

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

Employee

UD94/2008

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Hayes B.L.

Members: Mr. M. Flood
Mr. P. Trehy

heard this appeal at Carlow on 14 May
and 7 July 2008

Representation:

Claimant:

Mr. Ronan Tierney, James Cody & Sons, Solicitors,
The Parade, Bagenalstown, Co. Carlow

Respondent:

Ms. Helen Barry, IR/HR Officer, IBEC, Confederation House,
Waterford Business Park, Cork Road, Waterford

The determination of the Tribunal was as follows:

The claimant was a general operative in the respondent's plant. His work involved approximately 80% computer work and 20% manual work often involving the moving of 25kg bags of product. He had been employed since April 1998. The claimant reported an incident in the bagging plant on Monday 5 November 2007 at around 9-30am in which he had slipped and jarred his back. At around 2-30pm on the same day the claimant then told his foreman that he was now unable to get off the fork lift truck. The claimant was taken to the company doctor and certified unfit for work for three days. Analysis of the claimant's personnel record revealed that he had been absent from work on numerous occasions due to a higher than normal level of incident or injury. Four out of the previous five incidents had occurred on Monday mornings and this aroused the suspicion of management.

The senior production manager (PM) received information that the claimant was working at the weekend as a doorman or similar at an establishment in a town some 80 kilometres away. This

establishment was put under surveillance and the report for Saturday 10 November 2007 showed that the claimant had been observed apparently acting in the capacity as reported. The following day PM received a text message from the claimant to the effect that he would not be back to work on 12 November 2007 as he could not weight bear. The claimant submitted medical certificates on a weekly basis. The claimant received sick pay throughout his absence from work. The investigation into the claimant's activities went on for two months until on Friday 4 January 2008 the claimant was called to a disciplinary meeting at 7-00am on 9 January 2008 attended by the claimant, his union representative, PM and chaired by the incoming managing director (IMD). The claimant was given video footage of his weekend activities as well as a written summary of the report on his activities. The claimant's position was that the weekend activity was unpaid as he was learning about the security industry. He produced a letter from the proprietor of the establishment (PE) to the effect that he was not being paid, the claimant's position was that he was being paid travelling expenses only. The claimant requested a two-week deferral of the decision pending his obtaining evidence from his physiotherapist who spent Christmas 2007 in Australia and a report from his doctor. He was called to a second meeting on 10 January 2008 at which he was given a letter of dismissal. This letter, which had been prepared the previous day, indicated that the claimant's pay would cease 18 January 2008. The respondent's position was that the claimant's conduct constituted gross misconduct warranting dismissal. There had been a breakdown of trust with both the respondent and his fellow employees. The claimant when signing for his sick pay had certified that he was not working during this period of receiving sick pay. The type of work the claimant was engaging in on weekend nights was such as to require such a physical element to it so as to be inconsistent with the claimant's rehabilitation from his back injury.

The claimant appealed the decision to dismiss him to the retiring managing director (RMD) and this appeal was heard on 18 January 2008. Also in attendance were the company secretary, the claimant's union branch secretary (UB) and the union official at the disciplinary hearings. RMD had attempted to contact PE before the appeal, but without success. He had further contacted the private investigator who had posed as a potential security firm user and been told that the claimant was the head bouncer averaging €25 per hour. The claimant produced a letter from his physiotherapist, dated 16 January 2008, to the effect that the claimant was not fit to return to work and had not been following his rehabilitation regime. The physiotherapist was not aware of the claimant's activities at the establishment until 15 January 2008. During a recess in the appeal proceedings RMD was contacted by PE but would not tell RMD which security firm he was using. Before the appeal reconvened UB approached RMD to state that the appeal was not a fair process and that there was no point in continuing with it. RMD wrote to UB on 21 February 2008 to confirm that the claimant's appeal against his dismissal had failed.

Determination:

Despite there being a question mark over some of the procedures adopted by the respondent in regard to the disciplinary process the Tribunal is satisfied that the respondent had reasonable grounds to conclude that the claimant was engaged in paid work at the establishment whilst on sickleave. The matter as to whether or not the doctor or the physiotherapist might state that the claimant was fit to carry out the activities at the establishment are not relevant to the core issue. That is that as part of the respondent's sick pay scheme the claimant certified that he was not working during this period of receiving sick pay. The Tribunal is satisfied that the respondent was justified in regarding this as gross misconduct. In these circumstances it must follow that the dismissal was not unfair. Accordingly the claim under the Unfair Dismissals Acts, 1977 to 2001 fails

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)