

EMPLOYMENT APPEALS TRIBUNAL

Claims Of:
Employee

CASE NO.
UD582/2005
MN423/2005

against
Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. J. Sheedy
Members: Mr. T. O'Donnell
Mr. J. McDonnell

heard this claim at Waterford on 24th May 2006 and 16th November 2006

Representation:

Claimant: Mr. Brian Chesser, Solicitor, & Ms. Maeve Sutton, Solicitor, Brian J. Chesser & Co. Solicitors, 19 Catherine Street, Waterford

Respondent: Mr. Jim Rea, Senior IR/HR Executive, IBEC, Confederation House, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

The Tribunal heard dismissal was not in dispute.

Background:

The respondent operates a demerit procedure for lateness and absences. Under the system each employee is allowed to accumulate up to 100 points in a twelve-month period. An employee is fined 5 points for lateness or for leaving work early, 10 points for an excused absence and 20 points for an unexcused absence.

Respondent's Case:

The first witness for the respondent was the General Manager (hereafter referred to as GM). He has worked for the company since 1982 and has been the GM of the plant in Waterford for the last two years. The company is responsible for the procuring and slaughtering of beef carcasses. The claimant worked as a general operative in the factory in Waterford. The duties of a general operative include slaughtering, harvesting general parts of animals, cutting and loading meat. It is very manual work.

Each employee is given an induction into the company. They are provided with time during work to read through the company's rules. They can ask questions if they wish. Health and safety regulations are included in the induction. Each employee must sign a document to state they have completed their induction. The induction document signed by the claimant was opened to the

Tribunal.

Time keeping and attendance are very important. The production lines in the factory must be staffed to proper levels as the products are of a perishable nature. The respondent operates the demerit penalty procedure for all absences and lateness.

An absence is when an employee is absent from work for any reason. Included are all absences whether approved or not approved by the supervisor. An excused absence is where the employee has made prior arrangements with their supervisor and obtained permission to be absent. Days absent on medical leave are only taken as an excused absence if a doctor's certificate is provided. A non-excused absence is an absence of which the supervisor has no prior knowledge. Clocking in after the official clocking-in time or forgetting to clock the time card before the start of the shift is considered as a late.

GM explained points are allocated and then communicated to employees by a letter, placed by the wages clerk, in their wages, the week after the absence occurs. Each employee is aware of how many points they have accumulated. If an employee reaches 50 points the employee must meet with the supervisor. The supervisor informs them they have 50 points. The supervisor finds out if something is wrong and puts them "back on track". The employee has already read the rules and conditions and knows the points system is an accumulative system. Part of the procedure is providing an employee with a written warning when they reach 50 points. The same applies for accumulating 75 points except the written warning is a final warning. If an employee accumulates 100 points in any twelve-month period they are dismissed. The conditions are displayed in the factory. It is GM's function to dismiss.

A document detailing points accumulated by the claimant from 21 March 2004 to 23 January 2005 was opened to the Tribunal. The claimant received 15 points week ending 21 March 2004 for being late three times. He received 40 points for two unexcused absences week ending 18 April 2004 and 20 points for one unexcused absence during week ending 11 July 2004. The supervisor and the wages clerk complete a sheet detailing to the employee the total number of accumulative points. An employee can challenge the total with the supervisor that allocated the points. The employee is entitled to see the clock cards if they wish.

The claimant had two periods of certified absences. One of the certified absences was during week ending 07 November 2004 for which he acquired 10 points. This brought his total number of points to 85. The second certified absence was during week ending 02 January 2005. This brought his total number of points to 95. After this he received 10 points for being late twice during week ending 23 January 2005. His total was now 105 points.

Before the claimant accumulated 100 points, GM was informed by the supervisor (Mr. W), that there was a problem with the claimant. Mr. W was responsible for allocating points. The claimant was brought into the boardroom and GM and Mr. W had a chat with him. Mr. W told the claimant absenteeism affected production. GM told the claimant if he were unable to come work, points would continue to accumulate. The claimant signed the warning to state he had been notified that he had accumulated 50 points. This document was dated 22 April 2004.

When the claimant reached 75 points the claimant was again met with and informed of the consequences of accumulating 100 points. The claimant signed the warning to state he had been notified of this.

When the claimant had exceeded the 100 points in a twelve-month period GM told the claimant he was dismissed. The claimant told GM he had another job to go to.

GM was aware of the claimant's medical condition, as the claimant had told him about it. Of the total 105 points, only 20 points were allocated for excused medical absences. GM does not work on the factory floor but he made himself available to the claimant. The claimant did not approach him.

In cross-examination GM stated it is company policy to allocate 10 points for a certified absence. This is stated in the Rules & Conditions of Employment of the company. GM was satisfied the claimant's points were accumulated in a twelve-month period. He went through the records of all the points and he spoke to the claimant before his dismissal. GM wanted to satisfy himself with the points the claimant had been given and that he had been given the points correctly. GM met with the claimant's production manager (Mr. W) and the wages clerk to ensure all points allocated to the claimant were allocated correctly.

It was put to GM that a specialist had written a letter concerning the claimant's condition in December 2004. GM was not familiar with any written record of the claimant's condition. He was aware of medical certificates the company had received otherwise he was verbally informed.

GM held one meeting with the claimant prior to his dismissal. The Production Manager (Mr. W) was also present at this meeting. Mr. W took notes of this meeting. GM made notes at the dismissal meeting. He had noted in his diary that he dismissed the claimant on 28 January 2005.

The dismissal meeting was a light-hearted meeting. The claimant had another job to go to. GM thought he recalled it was a building job.

Answering questions from the Tribunal GM said there is no union in the factory. One other employee at the factory had his employment terminated as a result of accumulating over 100 points.

The second witness for the respondent, Mr. H, told the Tribunal he was Personnel Manager for the group until November 2005. He is now retired but works as a consultant for the respondent. The terms and conditions of the group were negotiated with the union in 1986. The rules have operated in the plant since 1979. The union still has a number of active members.

In cross-examination Mr. H stated that as recently as last year there was evidence of trade union involvement in the factory. The GM was mistaken when he said there was no trade union but GM is only working in the factory in Waterford the last two years. The procedure for the allocation of points is displayed in the staff locker room.

Answering questions from the Tribunal Mr. H stated he had experience of excused medical absences being penalised in the wider industry. Mr. H stated, "jobs cannot be kept open forever." The points system is not intended as a vehicle to dismiss but as a system to offer warnings.

The third witness was Mr. D who told the Tribunal he was employed with the respondent since 2001. He is the Quality Manager and he must ensure the standard and quality of the product at all points of production. He is responsible for induction training.

Each new employee is presented with the terms and conditions of their employment and given the time to read through them. They are brought through hygiene training and health & safety training. These regulations are also displayed as notices. Mr. D completed the claimant's induction. The Induction Training and Assessment form was signed by Mr. D and by the claimant. An employee may raise questions if they wish. Mr. D provides induction to approximately 100 employees per year.

In cross-examination it was put to Mr. D that the Induction Training and Assessment form states that a trainee's employment will be subject to the results of a medical examination, which they agree to take at the company's discretion. Mr. D said there was a medical examination but that it was not necessarily a pre-employment examination. Mr. D was not privy to the claimant's medical certificates. He was almost sure a medical was carried out on the claimant.

Answering questions from the Tribunal Mr. D said he did not know if the claimant's certificates had come from the company doctor. Few queries are raised at the point of induction. There are no queries raised regarding terms and conditions but sometimes there are queries regarding quality and health and safety. Mr. D informs all new employees they can speak to their supervisor. If a person working in the factory had a skin condition Mr. D stated he would take advice by contacting the doctor, as it would be an issue.

The fourth witness for the respondent was Mr. W who holds the position of Production Manager since 1997. He is based in the factory in Waterford. He has worked with the group since 1982. Mr. W operates the terms and conditions system regarding punctuality. Points are allocated for two reasons, lateness and absenteeism. There are three different supervisors under his jurisdiction.

Mr. W confirmed that he had completed the sheets for the claimant showing his accumulated points. He submits these sheets to the wages clerk. Mr. W was aware the claimant had reached 50 points. He had to inform the claimant verbally that he had reached 50 points, which was serious. Mr. W confirmed the claimant had signed the document stating he had been warned he had 50 points accumulated.

When the claimant had accumulated 75 points, Mr. W made him aware of this. Mr. W confirmed the claimant signed the warning on 15 July 2004. Mr. W and the GM met with the claimant on 21 September 2004 as the claimant had a high percentage of absenteeism (21%). This was an informal meeting for the benefit of all. Mr. W made a diary entry of this meeting dated 21 September 2004. The claimant was informed of his percentage of absenteeism. They stressed that any oversights on their behalf regarding points would not happen. Nothing in the procedures stated they had to hold this meeting but they did so as they felt the situation would only get worse if they did not have the meeting.

Mr. W met the claimant when he had accumulated 105 points. He told the claimant he had to terminate his employment. The claimant was not upset and he made reference to a job in construction. The claimant indicated it was just as well because he wanted to work in the building industry. Mr. W told the Tribunal that any points allocated to the claimant were done so correctly. Mr. W did not see a report from a skin specialist. Mr. W understood the claimant's medical condition to be one a reoccurrence rather than a new condition.

In cross-examination Mr. W stated the claimant had two supervisors as he worked in two sections in the factory. To allocate the points for lateness, the clock cards are checked. The wages clerk tallies the points at any given week. The receipt of points affect an employee's wages but if a person was injured through work their wages would be paid. Mr. W said it was the claimant's opinion he got a skin condition from his job in the factory.

Mr. W accepted the claimant had submitted medical certificates but could not recall how many were submitted. Medical certificates could be submitted to Mr. W, the supervisor or the wages clerk. If Mr. W or the supervisor received them they submitted them to the wages clerk who keeps them on record. When the claimant had accumulated 50 points Mr. W gave him a verbal and a written warning. At 75 points Mr. W held a meeting with the claimant. An employee is aware of how many points they have allocated to them. An employee can check the clock cards to ensure that

points were not allocated incorrectly.

Mr. W denied he questioned the legitimacy of the claimant's medical certificates or that he placed the claimant on difficult tasks. It was put to Mr. W he had positioned the claimant on the end of the line. As a result the claimant would finish last and miss his lift home. Mr. W replied that the claimant was a general operative who performed different tasks different days. In the pushing beef section there were three to four operatives in the same area. It was one of the last tasks to be carried out. Mr. W did not know how many times the claimant had worked on this task.

The oversight Mr. W referred to in his evidence related to a mistake that had arisen when the claimant should have received more points but due to an oversight between Mr. W and the wages clerk these points were not allocated to the claimant. Mr. W denied the points system was flawed.

Mr. W did not recall if he had enquired about the claimant's medical condition but he was aware of the condition due to the medical certificates. He denied he had put pressure on the claimant. He did not recall if he had referred the claimant to the company doctor. He had a meeting with the claimant when the claimant had accumulated 50 points, 75 points and when the claimant had exceeded 100 points. At this point he explained to the claimant there was no other option left but to dismiss him. It was put to Mr. W that while the claimant had been present at a meeting on 21 September 2004, the meeting was not regarding his absences. Mr. W clarified details of this meeting to the Tribunal.

Answering questions from the Tribunal Mr. W confirmed the claimant accumulated the points over a twelve-month period. He would need to check his records but he thought the claimant had not acquired any points between June 2003 and March 2004. Two certified absences and lateness's brought the claimant from 75 points to an excess of 100 points.

Claimant's Case:

The only witness was the claimant. He worked for the respondent for almost seven years in various locations in the factory as a general operative. He developed a skin allergy and took sick leave while attending a specialist. When he handed medical certificates into the office, he was asked if he had made them at home. The demerit system of points did not exist when he started his employment with the respondent. His skin condition flared up when he handled the meat and this led to him having open wounds on his hands, which was contrary to health and safety procedures. There was no doubt that his condition was genuine and nothing was done about it.

When he received a warning regarding his sick leave, he was stopped in the yard and asked to sign a document on top of a bin. He was told it was a written warning and to sign it and that was it. He explained about his medical condition and there was no comment made.

On his second written warning, the claimant was asked again to sign the document on the top of a bin. He felt that his life was made difficult and he was bullied and hassled. He was told not to bother coming in if he had no medical certificate. Some certificates that were handed into the wages office were never received and he got extra points (20) for his sick leave as a result. He also handed in a letter from his specialist and a "blind eye" was paid to it.

On the day of his dismissal, he turned up for work as usual and clocked in. Within a half hour, he was told that he was not meant to be on the meat floor and to go to the office. He went upstairs and was dismissed. He was told it was due to his missing days. Any time he was late, he phoned the factory and was told it was no problem. The points system was out of the blue and no one knew anything about it. His supervisor would make him stay until 5.30pm each day "pushing beef" and he missed

his lift home regularly. This added to the stress of the situation and to his skin condition. He was handling food at every job he did and the company showed no concern. The claimant did not receive sick pay when he was out on a medical absence. He had been told to “pull up (his) socks” by his supervisor and that was the only warning he had received.

The rules/statements on display in the canteen had never been pointed out to him. He received no notice or pay in lieu of notice. The claimant established loss for the Tribunal.

Under cross-examination, the claimant denied that he had been aware that he signed terms and conditions and rules and regulations regarding employment after his induction. He thought he was signing his contract. He was aware that the company placed huge importance on employees being punctual. The points system for absences and illnesses was never explained to him. He was being harassed and bullied by his supervisor. He was aware of the consequences of the points, i.e. 100 points would lead to dismissal.

Determination:

Having carefully considered the evidence adduced, the Tribunal is satisfied that the claimant was dismissed for accumulating absences for medical reasons. There was a “points” system in place to record such absences and as the claimant’s skin condition did not improve, it led to his being absent and therefore to his dismissal.

The Tribunal are of the opinion that the points system was very harsh in penalising an employee for a medically certified absence. There was no attempt by the respondent to investigate the claimant’s illness or reasons for absence. The claimant was not requested to attend a company doctor to verify his illness, nor was any health and safety issues taken into account to relocate him within the factory.

The Tribunal determine that the claimant was unfairly dismissed but was also remiss in failing to bring his difficulties to any other manager. Due to his own contributory factor, the Tribunal award the claimant the amount of €11,000.00 under the Unfair Dismissals Acts, 1977 to 2001.

The Tribunal award the claimant €313.76 (being one week’s pay) under the Minimum Notice & Terms of Employment Acts, 1973 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)