EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	CASE NO.
EMPLOYEE,	UD649/2011
,	MN699/2011

against

EMPLOYER
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. K.T. O'Mahony BL

Members: Mr. J. Hennessy
Mr. F. Dorgan

heard this case in Kilkenny on 31 October 2012 and 12 February 2013

Representation:

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Claimant(s):

Respondent(s):

The determination of the Tribunal was as follows:-

Summary of Evidence

The claimant worked as a driver in the respondent's hygiene division from May 2002 until her dismissal in early December 2010. The claimant had two other jobs: a cleaning job from 5.00pm to 7.00pm, Monday to Friday and she also collected money on a Thursday and Friday evening`s for a money lending company (MLO). The claimant's position was that she had the latter job at the time of the commencement of her employment with the respondent. According to the respondent's car policy rules, outlined in the Drivers Handbook, the claimant's contract of employment and the Authority to Drive Form, the company commercial vehicle is only to be used for company business; under its disciplinary procedure private use of the company vehicle without authorisation constitutes 'major misconduct'. The claimant had signed her contract of employment. The Authority to Drive Form submitted in evidence was not signed by the claimant.

The respondent received a phone call from a member of the public (the complainant) informing it that a colleague of the claimant (CC) had called to her house in a company van, bearing the company logo, on a number of occasions, both during and outside company hours, to collect money for a third-party money-lending organisation (MLO) and that the claimant collects money on CC's behalf and that on, at least, one occasion the claimant called, on behalf of CC, to her house to collect the money. As regards the latter complaint, the complainant alleged that it was her daughter who had spoken to the claimant as she herself had not been at home at the time. The company logo is displayed on the company van and employees wear the company uniform in the course of their work with the respondent.

The claimant had been informed while on annual leave that CC was being investigated about the allegations and that her name had also been mentioned in connection with those allegations. While on holidays she received a number of calls from the respondent asking about keys; this had never occurred before.

On her return from annual leave the claimant was called to a meeting on 18 November 2010, where OM informed her that allegations had been made against her, she was handed a letter outlining the allegations and informed that they may lead to her dismissal. She was suspended on pay.

The letter of 18 November 2010 invited the claimant to a disciplinary meeting and outlined the two allegations against her as follows:

It is alleged that you have used the company commercial vehicle while conducting debt collecting duties for MLO. I attach a copy of a written a statement/complaint which the company had received from (an MLO) customer, who alleges that you have visited their home this year regarding MLO business in the (respondent's) commercial vehicle. This activity brings the company into disrepute and creates a threat to the health and safety of you and your colleagues. It creates an association of the (company) drivers and vehicles with large sums of money. The company that it is alleged that you are collecting for is an organisation we do not wish to be associated with. It would similarly be creating a bad image that could prove detrimental to the business.

Additionally, it is also the alleged that you use the Company's Commercial Vehicle to commute to an additional employment with a Cleaning Company (sic). You are obliged to inform the Company of any additional employment, as any hours work over 48 hours would be in breach of the Working Time Act 1997.

The claimant was accompanied by her trade union representative (TU) at the disciplinary on 25 November 2010 and OM and HRM were present on behalf of the respondent. OM would not disclose the identity of the complainant/informant as the respondent had promised her anonymity but informed the claimant that the alleged collection took place between April and August 2010. The claimant maintained that the allegations were too general and she was entitled to know the identity of the complainant and asked for the dates and times that it was alleged she had called to the complainant's house. The claimant informed OM and HRM

thatshe knew who the complainant was as her Christian name had been accidentally disclosed in anemail and that the complainant was a friend of a fellow employee of the claimant, who wasalways trying to make trouble in the depot; on one occasion she scattered bins on a lawn andblamed CC for it. The respondent had a tracker on company vehicles for the previous two yearsand this practice had not raised any issues against her. Being aware from CC's disciplinary hearing that the respondent had engaged a private investigator (PI) the claimant sought thereports of both PI and the complainant's daughter and indicated she would be more willing toanswer the allegations once these were received. OM informed them that she expected toreceive the report within a few days. TU wanted all allegations ' on the table' before theclaimant would respond. The claimant maintained that the complainant's daughter did not knowher. The respondent's position was that providing the details of the visit would enable the claimant to identify the complainant.

The second allegation, which was that the claimant commuted to other work in the company vehicle, had been made by the claimant's supervisor (SC). The claimant admitted to the second allegation and that she had been working for the cleaning company for the previous seven years. Her position at the disciplinary meeting was that both OM and SC were well aware of this; on occasions one or other of them had called to the premises to collect keys and run sheets from her while she was working there; the claimant had left meetings at the depot on a number of occasion, where OM and/or SC were present, stating she had to go to work. OM had asked her a number of times when the cleaning contract was coming up for renewal as the respondent was interested in applying for it.

The meeting ended in an impasse when OM asked why the claimant who provided an answer to the second allegation would not answer the first allegation. TU repeated that she would not provide the answers until the full allegation was on the table.

TU and the claimant left the meeting with the understanding that the reports of PI and the complainant's daughter were to be provided to her. On or around 2 December the claimant found that her wages were short and the deduction made was equivalent to the sum she owed the respondent in respect of the cycle to work scheme; she believed that she had been dismissed. When she queried the matter she was advised that a letter of dismissal had been forwarded to her on 30 November. The claimant received the letter of dismissal a week later by ordinary post although it was dated 30 November 2010.

OM did not attend the hearing before the Tribunal. According to the letter of dismissal sent to the claimant, following the disciplinary hearing, OM, having considered the claimant's evidence, was satisfied that both allegations were 'substantiated and proved' and constituted. gross misconduct and she took the decision to dismiss the claimant with immediate effect.According to her letter OM took the position that the claimant had not denied the allegation inrelation to the use of the company vehicle in the collection of money for MLO and had admittedusing it to travel to and from work to a third party premises which is against company rules.

In the letter of dismissal OM stated, *inter alia,*

Upon considering the serious nature, particularly the allegation regarding MLO, the activity of collecting money in the (company) vehicle poses a serious risk of health and safety to all company vehicle driver and passenger employees as it creates an association of large sums of money travelling in the vehicles. Additionally, the activities of MLO are such that this company does not wish to be associated with and could prove detrimental to the business. In light of the above and the evidence against you I have come to the conclusion that the activity results in adverse publicity to ourselves, is a significant breach of company rules, poses a high risk to employees', all which culminates in an offence of such severity that it merits dismissal without notice.

The claimant's appeal was heard on 20 January 2011. The appeal failed. At the hearing the claimant denied using the company vehicle in the collection of money for MLO and stated that she always uses her own car in that work. She informed the appeal officer that she always has a helper with her in the van on Thursdays and Fridays and that helper was not interviewed.

PI's report was not available at the time of the dismissal and was not considered at the appeal hearing.

Determination

The Tribunal considered the evidence outlined above and all the evidence adduced at the hearing.

A party cannot expect to win a case before the Tribunal when the manager (OM) who took the decision to dismiss was not present at the hearing to give evidence to the Tribunal. In this case neither OM nor the other manager who participated in the disciplinary hearing, were present at the hearing. The claimant's representative is entitled to cross-examine the decision maker andtest her reasons for making the decision to dismiss in light of all the evidence and to test theweight the decision maker accorded to various factors in reaching her decision to dismiss. The respondent's minutes of the disciplinary meeting were not agreed and TU outlined a number ofomissions in those minutes.

The claimant was dismissed on two grounds: (i) using the company vehicle in the collecting of money on behalf of MLO (OM noted in her letter of dismissal that she had not denied the allegation) and (ii) using the company vehicle to commute to another job. The Tribunal cannot accept that in this case it was fair to refuse to divulge the identity of the 'confidential complain ant', particularly where the respondent's only witness acknowledged to the Tribunal that the inter staff relationships in the depot were so bad that he got external professionals involved in dealing with it and where he (a director) accepted in his evidence that such were the relationships there that they could give rise to a malicious complaint. To allow a complainant to hide behind a cloak of confidentiality in such circumstances is both unfair and dangerous.

As regards the second allegation, the Tribunal accepts the uncontroverted evidence of the claimant that both OM (Operations Manager) and CS (her supervisor) were aware that she used the company vehicle to commute to her job with a third party employer. Being so aware and in

failing to forbid such further use of the vehicle OM and CS (who were members of management) had acquiesced in that use of the vehicle.

It was reasonable for TU and the claimant to believe that the PI's report was to form part of the disciplinary process and that accordingly the process had not concluded. The Tribunal finds that OM acted precipitously and unfairly in dismissing the claimant following the meeting of 25 November without any further engagement with the claimant or her union representative (TU). The Tribunal notes that the claimant and TU left the meeting with undue alacrity.

Due to the death of the appeals officer he was not available to the Tribunal. Fortunately the Tribunal was provided with a comprehensive minute of the appeal hearing. The Tribunal finds that the appeals officer's decision was faulty on a number of grounds. Procedures cannot besaid to have been fair when it became obvious during the hearing that in failing to interview theclaimant's van helper the investigation had been flawed; this helper may have been in a positionto provide significant evidence, corroborative or otherwise. From the documentation providedon the appeal there is no evidence that any consideration was given to the fact that members ofmanagement had acquiesced in the use of the company vehicle.

For the above reasons the Tribunal finds that the dismissal was unfair and the claim under the Unfair Dismissals Acts, 1977 to 2007, succeeds. It awards the claimant compensation in the amount of €28,245.00 under the Acts. In arriving at this figure the Tribunal was mindful of the efforts made by the claimant to mitigate her loss and the fact that the Kilkenny depot subsequently closed with redundancy implications for the workforce, which were taken into account in calculating the compensation.

The Tribunal allows the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, and awards the claimant the sum of €1,883.00 (this amount being equivalent to four weeks' gross pay at €470.75 per week) under these Acts.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN