

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

Employee

against

Employer

under

CASE NO.

UD1087/2006

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. O'Leary B L

Members: Mr. M. Flood
Mr. F. Barry

heard this claim at Naas on 5th June 2007 and 30th January 2008.

Representation:

Claimant: Mr. Michael Ramsey B.L. instructed by Ms. Fiona Mulhern,
James V. Tighe & Co., Solicitors, Main Street, Celbridge, Co. Kildare

Respondent: Ms Ann Nowlan, Burns Nowlan, Solicitors, Main Street, Newbridge, Co. Kildare

The determination of the Tribunal was as follows:

Background:

The Claimant contends that he was unfairly dismissed because he was absent from work on a number of occasions because he was sick. He has doctor's certificates for the absences. The General Manager sent him home when he saw a swelling on the side of his face and told him it was for health and safety reasons and on both occasions he received written warnings. This led to his dismissal. He contends that when he was given a letter of dismissal he had the choice to resign or be dismissed and if he resigned he would be given a better reference. He did not resign, as he would not have been entitled to Social Welfare payments for some weeks.

The Respondent contends that the claimant was dismissed due to his absence on various dates from work from January 2006 to April 2006. During this period the claimant failed to notify the company of his reasons for his absence or the duration of his absence.

Respondent's case:

The General Manager giving evidence told the Tribunal that the claimant was absent on 9th January 2006 and the claimant said he would return to work on the following day with a medical certificate. On the following day he failed to furnish a medical certificate. When the General Manager completed the return to work interview form he asked the claimant to return home and get the certificate. The claimant did not return to work until 1.30 p.m. that day. On 11th January 2006 the claimant phoned the office to say he had received a flash from a welder the previous day. The General Manager asked him to come into work and see the company doctor. The claimant did not report for work. The claimant could not give an explanation as to why he was absent the previous day. Subsequently, the claimant was given a first verbal warning, which was verified in writing on 17th January 2006. Employees should phone before 10.00 am if they are going to be absent as work has to be allocated. This is stated in the company handbook and on the notice board.

On 20th January 2006 the claimant did not arrive in work and phoned after lunch. He resumed work on 23rd January 2006 with a medical certificate stating that he had been suffering from stress. The General Manager was worried that the claimant might still be stressed so he asked him to return to the doctor. The claimant arrived back into work the same day with a certificate stating he was now fit for work.

The claimant was absent on 1st 2nd and 3rd February 2006. He failed to notify the respondent of his absences. He returned to work on 6th February 2006 with a medical certificate. The claimant had had an ear infection. The claimant received a second verbal warning on 7th February 2006 and this was confirmed in writing.

The claimant was absent again from 8th to 17th February 2006. The claimant did not contact the company during this time. He resumed work on 20th February 2006 and he handed in a medical certificate to say he was fit for work. There was a swelling under his ear. Even though the claimant had a certificate to say he was now fit for work, the General Manager was not satisfied and suggested he return to the doctor. The doctor sent him to the Eye and Ear hospital. The claimant returned to work on 6th March 2006.

The claimant was again absent on 13th March 2006, the reason being that he slept it out. The General Manager recommended that the claimant receive counselling. On 14th March 2006 the General Manager issued a final written warning including a three day unpaid suspension to take effect on 15th March 2006.

The claimant was absent from 13th April to 18th April 2006 and did not contact the office and he gave the company a medical certificate on his return. While the claimant was absent the General Manager explained that he tried to contact the claimant twice by phone and called to his apartment. The General Manager discussed the matter with the Managing Director and issued a letter of dismissal. The claimant was dismissed with effect from 28th April 2006.

In cross-examination the representative for the claimant queried the procedures regarding the verbal and written warnings. In 2005, the claimant was absent on a few occasions. The issue with the claimant was he continually failed to contact the respondent before 10.00 a.m. This was vital as work had to be designated. The General Manager was asked and denied that he told the claimant that he would get a better reference if he resigned.

The Managing Director conducted the appeal and the General Manager participated. Both made the decision to dismiss the claimant.

The Managing Director gave evidence. He explained that he heard the claimant's appeal and that the claimant could not give them a firm assurance to let the company know should he be absent. The claimant had changed his medication and he felt he should be given another chance. The Managing Director considered and upheld the decision to dismiss the claimant. He also explained that illnesses happen and that is not an issue. The claimant did not contact the company for many of his absences. It was a small company and it affected productivity.

The Managing Director was asked why he did not consider taking the claimant back on probation on the day he appealed. He explained that he was waiting to hear the claimant tell them that he was going to change and the claimant could not give him guarantees that he would do so.

Claimant's Case:

The claimant commenced work with the respondent on 26th October 2004 as a General Operative. He stated that two-thirds of the thirty four days absent from work related to an ear problem. When he changed doctors his health improved greatly. If he felt he was going to be late for work he contacted the office and if the General Manager was unavailable he left messages with the office staff. He received the Company Handbook some weeks after he commenced work with the respondent. In 2005 he joined a Union. In 2005 he met with the General Manager and his lates were discussed. He attended several counselling sessions in the first few months of 2006.

Under cross-examination the claimant accepted that the cautions over his lates were recorded on his payslips. The claimant could not recall if he had union representation present when he received his first verbal warning. The claimant agreed that he did not receive a caution when he phoned the General Manager after 10 o'clock on 20th January 2006. Neither did he receive a caution on 23rd January 2006 when he returned to work with a certificate stating that he had been suffering from stress. That day, the General Manager was so concerned about the claimant's health that he asked the claimant to return to the doctor and obtain a fit for work certificate. The claimant stated that he did not know why he didn't contact the respondent when he was absent on 1st, 2nd and 3rd February 2006 and neither could he recall contacting the respondent when he was absent from 8th February till his return on 20th February 2006. Neither could he say why he did not contact the respondent on 13th March 2006 about his absence.

The claimant stated that he had been told if he were sacked he would not get a good reference from the company. After his dismissal on 28th April 2006 he hand delivered an appeal letter to the company on 2nd May 2006. His appeal meeting took place in the canteen on 16th May 2006. The Managing Director conducted the meeting in the presence of the General Manager, himself and his father.

He told the Tribunal he assumed that he received the three-day suspension effective from 15th March 2006 because of his lates.

The claimant established loss for the Tribunal.

Determination:

The evidence in this case showed that the claimant had a considerable number of days off due to illness and that he had provided his employer with medical certification for these absences. The problem with the absences was that the claimant had repeatedly failed to notify his employer on the day of the commencement of the absence period of his unavailability for work. Under the terms of his contract of employment the employee was required to notify the employer that he would not be able to work and this notification was required to be made before 10 a.m. Due to this failure the employer was unable to properly allocate work on the days of the claimant's non-attendance. The claimant admitted that he had a mental block about complying with this rule. It is the Tribunal's opinion that the claimant should have and could have complied with this term of his contract of employment. His failure to so comply resulted in the issuing of the two verbal warnings and the final written warning and indeed in his dismissal. The Tribunal determines that the employer acted reasonably in all the circumstances. Therefore, the claim under the Unfair Dismissals Acts, 1977 to 2001 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

