EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
Philip Molloy -*Claimant*
17 Upper Northbrook Avenue, East Wall, Dublin 3

CASE NO.
UD197/2011

against

Wincanton Ireland Limited -*Respondent*
100 Northwest Business Park, Blanchardstown, Dublin 15

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr D. Hayes B.L.

Members: Mr T. O'Grady
Mr J. Maher

heard this claim at Dublin on 12th July 2012

Representation:

Claimant: Mr. Stephen O'Sullivan B.L. instructed by Carley & Connellan, Solicitors, 10 Anglesea Street, Dublin 2

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

The determination of the Tribunal was as follows:

Dismissal as a fact was not in dispute.

The claimant was employed by the respondent for over ten years as a driver on a fuel distribution contract. Due to the nature of the respondent's business all known incidents no matter how minor must be reported by a driver to their supervisor. This is set out in the drivers' agreement which was compiled in partnership with a Trade Union.

The claimant was previously issued with a written warning for twelve months in January 2009 in relation to a disciplinary matter which constituted driving into a terminal without swiping his access card. This was later commuted to six months on appeal and would therefore expire on 13 June 2009.

In August/September 2009 the claimant was issued with a final written warning for twelve months but this was subsequently commuted on appeal to a written warning which would remain on his file until 1 October 2010.

The following year the claimant was absent for a second period of sick leave from 4 May to 19 July 2010. Upon his return to work in July 2010 the claimant undertook a driver assessment as per company policy to ensure that he met the standards required. An assessment is carried out after a period of sustained absence such as a couple of weeks. This became custom and practice within the company with Trade Union agreement.

Subsequently, following a period of annual leave in August the claimant returned to work. On 17 August 2010 he caused damage to a wing mirror on the lorry which he was driving. It was the respondent's case that the claimant failed to report this incident. It was the evidence of the Transport Manager that he first heard of the damage to the wing mirror on 18 August 2010 when he met the contracted mechanic on site who asked him if he was aware of the damage done to the claimant's vehicle the previous day.

Later that day the Transport Manager received a telephone call from the claimant. The claimant informed him that there had been a contamination at a petrol station he had delivered to. The claimant was issued with a notification letter dated 18 August 2010 stating that he was suspended pending an investigation

The respondent's disciplinary procedure and driver agreement was opened to the Tribunal including section 3.6.6 which stated that an example of gross misconduct was the failure to report to the company any spillage, contamination, vehicle accident or customer complaint. Following the letter of suspension the claimant was invited by letter to an investigation meeting on 24 August 2010 with the Transport Manager. The minutes of the meeting were opened to the Tribunal.

At the meeting the claimant confirmed that an employee at the customer's site had completed the relevant documentation. A schedule 4 document must be signed when delivering fuel products to a site. The document shows the quantity required and instructs the driver where to insert the fuel. The driver must be supervised by the customer. The claimant unloaded according to how this document was completed but without supervision and ultimately a contamination occurred.

During cross-examination the Transport Manager confirmed that he did not take into account the written warning on the claimant's file which had expired in June 2009.

It was put to the witness that the claimant had attempted to report the minor damage to the wing mirror. The Transport Manager stated that the claimant had not reported the matter correctly when he had reported it to the mechanic. All incidents must be reported to a member of management. There is a supervisor on duty at all times.

The Operations Manager for the petroleum section of the business gave evidence. He conducted the disciplinary meeting which was held on 13 September 2010, the minutes of which were opened to the Tribunal. Each incident was treated separately for disciplinary purposes. At this meeting the claimant seemed to admit that he noticed there was a problem with the schedule 4 document as compared to the load on the tanker but he did not raise this at

the investigation meeting. At the meeting the claimant admitted to unloading without customer supervision.

At the end of the meeting the claimant was informed that both matters were considered to be misconduct and that as he was already on a written warning the misconduct of both matters progressed him to a final warning and termination of his employment. A letter of dismissal dated 15 September 2010 confirmed this to the claimant. Both matters were treated as misconduct as the claimant did attempt to report the matter on 17 August although not properly.

The Operations Manager stated to the Tribunal that he has a duty of care and if there are a certain number of incidents there is the possibility of the termination of the respondent's contract. He believed he made a reasonable decision when he decided to dismiss the claimant given the proportion of incidents in relation to the numbers of days the claimant had worked.

During cross-examination he confirmed the incident on the 17 August put the claimant on a final written warning and the incident on 18 August brought him to termination. It was put to the witness that this did not allow the claimant an opportunity to improve from the time of the final written warning. While the Operations Manager accepted this; he stated that the company has a duty of care both to customers and to the general public. He believed the claimant was a danger on the road.

The claimant subsequently lodged an appeal but the original decision to dismiss the claimant was upheld by the appeals officer.

In reply to questions from the Tribunal, the Operations Manager agreed that had an incident not occurred on the 17 August, the incident on the 18 August would probably have resulted in a final written warning.

The claimant gave evidence that he secured his HGV license test at the age of nineteen; he is now fifty-two and has worked as a lorry driver since leaving school.

In relation to the incident on 17 August 2010 the claimant stated that a tree was blocking part of the road. He moved the lorry out as far as possible but the branch of the tree caught the wing mirror. Immediately he photographed the scene using his own mobile phone. The claimant then attempted to contact the supervisor but without success. He then telephoned the mechanic and informed him what had happened and that a replacement mirror would be required. When he returned to the depot he sought out the supervisor but he was not present. The claimant carried out a further delivery that day and by the time he returned to the yard there was no one there. The following day a colleague informed him that there was no supervisor in the office.

That day the claimant travelled with fuel to a customer's site. That site was already closed that day due to a diesel spill. A pump service man was there to recalibrate and spoke to the claimant about the tanks. The claimant became distracted and the contamination occurred.

The claimant gave evidence of loss and efforts to mitigate that loss.

Determination:

The claimant commenced his employment in August 1998. He was dismissed on the 25th October 2010. He was employed as a driver by the respondent in respect of their fuel delivery contracts.

In the course of his employment he had had a number of disciplinary incidents. The first involved entering an oil terminal without "carding-in". He was given a 12-month written warning, which was reduced on appeal to a 6-month warning. This took place in January 2009 and expired in June 2009. The second and third incidents were dealt with together. The second involved colliding with a low wall thereby damaging a toolbox attached to the truck. The third involved colliding with bollards thereby damaging the side of the truck. These incidents were in March 2009 and August 2009 respectively. He was given a 12-month final written warning, which was reduced on appeal to a 12-month written warning. This warning was due to expire on 1st October 2010.

Subsequently the claimant was absent from work for a significant period of time and was required, on his return, to undergo a driver assessment. In brief, the result of the driver assessment was that he had reached the company standard. The assessment took place on the 21st July 2010. The claimant was then on annual leave from 2nd-16th August 2010. On 17th August 2010 he was involved in an incident wherein damage was caused to his truck without being reported to management. On 18th August he was involved in a fuel contamination incident at an Edenderry petrol station.

On 17th August the claimant was trying to pass a tree that had fallen across the road. There was not sufficient room to pass and a branch struck the wing mirror of the truck, breaking it. The claimant attempted to phone his supervisor and send him a photograph of the damage. However, he had incorrectly stored his supervisor's number in his mobile telephone and consequently could not make contact. The damage was reported to the respondent's fitter on his return and a request made that the truck be repaired. The fitter was not an employee of the respondent but a contractor.

On 18th August, the claimant was delivering fuel to a petrol station in Edenderry. The respondent's regulations require that all deliveries are overseen by a competent person. On this occasion the claimant was not so overseen. He was distracted by another person in the course of the delivery and put fuel into an incorrect tank thereby causing a contamination. The respondent's regulations require that a delivery schedule is signed by a competent person. The delivery schedule indicates the fuel tanks to be filled. The competent person is then to oversee the delivery. The claimant had the delivery schedule signed but the competent person did not stay to oversee the entire of the delivery. The competent person is an employee of the particular petrol station and not of the respondent.

The claimant was invited to an investigation meeting. It was determined in the course of the investigation that, in respect of the first incident, the claimant had not notified his manger of the damage using a secure phone provided in the cab of the truck. In respect of the second incident, it was determined that the claimant had commenced the delivery without oversight and that this was the most significant default as regards the fuel contamination.

Subsequent to the investigation process, the claimant was invited to a disciplinary meeting. The disciplinary infractions of which he was notified were, firstly, that he had failed to follow correct reporting procedures in respect of damage to his truck and, secondly, that he had had a contamination.

It was found by the company that he had not reported the damage to the truck and that there is always someone in management available where the direct supervisor is not. It was found in respect of the second incident that the competent person had not overseen the connections.

The disciplinary hearing was conducted by BF, the operations manager of the respondent's petroleum section. He told the Tribunal that the claimant had been on a written warning and that the 17th August incident warranted a final written warning and consequently the incident on 18th August brought the claimant to dismissal. BF had taken the view that the claimant was a risk to public safety and took the decision to dismiss him. As he was entitled to, he took the incidents from March and October 2009 into account, given that the claimant was at that time subject to a written warning in respect of them.

Given that the absence of a competent person to oversee the delivery was the most significant factor in the respondent's decision to dismiss, it is surprising that it was given no attention in the course of the disciplinary hearing. This is a defect in procedure.

The role of the Tribunal is not to determine whether the claimant was guilty or innocent of the disciplinary matters. The role of the Tribunal is to determine whether a reasonable employer in similar circumstances and a similar line of business would have dismissed the employee.

The Tribunal is satisfied that, had the incident on the 17th August not occurred, the claimant would not have been dismissed for the incident on the 18th August. What caused him to be dismissed was that it was considered that the 17th August incident had moved him to a final written warning and therefore the 18th August incident must lead to dismissal. This is a misconstruction of the purpose of a final written warning. It is just that, a final warning. It is not merely a step in a disciplinary process that must be either passed or skipped. That it is in writing is to mark its formality and the serious intention of the employer. But it must be a warning in respect of future conduct. Its purpose is to let an employee know that he is in the last chance saloon and that no future infractions will be tolerated. However, essential to it is the concept that the employee has an opportunity to reform his conduct or performance and pull himself back from the brink. The claimant was not afforded such an opportunity.

The Tribunal is satisfied that a reasonable employer in similar circumstances would not have dismissed the claimant but would have given a final written warning.

This is not to say that an employer cannot look at the cumulative effect of several disciplinary infractions and to consider that as a whole they require a penalty of greater severity than had they occurred individually. However, that assessment was not made by the respondent in this case and would not, in the opinion of the Tribunal, have been merited. The respondent looked at both individually and decided that the 17th August incident warranted a final written warning and the 18th August incident therefore warranted dismissal. On the respondent's assessment, both incidents, taken individually, ought to have led to a final written warning. For the reasons set out above, the Tribunal is therefore satisfied that it was unfair for the respondent to dismiss the claimant.

15/1/2013

The claimant secured alternative employment in January 2012. The Tribunal is satisfied therefore that compensation is the appropriate remedy and, pursuant to the provisions of the Unfair Dismissals Acts, 1977 to 2007, awards the sum of €50,000 as being just and equitable in the circumstances.

Sealed with the Seal of the

Employment Appeals Tribunal

This 8th January 2013

(Sgd.) _____
(CHAIRMAN)