EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.
EMPLOYEE -*claimant* UD2163/2010

Against

EMPLOYER -*respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms D. Donovan B.L.

Members: Mr J. Browne
Mr F. Dorgan

heard this claim at Wexford on 21st June 2012 and 27th August 2012

Representation:

Claimant: In person

Respondent: Peninsula Business Services, Unit 3 Ground Floor Block S,
East Point Business Park, Dublin 3

The determination of the Tribunal was as follows:

Dismissal as a fact was not in dispute.

A director of the company gave evidence that the respondent sells inserts for weighing equipment as well as carrying out repairs and maintenance. The claimant was employed as a service engineer.

In June/July 2010 there was insufficient work for full-time engineers. Due to this the claimant was reduced to two days work per week and was issued with an RP9 in this regard. It was the company's case that the claimant then served part B of the RP9 on 6 August 2010 stating his intention to claim a redundancy payment.

However, in the interim an allegation was received on 28 July 2010 that the claimant's work vehicle was at a customer's premises when he was not scheduled to work as witnessed by another engineer. The claimant was informed of the allegation on 4 August and was issued with a notice to attend an investigation meeting on 5 August 2010 and he was suspended

pending the outcome. The respondent company had supplied scanners to this particular customer but the customer declined to purchase a service or calibration service from the respondent company.

The claimant was also served with part C of the RP9 form as full-time work was pending and indeed while the claimant was placed on suspension, other engineers had to be drafted in to cover the claimant's work.

At the investigation meeting on 5 August 2010, the claimant stated that he had looked at two scanners and a weighing machine which he had realigned. The value of the work to the respondent would have been €115. The claimant stated that he had carried out this work as goodwill work.

The director of the company outlined to the Tribunal that the usual procedure is that a job is issued to a service engineer from the office after the call has been logged in the company's register. Once the engineer completes the work and a job card is signed by the customer, aninvoice is raised. A callout charge is always applied to a customer regardless even if the workis of a minor nature. As part of the investigation the director enquired of other engineers aboutgoodwill work and they confirmed they did not carry out such work. This was disputed by theclaimant. It is stated in the employee handbook that the work vehicles are not to be used forprivate work. There was a dispute between the parties as to whether or not the claimant hadreceived the employee handbook.

The claimant was subsequently invited to attend a disciplinary meeting on 16 August 2010. The minutes of the meeting were opened to the Tribunal. At this meeting the claimant explained that the computer manufacturer had advised him to wipe the laptop.

The disciplinary meeting was reconvened until 9 September 2010 to allow for further investigation. Further issues had come to light since the previous disciplinary meeting. A customer required an engineer but the engineer allocated to the area was not in work and the distance was too far from the claimant. The claimant had provided the customer with the contact details for the respondent's competitor.

The claimant was subsequently informed by letter dated 30 September 2010 that a decision had been taken to terminate his employment as his actions constituted gross misconduct. The claimant wrote seeking an appeal but this did not proceed as he then lodged the claim under the Unfair Dismissals Acts.

The claimant was asked to return the company laptop and mobile phone. When the laptop was returned it had been wiped. Part of the respondent's business is supplying labelling equipment and this also involves using software to design labels which is time-consuming. The company considered the fact that the computer had been wiped was a disciplinary matter. The claimant had been asked to return these items as he was getting some direct calls from customers and the company wanted to ensure the calls were being dealt with correctly as the company strongly discourages calls from customers going directly to engineers.

During cross-examination it was put to the director that all company computers are backed up on a central server. The director was unaware of this but stated that the claimant had not raised this at the disciplinary meeting.

It was put to the director that the claimant had actually verbally notified his direct manager on 4 August 2010 of his intention to claim redundancy following four weeks of short-time and that within two hours of this he was asked to attend an investigation meeting. The director stated that there was no redundancy situation as an additional engineer was employed after the claimant was dismissed.

It was put to the director that a job offer was made to the claimant by the respondent company in April 2011. The director stated that this was due to a concern the company had that the claimant would take customers from the company.

JA the service director gave evidence that he acted as appeals officer. He received a letter of appeal from the claimant in early October 2010. JA replied setting out a date for the appeal in the Armagh office on 29 October. The claimant advised the company that he would not be attending and was pursuing a claim through the Employment Appeals Tribunal. JA replied to his letter on 2nd November advising him that the offer of appeal still stood.

The claimant MM gave evidence that he began work as a service engineer for the respondent in 1999. The business he worked for was taken over by the respondent in August of 2009. All engineers took pay-cuts and the office closed. Engineers worked from home and got instructions by telephone from administration staff. MM went on short-time working a two day week in July of 2010. He applied for his redundancy four weeks later and got counter notice from the respondent. On 4 August the claimant received a letter from the respondent requesting him to attend an investigation meeting. The allegation was that MM was working in competition to the respondent because of a location he was seen at on 28 July. At the investigation meeting MM admitted to being at the business premises on the day in question but said it was a goodwill gesture, he was driving past and he was only there for 10 minutes.

During cross-examination MM stated that he did not log the call with the respondent as it was insignificant. He was on a two-day week so was trying to ensure he had a day's work for the following week. Asked about software he removed from a computer before he handed it back to the respondent MM said that he gave the laptop back the way he had received it

Regarding an incident that occurred on 30 April where it was alleged that MM refused to travel to a customer's premises he said that it would be a 10/12 hour round trip, he carried no spare parts and there were other engineers closer to the customer.

Determination:

Having carefully considered the evidence adduced at the hearing the Tribunal is not satisfied that the conduct engaged in by the claimant in the particular circumstances amounted to gross misconduct such as would entitle the respondent to dismiss the claimant. This finding is supported by the fact that the respondent sought to re-engage the claimant some months later.

In reaching its determination the Tribunal noted that one of the incidents occurred on 30 April 2010 but was only raised by the respondent in or around the time the claimant served a RP9 notice on the respondent claiming redundancy. The Tribunal accepts that the respondent did not have a need to make the claimant redundant. The second incident was also raised at this time. The final incident relating to the removal of software from the claimant's company computer occurred after the dismissal and whereas the claimant should not have done this

the Tribunalfinds that it could not have contributed to the decision to dismiss.

The Tribunal finds that there was some prevarication on both sides regarding the final internal appeal.

Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds and the Tribunal awards the claimant compensation in the amount of €8,500

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)