

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee

UD183/2007

WT54/2007

against

Employer

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2001
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. L. Ó Catháin

Members: Mr. M. Forde
Ms. H. Kelleher

heard these claims in Cork on 24 January 2008 and 2 May 2008

Representation:

Claimant :

Mr. Paul Depuis, Assistant Branch Organiser, SIPTU,
Connolly Hall, Lapps Quay, Cork

Respondent :

Mr. Jim Reaney, IBEC, Knockrea House, Douglas Road, Cork

The determination of the Tribunal was as follows:-

The claimant's employment with the respondent commenced in April 2004 and ended in October 2006. The claim form lodged with the Tribunal stated that the claimant felt that he had been unfairly dismissed because of his failure to attend the company doctor at a time specified by the company.

The respondent's notice of appearance stated that, "having considered all representations made by

the claimant and on his behalf and all other relevant matters, including the false reasons given by him for not attending the company doctor”, the company terminated his employment.

A claim lodged under the Organisation of Working Time Act, 1997, was withdrawn at the start of the Tribunal hearing.

Respondent’s Case:

In an opening statement the respondent’s representative said that the claimant had requested holidays which, for operational reasons, had been denied. Subsequently, the claimant sent a medical certificate, alleging workplace stress, to the respondent. The respondent, acting upon receipt of this certificate and in line with internal procedures, asked the claimant to attend for assessment with the respondent’s medical adviser. The claimant said that he could not make the first scheduled appointment and a second one was set up. The claimant did not attend at the rescheduled appointment citing acute stress as the reason. The company had strong reason to believe that the claimant was in fact out of the country on vacation at the time. At a subsequent meeting held to discuss the issue the claimant firstly denied this but later admitted that he had indeed been out of the country on vacation and that his excuses for failing to attend at the medical appointment had all been lies. The claimant had been issued with a final written warning for a flagrant breach of company procedures only weeks before this transgression and the respondent felt that it could no longer trust the claimant. The respondent took a very grave view of the claimant’s behaviour in this matter and, having reviewed all the details, felt that the continuation of the claimant’s employment was untenable. The respondent’s decision to dismiss the claimant was based on the loss of the bond of trust.

Giving sworn evidence, a director of the respondent said that the claimant had joined the respondent on 8 March 2004 as a general operative in the lamination department. There had been no issues in the claimant’s six-month probation and he was made permanent on 8 September 2004.

However, as time went on there was a dip. On 12 January 2005 the claimant received a first verbal warning and on 30 November 2005 he received a second one. On 14 February 2006 the respondent spoke to the claimant again and on 16 March 2006 the claimant got a written warning regarding his attendance and work performance. On 14 August 2006 the respondent met the claimant again and gave him a final written warning because he had left the respondent’s premises on 11 August 2006 without his supervisor’s permission. On 8 August 2006 the supervisor had spoken to the claimant about leaving the company premises without permission.

The director told the Tribunal that it would be unusual for any employee to get a final written warning within two years of being made permanent. The respondent had had meetings with the claimant and had been very lenient by not holding disciplinary procedures. Warnings were given to help somebody improve their position. The next stage was to be dismissed. It was highlighted at meetings what the next stage would be. The director referred the Tribunal to the concluding words of the claimant’s final written warning:

“This warning constitutes the final stage of the Company’s disciplinary procedure.

I therefore want to make it perfectly clear that any further breach of company policy or procedure or any lapse in your work performance will unfortunately lead to your employment with...(the respondent)... being terminated.”

The director told the Tribunal that the respondent had gone to great lengths to make sure that corrective action was taken but that, on Monday 21 August 2006 i.e. only a week after the final written warning, the claimant rang in sick, spoke to a colleague and asked that the claimant's supervisor be notified. On Tuesday 22 August the respondent received a medical certificate for 21 August to 31 August 2006.

The director informed the Tribunal that in July 2006 the claimant had requested eight days' holidays for some time in August of that year but that this request had been denied for operational reasons. The director added that the respondent generally referred an employee on a medical certificate to the respondent's doctor and that on 23 August 2006 the respondent told the claimant to attend the respondent's doctor on 25 August but it was discovered from the claimant it would be hard for him to attend. The respondent's HR officer then told the claimant that the appointment was rescheduled for Monday 28 August whereupon the claimant said that he would see how he felt over the weekend.

Subsequently, the claimant's wife rang the respondent for directions to the respondent's doctor and asked for a change of appointment. The respondent could not do this. The claimant's wife rang again looking for a change but it was not possible. The respondent set up the appointment for the following Monday. The claimant failed to attend the appointment but did not contact the respondent or the respondent's doctor.

On Tuesday 5 September the respondent received a medical certificate for the claimant dated 4 September 2006 to cover the period up to Monday 18 September. On 15 September the respondent received a certificate up to 30 September and on 18 September the respondent received a certificate for 1 and 2 September. To the Tribunal the director described this as "filling in the gap". On Monday 2 October the respondent received a certificate up to 5 October and on 5 October the claimant was certified fit and returned to work.

The director told the Tribunal that, while the claimant had been out, he (the director) had received calls from the claimant's representative asking why the claimant's sick benefits had not been paid. The director explained to the Tribunal that this was because a breach of procedure was becoming evident due to the fact that the respondent did not have certificates for all of the claimant's absence and because the claimant had not attended the respondent's doctor at the specified time. The director and the claimant's representative had a number of phone calls during the claimant's absence. It was pointed out that there were gaps in the claimant's certificates. When a certification gap was pointed out the respondent received a certificate for the gap highlighted.

On Thursday 5 October 2006 the claimant returned to work. At 10.30 that morning the director was told that the claimant was back. The director sought a meeting with the claimant through the supervisor and the claimant was told to bring a colleague.

That day, the claimant and his shop steward met the director and a colleague in the director's office. The meeting went on from 11.30 a.m. to 1.10 p.m. They went through the sequence of events. The director asked the claimant why he had not contacted his supervisor when he was originally sick. The claimant replied that, when he had rung, he had asked a colleague for the supervisor but the colleague had said that he could not find the supervisor. The claimant said that this had happened three times and gave dates and times for when he had called.

The director told the Tribunal that the supervisor had a portable phone which was a natural

extension of the phone that the claimant had rung and that it was “inconceivable” that the supervisor would be so unavailable i.e. that it might happen once but not more.

Going through the sequence of medical certificates, the claimant agreed that he had spoken to a colleague (rather than the supervisor). Regarding the respondent’s HR officer ringing him, the claimant admitted that he had got the call and said that he had not been able to go that Friday 25 August (only two days after 23 August) but agreed that the appointment had been set up for the following Monday. The claimant said that he had spoken to a doctor who had written a letter to the respondent’s doctor saying that the claimant could not attend due to stress and that he required counselling. The director told the Tribunal that he knew that the respondent’s doctor had had no contact other than from the claimant’s wife.

Regarding the Monday 28 August appointment, the respondent asked the claimant why he could not attend. The claimant said that he had been too stressed out. When the respondent asked about this the claimant said that he had not been able to drive because he had been on medication for stress and that his wife had taken that Monday off to drive him but that he had been too stressed to get out of bed. This was said on more than one occasion.

The director asked the claimant if he had been on holidays. The claimant asked where the director had heard that. The director replied that there had been a lot of talk around the factory that the claimant had been on the holidays that he had requested. To all questions regarding whether he had been on holidays the claimant replied that he would have to talk to someone. Eventually, the claimant said that he had been in Portugal.

The director told the Tribunal that they had now gone from the claimant being too stressed to get out of bed to the claimant being in Portugal whereupon they took a break and he asked the claimant’s shop steward to talk to the claimant. At 12.30 p.m. they left and came back at 12.45 p.m.. The claimant said that the respondent knew what had gone on, that the claimant’s wife had booked holidays at the start of July for ten days, that these were the requested holidays that had been denied and that the claimant had been in Portugal from 24 August to 31 August.

Regarding a 18 September medical certificate, the claimant admitted that his doctor had written it on 18 September and dated it 1 September. The director said to the claimant: “This is a complete pack of lies you’re telling me.” The claimant agreed.

At 12.50 p.m. the director told the claimant and his shop steward that they should turn it into a disciplinary meeting. The claimant gave no reason for lying. At 1.10 p.m. the meeting ended. The director told the claimant and the shop steward that he would have to take stock and decide the outcome.

At 3.30 p.m. that day the director met the claimant and the shop steward. The claimant had nothing to add. The director outlined what had gone on, told the claimant that he had no option but to dismiss him and said that the respondent would pay the claimant for two weeks in lieu of notice. The director said that he would put a letter together to outline what he had just said.

The Tribunal was referred to a dismissal letter dated 9 October 2006. In summation, the director told the Tribunal that the claimant, having given no defence, got two weeks’ notice and that the claimant’s employment ended on 19 October 2006.

The director told the Tribunal that the respondent had subsequently received an appeal request from

the branch secretary of the claimant's trade union but that the decision did not change. The appeal was heard by the respondent's sales director and technical director neither of whom had been involved up to that point. The branch secretary represented the claimant at the appeal.

Under cross-examination, the director was asked if it was usual to make an appointment with the respondent's doctor when an employee was two days out. He replied that the claimant had referred to acute stress at work and that the respondent could not afford to wait two or three weeks when a medical certificate had that on it.

Asked where in the respondent's procedures it said that an employee had to be at home while out sick, the director replied that it did not say it but that the respondent had the right to send an employee to the company doctor.

Asked if the decision not to pay the claimant for sick leave had been made prior to the investigation, the director said that it had not and that, if all had been in order, the claimant would have been paid for while he was out. The director added: "A decision was made to investigate the circumstances of his being out. Payment of sick pay was put on hold till we knew the circumstances. If they were okay perhaps the sick pay scheme may have applied. He agreed it was a complete pack of lies."

Asked if he recalled the claimant's shop steward asking on 5 October 2006 if it was an investigative or disciplinary meeting, the director said:

"It started off as an investigation. He had said his wife had taken a day off for him to go to the doctor. During the investigation he told us he'd been too stressed to get out of bed. When he was asked if he had been on holidays he said he had to speak to somebody. When pushed, he said he had been on holidays. At a point later in the investigation we changed it from an investigation to a disciplinary hearing."

Asked if the claimant had requested a postponement to get a union official's help, the director replied that the shop steward who had indeed been present had wished to speak to a union official and had been given the opportunity to do so.

Asked if the claimant should not have been given the chance to have an official, the director replied that the claimant had chosen to bring the shop steward with him. The director added that it had been outlined to the claimant that this was a serious matter, that he was on a final written warning and that he had told "a pack of lies". Furthermore, the director told the Tribunal that the claimant could have asked for somebody other than the shop steward if he had wanted and that "arrangements could have been made".

Asked what had been the respondent's objection to a "Rights Commissioner service" hearing, the director said that the claimant "would not have had to stand up and swear on his testimony".

Asked by the Tribunal if the sick dates had been the same as the holidays the claimant had sought, the director replied: "The first three days out were not dates he had sought for holidays. The rumour round the place was that he had gone on his holidays. We'd just come back from the annual shutdown. We sell through the shutdown and run stocks down. For one or two months after the shutdown we're under pressure."

The director added that the claimant's first written warning had been for the quality of his work and that the second written warning had been for absence without permission. Asked if it had not been necessary for the same reason to be at issue in the end, the director replied that it was "unusual for somebody to be at final written warning stage".

Claimant's case:

The claimant in his evidence told the Tribunal that he received a written warning on 16 March 2006. This warning related to his attendance and performance. He was late on a few mornings because of the traffic and his bringing his children to school. The respondent gave no recognition for the times he was in early. In relation to his performance he said that the store was full of re-cycling materials and when the store was extended and he could not keep up with the increased volume of work. He mentioned this to the respondent however he was told that it was a one-man job. He asked the production manager for help who in turn spoke with the director and the reaction was that if he could not do the job he knew what to do. The claimant had a family to support. He got stressed out and he was also taking care of a sick relative at weekends.

In relation to the final warning dated 14 August 2006 he went out sick and his GP put him on medication. During this time he sent in medical certificates to the respondent. Another issue raised in this warning letter was his leaving the company premises without permission. The claimant said that he left the premises one morning to go a nearby petrol station to get lunch. He did not report his absence to his supervisor as he it was during his break time. On another occasion he was collecting the children from school and when he returned he found the director waiting for him. The claimant was unable to locate the supervisor on that occasion. On 21 August 2006 he contacted a work colleague and asked that a message be given to the director that he was out sick and he would send in a medical certificate. His colleague promised to do as asked. On 22 August 2006 he was contacted by the respondent's secretary asking him to attend the company doctor on Friday 28 August. He told her that he could not attend on that date. She then gave him another date for the following Monday and he could not attend as his wife had booked a holiday and they were going away. He then asked for another date however the company doctor said there was no other date available. On 4 August he got a medical certificate for a further two weeks and as far as he is aware he was not contacted by the respondent at that time.

On 14 September the claimant contacted his union as he was not getting his sick pay and when an enquiry was made with the respondent he was told that his sick leave was being investigated. On 5 October 2006 at 8am he returned to work and had a letter from his GP stating that because of his medication he was not fit to drive the forklift but he could do other duties. When he was asked to go to the company doctor his GP gave him a letter. He was told that his job was that of forklift driver and if he could not drive there was no other work available. He had signed on as general operative but was told he was a stores person and forklift driver. Later that morning he was called to a meeting with the director and the claimant brought the shop steward with him as representative. At the meeting the director asked him on two occasions where he was and why he could not attend the company doctor. The claimant made up a story as to why he could not attend. The meeting was then re-convened for the afternoon and at this point the claimant told the director the truth that he had been on holidays in Portugal and that his wife had taken him away as he was stressed out. He apologised for not telling the truth earlier in the day. The director told him he had broken company and union regulations. The claimant did not think he had done anything wrong. He was out sick, had sent in all the medical certificates and his wife had organised the holiday. He

had been out sick from 21 August to 5 October 2006 and was out of the country for one week.

The claimant was told that the company were going to review that matter and they would revert to him. After this the claimant's supervisor asked him to sweep the floor. At 3.50pm that same day the claimant received a letter stating that his employment was being terminated for breaking company regulations. The appeal hearing took place on 27 October 2006. The claimant's reason for appealing was that he felt he was unfairly dismissed. While he was out sick he did not feel he had to be sitting at home and did not think he was breaking any company regulations by going on holidays.

In cross-examination he said that the company was good to work for at the start of his employment and in the beginning the store was small. Prior to his dismissal his work-load had trebled and he could not keep up. He agreed that as early as January 2006 he knew that the shut down period was scheduled for July/August. He did not know when the holiday was booked. About a week before he went out sick he was told about the surprise holiday. In relation to his leaving the company premises to get a sandwich he did not know that this was against company regulations. He could not recall if he asked the respondent's permission prior to going on holidays. Witness said he was suffering from stress and the side effect from the medication meant that he was not allowed to drive on a regular basis. The reason he did not tell the truth about the holiday was that he was stressed out. He did not recall telling the director that his wife had booked the holiday at the start of July. He went on his holidays at the beginning of September but he was not sure of the exact date he went to Portugal. The medical certificate was for fourteen days and he went on holidays for a week.

The Tribunal also heard evidence from the shop steward who said that he was approached by the claimant on 5 October 2006 at 10am stating that he had been called to a meeting with the director. Having spoken with an official in SIPTU he accompanied the claimant to the meeting. At the outset he asked if it was disciplinary and the director's response was that it would be a general meeting initially but that it could lead to disciplinary. The respondent enquired from the claimant about his medication and asked where had been and why he did not attend the company doctor. The claimant said he had been stressed with the increased work-load and was unable to attend the doctor. It was put to the claimant that he had gone on holidays while out sick and he then admitted that he had gone to Portugal. At this point the meeting changed to disciplinary and after taking a break for lunch the meeting re-convened at around 3pm. The claimant was then told of the decision to dismiss him. Witness contacted the union official who was unable to be at the meeting and it proceeded even though witness requested the respondent to wait until the official was available.

In cross-examination witness said it was possible that the claimant's work-load was not discussed in detail at meeting on 5 October.

Determination:

On the evidence before the Tribunal it considers that the dismissal was not unfair, therefore the claim under the Unfair Dismissals Acts, 1977 to 2001 fails. The claim under the Organisation of Working Time Act, 1997 was withdrawn.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

