

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE – *claimant*

CASE NO.
UD593/2011
MN629/2011

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: Ms M Levey BL

Members: Mr C Lucey
Mr G Whyte

heard this claim at Dublin on 30th July 2012

Representation:

Claimant(s) : Mr William F O'Brien BL, instructed by:
Mr Niall Ward
H J Ward & Co, Solicitors
5 Greenmount House, Harold's Cross, Dublin 6W

Respondent(s): Mr Paul McDonnell,
Solicitor
Gartlan Furey Solicitors
20 Fitzwilliam Square
Dublin 2

The determination of the Tribunal is as follows:

Background:

The claimant was employed as a truck driver for the respondent company. He was initially employed from February 2005 to 2006. He was dismissed for not reporting a road traffic accident. He was re-employed in May 2006 after his mother made representations to the company. A number of disciplinary issues in 2010 led to his dismissal in September 2010.

Respondent's Case:

The Distribution Manager gave evidence. He is responsible for 60 employees from drivers to warehouse staff. He was responsible for disciplining and dismissing the claimant.

he claimant's contract of employment outlined the disciplinary procedure. He hired the claimant in 2005 and dismissed him in 2006. The claimant had hit a car with a company vehicle. He did not inform the company, but instead paid the repair costs from his own money. The company became aware of the accident when the other driver tried to claim from the company. He rehired the claimant in May 2006 after the claimant's mother wrote to him.

A number of incidents led to the claimant's dismissal in 2010:

- On March 15th 2010 the Distribution Manager issued the claimant with a verbal warning for leaving the keys of the truck in the ignition. The claimant had done this a number of times and the Distribution Manager felt that a verbal warning was necessary. The truck was in a yard which was open to passers by.
- On April 4th 2010 the Distribution Manager issued the claimant with a written warning for dangerous driving. He saw the claimant mounting the kerb while entering the delivery yard. The kerb was a foot high and he thought the truck could tip over. The Distribution Manager had also received a number of complaints about the claimant's driving from helpers who accompanied truck drivers on deliveries. Staff members were refusing to work with him. One helper went to the Distribution Manager about two incidents with the claimant while he worked with him one week. The Distribution Manager wrote down the complaints and the helper signed them. On one occasion the claimant was moving away from a traffic light when a tyre blew out. He contended that the claimant took his hands off the wheel in panic while the truck was still moving. He shouted at the claimant to put his hands back on the wheel. The claimant then pulled the truck over. The other incident was when the helper was directing the claimant down a lane. He instructed the claimant to reverse, but the claimant moved the truck forward instead catching the helper's clothes in the curtain ties pulling him four or five feet with the truck. When the claimant stopped he told him what had happened and the claimant apologised.
- On May 4th 2010 the Distribution Manager issued the claimant with a caution for leaving work early without permission and without checking out his dockets. The Distribution Manager did not want to seem unfair to the claimant as he already had a verbal and written warning. He had spoken to the claimant previously about leaving without permission.
- On May 25th 2010 the Distribution Manager issued the claimant with a final written warning after a second helper (not present to give evidence) complained that while out in the truck with the claimant they had argued and the claimant had become aggressive. The claimant jumped out of the truck and left the helper and the truck in the city centre. The helper had to contact the office for assistance. The Distribution Manager met the helper and the claimant together in order to see if they could work out their differences, but the claimant became aggressive with the helper in the office.
- On July 28th 2010 the Distribution Manager issued the claimant with a caution for failing to deliver an important delivery. The customer was very demanding in regard to prompt deliveries. The claimant arrived late with an order and was turned away. A new delivery time was arranged. The claimant was to make this delivery first in the morning. The transport manager phoned the claimant in advance to remind him. The claimant failed to load the order and went straight into town without going to the customer. The company lost the customer as a result. Again the Distribution Manager

did not want to be unfair to the claimant and only cautioned him about this. The Distribution Manager's boss was very unhappy.

- As a result of three incidents that occurred in one week the Distribution Manager held a disciplinary hearing with the claimant on September 10th 2010. On Friday September 3rd 2010 the claimant requested to do an evening delivery with his car so he could go straight home. The stock was left by his car for him to load. The Distribution Manager later received a phone call from a security guard who told him that two kegs and a gas cylinder were in the yard. The claimant had left without the stock and had not informed anyone.
- On Tuesday September 7th 2010 the claimant went home with the keys to the truck. He had been spoken to about this previously. On Wednesday September 8th 2010 when the Distribution Manager went to discuss the previous incident with the claimant the Distribution Manager discovered that he had left the premises without permission.

The Distribution Manager dismissed the claimant on October 9th 2010. The dismissal letter stated that if the claimant wished to appeal he should do so in writing within three days. The claimant did not appeal the decision.

The claimant was paid one week's pay in lieu of minimum notice. The date of termination of employment was September 17th 2010. The Distribution Manager conceded that the claimant was entitled to a further week's pay and the claimant was sent a cheque for €337.25, but this was returned by the claimant. The company did not have a copy of the grievance procedure. If an employee had a grievance they could come to him or to his boss.

During cross-examination the Distribution Manager agreed that he had given the claimant a positive reference after his first dismissal in 2006. The claimant had not sought a reference after his dismissal in 2010. He disputed the claimant's contention that a delivery docket had been falsely created for the collection of empties from a psychiatric hospital. This was a sponsorship account and was not fabricated. The claimant did not make any complaint to him about this.

The claimant was involved in a road traffic accident in a company vehicle in December 2009 which resulted in him taking three periods of sick leave from December to February 2010. The Distribution Manager was unaware that the claimant had entered a personal injuries claim against the company and disputed the allegation that he had tried to humiliate him when he returned to work. He denied that he bullied the claimant.

Regarding the keys in the ignition the Distribution Manager contended that he saw them there. The keys were either to be left in his office or in the dispatch office. He had issued every driver with note on numerous occasions to remind them to leave the keys in the office. Other employees who did not comply with this were issued with warnings. He offered the claimant a role as helper, but the offer was refused. The claimant had a licence to drive a truck and the Distribution Manager expected him to live up to that, but he was a careless driver.

The Distribution Manager disputed the claimant's contention that he was dismissed in February 2010. He was being spoken to about an issue and he left the premises. The company later received a solicitor's letter on behalf of the claimant concerning his dismissal. The Distribution Manager phoned the claimant and asked him why he thought he'd been dismissed. The claimant returned to work. The claimant never complained that he was being bullied or mistreated. The company did not bring any documents in regard to any warnings or cautions

issued prior to the disciplinary process which led to the claimant's dismissal.

The first helper referred to above gave evidence. He complained to the Distribution Manager about the claimant as outlined above. The claimant took his hands off the wheel after a tyre blowing out and on another occasion caught him with the truck while the witness was directing him.

During cross-examination he explained that he dictated his statement to the Distribution Manager and then he signed it. He denied that his complaints were concocted to support the written warning. He considered the incidents to have been serious. He told the Distribution Manager that he didn't want to work with the claimant again.

Claimant's Case:

The claimant gave evidence. He could not recall any verbal or written warnings prior to February 2010. In February 2010 he had recovered from his accident and he asked the Distribution Manager if he could return to work. The Distribution Manager said no and that he would have to terminate the claimant's employment. The following week his solicitor sent a letter to his employer and following that the Distribution Manager rang him and told him to come back to work. After that he felt that the Distribution Manager and the transport manager were hostile towards him. He contended that the Distribution Manager was trying to save face after having to rehire him in February 2010.

On one occasion in March 2010 the claimant had collected his dockets from the dispatch window when he was called to the office. The Transport Manager gave him a delivery docket for a psychiatric hospital and said to him 'you belong there'. The claimant had never made any deliveries to the hospital before. The contact number on the docket was not the customer's but a staff member's. He felt very embarrassed and degraded.

He contended that he was victimised. He had seen other drivers mounting the kerb on the way into the delivery yard without receiving warnings. There were no line markings in the yard which did not help. He denied that he left the key of the truck in the ignition. He left it inside the truck so that other employees could move it into the warehouse for the night. He contended that someone moved the truck into the warehouse while he was there. He contended that he had never received a letter about leaving the keys in the office. He wasn't aware of any procedure whereby he could challenge the warnings he received. The Distribution Manager never suggested any alternative role to him.

He refuted the evidence of the helper. He denied that he caught the helper's clothes while manoeuvring the truck. He contended that when the truck had a blown out tyre he had just moved from the traffic light and had stopped before he took his hands off the wheel.

He contended that it was the company who asked him to make a delivery with his car so they wouldn't have to wait for him to return. He went to the transport manager and told him that he couldn't fit the stock in his car. He believed that he had covered himself and left. He could not move the pallet.

Regarding not making the call to the difficult customer he stated that he had ten calls to make in the morning before 12pm and that it was difficult to get to all of the customers in that time. Morning calls were missed all the time.

He felt that other employees made mistakes but they were brushed aside. The claimant gave evidence of his loss. He had not found employment since his dismissal. He had undertaken

several training courses.

During cross-examination the claimant disputed that he had received any warnings prior to 2010. He saw his solicitor regularly in relation to his personal injuries claim. He spoke to his solicitor in February 2010 when he contended he had been dismissed. His solicitor wrote a letter on his behalf. He didn't recall being asked to provide a certificate stating that he fit to resume work.

He contended that he had never left the key in the ignition of the truck. He agreed that his truck had mounted the kerb on the occasion he received a written warning. He did not complain to the Distribution Manager about the lack of lines in the delivery yard. He agreed that he had left the premises early, but he contended that he was always in early and worked the hours required.

He contended that after February 2010 the Distribution Manager created the rule about needing permission to leave in order to victimise the claimant. He did not instruct his solicitor about any of the events after February 2010.

He believed the delivery docket to the psychiatric hospital was fabricated to belittle him. He denied threatening or abusing a helper. He denied abandoning him in the city centre. He contended that he parked the truck, locked it and went to make a delivery. He then returned to the truck. Regarding the non-delivery of the order he contended that the forklift driver had not loaded the order.

He sometimes got an opportunity to explain his side of things. The Distribution Manager believed the second helper rather than him. He didn't think anything was wrong until he went to his solicitor. When his solicitor said it was unfair he decided to proceed with the case. He didn't appeal the dismissal as provided for in the dismissal letter. He wasn't familiar with legal procedures. He gave the letter to his solicitor to deal with a week after his dismissal.

Determination:

Having considered all of the evidence the Tribunal finds that the claimant was not unfairly dismissed. Issues arose over his competence regarding his driving and these were conveyed to the employer by other employees and in some instances witnessed by the Distribution Manager himself. Other issues arose regarding leaving early and the performance of his duties which were drawn to his attention and notwithstanding these there was no improvement in his performance. He was given a right of appeal and did not avail of it. In the circumstances the Tribunal finds that the dismissal was not unfair.

The respondent company paid the claimant one week's notice. The claimant had a statutory entitlement to two weeks' notice. Accordingly the Tribunal awards the claimant €450.00 (four hundred and fifty euro) in respect of the outstanding week's notice.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)