EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S): CASE NO.

Employee UD958/2006

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr D. Mahon BL

Members: Mr. J. O'Neill
Ms. E. Brezina

heard this claim in Dublin on 14 March 2007 and 27 July 2007
and 27 February 2008 and 20 October 2008

Representation:
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Claimant(s): Mr. John Curran BL instructed by Ms. Eileen Hayes, Sheridan Quinn, Solicitors, 29 Upper Mount Street, Dublin 2

Respondent(s): Mr. Tom Mallon BL instructed by Arthur Cox, Solicitors, Earlsfort Centre, Earlsfort Terrace, Dublin 2

The determination of the Tribunal was as follows:-

Respondent's Case

CN told the Tribunal he was an "upline" manager and that first line managers reported to him. He joined the respondent company in December 2003. He took the decision to dismiss the claimant and prior to this he had no knowledge of the claimant. The claimant did not work in his area and CN was brought in as an independent person. He did not know of the claimant's injury or of a settlement. This did not influence his decision. In this regard the OHS (Occupational Health Service) prepared a letter for him and he had no other information apart from this letter. He met the claimant on Saturday 15 March 2006, (reconvened meeting) put points to him and then met his manager. HR did not give him the letter and he had to seek it from the respondent. The online manager in that area did not know the context of the previous first written warning. CN knew that there was a serious incident but he did not know of a previous

warning until he started his investigation. The first written warning furnished to the claimant was not appealed. There wasno evidence of MC forms or Social Welfare claims in respect of absences. CN asked to check withSocial Welfare and there was no evidence of any claims by the claimant. It was up to employeesto apply to Social Welfare for benefit. Employees recorded their own times. It was a matter oftrust. There was no clock-in system in place. The claimant was three hours late for work on 16November and he came to the conclusion that the claimant had only one late. 24 December and 27December were overtime days and the claimant could not be punished if he was not there for overtime. The normal absenteeism rate for employees was three to five per cent

The claimant was given a month's notice and he was paid to the 24 May 2006. A key point was that, from an OHS point of view, the claimant was fit to work. The claimant did not comply with OHS and in terms of his attendance and he was getting worse. The manager kept daily records and got feedback from managers. That was from March to July 2005 and after a first written warning. He did not check in for counselling but he did for a VHI counselling; a number of conversations. It was informal and not recorded. A verbal warning was issued to the claimant. Following a written warning an informal plan was put in place. The first written warning issued on 18 November 2005 (which the claimant acknowledged) but he did not sign it. The claimant did not make any complaint regarding the first written warning. He was not aware of an e-mail of 23 November 2005. The claimant told the witness inter alia that he had an accident at work and that his life was changed since the accident. The claimant did not say when he had the accident. CN had not been told about the claimant's accident prior to that. No contact was made with him regarding the accident, claim or settlement. He was not influenced in his decision by the claimant's accident or claim.

In cross-examination he stated that he now knew that there was an accident and the claimant mentioned it at the dismissal hearing. The claimant told him his life had changed since the accident. He asked OHS if the claimant was fit to work and the response was yes. He did not makea further enquiry as to the claimant's health. He did look at the claimant's absence record and thereasons for it. He believed that four to five per cent absence was normal. The claimant had avery high level of absenteeism. The report indicated neck injury and neck pain. He did not enquire about the underlying reasons. He did not know that the claimant had been injured and hadbeen hospitalised. OHS deemed the claimant fit to work. Asked if up to his dismissal theclaimant's absence largely related to the accident, he did not reply. He did not know if the underlying issue was the accident and neck pain. He always referred to OHS and, in the period thathe was fit for work, he had a high level of absence. He believed that the serious accident (whichthe claimant had in 2003) caused months of sick leave. He did not know if this related to neckinjury. He could not interpret what Dr. BH said. It was not unusual for an employee to furnish acertificate from the first day of absence. He had come across employees who had a thirty to fortyper cent absence and they were requested to provide a medical certificate on the first day of absence. The witness has been with the respondent since 2003 and it is part of the respondent policy and it is adhered to. It was up to an employee to improve his performance. He was awarethat there was a serious problem before this. In October 2004 the claimant had unauthorised absences and from then warnings started. He was dissatisfied with the claimant's absence. He didnot know if the claimant's absences related to the neck injury. In relation to the MG medicalreport he presumed that MG was a senior consultant. He did not know if the MG report was as aconsequence of the accident. Asked if he accepted that the claimant's absence related to the neckinjury he replied that MG was not clear himself and not sure if lighter duties would help. He didnot accept that the claimant would continue to suffer. He did not know if this report was takeninto account and he had never seen

this report and he did not know if the claimant's manager hadbeen aware of this report. The witness was asked if the claimant was leading the life of a chronicpain patient at the time, if the warnings issued gave the claimant directions to follow. He was alsoasked if the claimant was to pay out €60 on the first day of illness for a medical certificate and ifthese did not accelerate discipline. He replied that the claimant did not contact his manager orprovide the right documents. OHS stated that the claimant was fit for work. A formal medicalreview was not requested.

The witness was of the view that the claimant was not managing his own health. OHS was a function of the respondent and it was a service that the respondent paid for. He disagreed that the OHS prime responsibility was to report to management. OHS got people back to work and it assisted employees on returning to work. There was very little information regarding employees that the OHS saw because there was confidentiality between the employee and OHS. He did not know what Dr. MG regarded as a short-to-medium-term performance improvement plan. Asked if supports were put in place for the claimant he replied that he did not know what happened as a response. The witness was not qualified to comment on the claimant's underlying condition.

Normally the claimant provided a certificate for any day he was out sick. From the time of the first written warning there were other recommendations but the respondent put him under extra imposition for his absences from the time of the first written warning. Asked if it was inevitable that the claimant would face dismissal for breach of it, he replied that some people followed the procedure necessarily. The claimant was not getting paid while he was out sick and he did not apply for an MC1 form. The claimant should have applied for this when he came out of hospital. The witness stated that it was true that the claimant's English was not as good as his. The demands on the claimant were never the issue. There was an improvement plan. He did not accept that there was a language difficulty. The claimant told him at a disciplinary meeting that he completed the MCI forms. It was the claimant's responsibility to apply and get a letter saying that he was not eligible. He could not recall if there was a danger of overpayment. He agreed that the claimant could be confused about this. At this time the claimant was on a first written warning and was asked to follow certain procedures. The claimant did not see the need to adhere to the procedure. The procedure in place was that if an employee was absent on sick leave he had to contact his manager at least once a week. He based his decision on documented evidence. He was not sure if the claimant's absences related to him getting treatment, i.e. physiotherapy. He was not sure if he made that request to TG. The medical certificate was to ensure that the claimant got paid.

The witness was investigating the claimant's health and attendance situation. The claimant was not represented at the disciplinary hearing and the claimant refused to sign the first written warning. The claimant was told that he was entitled to representation. The claimant was not told that he would be in peril of dismissal. He did not know that the claimant could not attend with a representative. The claimant attended all previous meetings without a representative. The claimant did not say that he wanted a representative and that he could not proceed. Asked if the claimant said that the respondent was notorious for a non-union policy, counsel for the respondent intervened to have the allegation withdrawn if no witness would be called to support it. Counsel for the claimant responded that, on the next day of the hearing, he would bring a ream of information to support what he said. Counsel for respondent wanted his objection to the claimant's allegation put on record.

Dr. BH for the respondent outlined in detail to the Tribunal her qualifications and she has practiced in Occupational Health Service for the last fifteen years. She provided a service part time to the respondent approximately one to two days a week. She was involved in establishing the

occupational health services provided to the respondent. OHS was governed by very strict ethical guidelines and a practitioner in occupational health would be required to abide by these. If the HR sent a client for assessment regarding fitness for work and ability for work no one had access to the OHS files. Once OHS knew that an individual had consented to releasing information a copy would be given to the relevant party. The claimant's occupational health file was given to the claimant's solicitor but it was not sought by or given to the respondent. If the respondent sought it, consent would be required. It had to have consent of the respondent and the respondent did not have a copy. The claimant's absence was extreme at 40/50 per cent. She was of the view that the claimant was fit for work but that did not mean that the claimant did not have pain but that he was fit for work. The OHS had looked at other aspects of his health problems. In her dealings with the claimant she was exasperated at his attendance in reporting late for appointments and on many occasions the claimant was thirty minutes late. She felt that the claimant could have engaged more effectively with treatment. She spoke to the claimant's GP and the claimant's injury incurred more disability than was expected at the outset.

In cross-examination she stated that the relationship was between OHS and the claimant and the claimant was not her patient. Employees who came to the OHS service had their own GP. The OHS had an independent role and was not the employees' doctor. The relationship with the client and the OHS was confidential and that is why there is a very strict code of ethnics around the relationship. She did not have full information on any client. She did not know if the claimant was reminded of his appointment time. Recommendations on an independent medical report tied in with everything that was done in OHS. The claimant was not referred to a chartered physiotherapist. She did not know what led to the claimant's dismissal. At the end of March OHS received a report and all recommendations were given to the GP. She would say that OHS implemented the report and the claimant was already with another physician. It was not for the witness to refer a patient to a specific individual. As soon as she saw the claimant she took the rehabilitation approach. The claimant did not do all his exercises and attended some appointments but not all. The claimant did not engage proactively with the physical programme. She was concerned with the claimant's high absence rate. She could not comment on the claimant's absences from October 2005 to March 2006. The claimant's absence rate was high by any standards. There were certain times when an employee may not remember an appointment and in the circumstances she accepted that it was fair to remind them. OHS informed clients of appointments by text messages and it was difficult to run a service if someone was late.

The claimant's GP was contacted and agreed that the claimant was depressed and prescribed treatment. The claimant was not referred to a psychiatrist.

In answer to questions from the Tribunal she stated that the claimant was offered counselling but did not avail of it. An employee could avail of eight counselling sessions in any year. She felt that the claimant was clinically depressed. OHS would have liaised with the claimant's GP. The claimant was not referred to a psychiatrist. Put to her that the claimant experienced symptoms of pain, that there was an emotional element and that the claimant was not engaging with the treatment she replied that issues at work were not going to help the claimant and the fact that he was not in work was going to add to his problems. The claimant reported thirty to forty minutes late for appointment.

CL the third witness for the respondent told the Tribunal that the claimant attended the appeal hearing but he did not participate in the appeal. The claimant was requested to furnish one-day medical certificate. Out of a workforce of approximately seven to eight hundred seventeen members of staff were requested to do this. The claimant had taken a personal injury claim against

the company. He was made aware of the personal injury claim but he was not aware when it happened. He took up his present position on 10 January 2005 and he did not know the claimant. He had seen no evidence of discrimination with the claimant. The dismissal was not influenced by the existence of the settlement of the personal injury claim.

In cross-examination he stated the reason that the claimant was dismissed was because of failure to comply with company policy in relation to attendance, absence and sick leave. The claimant was not sent to an independent medical practitioner. The decision to dismiss the claimant was based on the information that was provided by the OHS, a culmination of other evidence including absence and failure to comply with the sickness policy. The claimant did not bring a representative to a disciplinary meeting and he had a solicitor present at his appeal hearing. He never heard the claimant speak. Put to the witness that the claimant's behaviour was erratic he replied that over a long period of time every opportunity was given to the claimant and he failed to comply with policy. There was no reason given by the claimant for the way he acted. There was nothing to indicate that he was not physically capable of returning to work. He could not say why the claimant behaved the way he did. He looked for the medical certificates and there was no response given that this was for a particular reason. He was never given an explanation regarding the claimant's behaviour. He could not answer how much the claimant was costing the respondent. He was paid in accordance with the respondent's policy. There were no certificates provided to indicate that the claimant was unfit to work. The witness was at the third level of management and he did have some interaction with employees.

TG the fourth witness for the respondent told the Tribunal she was the claimant's first line manager. She had day-to-day dealings with the claimant. The claimant was a quiet placid individual and adhered to instructions. The claimant was absent in May 2005. In a document provided to the Tribunal the reason the claimant was absent in May was due to the death of the claimant's father. She spoke to the claimant on his return and she could recall the conversation she had with the claimant. She did not doubt that the claimant was absent for his father's funeral.

In cross-examination she stated that there was no evidence that the claimant contacted her on 19 December. When an employee was absent they were allowed two hours to contact the respondent. If there was no show by an employee, a letter of no call no show was issued to the employee and given to the employer. Her record indicated that the claimant did not contact her. Any messages that she received from employees she saved. She had evidence to indicate that the claimant was late for work on 16 November. The onus was on employees to enter their own time keeping attendance and the respondent did not have a clock in system. The claimant asked to work the weekend shift but the respondent did not have availability on this shift. The claimant did not follow procedures and the respondent did everything to assist him. She entered the time that the claimant took off after she received a telephone call from him. There was a conflict when the claimant contacted her on her return. She was absolutely clear in her mind. At no stage did the claimant speak about his father and if he needed employment assistance she would have a meeting with the claimant. The claimant clearly stated that it was his father.

Claimant's Case

In relation to the claimant's non attendance at the resumed tribunal hearing on February 27 2008 the claimant told the Tribunal that he went to Africa for his father's funeral in February 2008. His father's elder brother lived in London and he could not remember after 2005. His father's elder brother died in 2005. In May 2005 he had four weeks holidays and he left a message with the respondent. He was not aware of the respondent policy in relation to compassionate leave. He was

informed at midnight on 7 February 2008 that his father had died.
In cross-examination when put to him if his uncle died in London in 2005 he replied it was in May and that his memory was not good. Asked if the funeral took place within twenty-four hours he replied that his uncle was a Christian. In Africa there are traditions that are adhered to for a funeral. His father died suddenly. In relation to a letter furnished by his solicitor to the respondent solicitor which indicated that the claimant would not be available for the resumed hearing of his case on the 27 and 28 February 2008 he replied that he was not good on memory. Put to him that he said in advance of his father's death that he was going to South Africa he replied that it was a family situation and his father was old. His mother called him before his father died and she told the claimant that his father did not look well. He called the solicitor and did not give details. Due to a problem with his visa he encountered a difficulty in returning to the country and he was in Dublin on 23 February 2008. He purchased his ticket in a travel agency, he collected his ticket at the airport and he paid for it in cash.

He commenced employment with the respondent in 2000 and he had no absences for three years. He trained a lot of people. In May 2003 he had an accident when a server from the conveyor fell on his neck. He was taken to hospital and he was sent to a physiotherapist. He returned after September /October 2003 and worked to regular hours. He attended OHS and he co-operated with the respondent and he attended for physiotherapy. He had neck pain and the physiotherapist who he attended told him that he should do exercises. After a time OHS wanted him to return to work. His GP gave him three weeks off work. He informed TG his manager that he would not be able to travel from Navan to OHS. His physiotherapist told him that he should do exercises. He returned to work and his GP gave him three weeks off work.

He could not afford to pay €60 for a one-day medical certificate. When he took a day off he left a message on TG's telephone. He was in hospital after Christmas for three days. He did not submit social welfare cheques. He did not attend OHS on 11 January, as he was ill. OHS did not remind him of the appointment. He denied that he was late for work on 16 November 2005.

After he was dismissed on 25 May 2006 he registered with FAS a month later. He applied for six to seven jobs in the first three months. He went to Social Welfare and later on he obtained employment as a courier. He worked as a courier for two months in March 2007 and he then worked until the end of July 2007. He then found another job on 27 September.

In cross-examination he stated that if he did not feel okay he went to his general practitioner. After his dismissal he was out of work for ten months. He was not good on dates and he does not have a good memory. In relation to being hospitalised for three days with a leg injury he could not remember. He agreed that he accepted a sum of money in relation to a negotiation. He was absent after the accident as he was not feeling well. He did follow the instruction given by OHS and he was not fit when he was dismissed and he still feels pain. If he was not fit to lift he could not lift. Put to him how he remembered that he telephoned TG on 19 December 2005 he replied it was not a mistake.

He did not know how many people reported to TG. The claimant had only one team leader. Put to the claimant if an employer could keep a job open when his absenteeism rate was forty to fifty per cent and he was not fit for work he replied that he was one of the best workers there. He had no idea if people from Nigeria were promoted. He did not know how many nationalities the respondent employed.

Determination

The members of the Tribunal very carefully considered all of the evidence adduced, statements made and documents put forward during the four day hearing. The Tribunal finds that the claimant did not make reasonable efforts to co-operate with and conform to company procedures in relation to his disability. Furthermore, he did not avail of reasonable opportunities to use the appeals procedure as appropriate at the time.

Having regard to all of the circumstances it is the unanimous determination of the Tribunal that a fair dismissal did occur. Therefore the claim under the Unfair Dismissals Acts, 1977 to 2001 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)