

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee

UD729/2006

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

Chairman: Mr. P. Hurley

Members: Mr. T. Gill
Mr. T. Kennelly

heard this claim at Limerick on 26 October 2007

Representation:

Claimant:

Mr. Daniel O’Gorman, O’Gorman Solicitors,
Munster House, 75A O’Connell Street, Limerick

Respondent:

Mr. Paudie O’Mahony, Babington Clarke & Mooney Solicitors,
48 South Mall, Cork

The determination of the Tribunal was as follows: -

The claimant was employed in the respondent’s Limerick retail outlet from 21 September 2004 as a sales assistant. There was no written contract of employment and no disciplinary or grievance procedure. Despite the claimant being well regarded by the respondent issues arose around matters of both timekeeping and unauthorised absence. It is common case that, after the claimant missed a day at work on 24 January 2005, the shop manager (SM) gave the claimant a verbal warning form in which she was that her employment was under threat unless there was an improvement in the situation. Matters did improve until the claimant was given a further similar verbal warning after missing a day at work on 26 October 2005.

The claimant was ill on 11 January 2006 and phoned SM to report this. SM reminded the claimant that, in view of her record, she would need to get a medical certificate for her absence. The claimant attended her GP, obtained a medical certificate to cover 11 to 13 January 2006 and telephoned the respondent and spoke to the assistant store manager (ASM). The claimant’s position is that she told ASM the extent of the certificate. The respondent’s position is that the claimant raised the possibility of returning to work on 12 January 2006. It is common case that SM and ASM were sceptical that the claimant was being honest with them. In any event the claimant phoned SM

around lunchtime on 12 January 2006. During this phone call SM raised the possibility of the claimant being dismissed and then ended the call in order to refer to the managing director (MD) in Cork. SM phoned the claimant after speaking to MD and told her that she was to be given another chance and was to receive a written warning the next day, 13 January 2006. The claimant told SM that she would find it difficult to work under those conditions. SM then asked the claimant if she would prefer to leave a suggestion which the claimant refused. SM again contacted MD and then had a third phone conversation with the claimant during which the claimant was dismissed.

Determination

Whilst it was reasonable, given the claimant's record, for the respondent to have concerns about the claimant's absence from work on 11 January 2006, the fact remains that she was in receipt of a medical certificate to cover that day, the day she was dismissed and the day she was to receive the written warning. The claimant was given no opportunity to show the certificate to the respondent before she was dismissed. The claimant was dismissed without any, or fair procedures. In such circumstances the Tribunal must find, in particular having regard to the provisions of Section 5 (b) of the Unfair Dismissals Amendment Act 1993, which provide that in determining fairness the Tribunal shall have regard to the reasonableness or otherwise of the conduct of the employer in relation to the dismissal, that the dismissal was unfair. The Tribunal would adopt and reiterate the wording of Determination 367/88 that the right of the Claimant "to defend herself and have her arguments and submissions listened to ... is a right of the Claimant and is not the gift of the respondent or this Tribunal... the right is a fundamental one under natural and constitutional justice, it is not open to this Tribunal to forgive its breach." The Tribunal is not satisfied that the claimant made sufficient effort to mitigate her loss and awards €3,500-00 under the Unfair Dismissals Acts, 1977 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)