

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE,
,

CASE NO.
UD650/2011
MN700/2011

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:

Claimant(s):

Respondent(s):

The determination of the Tribunal was as follows:-

Summary of Evidence

The claimant commenced employment in the respondent's hygiene division on a temporary basis as a driver, replacing another driver who was on holidays, but continued in the employment until her dismissal in late November 2010, more than eight years later. The claimant had a clean disciplinary record with the respondent up to the time the allegations herein were levelled against her. The claimant had two other jobs: a cleaning job from 5.00pm to 7.00pm, Monday to Friday and she also collected money on Thursday and Friday evenings 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. Under 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 and under the respondent's disciplinary procedure private use of the company vehicle without authorisation constitutes major misconduct. A contract of employment signed by the claimant was produced in evidence. The Authority to Drive Form produced 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 the claimant had called to her house in a company van, on a number of occasions, to collect money for a third-party money-lending organisation MLO. 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 respondent's Operations Manager (OM) asked the claimant to attend a meeting with the Director of the Division (the director) on 27 October 2010. The claimant was led to believe that the meeting was to be about a bullying allegation involving other employees. At the meeting the director advised the claimant that there were serious allegations against her: (i) collecting money in the company van, (ii) working for another company, and (iii) transporting others to work. The claimant admitted that she had twice called to a residence in the company van to collect money that was owed to herself. She further admitted that she worked for a third party company at which she stopped off at on her route home in the company van and that she carried other company employees in the company van to that employment. The claimant's position was that it was common knowledge in the company that that she worked for the third party company. When she was informed that a member of the public had made the complaint, the claimant commented that she felt another employee (AE), whom she named, might have something to do with the allegations against her as AE was always trying to get her into trouble. The claimant was suspended on pay. Following the meeting the claimant received a phone call from the respondent requesting her to return the company van and keys and she had to find her own way home.

In her letter of 28 October to the claimant, inviting her to a disciplinary meeting, OM outlined the allegations against her (use of the company vehicle during the course of working for another employer both during and outside her normal working hours for the respondent), which were a breach of the terms of her employment as contained in the Employee Handbook and the Drivers Handbook (which provide that the company vehicles may only be used for company business. and could result in a sanction of summary dismissal. The claimant's evidence to the Tribunal was that she had only received the employee handbook some weeks prior to this meeting and had never received the Drivers Handbook.

On 1 November 2010 the complainant provided her complaint in writing to the respondent. In her letter of 5 November inviting the claimant to a disciplinary meeting on 10 November OM stated *inter alia*:

Further to my letter dated 28th October 2010, I can now provide you with further details regarding the allegations against you, which we have received in writing from a customer of MLO. It is alleged that you have been using the company commercial vehicle while conducting debt collecting duties for MLO and have called to the individual's home on approximately four occasions in the (company) hygiene van. I attach a copy of this written statement for you. 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.

It is also alleged that you are using our vehicle on occasion to commute to another employment, that of a cleaning company ... which may be in breach of the Organisation of Working Time Act (sic).

...

You should also note that these allegations are considered to be of such a serious nature, that if proven, could lead to your dismissal.

This was the first time the claimant was made aware that the collections being complained about were those made on behalf of MLO. The claimant's evidence to the Tribunal was that she worked as an agent for MLO on Thursday and Friday evenings, that she had been doing so since she started with the respondent, that her supervisor (SC) was aware that she was doing this work and for this work she had always used her own car.

OM, HRM, the claimant and TU were present at the disciplinary meeting on 10 November 2010. (Neither OM nor HRM were present at the hearing before the Tribunal). The respondent's minutes of the meeting were produced to the Tribunal but these were not agreed. TU was adamant at the disciplinary meeting that the claimant was entitled to cross-examine the complainant. She also indicated that the allegation in relation to the collection of money was too general and that the claimant would not answer the allegation until the dates and times of the alleged collections were provided to her. The respondent refused to provide the details maintaining that such details would enable the claimant to identify the informant. TU informed OM that, in any event, the identity of the complainant had been accidentally disclosed to her and that she believed that she was a friend of a co-worker who tried to create difficulties for the claimant. OM then wrote out a list of questions that she wanted to put to the claimant and a recess was taken to afford TU and the claimant an opportunity to consider them.

Following the recess TU acknowledged that the claimant worked for MLO and the claimant pointed out that that her supervisor (CS) had been aware of this from the time she started with the respondent. OM indicated that CS had been concerned some time previously that the company van may have been used in connection with the claimant's work for MLO. This allegation had not been raised with the claimant at that time. (In his evidence to the

Tribunal the director stated that he had never been made aware that SC had such concerns) When it emerged that the respondent had hired a PI but that he had not yet provided a report to the respondent TU indicated that they were not willing to continue with the meeting until the full allegation was on the table.

As regards the second allegation, the claimant admitted to commuting in the company van to another job for a third-party employer; she did this on her way home from work. Her position was that SC had authorised her use of the van for this purpose and had called to her while she was working on that premises to collect/give her keys to certain premises. Furthermore, OM had remarked that having the company van parked outside the third-party's premises was good publicity for the respondent. OM could not recall this. OM suggested 'adjourning the meeting'.

The disciplinary meeting ended in an impasse when OM asked why the claimant, having provided an answer to the second allegation, would not answer the first allegation. TU re-iterated that the claimant would not provide the answers until the full allegation was on the table. It was agreed that TU would provide some questions to be put to the complainant. TU and the claimant left the meeting with the understanding that there would be a follow-up meeting to discuss the PI's report, the clarification on the four dates of the alleged collections. On 10/11 November the respondent claimant No further meeting was convened.

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 proven and constituted. gross misconduct' within the respondent's disciplinary rules 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 in relation to the use of the company vehicle in the collection of money for MLO and had admitted using 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 complainant's replies to the questions raised by TU were enclosed with the letter of dismissal.

The claimant's appeal was heard on 9 December 2010 and failed on substantive and procedural grounds.

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 and test her reasons for making the decision to dismiss in light of all the evidence and to test the weight she accorded to the various factors in reaching that decision. The Tribunal did not have the benefit of agreed minutes of the disciplinary meeting.

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 the claimant 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 complainant', 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 in such circumstances a vendetta may exist. To allow the 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 prohibit 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 note of the appeal hearing. The Tribunal cannot accept his decision upholding the dismissal. Significant to the Tribunal was that no consideration seems to have been given at the appeal stage to the denial that the company van

had been used in the collection of money for MLO, albeit the denial was by TU. Nor it seems was consideration given to the fact that the claimant's superiors had acquiesced in the impugned use of the company vehicle to travel to a third party employment. after work on her way home.

Whilst, in general, the principles of natural justice do not apply at the investigation stage, to mislead an employee as to the purpose of an investigation meeting falls far short of good practice.

The Tribunal allows the claim under the Unfair Dismissals Acts, 1977 to 2007. It awards the claimant compensation in the sum of €29,187.00 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 payment implications, which were taken into account when 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

