

EMPLOYMENT APPEALS TRIBUNAL

Claim Of:
Employee

Case No:
UD950/2005
MN715/2005

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 T. O'Donoghue

Members: Mr T. Gill
Mr. T. Kennelly

heard this claim at Galway on 24th July 2006 and 20th November 2006

Representation:

Claimant: Mr. Albin Kearney B.L. instructed by Geraldine Costello & Associates, Oranmore
Business Park, Oranmore, Galway.

Ms. Maura Keaveney Costello, Conflict Management Services,
Crumlin Park House, Ballyglunin, Co. Galway

Respondent: Mr. Gearóid Geraghty, Fair & Murtagh, Solicitors, Society Street,
Ballinasloe, Co. Galway

The determination of the Tribunal was as follows:

Respondent's Case:

The **first** witness for the respondent, the Manager, confirmed that the claimant had been employed initially as a General Operative, and later assigned to office duties. The claimant's salary was €737.97 per week. The claimant applied for financial support to complete a training course, which he completed successfully. The respondent agreed to fund the course on the basis that the claimant worked a thirty-nine (39) hour week. However, the claimant did not uphold his part of the agreement, did not work his agreed working hours per week, which created a situation that the respondent did not know his whereabouts on days when the claimant was absent from the company. When this situation arose, he attempted to contact the claimant but without success. He confirmed that given the claimant's absences, and with no reasonable explanation

provided for them, he wrote to him at the end of April 2005 outlining the circumstances, and indicated that he was dismissed, which evoked no response from the claimant.

He indicated that problems arose in respect of the claimant's failure to complete his duties satisfactorily, which reflected badly on the respondent. The witness also confirmed that the respondent had introduced an electronic time recording system, and that the claimant had claimed for payment on days when he was, in fact, missing. Also, despite warnings, the claimant continued to smoke in the workplace. The witness said that initially the claimant performed well, but that his work performance went downhill around the time he returned to college which, when taken with his failure to undertake his duties, ultimately led to the decision to dismiss the claimant.

In cross-examination, the witness confirmed that he had established the respondent company in 1998. He confirmed that the claimant initially commenced employment as a General Operative with the company in 1999, subsequently transferring to purchasing duties in his role as Purchasing Manager. He repeated that problems arose from June-July 2004, with the company's failure to deliver goods to its customers as well as the loss of a substantial contract. He said that the claimant ignored the regulations governing smoking in the workplace. He agreed that there were no Terms and Conditions of Employment in existence in the company in 1998, but that these were since put in place. He agreed that the company had not kept a formal record of issuing verbal warnings to the claimant in respect of his failure to comply with smoking regulations but that he had begun to "diary" instances from March 2005. Following a meeting, the decision to dismiss the claimant was taken by the company's three Directors at the end of April 2005. The witness said that that decision was based on the claimant's overall record: his failure to work the agreed thirty-nine hour week; problems with customers; his failure to comply with the regulations on smoking in the workplace; his non-attendance, as well as submitting incorrect claims for payment for days when he was absent. He claimed that he was not aware specifically that the claimant suffered with a medical illness.

The witness said that the claimant was given a pay rise, although no formal warnings were given to the claimant. However, when questioned further, he agreed that the company had not written to the claimant about any of these problems and, by way of explanation, stated that he had tried to contact the claimant by telephone as he did not know the claimant's whereabouts, as well as citing his personal heavy workload. The witness felt that the dismissal was fair.

The respondent's **second** witness repeated and supported the details and reasons for the dismissal as outlined by the first witness. When questioned further, however, he agreed that with the benefit of hindsight it may have been more prudent to write to the claimant setting out the respondent's position. He confirmed that the decision to dismiss the claimant was made by the company Directors. He was not aware if any advice had been sought from employers' bodies.

Claimant's Case.

The claimant stated that he qualified from the National University of Ireland in Galway. He commenced employment as a General Operative with the respondent on 6th September 1999. He subsequently moved into the design area within the company and worked in that environment for about two years, up to September 2002 as well as in the purchasing area. He stated that he sought a pay increase in December 2004. His salary at that stage was in the range of €28k-€30k and that this was increased to €38k per annum. He was offered the use of a company car, which he refused. He stated that he was not advised of any complaints either about his work, or received from customers.

The claimant said that he approached the company in August 2004 to seek financial support to enable him complete a Masters Degree in Business Administration (MBA), the fees for which were €7,500.00. He was required to attend the course one complete day per week, on Friday, and on each Saturday morning. He confirmed that no problems arose in relation to this arrangement, and stated that he made up the agreed thirty-nine hour week over the course of the other four working days. No one ever complained to him that he was not working the agreed hours, or about any failure on his part to comply with the regulations governing smoking in the workplace. He claimed he was not responsible for the production area, and denied ever having sight of a letter of complaint from a customer in respect of an order for that important client. He repeated that he was not told of any issues, complaints or problems, about his work performance.

The claimant stated that the company was aware that he suffered from a medical illness from the start of his employment with them. He was given a fair level of autonomy within the company, and was treated well by the respondent. He repeated that the company was aware that he was completing examinations in the MBA, which were finished by 28th April 2005. He confirmed that his letter of dismissal was received and opened by his spouse on 28th April 2005 and that he had not received any prior warnings, either verbal or written regarding issues, complaints or problems about his performance from the respondent.

The claimant established loss for the Tribunal. He said that he had been engaged on a twenty week contract as a lecturer at the rate of €60 per hour, the number of which remained unspecified. He claimed his loss amounted to €30k on the basis that his previous salary was €38k per annum, which discounted his entitlements under social welfare, as well as payments made to him by way of the temporary lecturing contract.

During cross-examination the claimant confirmed he received a letter of termination. Money was paid into his bank account in lieu of notice.

Absences spanning from October 2004 to April 2005 (totalling approximately twenty-seven days) were listed to the claimant. The claimant was asked if he agreed there was a problem with his absences from work. The claimant replied that his employers were aware he had a medical illness and he was only ever absent from work for that reason. It was put to the claimant the respondent did not know his whereabouts and had difficulty contacting him on the phone during his absences. The claimant told the Tribunal when he was absent he contacted the respondent and customers via telephone. The claimant had spoken to the Manager on the phone during one of his absences about a customer whose business the respondent had lost. He was never asked for medical certificates. The claimant made the manager aware he had examinations during week commencing 25th April 2005. He disputed that the Manager did not know where he was during April 2005.

The claimant was questioned on a new electronic clocking system the company introduced in March 2005. It was put to the claimant he claimed for hours he had not worked on his timesheets. The claimant could not fill out overtime hours on his timesheet so he used overtime hours to make up his thirty-nine hour week. When the company was prepared to pay college fees for his course he insisted he wanted to work a thirty-nine hour week for the company.

The claimant was asked about a customer who withheld payment of €52,000 because incorrect equipment was fitted. The cost to the respondent of rectifying the matter was €18,000 to €20,000. The claimant replied he was responsible for the quotation and pricing of jobs, and not for fitting them. Asked if he ever told a customer their equipment was on the way when the equipment was

actually on the factory floor, the claimant replied “no”.

The claimant denied he continued to smoke in the office after new legislation was passed which made it illegal to smoke in the workplace. He accepted his notice ended one month from 29th April 2005.

Answering questions from the Tribunal the claimant said his employers were very supportive when they realised he had a medical illness. He inquired if they needed medical certificates but they did not. He was never asked for a medical certificate, which reflected the culture of the organisation.

Determination:

The Tribunal are satisfied beyond the balance of probabilities that the dismissal was fair and in these circumstances the claim under the Unfair Dismissals Acts, 1977 to 2001, fails.

The claimant gave evidence to the Tribunal that he received his statutory entitlements as per the Minimum Notice and Terms of Employment Acts, 1973 to 2001 thus his claim under this act is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)