EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	CASE NO.
EMPLOYEE	UD343/2011 MN332/2011 PW148/2011

against

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
PAYMENT OF WAGES ACT, 1991

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. P. McGrath BL

Members: Mr. E. Handley
Mr. J. Jordan

heard this claim in Dublin on the 29th February and 10th May 2012

Representation:

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Claimant(s):

Respondent(s):

Determination

At the outset, the appeal under the Payment of Wages Act, 1991 was withdrawn.

The Tribunal has carefully considered the evidence adduced over the course of this two day hearing.

The claimant brings this application under the Unfair Dismissals Legislation in circumstances where his employment was terminated for breaches of health and safety standards following an investigation conducted in June 2010. The decision to terminate the employment has been

affirmed on appeal by the 26th July 2010.

In essence, the claimant was being disciplined for the dangerous operation of a digger truck. He and a colleague Mr. K had been assigned a task of loading a dumper truck on the 29th of April 2010. It is common case that Mr. K was operating the dumper truck whilst the claimant was operating the digger. It is also common case that the claimant was an experienced digger operator who worked with the company since 2003 and was well versed with all aspects of the operation of same. In particular all parties accepted that a dumper truck must never, ever be loaded until it's driver had disembarked having parked the dumper and put on the hand brake. This is a strict procedure as the risk of injury to a dumper driver from the bucket of a loading digger could be catastrophic.

On the morning of the 29th of April both Mr. K and the claimant herein were reprimanded for the manner in which they were loading the dumper. It is accepted that the claimant was indeed operating his digger and loading the dumper truck whilst Mr. K was still in the driver's seat. There can be no doubt that this was a grave infraction of the accepted safety and health standards. On the day in question both men were "white carded" by the site manager and theiremployer (the respondent) who was a sub-contractor on site was notified of the purported lackof care. In response to this the respondent employer undertook to conduct a disciplinary investigation.

A Mr. Bulger conducted the investigation into the incident. The claimant has consistently maintained that he had no reason to believe that the dumper driver was still in the dumper. Hehad understood that the driver would dismount having given the claimant the "thumbs up" gesture – an indication to start loading. The claimant it seems relied on the dumper drivers ownexperience and understanding of what is accepted procedure. It is clear that the claimant didnot double check to make sure that the driver had disembarked. In his evidence the claimantindicated that his view of the driver had been obscured at any rate given the positioning of thedigger and dumper. Mr. B was satisfied that the claimant had acted with a lack of regard forsafety on site.

Whilst there was evidence adduced concerning the possible justification of the scenario having arisen, the investigator was of the view that there can be no justification for allowing such a dangerous operation of the dumper and digger to arise. It seems therefore, that to the investigator, evidence in relation to the working or non-working of the hand brake, the possibility of not having a perfect view and the lack of understanding between the two operators could absolutely not outweigh the recklessness of proceeding without being absolutely sure that it was safe to do so. To his mind, the investigator Mr. B believed this action on the part of the claimant was so grave as to be worthy of a final written warning.

Unfortunately for the claimant he already had a final written warning on his file. The claimant was consequently terminated as being the next available step.

In his argument, the representative for the claimant makes the case that the final written warning which was held on the file was invalid. This final warning was for damage caused by the claimant to machinery owned by the employer and the warning had come into operation on the 30th April and was affirmed on appeal on the 25th May 2011. It is worth noting that this final written warning was preceded by a first written warning which had issued in September of 2009. The claimant's solicitor pointed out that the investigation procedures in operation in September 2009 had been unsatisfactory in that the claimant was not offered sight of, and an opportunity to reply to, certain statements and other evidence purportedly taken. Such evidence was certainly never shown to the claimant. It is worth noting that Mr B had been involved in the appeal process which led up to the first of the final warnings. For some reason Mr. B's observations note and reports were not opened to the Tribunal and were never made known to the claimant either in the first disciplinary process or the second written process.

The claimant's solicitor makes the case that this first written warning was therefore rendered invalid which has the knock-on effect of rendering the first final written warning as invalid. This makes the presumption that the first final written warning on the 30th April was related to the first warning of September 2009. The Tribunal notes the 30th April 2009 final written warning issued without reference to the earlier warning on file, and the disciplinary procedures allow for the issuing of a final written warning if the conduct so merits (chapter 8 P. 34). Therefore the employer is entitled to move to the second stage sanction without reference to or the need for a first stage.

The majority of the Tribunal is satisfied that the first final written warning was valid and issued correctly after following correct procedures. In concluding, the Tribunal finds that the employer was therefore entitled to terminate the claimant's employment when the second written warning, the subject matter of these proceedings, issued. There was a dissenting voice on this majority decision but the majority of the Tribunal finds the termination to have been fair.

The claims under the Unfair Dismissals Acts, 1977 to 2007, and the Minimum Notice and Terms of Employment Acts, 1973 to 2005, fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)