

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYEE - (*appellant*)
against the recommendation of the Rights Commissioner in the case of:

CASE NO.
UD1364/2012

EMPLOYEE (*respondent*)
V
EMPLOYER

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms M. Levey B.L.

Members: Ms J. Winters
Mr J. Flannery

heard this appeal at Dublin on 11th April 2013 and 26th June 2013

Representation:

Appellant(s): Mr Paul Twomey B.L. instructed by:
Ms Janet Keane
Kate McMahon & Associates
Solicitors
223 The Capel Building, Mary's Abbey, Dublin 7

Respondent(s): Ms Niamh McGowan BL, instructed by:
Mr Shane O'Dowd, O'Dowd
Solicitors
Bridge Street, Boyle, Co Roscommon

This case came before the Tribunal by way of an employer appealing the recommendation of a Rights Commissioner under the Unfair Dismissals Acts, 1977 to 2007, ref: r-120992-ud-12/SR. The determination of the Tribunal was as follows:

Background:

The respondent was employed by the appellant from 4th October, 1999 to 7th November, 2011 working as a Team Leader at a car testing centre. The employee alleged that he was unfairly dismissed by the employer. The employer submitted that the employee was fairly dismissed with good cause. Both parties made detailed submissions to the Tribunal.

Preliminary issue

A preliminary issue arose as to whether the private investigators report could be opened to the Tribunal when this report was not put to the respondent during the investigation meetings. The report was sought by the respondent but was not forthcoming. The respondent's representative submitted that this could not now be relied upon by the appellant. The appellant's representative indicated that the allegations were put to the respondent and that if the private investigators report could not be used, then one of the allegations could not be referred to at the current hearing.

It was stated by the respondent's representative that even at the appeal meeting, the appellant would not disclose the private investigator's report and that it would be unfair to the respondent to have to meet a case today that he was not asked to meet previously. It was also submitted that this goes against every principle of natural justice.

It was ruled by the Tribunal that the private investigator's report could not now be submitted as evidence to the hearing.

Summary of Appellant's (Employer) Case:

As a result of an audit carried out in the employer's premises, the appellant carried out an investigation of matters within the company and as a result, two employees' were investigated, including the respondent.

The HR Manager told the Tribunal that the respondent was in breach of the company integrity code, which is considered to be gross misconduct. All staff members are made aware of the company integrity code by way of training. The concerns relating to the respondent involved him driving vehicles to and from the test centre and subsequently testing these vehicles himself.

This was not normal practice within the company. The respondent should not have been acting in such a manner and in situations where he was driving a vehicle for a family member or another party to be tested, the Manager should be informed so as another tester could carry out the test. It was important that the centre be seen to be transparent as regards the testing of vehicles. Another employee was suspended the same day as the respondent.

The HR Manager indicated that the respondent was invited by letter dated 10th October, 2011 to attend an investigation meeting on 13th October, 2011. The HR Manager attended as a witness and to make sure that the proper process was followed. A second investigative meeting was held on 4th November 2011 to allow the respondent the opportunity to clarify matters. The HR Manager also attended this meeting as a witness and to make sure proper process was followed. At this meeting, the respondent stated "if I was told what I was doing was wrong I would have ceased what I was doing straight away". Minutes of the investigation meetings were opened to the Tribunal.

The HR Manager stated that she also attended the appeal meeting on 20th December, 2011 as a witness and to make sure proper process was followed. The minutes of the appeal meeting were opened to the Tribunal. The HR Manager felt that the respondent was given a fair process

by the appellant company. After reviewing all the evidence a letter was issued to the respondent on 7th November, 2011 terminating his contract and allowing him a right to appeal within 7 days.

Under cross-examination, the HR Manger stated she did not carry out training in relation to the integrity code. She could not confirm that the respondent had responsibility for the running of the centre during training and she was not in a position to comment on whether he would be “in and out” during a training session. The witness denied that the respondent only became aware of the integrity programme on 4th October, 2011. She confirmed that no disciplinary meeting was held. In relation to the investigation meetings and appeal, the HR Manager stated she did not have an active role and only clarified or asked questions. She confirmed she opened both meetings.

The HR Manager denied that it was company practice to drive vehicles from the road to the car park. She did not think it appropriate for a Manager to approach the respondent as the investigation was in relation to the centre as a whole. The HR Manager indicated she did not have any influence on the dismissal decision.

During re-examination, when referred to the respondent’s signature on the acceptance of the integrity programme dated 19th October, 2010, the HR Manager indicated that it represents the fact that the individual accepts the integrity programme. As regards the company handbook, the information in relation to gross misconduct and dismissal is the same since signed for in 2000 and 2002 by the respondent. The reason why there were no disciplinary stages was because the respondent admitted the allegations.

In reply to the Tribunal, the HR Manager said it was a coincidence that the respondent was asked to sign for the integrity programme the same day he was suspended. At the first investigation meeting, she did not tell the respondent what the outcome of the investigation could be. When asked if at the second investigation meeting it was pointed out to the respondent what the consequences could be, the HR Manager stated that she could not say, but that it was normal practice that the company would tell employees. The respondent was told at the investigation meetings that it was “his time”.

The Regional Manager told the Tribunal that he was appointed to this position about two weeks before the investigation commenced. He made the decision to suspend the respondent based on the evidence that the code of integrity may have been breached on more than one occasion. The code of integrity was previously referred to as the code of ethics. The Regional Manager commenced his employment with the company as a trainer and the code of ethics was always hammered home whenever there was a training course. He said that all staff would have received this training and he believed that the respondent was fully aware of the code of integrity.

The Regional Manager told the Tribunal that no vehicle should be driven to the centre by a tester and they certainly should not be testing it if they have driven it there. He was not aware

of the practice of vehicles being delivered and tested by the same person. This was in breach of the code of integrity. The Regional Manager's role was to investigate the allegations. The fact that the respondent's son drove vehicles to the centre, that were then tested by the respondent, was in breach of the code of integrity.

The Regional Manager indicated that he would have no problem with the respondent having contact with garages but the garage should drop the vehicle to the test centre and collect it when the test is complete. If the respondent had an accident driving these vehicles, the centre would be open to insurance claims. The Regional Manager had no knowledge that the respondent would be signing the code of integrity document the same day as he was suspended. He did not accept that the respondent provided the service to customers purely for the customer's benefit.

Under cross-examination, the Regional Manager denied he had a problem with the respondent. He did not hold a disciplinary meeting as he was following procedures set down by HR. He thought he was in a disciplinary meeting at the investigation meeting and it was his mistake if he did not describe it as such. The Regional Manager said he did not accept that the respondent did not know what he was doing was wrong. He said this breach of integrity was in both the old and new codes. The Regional Manager was not present when the respondent was trained.

In re-examination, the Regional Manager denied he had pre-judged the respondent before the investigation. The witness confirmed that he composed the letter of suspension and brought it with him to the test centre on 4th October 2011.

A different regional manager gave evidence that part of his role was to provide training to staff. He provided training to the respondent on 19th October 2010. Employees annually receive a full-day training held offsite. There is also bi-annual onsite training which includes a 2 hour session. The handbook changed in 2010 due to a transfer of undertakings but it was similar to the previous one. The code of integrity was in place to show the independence of the service. The respondent signed an acknowledgment that stated he had received integrity programme training and agreed to comply with it. An employee would not sign the acknowledgment unless the training had been given. If an employee left the room to deal with a customer the trainer would wait until the individual returned to continue.

The integrity programme outlines guidelines to help employees:

- Avoid situations that may require you to do something which you know to be illegal or unethical.
- Company property may not be used for your own benefit.
- Do not engage in any transaction which does not have a genuine, legitimate business purpose.
- Ask yourself whether any contemplated transaction or business practice would

withstand the scrutiny of the public eye.

- Do not do anything which could require you to be untruthful.
- Seek advice when in doubt.

During cross-examination the witness could not say whether the respondent saw the current company's code of integrity. It was unlikely that the handbook was handed out. He always stated in training that an employee could only bring a close family member's car to the centre for testing, such as a spouse's car. Driving a customer's car home is not permitted.

The next witness delivered a training session on the morning of 4th October 2011 at the respondent's test centre. The date had been scheduled a couple of months previously. The test centre had to be closed for two hours from 8am-10am and so no bookings could be taken for this time. He was not there to cover integrity training because of the situation with the respondent. He delivers twice yearly sessions in each test centre. He normally schedules this centre for April and October. He was unaware that the area manager was visiting that day.

At the end of training sessions he questions employees on what was covered in the session. No employee has ever raised a problem with signing an acknowledgement form. He considered that an employee bringing a spouse's car to work for testing was acceptable but outside of that was not normal. The respondent signed an integrity programme acknowledgement form at the end of the session. He often receives queries from staff members who want to clarify if they can bring someone else's car to be tested. An elderly parent's car would be alright, but not the car of a relative who did not reside with the employee.

The Operations and Quality Manager gave evidence. He heard the respondent's appeal. He knew the respondent 10-12 years through work. He reviewed the dismissal letter and was briefed on the background of the case by the HR Manager. He concluded that the respondent's area manager had no choice but to dismiss the respondent. There was a serious breach of integrity on the respondent's part. The integrity of the car test was of paramount importance. The respondent's actions undermined this. The test must be carried out without reproach and be seen to be that. He checked that the respondent had signed the integrity code acknowledgements. The witness has received calls from employees checking if they can bring another person's car to be tested. If an employee brings a car for a close family member they cannot be the tester. The respondent did not contend that any of the cars he tested belonged to a close family member. He was satisfied that the respondent was aware that he could not bring or test cars.

The handbook forms part of the contract of employment. Each employee gets a copy in commencement of employment. The witness particularly took into account three points under the disciplinary violations in the handbook, namely:

- Wilful violation of Company rules especially those relating to health & safety, testing

policies procedures, misuse of annualised hours system...

- Breach of Company integrity
- Conflict of interest and employment

One of the points of the integrity code is to seek advice if in doubt, which is why the witness receives phone calls from employees with queries. This is also included in the handbook.

During cross-examination the witness denied that the HR Manager had any decision making role in the appeal and was there as a note taker and witness. He did not deliver training. He authorised centre's closing to facilitate training. In regard to the private investigator, he acquired the services of a private investigation company, but did not assign them tasks. That was the duty of the Manager for Training and Standards. This action was taken after the Primetime investigation.

For the appeal he considered all the documents and deliberations. He came to the same conclusion as the area manager. He wanted to know if the respondent refuted any of the allegations. He did not suggest during the appeal that he was unaware what he was doing was wrong. While there was no disciplinary meeting there were two investigation meetings. He was satisfied that it did not materially affect the decision and it was just a word.

There was some damage to cars left in the test centre car park, but he believed that cars were safer there than in the shopping centre car park.

Summary of Respondent's (Employee) Case:

The respondent's employment with the appellant company began in 1999. He gave evidence that each employee had 12 cars allocated to test every day. To keep up with performance targets he phoned local garages and said that if a gap came up in the schedule they could bring up a car to be tested without an appointment. Initially the cars were parked in the test centre carpark, but this had limited space and with staff cars and VRT testing also being carried out there was nowhere to park. The road to the test centre got busier over the years as a housing estate and halting site were established. There was a gap in the fence and cars in the test centre carpark were being vandalised.

He began to use a car park in an adjacent retail park as extra parking. With the agreement of the proprietor of a coffee shop the cars were parked in front of his premises in this centre. He collected the cars from the car park when a gap arose. The keys were left somewhere in the car.

This was totally normal and no issue was raised with him. At the coffee shop owner's request he sent a letter dated 27th December 2010 requesting this arrangement though he did not notify his employer. He thought he had the authority to make the arrangement. His area manager told him to run the centre and not phone him on trivial matters. He did not know he was doing anything wrong.

He first spoke to his new area manager regarding the reduction of allocated test times from

30-45 minutes to 20 minutes. The area manager said it was to keep productivity up and cover no shows if the respondent did not cover them.

He contended that he would have been in and out of the room during training sessions to deal with calls and customers arriving early. The trainers did not stop the session while he was absent. It was a group session with the two other centre employees. The integrity code was referred to. It was not given in writing. Examples of the code were not taking gifts, especially at Christmas. If a gift was received it was to be raffled off and the money given to charity. Another example was repairing cars and testing them yourself. He did not consider there to be any issue driving a car 100 yards from the coffee shop car park to the NCT. He used it as an extension of the test centre car park.

He knew everyone in the motor trade locally as his father had owned a garage and he had worked for him. A garage representative would phone and say there was a car in the coffee shop car park, that it was sold and ask for it to be tested. He had no difficulty doing this as it was keeping his productivity up. If it was during the day and there was room in the test centre car park they could leave it there. He was open about this practice. He did not hide it from an AA audit man on the premises. No one told him it was inappropriate. He did not always carry out the test. Whoever was free did it.

When the Regional Manager handed him the letter of suspension the respondent asked why but he was told he did not need to know then. He was told to clear his desk and hand in his keys. At the meeting of 13th October 2011 he admitted that he drove cars from the coffee shop car park to be tested and occasionally he drove them home if he did not have a lift. He did not drive customer cars from home to work. The HR Manager asked many questions during the interview. He was not advised that his job was at risk. He did not receive the private investigator's report until after the appeal was heard.

He was told that a subsequent meeting on 4th November 2011 was to fine tune points from the first meeting. He spoke to Mr C who said that he should be back to work in two weeks. He thought there would be a disciplinary meeting if he was going to be dismissed. He thought it was a simple solution to drive cars from the coffee shop car park.

He considered the outcome of the appeal meeting as inevitable. He thought an external person would hear it. It was over in 30 minutes.

The respondent gave evidence of his loss.

During cross-examination the respondent accepted that he now understood that he was not authorised to make arrangements with the coffee shop owner regarding parking. He was keeping up productivity levels and providing good customer service. He did not seek any credit from the company as it was not the type of company to give accolades and he was not interested in promotion. He agreed that he was not told to run the test centre on his own initiative. There was a handbook for running the test centre.

He had run training sessions in previous years, but on technical areas. He got employees to sign acknowledgment forms, but he considered that the purpose of the forms was to show where he was. He agreed that the form was an acknowledgement that the training had been received. It was signed while “chat and banter” was going on. He was familiar with the code of integrity but he did not consider that what he was doing was wrong. He was confused about the code. He did not seek clarification as he believed his manager would say if he was doing something wrong. He did not hide what he was doing. He believed that it was at most a misdemeanour and that if it had been pointed out to him he would have stopped that practise. He was not concerned about driving customers’ cars on public roads as they were normally garage cars.

Determination:

The HR manager was involved throughout the whole process including the appeal and she did not advise the respondent he was being disciplined. The regional manager was involved in the investigation and then proceeded without warning and in contravention of the respondent company’s own policies to dismiss him without invoking the disciplinary process.

Thereafter the appeal followed presided over by the Operations and Quality Manager and was attended by the HR manager allegedly as a note taker but she in fact participated in that process at that stage also albeit to a minimal degree. Furthermore the respondent was requested to attend another meeting but he was not informed prior to the meeting that there were serious allegations being made against him and that this could result in his dismissal.

The Tribunal does not accept that the respondent was entirely unaware that what he was doing was in breach of the company policies and codes and the Tribunal finds that the respondent contributed significantly to his dismissal.

However taking all the evidence into account, and in view of the shortcomings on behalf of the respondent with adhering to the proper policies, and also bearing in mind the respondent’s contributions to his dismissal, the Tribunal varies the recommendation of the Rights Commissioner (ref: r-120992-ud-12/SR) and awards the respondent (employee) compensation of €20.000.00 (twenty thousand euro).

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)