

EMPLOYMENT APPEALS TRIBUNAL

Claim Of:
Employee

Case No.
UD463/2007

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. O'Leary B L

Members: Mr. J. Browne
Ms. E. Brezina

heard this claim at Wexford on 5th June 2008

Representation:

Claimant: Mr. Joe Byrne, UCATT, Ucatt House, 56 Parnell Sq, Dublin 1

Respondent: Ms. Catherine O'Connor, M.J. O'Connor, Solicitors, Drinagh, Wexford

The determination of the Tribunal was as follows:

Respondent's Case:

Giving evidence the Managing Director (hereinafter MD) stated that the company is a joinery manufacturer. The claimant was employed with the company since 1996 as a veneer-stitcher and his role involved two processes. Prior to this MD worked with the claimant in a different company.

The claimant's employment was terminated on the 12 September 2006. A copy of the claimant's medical certificates and the company's handbook were submitted to the Tribunal. The company has 45 employees, of which 35 are factory workers.

The company handbook outlines in its third section that persistent absenteeism is dealt with under the company's disciplinary procedures. It is outlined in the company's disciplinary procedure that due to incapacity to work and other substantial reasons the company can dismiss an employee.

In March 2005 the claimant was absent for in or around 7 weeks and MD was provided with medical certificates stating that the claimant was suffering with an illness. MD received a medical certificate for each week the claimant was absent. MD contacted the claimant by telephone on the

29 April 2005 to see how he was. The claimant returned to work in or around one week later.

In October and November 2005 the claimant was absent for a number of weeks. In or around this time MD spoke to the claimant about an incident concerning the supervisor in the company. MD thought the claimant overreacted about the incident but MD asked the supervisor to apologise to the claimant. To the best of MD's knowledge the supervisor apologised to the claimant when he had returned from sick leave. The claimant was absent for week commencing 7 October 2005, 24 October 2005, 1 November 2005, 7 November 2005, 14 November 2005 and 21 November 2005. MD received medical certificates for these dates. The claimant was certified fit to return to work on the 29 November 2005.

The claimant attended work on the 7 March 2006. MD spoke to him about a complaint he had received. It was alleged by the person making the complaint that the claimant was "pushing" the younger members of staff to join the union. MD asked the claimant to refrain from doing this. He told the claimant that "someone out there may mark your card" as a figure of speech. He did not accuse the claimant of bullying but he told the claimant to be careful.

The claimant subsequently told the MD that he had a pain in his chest. From the 7 March 2006 the claimant was absent for 28 weeks through April, May, June, July and August of 2006. During this time MD wrote letter dated the 24 May 2006 asking the claimant when he might be in a position to return to work. MD subsequently received a doctor's certificate for the claimant on the 31 May 2006. The claimant's doctor wrote that the claimant would be absent for approximately eight more weeks. MD did not make further contact until the end of July 2006 after the eight weeks had elapsed. MD wrote letter dated 26 July 2006 telling the claimant that his position was open for his return until the 21 August 2006, but that if the claimant failed to return to work with a doctor's letter confirming he was fit to return, the company would have no option but to terminate his employment. MD telephoned the claimant on the 24 August 2006 to enquire how he was and to see if the claimant would be returning to work. MD subsequently received a medical certificate from the claimant stating that he was unable to attend work for a further 8 weeks.

MD then wrote letter dated the 28 August 2006 to the claimant stating that he was extending the time and giving the claimant a further additional week and that the decision, concerning his employment, would be made on the 4 September 2006. This letter also asked the claimant to contact him about obtaining a second opinion by a company doctor. MD received a letter from the claimant's doctor stating that the claimant was unfit to return.

MD wrote letter dated 12 September 2006, terminating the claimant's employment. MD told the Tribunal that the company was very busy and other staff members had covered the claimant's job. MD had to change staff around to ensure the work was done but this was causing increasing pressure. The company had also purchased a second machine due to increased workload and MD needed to put a second person on the veneer presser. This would also help to cover the work if one person was absent as the role of veneer presser is a vital part of the manufacturing process. MD advertised the position for a second veneer stitcher on the 17 March 2006.

MD terminated the claimant's employment as this was a very busy year for the company and it had increased profit of 30%. MD later heard the claimant secured new employment on the 25 September 2006.

During cross-examination MD stated that he had not followed through on his request to the claimant that he attend a company doctor. He received confirmation from the claimant that he would attend a company doctor but MD then received the letter from the claimant's doctor stating that the claimant had been referred.

It was put to MD that on the 28 March 2005 allegations of bullying were made against the claimant and MD had interviewed people concerning this. MD replied there were not allegations of bullying against the claimant but that there had been a difficulty on the factory floor. He brought the claimant to talk to him as the work force was divided. MD gathered everyone's views on what was happening. After he had interviewed a number of people MD called the claimant back and told him that he would want to be careful as he could be accused of bullying. It was on a personal level that he told the claimant this. MD had received complaints from the parents of younger staff members who said the claimant was "pouncing" on the younger members of staff to get them to join the union.

MD did not receive any responses to the advertisement for a new veneer stitcher. The company has since trained other staff into the role.

It was put to MD that he approached the claimant a number of times and told him that his card was marked and to desist from union activities. MD denied this stating that he did not ask the claimant to leave the union and he did not have a problem with staff joining the union.

Claimant's Case:

Giving evidence the claimant stated that he was a shop steward for a number of years. He submitted the medical certificates to the respondent. The claimant told the Tribunal that he would have had no difficulty in attending a company doctor and he sent a letter to this effect to MD. He did not receive a date to attend before a company doctor.

The claimant's role as a veneer stitcher involved physical work such as lifting and the claimant performed the role without lifting gear. The claimant complained to MD about the lack of a lifting mechanism and MD told him that he was looking into it but nothing changed.

The claimant stated that during the course of his employment he was absent for a number of health reasons. In August 2000 he was absent with a ruptured disc and he was told this was due to the wear and tear of lifting. He told MD about this and asked for assistance with lifting. There was no one available to do this so the claimant had to keep doing the lifting.

The claimant was absent from the 28 March 2005 for another health reason. He had been told by MD that he was "the luckiest person in the world" not to have been brought up for bullying. MD interviewed eight people at this time. There were two people claiming allegations against the claimant and a possible further two people. MD told the claimant that he was "marking his card". The claimant was not given any evidence that parents had complained.

The claimant was out sick for a period of six weeks later that year. He returned to work in October 2005. There was graffiti in the toilets and the supervisor verbally abused the claimant about this. The claimant stated that it had nothing to do with him. Subsequently three employees were brought into a meeting concerning the graffiti but the claimant was not asked to the meeting even though he was the shop steward.

MD continually approached the claimant about asking the young apprentices to join the union. The claimant had told the apprentices there was a union if they were interested in joining it. MD told the claimant a number of times it would be better if there was not a union. The claimant observed the supervisor mistreating the younger members of staff and he brought this to MD's attention. MD told the claimant that he knew the supervisor was "hot-headed". These matters were on the claimant's conscience and it affected him. He asked MD to do something about it and MD said he would but nothing changed. Several times MD asked the claimant to step down as shop steward. He was removed from his role as safety officer.

The claimant stated that two of his four overall absences were as a result of back problems. The claimant gave evidence concerning his loss. He confirmed that he commenced new employment on the 25 September 2006, on a three-day week. He was subsequently made redundant from this employment in March/April 2007.

During cross-examination the claimant was asked if he had formally raised a grievance. The claimant replied that he had told MD he was unhappy. The supervisor was to apologise personally to the claimant for verbally abusing him but this did not happen.

Determination:

During the time the claimant was out sick, the employer contacted him a number of times. The employer requested the claimant to contact him about obtaining permission from the claimant to have him examined by a company doctor in order to obtain a second opinion on the claimant's medical condition. The Managing Director then received a letter from the claimant's doctor stating that he was unfit for work. Without obtaining the second medical opinion, the Managing Director decided to go ahead and dismiss the claimant. The Tribunal determines that having opened the prospect of a second opinion the company failed in its duty to the claimant by not going ahead and obtaining this opinion. Therefore, the dismissal was unfair. The Tribunal deems the most appropriate remedy to be compensation and awards the claimant the sum of €8,500.00 under the Unfair Dismissals Acts, 1977 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)