/2010

against  
EMPLOYER *-respondent*

under

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

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. T. Ryan

Members: Ms J. Winters  
Mr J. Flannery

heard this claim at Trim on 10th November 2011  
and 2nd February 2012

#### **Representation:**

Claimant: Richard H McDonnell, Solicitors, Market Square, Ardee, Co. Louth

Respondent: JHR Solutions, 28 St Eithne Road, Dublin 7

The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 was withdrawn at the outset. As dismissal is not in dispute in this case it is up to the respondent to prove the dismissal was fair.

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

The respondent's Health & Safety Officer (OS) gave evidence. His role within the company was to identify any Health & Safety training required and to investigate and prevent any accident from occurring. On the 4<sup>th</sup> of September 2009 OS was called to the scene of an accident. The claimant had arrived at a customer's site to collect a skip. The claimant parked the lorry and got out. On the claimant's return the lorry had rolled over the edge of the roadway and was lodged on a kerb (pictures submitted to the Tribunal.) The claimant maintains he had engaged the handbrake and the lorry moved due to a fault. The claimant told OS that the handbrake had possibly failed.

OS investigated the accident and due to the fact that the ground was level he decided that the claimant must have failed to engage the handbrake. When he arrived to investigate the accident OS did not get into the truck, to check if the handbrake had been engaged. As OS did not check

the handbrake he relied on a letter from the respondent's mechanic stating that the handbrake was in perfect working order as of the 11<sup>th</sup> of September.

The respondent mechanic (SW) gave evidence. SW looks after all the respondent trucks. He works full-time and has assistants. SW tested the handbrake on the claimant's truck and found it to be in perfect working order. The truck was towed back to the respondent premises following the accident on the 4<sup>th</sup> of September and the handbrake was tested on the 11<sup>th</sup> of September. As a result of the claimant reporting a fault with the handbrake it had been checked a week before the accident and SW found it to be fine. A number of invoices and work cards were produced for parts and work done on the claimant's truck between 4<sup>th</sup> of September and the 9<sup>th</sup> of September. SW did not work on the handbrake during this period. The letter signed by SW stating the handbrake was in perfect working order when examined on the 11<sup>th</sup> of September was written by his manager and handed to him to sign. SW agrees that the power wash from the Fire Brigade the day before the accident could damage the engine or the wiring of the truck. The claimant did not report any faults following the incident on the 3<sup>rd</sup> of September so the truck was not checked. The incident on the 3<sup>rd</sup> of September was only a spillage so the normal accident procedure did not apply.

A driver (CP) for the respondent gave evidence. CP was the regular driver of the truck involved in the accident. CP gave evidence that he never had a problem with a handbrake on the truck. If there was any type of problem the driver would pull the lorry in and ring the mechanic to decide if the journey should continue. CP is aware of the section of the Health & Safety booklet that states, *'It is the responsibility of the driver to check the condition of the vehicle...'* CP has driven many trucks in his time working for the respondent. The braking system would not work if the engine was not turned on; you could not determine if it was working by visual inspection.

On the second day of hearing the Supply Manager (ET) gave evidence. ET was part of the decision to dismiss the claimant. All the trucks are regularly serviced as well as weekly checks and driver daily checks carried out. If a problem is found it can either be fixed straight away or the driver contacts ET so she can ring the mechanic and see if she needs to put the driver in a different truck. The same procedure applied if a truck broke down; the driver would ring ET. Prior to the claimant's accident the truck had completed a round trip to Strabane (app 5.5hrs); he did not report a fault on his return from Strabane. ET was aware of the spillage and the resulting attendance of the Fire Brigade to clean up the scene. ET was driving when she received the call on the 4<sup>th</sup> of September regarding the accident, so sent OS and the customer service manager (MC) out to investigate.

An investigation meeting was held on the 8<sup>th</sup> of September 2009 between the claimant, ET and the Employee Relations Advisor (RR). A second meeting occurred on the 18<sup>th</sup> of September where the report from the Health & Safety Officer and the mechanic was available. The claimant was aware of these reports even if he was not given a copy of them. The mechanic said there was no problem with the handbrake, the regular driver of the truck said there was no problem with the handbrake. At that meeting of the 8<sup>th</sup> of September the claimant was suspended with pay until the disciplinary meeting on the 22<sup>nd</sup> of September. ET had formed the opinion that the handbrake was not put on in the truck and she did not accept any of the claimant's explanations.

At the second disciplinary meeting clarification was received regarding the engine i.e. the engine was running. As per stage 5.2.11 of the respondent's disciplinary procedures

which states, *'If, despite warnings/action taken in accordance with steps 1,2 and 3 of this procedure, the employees conduct/performance is still not acceptable to the company then he/she will be dismissed. The department manager will make this decision.'* As the department manager ET decided that the claimant's actions were Gross Misconduct as they were a breach of the Health & Safety regulations. The decision to dismiss the claimant was taken on the 30<sup>th</sup> of September by ET. Approval for this decision was given to ET by the Chief Executive Officer. The Chief Executive Officer was present throughout the disciplinary process. The claimant appealed this decision which was heard by the Chief Executive Officer.

The severity of the incident determines whether an employee is suspended with or without pay. There was less than €2,000.00 of damage done to the claimant's truck but it was the negligence, not the monetary value that led to his dismissal. Due to the severity of the incident a lesser sanction was not considered.

The HR Manager (RR) gave evidence. RR can verify that the claimant received full Health & Safety training. RR gathered all the information and acted as secretary during the disciplinary process. The claimant was informed of his right to representation and at the meeting of the 18<sup>th</sup> of September was warned that the process could lead to his dismissal. The claimant did have a copy of the respondent's policies and procedures. RR wrote the dismissal letter but did not have any part in the decision to dismiss the claimant. RR disputes threatening to withhold the claimant's P45 if he did not sign documents/minutes of meetings.

The Chief Executive Officer (JG) gave evidence. He did not make the decision to dismiss the claimant. JG did inform the claimant at the meeting of the 30<sup>th</sup> of September that, *'I regret to inform you that the company has no other option but to terminate your employment due to the serious breach of health & safety rules.'*

### **Claimant's Case**

The claimant has been a driver since 1992 and working for the respondent since 2007. The claimant had no prior accidents or disciplinary problems before his dismissal. The claimant had good performance reviews.

The claimant was definitely not shown a copy of the Health & Safety Investigation report or the letter from the mechanic stating the handbrake was in perfect working condition as of the 11<sup>th</sup> of September. The claimant was informed that if he did not sign all the minutes of the meetings he would not be given his P45. He did not agree with some of the statements in the minutes or the absence of some of his responses. The claimant received his P45 a couple of weeks later and signed the minutes on the 2<sup>nd</sup> of October after the CEO stated that, *'you might as well sign the minutes, it won't change my decision.'*

The claimant gave examples of faults in the Lorries that he was expected to drive. As he was the relief driver he had experience with all the respondent Lorries. On the 4<sup>th</sup> of September the claimant was sitting in the cab of the lorry drinking tea, he then got out to open a gate leaving the engine running; the handbrake was on as the claimant had been sitting in the lorry. After the incident the H&S investigator came out to the scene. He asked the claimant if he was alright, took a few pictures and left; he did not check the position of the handbrake. On the 3<sup>rd</sup> of September as a result of a spillage the lorry had to be hosed down with the Fire Brigade's high pressure hose.

The claimant gave evidence of Loss.

**Determination**

Having carefully considered the evidence the Tribunal find that the claimant's accident did not amount to Gross Misconduct. The respondent's procedures in effecting the dismissal were seriously flawed. The C.E.O. of the respondent approved the decision to dismiss the claimant, yet it was he who heard the appeal. It is a complete lack of fair procedures for the person involved in the dismissal to hear the appeal.

The Tribunal heard evidence of the claimant's attempts to mitigate his loss and is not satisfied by the attempts made by him.

The claim under the Unfair Dismissals Acts 1977 to 2007 succeeds and the Tribunal award the claimant €9,500.00 as compensation under said Acts.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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