

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee
MN809/2007
against

UD1037/2007

Employer

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. E. Murray

Members: Mr. D. Hegarty
Mr. D. McEvoy

heard this claim at Cork on 24th June 2008

Representation:

Claimant: Mr John O'Brien, Barry C.Galvin & Son, Solicitors, 91 South Mall, Cork

Respondent: The Managing Director of the company.

The determination of the Tribunal was as follows:

Respondent's case:

The Director in charge of transport (LS) gave evidence that the company manufactures commercial glass mainly, which is transported throughout Ireland. He said that he got a phone call on 9 August 2007 from the claimant saying his father died. He was entitled to three days compassionate leave, but no call was received from him as to when he would be back. He tried to ring the claimant but got no response. The following Friday he got a call from someone saying he would be back to work the following Monday, but he did not arrive on that day and the Managing Director (DO'G) had to drive the truck to Dublin. The claimant had a company mobile phone, and the call list shows many calls and texts but none to the company. They had no problem with staff making non-work calls once they were not excessive.

He admitted that when the claimant called him on 9 August 2007, he may have said that his father was sick, as the call was made before his father died. He agreed that the claimant's brother rang him on 20 August 2007 to say he would be back to work on Monday. He denied that he

rang the claimant the same day to tell him he had been replaced, but said that he was merely asking him when would he be coming back. He said that it was DO'G's decision to dismiss him.

The claimant's brother-in-law (LB), who is an employee of the company, gave evidence that he was a driver with the company for over eight years. He said that the company was under a lot of pressure at the time. He agreed that he had received an employee manual about a year ago. He said that he didn't have any contact with the claimant after he left on compassionate leave.

The Managing Director gave evidence that he was the principal shareholder of the WMG group employing about 175 people. He said that he met the claimant on 9 August 2007 at Youghal bridge. The claimant told him that his father was unwell, he then phoned him that afternoon to say he had died. All employees knew they have an entitlement to three days compassionate leave, but he didn't come back when he was supposed to, and he had to drive the truck instead of the claimant. After this they had to get alternative drivers to do the claimant's work. He was told by LS that he was due back on Monday, they could cope with that, but he did not appear and he (DO'G) had to drive the truck. On Tuesday he made a decision that if he did not come in the next day, he would be dismissed. They tried to contact him by phone but got no response. He said that the claimant received the employee manual and had signed for it.

When he was asked why no warning was issued to the claimant, he said that it was gross misconduct so no warning was necessary. Asked why no procedure was followed, he said that it was the claimant's responsibility to talk to the company. Questioned why failure to return to work was not listed in the manual as gross misconduct, he said that it did not need to be listed there. Then he was asked why no appeal was offered, or a formal letter written to the claimant, he said that they had made numerous efforts to contact him by phone. He accepted that the claimant received no payment in lieu of notice. He was asked would not some kind of personal contact with the claimant have been more desirable, he said that they had made all possible attempts to contact him.

Claimant's case:

The claimant gave evidence that he was a driver for the company since 2004. He said that his father died on 9 August 2007. He met DOG when driving back from Dungarvan, told him about his father, and asked him about time off. He was told to give him a shout the following Wednesday. He rang LS on 20 August 2007. LS returned his call to tell him he had been replaced. He didn't remember getting a copy of the employee manual. He said that he knew he was entitled to three days compassionate leave, but was in bad shape at the time, and had a medical cert for acute depression which he intended to hand in when he went back to work. He started a new job with SLS on 17 June 2008. He was in receipt of assistance from Social Welfare to the tune of €190 a week. He applied for work, but did not ask the company for a reference. He said that he didn't make any effort to contact the company for some time because he was in a heap, but didn't expect to be fired. When he rang them on 20 August 2007 to tell them he was going back they told him his job was gone.

He said that he had no home phone. He denied that the date he made the call to the company was 27 August 2007, but 20 August 2007. It was pointed out to him that the phone records showed no calls to LS on 20 Aug 07, but showed two on 27 August 2007. Asked why he had not contacted the company sooner, he said that he was not in a fit state of mind, but that his brother did contact them. He got his P45 from the company some time after without any covering letter.

The claimant's brother (DH) gave evidence that he took a call from LS on 14 August 2007.

LS asked him when the claimant would be back to work, he answered that he would be back on the following Monday. He said that the whole family were very emotional at the time and he took three weeks off himself.

A friend of the claimant (JO'D) gave evidence that he returned some items belonging to the company shortly after 20 August 2007 – a mobile phone, a fuel card and some keys. He said that he did this as a favour to the claimant because he believed that the claimant was not in a fit state of mind to drive.

Determination:

This matter came before the Tribunal for determination of a claim under the Unfair Dismissal Acts. The claimant was employed by the respondent as a lorry driver and commenced employment with the respondent in August 2008. Evidence on behalf of the employer was heard from The Director in charge of transport (LS), the Managing Director (DO'G), and the claimant's brother-in-law (LB). The confluence of that evidence is that on the morning of the 9th of July 2007 LS received a phone call from the claimant informing him that his father had died the previous evening and that he would require a few days leave. In the ordinary course of events the claimant would be entitled to 3 days compassionate leave and consequently he should have returned to work on Tuesday the 14th of August. He did not return to work on the 14th of August and made no further contact with his employers up to and including Friday the 17th of August. During that period LS made several attempts to contact the claimant on his company mobile phone but was unable to contact him. On Friday the 17th of August LS spoke to the claimant's brother who advised him that he would return to work on Monday the 20th of August and consequently on Tuesday the 21st of August, when he did not return he was dismissed from his employment.

The Managing Director of the Company said that the decision to dismiss the claimant was taken on the 20th of August when he did not turn up for work. DO'G introduced a detailed employee handbook which is an excellent and comprehensive document, and he indicated that the claimant was given a copy of this document and was aware of what precisely was expected of him in the context of compassionate leave. The handbook also deals at section 8.4 with disciplinary procedures and at 8.5 gives examples of misconduct. DO'G said that the lorry was loaded and ready to go on the 20th but unfortunately the claimant did not turn up for work and DO'G had to make the run to Dublin himself which created considerable difficulties for the company. DO'G acknowledged that he had dismissed the claimant for gross misconduct. He accepted that he made no attempt to personally contact the claimant nor did he send him any written warning or notification that he should return to work and other than telephoning him repeatedly, the company did not make any direct contact with him. The only correspondence was when he sent out his P45 to him. He paid him for the week that he had not worked.

The claimant said that he was adamant that he telephoned on Monday the 20th to discover that DO'G had taken on another driver and that his employment was now terminated. He was in very bad emotional shape at the time. He had a medical certificate but he had never handed it in. This certificate excused him up to the 20th of August because of acute depression. He was not in the right frame of mind to go back to work. He was married with four children and was living on €197.00 per week. He had received no pay in lieu of notice. He explained his failure to communicate with the company on being "in a heap"... "I was just in a terrible state, everything was agitating me". He said that he could not remember much about the days surrounding his father's death but that he was exhausted from the funeral and was not in the right frame of mind.

It was put to him in cross-examination that he, in fact, did not contact the company until the 27th of August and not the 20th as he had said. He was also pressed on why he did not answer the many telephone calls that the company had made to him. He said that he was not in a fit state to answer the phone.

The Claimant's brother (DH) gave evidence that he telephoned the company on the 14th and had a conversation with LS. He told him that the claimant would be in on the following Monday the 20th. That was the day on which it was agreed he would return. A friend of the claimant's gave evidence that he returned the company's property to the company on the 29th of August. He felt that the claimant would not have been safe to drive during those days as he was so down and so distressed.

The Tribunal, having considered the evidence of the parties herein, is satisfied that all of the people who gave evidence did so in good faith and endeavoured to be as accurate and factual as possible. The Tribunal finds that though the company made many attempts to contact the claimant on his company mobile phone during his period of absence, they were peremptory in terminating his employment when they did. In effect, the claimant had been absent on the 15th, 16th and 17th of August and when he did not finally show up for work on the Monday morning the decision was taken to immediately dismiss him. The claimant was given no reasonable opportunity to make out his case and indeed the Respondents were aware that the claimant was suffering from a degree of depression and had just been through bereavement. It was unreasonable of them not to make direct personal contact with the claimant or send him some communication in writing that would make his position crystal clear.

Furthermore, the Respondents did not comply with the provisions of their own rulebook, a copy of which the Tribunal finds was given to the claimant.

Consequently, the Tribunal finds that the claimant was unfairly dismissed.

The Tribunal however must also consider whether or not the claimant contributed to his own dismissal. In this regard, the Tribunal finds that there was a failure on the part on the claimant to communicate with his employer and also finds that on the balance of probabilities he did not in fact contact the company until about the 27th of August. Whereas there is an onus on the employer to act fairly, there is also an onus on the employee to act reasonably and in this regard the Tribunal finds that the claimant contributed significantly to his own dismissal by his failure to communicate properly with his employer.

The claimant did not receive any pay in lieu of notice and in this regard he is entitled to recover the sum of €1,143.62. With regard to the unfair dismissal aspect of the case, the Tribunal finds that compensation is the most appropriate remedy and having regard to the fact of the finding of unfair dismissal and the significant contribution made by the claimant to same, the Tribunal awards the claimant the sum of €6,000.00 under the Unfair Dismissals Acts, 1977 to 2001.

In addition, the Tribunal awards him €1,143.62 (being the equivalent of two weeks gross

pay) under the Minimum Notice and Terms of Employment Acts, 1973 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)