

## EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF: CASE NO UD1006/2007  
Employee MN784/2007  
against  
Employer  
under

### UNFAIR DISMISSALS ACTS, 1977 TO 2001 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. K.T. O'Mahony BL

Members: Mr. P. Casey  
Mr. D. McEvoy

heard these claims in Cork on 17 June 2008 and 26 September 2008

Representation:

Claimants: Mr. David Gaffney  
Coakley Moloney, Solicitors, 49 South Mall, Cork

Respondent: Mr. Paul Derham,  
Daly, Derham, Donnelly, Solicitors  
Florence Buildings, 1a, Washington Street West, Cork

The determination of the Tribunal was as follows:

### Summary of the Evidence

The Managing Director (MD) of the respondent company, a fireplace manufacturer and installer, employed the claimant for the first time in August 2000, at the request of Cope, a training organisation. The claimant received on-the-job training on how to fit and grout hearths; he also completed a training course and ultimately qualified as a fireplace fitter. There was a conflict of evidence as to whether the claimant left his employment with the respondent once or twice. For personal reasons he suddenly left Cork in 2005 and put a letter under the respondent's door on the Sunday evening to notify him of his leaving. In September 2006, at the claimant's mother's request the respondent created a position in his business for the claimant and re-employed him. MD treated the claimant like a son. As well as encouraging the claimant and assisting him in developing his work skills he also gave him assistance of a personal nature, including assistance with financial and legal problems. This claimant acknowledged this and that the respondent had been a good employer. Problems arose in the employment in 2007.

The respondent had two fitting crews, each with two employees who did three or four jobs per day. Failure by the claimant to give prior notification of absences to the respondent meant that the respondent could not rearrange the jobs. It was MD's evidence that the claimant's absences without prior notification put pressure on the fitters, jobs began to back up and customers were inconvenienced. In 2007 the respondent issued the claimant with at least four verbal warnings for: absenteeism, failure to give prior notification of his absences and for use of his mobile phone while at work, which latter annoyed his fellow workers. He had made the claimant aware that his job was at risk. The claimant denied receiving any of these warnings.

Following the claimant's absence from work on 6<sup>th</sup> June 2007, MD issued him with a written warning by way of a letter dated 8<sup>th</sup> June 2007 outlining that he had been absent on 24<sup>th</sup> January, 8<sup>th</sup> and 9<sup>th</sup> February, 2<sup>nd</sup> April and 28<sup>th</sup> May and 6<sup>th</sup> June and that on at least two of these occasions he had failed to contact him. In the letter MD indicated that he was not willing to accept the claimant's behaviour any longer and asked him to support his fellow workers. The claimant admitted to the absence in May but denied the others; however he later remembered being absent in June. The claimant denied receiving the letter of 8<sup>th</sup> June.

The claimant failed to attend for work again on Monday 1<sup>st</sup> October 2007 or to make any contact with the respondent. MD made several attempts to telephone him and he sent him three text messages, the final text informing the claimant that his job was gone. The claimant attended for work on Tuesday, 2 October 2007. MD was out at a meeting at the time but he spoke to the claimant over the phone. The claimant told him that he did not contact him the previous day because he had no credit on his mobile phone. MD told the claimant that this was not good enough and told him to leave his keys and to go. It was the claimant's evidence that he was absent on 1<sup>st</sup> October because he had a sore back but he did not get the opportunity during the conversation with MD on 2<sup>nd</sup> October to inform him of this; MD was angry with him during their conversation and told him that he was costing him time and money. It was MD's case that he dismissed the claimant because he was compromising him with his customers and with his other employees; he did not accept the claimant's excuse that he had no credit on his mobile phone because with the particular mobiles there is a facility, even where it has run out of credit, to send a text. MD denied the claimant's allegation that he dismissed him because he wanted to employ a Polish worker; he had employed the Polish worker about four months before the claimant's dismissal.

MD had availed of the services of an employment law consultants, who had given him an employment manual. This manual was available to all employees at the reception desk. MD contacted the consultants when the situation with the claimant arose.

An employee, who acted as manager when MD was away, told the Tribunal that the claimant was frequently one to one and a half hours late returning to work after lunch [when MD was not on the premises]. She warned the claimant several times that he would lose his job for failing to return to work on time. She informed MD about this.

### **Determination:**

The Tribunal feels that in the whole context of this case justice requires that it notes the kindness demonstrated by the respondent to the claimant during his employment with him, in particular his going beyond the duties imposed on an employer and helping the claimant with his personal problems as well as creating a job for him and re-employing him in September 2006. The Tribunal accepts the respondent's evidence that the claimant's absences without prior

notification caused problems for the respondent in his business. It further accepts that the respondent issued warnings both verbal and written to the claimant and indicated to him that his job was at risk. Whilst the Tribunal understands that the claimant's absence on 1<sup>st</sup> October 2007, his failure to make any contact with the respondent that day and his excuse for that failure was the last straw for the respondent, the principles of natural justice none the less require as a minimum that an employee be told the reason for his dismissal and given an opportunity to make his response. The respondent's failure to comply with these requirements renders the dismissal unfair. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2001 succeeds. Having taken the claimant's loss into account and the attempts made to mitigate his loss the Tribunal awards the claimant €5,820.00 under the Unfair Dismissals Acts.

The claim under the Minimum Notice and Terms of Employment Acts 1973 to 2001 was withdrawn.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)