

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYER - *appellant*

CASE NO.

UD1410/2011

against the recommendation of the Rights Commissioner in the case of:
EMPLOYEE - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. McGrath B.L.

Members: Mr. D. Winston
Mr J. Flannery

heard this appeal at Dublin on 7th January 2013

Representation:

Appellant(s) : Mr. David Farrell, IR/HR Executive, IBEC, Confederation
House, 84/86 Lower Baggot Street, Dublin 2

Respondent(s) : Mr. Sean McDonagh, Communications Workers' Union, 575 North
Circular Road, Dublin 1

This case came before the Tribunal by way of an appeal by the employer (appellant) against the recommendation of the Rights Commissioner (r-086517-ud-09 JOC) under the Unfair Dismissals Acts 1977 to 2007.

Summary of Case

The appellant is a global package delivery company employing a large number of employees in Ireland 100 of which are employed as service providers/drivers. The respondent was employed as a service provider/driver from May 2007. The delivery vans are specifically built for the company and the Tribunal heard detailed evidence in relation to how the vehicles are accessed by the drivers. The security of the vehicle and its contents are of paramount importance and all drivers are trained in relation to vehicle security in accordance with Department of Transport Regulations.

Random security audits are carried out by the company on a regular basis and the respondent failed one such audit on 1 May 2009 by failing to keep his vehicle secure. The passenger van door and the bulk head door had been left open and unsecured. As a result of this the respondent

received a final written warning which he did not appeal. On 26 May 2009 the respondent again failed an on road random security audit. The Tribunal heard evidence from the security manager that the cab passenger door was unlocked when he carried out his random audit on the day in question. The company conducted an investigation into this incident and the respondent was invited to attend a disciplinary hearing. The respondent was accompanied by his trade union representative at the hearing. Following the investigation a decision was made to terminate the respondent's employment. The respondent was already on a final written warning and his failure to secure his van amounted to gross misconduct, a policy which is outlined in the company handbook.

The respondent appealed this decision and an appeal hearing was conducted 17 June 2009. As part of the appeal hearing a review of the security audit of 26 May 2009 was undertaken. The Tribunal heard evidence from the company mechanic that he checked the vehicle on 26 May 2009 and found no fault with the central locking system of the vehicle. The decision to terminate the respondent's employment was upheld and the appeal failed. The respondent was informed of this decision by way of letter dated 26 June 2009.

The respondent gave evidence that he worked for the appellant for 2.5 years. He fully understood the process of securing and accessing his vehicle. He had no issues with the company until the audit of 1 May 2009. He accepted that he failed that audit. He received a final written warning for this failure by way of letter dated 19 May 2009 and was given the opportunity to appeal this decision. He did not appeal this decision but gave evidence that he did not understand the seriousness of this letter.

On 26 May 2009 he returned to his vehicle after making a delivery and saw Mr.C with the passenger door open. He could not understand this as he had pressed the key fob to lock the cab. He gave evidence that it was not possible that he forgot to press the key fob as he is trained to do so. He could not remember if he heard a sound when he pressed the key fob. He attended a disciplinary hearing on 29 May 2009 along with his trade union representative. He was dismissed from his employment by way of letter dated 29 May 2009 and appealed this decision through his trade union representative by way of letter dated 4 June 2009. His appeal was unsuccessful and the decision to dismiss him was upheld.

The Tribunal heard further evidence in relation to his efforts to secure alternative employment since his dismissal. He is not currently in employment and has returned to college since September 2012.

Determination

The respondent had been in receipt of a final written warning in May 2009. This arose out of the respondent's failure to ensure that his delivery van was properly secure in accordance with strict company procedure. There seems little doubt that the respondent knew the significance of this letter and of the fact that as a company the appellant must uphold the highest standards of security and safety in order to satisfy its international client base and to preserve its international reputation.

On 26 May 2009 a random security audit was carried out on the respondent's van and the uncontroverted evidence is that the passenger's side cab door was unlocked. It is accepted that the package storage unit was secure and that the driver's door was also locked and how the passenger side door came to be unlocked remains unexplained. The respondent is adamant that

he always uses the remote control to centrally lock the van cab and he did carry out this procedure on the morning in question (and at his first point of delivery). The appellant says that there is no mechanical or electronic reason to suppose and/or suggest that the central lock was not working perfectly. The appellant relies on the fact of human error as having given rise to the door being unlocked when it should have been locked.

The appellant conducted a disciplinary hearing based on the report of a Mr. C (who carried out the audit) and taking into consideration the findings of the mechanic that he could find no apparent problem with the central locking system. The appellant determined that by reason of the fact that the respondent was on a final warning, the appellant had no alternative other than to terminate his employment.

Mr. K conducted an appeal and it seems in an attempt to try and fully investigate the matter Mr. K increased the scope of the investigation by having Mr. C give an oral account of the audit but the content of this conversation was not put to the respondent. Whilst this need not be fatal to the process it is not appropriate that Mr. K would consider matters about which the respondent knows nothing.

What was quite clear from the course of the evidence, was that the appellant had no difficulty with the respondent and that the appellant felt bound to terminate the employment simply because the letter of warning was on file. In the letter of appeal the respondent had looked for clemency on the issue of the penalty. This does not appear to have been given due consideration and despite the fact that the handbook specifically provides for demotion, transfer and suspension without pay these forms of penalty were not considered.

The Tribunal cannot determine whether human error or mechanical failure gave rise to the fact that the passenger door was unlocked but the Tribunal must satisfy itself that the appellant has discharged it's onus to act reasonably and fairly in all the circumstances. This becomes all the more acute where a man is to lose his livelihood. The Tribunal is not satisfied that the appellant has discharged it's onus. The appeal process was fundamentally flawed and the penalty far outweighed any wrongdoing committed. The Tribunal makes a finding that the respondent was unfairly dismissed and varies the recommendation of the Rights Commissioner and awards the respondent the sum of €15,000.00 under the Unfair Dismissals Acts 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)