

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee

MN327/06

UD514/06

against

Employer

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr D. Hegarty
Ms H. Kelleher

heard this claim at Cork on 11th July 2007.

Representation:

Claimant: Mr. David Waters, Sullivan Waters & Co., Solicitors, 19 West End, Mallow,
Co. Cork

Respondent: Ms. Catherine O'Connor, William Fry, Solicitors, Fitzwilton House, Wilton
Place, Dublin 2

The determination of the Tribunal was as follows:-

The claimant commenced her employment with the respondent in November 2004 and worked there for thirteen months until her dismissal in December 2005. She was employed as a counter assistant and had been a good employee. It was a term of her contract of employment that she was to notify the respondent by 09.10/09.15 on the day of any absence. It was the respondent's evidence that whilst the claimant initially complied with the notification procedure she ceased doing so in and from September 2005. The claimant denied any such failure to comply.

It was the respondent's case that on 29 September 2005, following the claimant's absence without notification on 28 September, HH (the member of staff with responsibility for disciplinary issues) had a discussion with the claimant about the respondent's policy on notification of absences and the difficulties caused for the respondent by the failure to give notification. HH told the claimant to take the discussion as a verbal warning. This claimant denied receiving this verbal warning.

It was the respondent's evidence that the claimant was absent for a number of days in mid October 2005 but that she never phoned the respondent. On the first day of this absence, 19 October, HH tried to contact the claimant by phone but her first call rang out and thereafter the claimant's phone was switched off. Similarly, on 20 October HH made several phone calls to the claimant but her phone was turned off. On 21 October HH again failed to contact the claimant by phone. On that day the claimant's doctor sent a fax stating that the claimant would be out sick for the remainder of the week. On the claimant's return to work on 24 October HH had a further discussion with her about the requirement to notify the respondent of absences and told her that she was being unfair to the other members of staff. During this discussion HH issued the claimant with a verbal warning telling her that this could not happen again and that her job with the respondent was at risk. The claimant seemed indifferent during this discussion and did not apologise for her failure to notify the respondent. It was the claimant's evidence that there had been no mention, during that discussion, of her failure to phone in regarding absences and maintained this was so because she had rung in. The claimant had also spoken to HH during this discussion about her (the claimant's) personal problems and HH had said that everybody has problems. The claimant accepted that she received a verbal warning on this occasion, on 24 June.

It was the respondent's evidence that the claimant again failed to give any notification of her absences on 5-7 December 2005. HH had made several (about five) attempts to contact the claimant by phone on 5 December but the phone was turned off; however, the claimant sent texts to members of staff during the day. On 6 December HH blocked the respondent's phone number and succeeded in getting through to the claimant but she hung up when HH said, "Hello". When HH rang again the phone went straight to voicemail and she left a voice message, asking the claimant to contact her but the claimant did not return her call. On 7 December, when the claimant was again absent, HH and the owner, who was the pharmacist in the business, discussed the matter, and having spoken to both the Citizen's Advice Bureau and the Pharmacy Union, the owner took the decision to dismiss the claimant. The main reason for the dismissal was the claimant's failure to notify the respondent of her absences. The respondent's business was a small one with only a few employees and the claimant's failure to give notification of her absences left the respondent in "the lurch". Later that day (7 December 2005) HH informed the claimant over the phone that it was better that they "part ways" to which the claimant replied, "Fine, if that's what you have to do". The respondent had not been advised regarding dismissal procedures. On 9 December the claimant phoned the respondent enquiring about the money that was due to her. An external company did the company's payroll and a sum of € 733.00, being the equivalent of eight days' pay had been lodged in her bank account; this included three days' pay to the end of the week commencing 5 December and five days' pay for the following week.

It was the claimant's evidence that she had been at work during the week commencing 5 December. She had been absent on Monday, 12 December and that was the only occasion on which she had not notified the respondent of her absence. HH telephoned her, late that afternoon, while she was in Mallow with her boyfriend, to ask her, "What's the story". HH was angry during that telephone conversation and told the claimant that there was no point in her returning to work and that she would "dig out her P45". This was the only time that HH had phoned her. The claimant could not recall seeing a lodgement in the sum of €733.00 in her bank statement

Determination:

There was a serious conflict of evidence in this case. The Tribunal accepts the evidence of the respondent on those issues where a conflict arose. The respondent failed to follow fair procedures in dismissing the claimant. In failing to afford the claimant the opportunity to put her case prior to her dismissal the respondent failed to adhere to a basic tenet of natural and constitutional justice. Accordingly, the dismissal is unfair and the claim under the Unfair Dismissals Acts, 1977 to 2001 succeeds.

The Tribunal finds the claimant made a substantial contribution to her own dismissal and that she failed to mitigate her loss. Taking both of these into account the Tribunal awards the claimant €1,900 under the Unfair Dismissals Acts, 1977 to 2001. The Tribunal is satisfied that the claimant was paid her due entitlement under the Minimum Notice and Terms of Employment Acts, 1973 to 2001. Accordingly, the claim under these Acts fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

