

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.
UD412/2012

EMPLOYER *-appellant*

EMPLOYER *-appellant*

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 F. Cunneen
 Mr A. Butler

heard this appeal at Dublin on 19th June 2013

Representation:

Appellant: Mr Aidan Phelan, Peninsula Business Services (Ireland) Ltd,
 Unit 3, Ground Floor, Block S, East Point Business Park, Dublin 3

Respondent: Mr. Greg Maxwell, Novas Initiatives, 1 Mungret Street, Limerick

This case came before the Tribunal by way of an employer appeal of the Rights Commissioner Recommendation **ref: r-111777-ud-11/JT**. Hereinafter the appellant shall be referred to as the employer and the respondent the employee.

Appellant's (employer) Case

The employer is a successful company with a multi-million euro turn-over. They supply portable bars and associated facilities at various events. The employee was employed as a temporary worker in May 2008, paid on a cash basis until he was 'officially' employed in January 2009. He was promoted to supervisor in 2010. The employee's position was very intensive and included a significant amount of overtime which necessitated flexibility.

On promotion, the employee was given full use of a company van instead of a pay increase. The employer (Managing Director) felt that having a company van would be crucial in his development and ability to work going forward. It was always communicated to and expected, that the employee would secure a full driving licence in order to carry out his duties and to

benefit from the use of the van. The employer continuously requested the employee to secure a driving licence but the emphasis was seriously placed on securing it from January 2011 onwards. A number of other employees had complained that the employee was sleeping in the van on long journeys leaving them to do all the driving as he was unable/unwilling to drive.

It had come to the employer's attention that the employee's performance and enthusiasm had diminished. The employer spoke to the employee on many occasions about his performance; the employee assured the employer that he was still interested in the job and would improve.

The employee's performance had not improved and he had not secured a driving licence so the employer sent him a letter dated the 31st of March 2011. This letter stated, *'We write this letter as an official and final written notice to re-iterate your requirement to obtain your driving licence.'* The employee replied by letter accepting responsibility for the delay and confirmed that he had a theory test booked for the 27th of April 2011. The employer also spoke to the employee at this time and asked him 'what was going on' to which the employee replied that he was having personal problems.

On the 1st of June 2011 the employee's mother rang the employer to inform them that the employee could not come to work due to exhaustion. This was short notice to contact the employer regarding an absence. The employee returned on the 7th of June with a medical certificate stating he had tonsillitis. The employer asked to see him as he believed that the employee was "letting down his workmates, himself and the company." The employer felt that the employee's "performance wasn't there; we had got to the end of the road." The decision to "part with" the employee was made that day and he was informed of this decision to dismiss him. The employee's sick leave was "part of the catalyst to sack him."

The employer accepts that there was no issue with the employee's attendance and this did not form any part of his decision to dismiss him. The employer was concerned with the employee's "outlook and view on things." The employee's demeanour had changed and he had lost interest in his work. The employer spoke to the employee on numerous occasions regarding his attitude but did not document any of the conversations or warnings. The employee was not given notice, offered a representative or informed what the dismissal meeting would be about. He was not offered the opportunity to appeal the decision to dismiss him or given a dismissal letter. There was no disciplinary procedure in place as the employer had never needed one before this. In relation to the employee's evidence of feeling fearful; "if he was afraid and threatened, why did he not know why he was being called to the office?"

The Operations Manager (employer's son) gave evidence that the employee's mother rang him on the 1st of June to say that the employee was sick. The employee then text the Operations Manager to confirm he would be returning to work on the 7th of June 2011. The Operations Manager did ask the employee to reply to the warning letter of the 31st of March but did not put any undue pressure on him. There were complaints about the employee's attitude from both employees and customers; the employee was not informed of the complaints from the other employees only the customer complaints. In relation to requesting the employee to cancel his annual leave; "it is expected that staff do not make any personal commitments during the busy work periods" which is 6 months of the year.

Respondent's (employee) Case

This was the employee's first employment after leaving college. He worked 50 hours per week on average. It was never made clear to him that his employment depended on having a driving licence. Having a driving licence only became obligatory from January 2011 onwards. The employee passed his theory test on the 27th of April 2011 and applied for his learner permit immediately; he received this 2 weeks after his dismissal. He informed the employer that he had passed the theory test and that there was a requirement to wait six months before sitting the driving test. The employee replied to the warning letter issued in March as he was fearful that his job 'was on the line' if he did not.

On two occasions the employee had booked annual leave days and was planning to go away. On both occasions the employer forcefully tried to get him to work, even after he explained he had already paid for the family trips. After the Operations Manager failed to persuade him to cancel his holidays the MD contacted him and said they would let him take his holidays this time. The employee had told the Operations Manager he was going to get his new contract looked over when they were introduced in January 2011; he responded saying 'who the f**k do you think you are getting my contract checked over.' The interactions led the employee to be fearful of the employer.

The employee was sick on Tuesday the 1st of June 2011. His mother rang the employer and notified them that he was sick and had a medical certificate. On his return to work on the 7th of June 2011 the Operations Manager instructed him to go to the employers (MD's) office. The employee did not know why he was being called to the office.

The employer said that 'it had been a busy week and the lads aren't happy you let them down.' The employee was then asked about the progress of securing a driving licence. The employer then said 'there's no more work for you, that's it.' The employer asked if the Operations Manager wanted to say anything, to which he replied 'I'm getting bad vibes, I've nothing to say to him.'

The employee gave evidence of his loss and his attempts to mitigate his loss.

Determination

The Tribunal has carefully listened to the evidence adduced. This case comes before the Tribunal on foot of an appeal of the Rights Commissioner findings dated the 20th of February 2012. The fact of dismissal is not in dispute and the onus therefore rests with the employer to act reasonably and fairly in all the circumstances.

The employee came to the employer in a casual way through a soccer buddy in the summer of 2008. By 2009 the employee had been taken on permanently as a technician to deliver and install the mobile bar product being provided by the employer.

It is common case between the parties that the employee's lack of a driving licence was a hindrance to performing his job in an optimum way. His employer had made it clear that there was a van at his disposal if he obtained his driving licence. The employee clearly dragged his feet on the issue and matters came to a head in the December 2010 when the MD of the company indicated that the driving licence needed to be obtained as a matter of urgency.

The workplace appears to have been pressurised and the hours were long with a lot of regular

overtime factored into the week. The work may have been seasonal, in that most events would have been outdoors and during the summer.

In his evidence the MD of the company indicated that the employee had started off well but that his performance had deteriorated over the course of his employment. To back up this perception the MD said that his son and other co-worker were unhappy with the employee not pulling his weight in terms of not being able to take on any of the onerous driving duties, that the employee's demeanour had changed and that he lacked motivation and a positive attitude.

The employee in his evidence pointed to an extremely pressurised set up wherein there was an expectation that he would drop everything at short notice to accommodate extra workload. The employee gave evidence of at least three occasions wherein arrangements he had made in his personal life and which he says he had notified to his employer, were being interfered with on an expectation that he should abandon them to meet his employers immediate needs.

Equally the witness on behalf of the company gave evidence to the effect that the appellant's standard of work had dropped off and that he was dealing with customer complaints about work not being completed.

What is absolutely clear to the Tribunal is that there were absolutely no Disciplinary procedures in place or being correctly operated in the workplace. There seems to have been a Grievance procedure set out in the Contract of Employment but this does not seem to have been invoked. So, for example, purported complaints made by co-workers that the employee was not pulling his weight were never given a formal footing. Indeed the employee says he had no idea that his co-workers were aggrieved by his lack of licence, as the employer witnesses confirms that this fact was not made directly known to the employee so as not to effect moral.

Ultimately, the employee was given a final written letter concerning the lack of a driving licence. After some delay the employee did confirm that the matter was in hand. The Tribunal accepts that the employee was expected to prepare for his theory test and organise his twelve lessons at his own expense and in his own time. The employer wanted this qualification but was not being pro-active in terms of assisting the employee obtaining same.

The employee, some months later, went out on a weeks' sick leave. The employee had no particular history of being absent from work through ill-health. The employee's sick leave was certified in the usual way. On his return to work the employee was called into the MD's office and was dismissed. The MD gave evidence to the effect that it wasn't necessarily just the lack of licence or the abrupt absence through sick leave that gave rise to the decision. The MD indicated it was quite simply "the end of the road" and that it was time for them to "part ways."

The respondent MD admits that there were none of the usual disciplinary processes in place. The Tribunal notes that the employer believes he never had any need for a formal disciplinary procedure. However, observing natural justice and fair procedures cannot be in the gift of an employer, it is an obligation placed on the employer in any interaction with employees.

It is quite clear that the employee herein has been Unfairly Dismissed and the Tribunal affirms the findings of the Rights Commissioner in this regard.

In assessing compensation the Tribunal must have regard to the fact that the employee made no consistent and concerted effort to find alternative employment so as to minimise his losses. The

Tribunal respects the employee's decision to follow an alternative path and in the circumstances awards the sum of €21,300.00 in compensation under the Unfair Dismissals Acts, 1977 to 2007.

The Tribunal therefore varies the Rights Commissioner Recommendation **ref: r-111777-ud-11/JT.**

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)