

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE -*claimant*

UD2458/2009
MN2299/2009

against

EMPLOYER -*respondent*

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms N. O'Carroll-Kelly B L

Members: Ms A. Gaule
 Mr J. Flannery

heard this claim at Dublin on 23rd February , 6th October 2011 and 4th January 2012

Representation:

Claimant: Ms Mary Paula Guinness B L instructed by
 O'Mara Geraghty McCourt, Solicitors, 51 Northumberland Road, Dublin 4

Respondent: Ms Shelley Horan B L (23rd February 2011) and Mr Niall Beirne S.C.
(6th October 2011 and 4th January 2012) instructed by
 Peter Morrissey & Company, Solicitors, Lower Merrion Street, Dublin 2

Preliminary Issue

The secretariat of the Tribunal received the claimant's signed T1-A form on 4 November 2009. The applicant listed as 24 March 2009 as the date his employment ended with the respondent.

Having hearing the circumstances and background to that application the Tribunal exercised its powers under section 8 (2) to allow exceptional circumstances apply in this case.

The appeal under the Minimum notice and Terms of employment Acts, 1973 to 2005 was withdrawn during the hearing.

Respondent's Case

The respondent is involved in the stocking and distribution of metal seals for a wide range of customers. On the morning of 2 March 2009 its office manager took a telephone call from the claimant who informed him that due to illness he was unable to report for work. That afternoon a detective Garda visited the premises of the respondent and sought certain information on the claimant particularly his whereabouts on 26 and 27 February 2009. That Garda was assured that the claimant was present and at work on the premises those days. He told the respondent that the claimant had been arrested and was currently in custody as a suspect in connection with a recent major robbery. During that weekend the office manager had viewed the claimant's residence on the television news related to that robbery. He opted not to mention that sighting to the claimant when they spoke on 2 March.

When the claimant phoned again on 3 March seeking the rest of the week off due to illness the office manger told him about the detective's enquiry. The claimant responded by saying that he had neither involvement nor knowledge of that robbery.

The respondent's sales director and manager of the claimant told the Tribunal that the claimant was a good employee with no disciplinary record. He was informed by the office manager on 2 March 2009 that the claimant had phoned in sick but the Garda had said he was in custody. When the witness put that to the claimant he stated that he had nothing to do with that crime. A letter from the respondent issued to the claimant on 5 March that reminded him of the company's sick leave policy and the need to furnish the company with a medical certificate. That letter also referred to his annual leave and indicated that he had to take all his outstanding leave by the end of that month. Under the heading of equipment the respondent also sought the return of the claimant's laptop and mobile phone while he was absent from the company. The witness accepted that this was an unusual requirement and had not been applied before to him or to other employees. However this was done in the name of the recession as the witness on his own initiative changed the password on the claimant's laptop.

In a further letter dated 10 March 2009 bearing the name of the chief executive officer the respondent issued the claimant with a written warning. That warning related to the behaviour of the claimant for his reportedly abusive language and tone he directed at the witness during the course of a telephone conversation the previous day. This witness did not know whether a disciplinary procedure existed within the company and was unsure of a formal grievance procedure. The witness commented that up to the end of March 2009 no medical certificate had been received by the claimant to cover his illness.

A Garda from the national bureau of investigation told the Tribunal that the claimant was arrested at his home on 27 February 2009. While detained at a city centre station up to near midnight on 2 March a general medical practitioner attended to him on three occasions. That morning the claimant phoned his line manager and engaged in a conversation with him. He was released without charge and no further action taken against him.

Claimant's Case

The claimant commenced employment with the respondent as a sales person in the spring of 2002. He described himself as a loyal employee who at times worked for this family owned company outside normal hours. An informal arrangement was in place that allowed him to get time off in lieu for those excess hours. A similar type of arrangement existed regarding his annual leave as the

respondent had no formal mechanism for submitting, granting and recording such leave. Subsequent to his commencement of employment the claimant was issued with a document bearing the title contract of employment. Among its contents was a section on illness which read as follows: *If you are unable to work due to illness you must inform the company within 1 hour of your normal starting time on the first day. A medical certificate is required for any absence whatsoever.* The claimant was promoted to the position of a business development manager during the course of his employment and enjoyed some success in that role.

Following a business trip to the southeast and office work with his manager on 27 February 2009 the claimant returned to his residence later that evening after dining with his son. Within an hour of returning the Gardai arrived at his house and questioned him on his movements in relation to a major recent robbery. Mobile phones and a laptop belonging to the respondent were removed by the Gardai. The claimant was arrested and held for questioning for the next few days and nights. While detained he felt ill due to the quality of the nourishment given to him. That illness required medical treatment. While still in police custody on 2 March the claimant phoned his line manager and informed him that due to sickness he would not be reporting for work that day. He neither told that manager of his whereabouts nor was he asked for it.

Due to the timing of his release and its experience the claimant felt “shaken up” and opted to take leave from 3 March. By that stage he had acquired twelve days leave. In a phone call to the sales manager that day the claimant informed him that he was taking some leave. He denied seeking sick leave and any mention of a kidney complaint. He also told that manager that he had nothing to do with that robbery. By that stage the claimant had learned that the respondent knew of his arrest and detention. His fears for his job were added to when he read the contents of a letter bearing the chief executive officer’s name dated 5 March. The claimant had concerns about comments made under sick and annual leave as well as equipment. The claimant had no desire to take the rest of the month off as leave from 9 March, and was surprised to read that the respondent considered him on sick leave up to that date. He had not deemed it necessary to submit a medical certificate for 2 March as the following day he was on annual leave. The instruction to return the mobile phones and laptop both annoyed and puzzled him especially as the respondent knew that this equipment was no longer in his possession. According to the witness the contents of that letter was an attempt to contradict his version of events and as a consequence he had lost trust in his employer.

The claimant accepted his language on the phone to the sales director on 9 March was less than polite and expressed regret to the Tribunal for that language. That call was in response to the respondent’s earlier letter. The witness received a further letter from the respondent dated 10 March which contained a written warning. While he described its contents as generally inaccurate he did not directly respond to it despite the invitation to do so. He decided instead to seek legal advice. The claimant received another letter in the name of the chief executive officer dated 24 March 2009. That letter advised the claimant that his employment with the respondent was terminated with immediate effect. Four issues were identified as justifying that decision. These were his failure to submit a medical certificate or an explanation as why he was from 2 to 9 March. The third issue was his failure to make arrangements for continuity of service while on leave and the final stated reason was neglecting to tell the respondent where and when the mobile phones and laptop could be collected. The letter ended as follows: *We genuinely regret that your employment has terminated in this way and sincerely wish you the best of luck in the future.*

The claimant said he had done nothing wrong to merit that sanction.

Determination

The Tribunal have considered all the evidence adduced. The claimant was dismissed by letter on the 24th of March 2009. Prior to that letter the claimant received a letter as of the 5th of March 2009. That letter requested a sick certificate for the week commencing the 3rd of March 2009 and dealt with annual leave entitlements. The Tribunal find the content of the letter with regard to annual leave was at best ambiguous. The letter further requested the laptop and mobile phone to be returned to the respondent during the claimant's absence. The Tribunal are satisfied that the respondent knew that the claimant couldn't comply with that request as the Gardaí had seized both the laptop and the phone. The respondent's knowledge of the situation is confirmed in the letter of dismissal dated the 24th of March 2009.

The claimant received a warning letter on the 10th of March 2009. The warning related to the following matters;

1. Misinformation as to the claimant's whereabouts when absent from work
2. The use of foul and abusive language to a director
3. The non-production of a medical certificate.

Again the respondent requested the return of the respondent's equipment knowing it was in the custody of an Garda Síochána.

The claimant was not dismissed for using foul language, therefore the tribunal are not considering that issue. The respondent invited the claimant to respond to the warning letter but he failed to do so.

On the letter of the 24th of March 2009 the claimant was dismissed. The reasons given were;

- A. You have not submitted a medical certificate for the week commencing 2nd March 2009 as requested on 5th March and 10th March and as required under the terms of your Contract.
- B. Alternatively if you were not on sick leave, you have not advised as to why you were absent from work for that week.
- C. You have failed to make any arrangements for continuity of service while on annual leave. You were aware that you had booked leave and were required to take the leave held over from 2008 before the end of March. Given that you are on annual leave for 3 weeks, it is not acceptable that no details of "follow-up" for customers was advised.
- D. You have not advised as to where and when the two Blackberry mobile phones and Sony laptop may be collected from you so as to ensure continuity of service to the Company's customers while you are on annual leave. These items belong to the Company and, as you are aware, contain specific and confidential information regarding our customers and their business. We have been informed by the Gardaí that in the course of their enquiries into a matter unrelated to the Company, they have seized and retained the Company's two Blackberry mobile phones and Sony laptop computer. These devices will not be returned to us in the short term, if at all. We urgently require specific information on those devices to continue our business but have no assurance from the Gardaí that this will be provided. This

seriously jeopardises the Company's business and relations with customers.

A. The claimant was contractually obliged to submit a medical certificate. He failed to fulfil this obligation. However that in itself is not a breach that could justify his dismissal taking into account the factual nature behind the leave from work.

B. The respondent was aware of the reason the claimant was absent from work. There was a conflict in the evidence in relation to the alleged agreed annual leave. The claimant said he had agreed the JF he could take his holidays a week earlier. That was denied by the respondent. The letters that followed in relation to that issue are at best ambiguous. In any event the respondent was fully aware of why the claimant was not at work. The claimant also knew that the respondent was aware that he had been in custody. The Tribunal is at a loss to understand why both parties continued to play a game of 'who knows what' with each other up until the date of dismissal.

C. The claimant had no contractual obligation to make arrangements for continuity of service while on annual leave. That issue was not addressed directly in the warning letter of the 10th of March 2009. The claimant gave evidence that he had never formally been asked to make 'continuity of services provisions' before. In any event the respondent had full access to the claimant's email account. The Tribunal also note that the claimant's passwords were changed while he was on annual leave. The Tribunal can only conclude that the claimant's dismissal was at the forefront of the respondent's mind even at the earlier stage of his leave.

D. The return of the mobile and laptop issue was raised again. The respondent conceded in part D of that letter that they knew the equipment was in the custody of the Gardaí and therefore they were making a request they knew the claimant could not comply with. The fact that the non-return of the equipment 'seriously jeopardised' the respondents business was something the claimant had no control over. It is worth noting at this stage that the claimant's arrest and questioning never resulted in any charges being proffered against him.

The Tribunal find that none of the reasons for the dismissal in the letter of the 24th of March 2009 amount to misconduct which would justify a dismissal taking into account the circumstances surrounding the case. However, the Tribunal find that the claimant's failure to be forthcoming with the truth from the outset may have fed the respondent's suspicions and did contribute to his dismissal. Whether or not the truth would have led to a different outcome is not something the Tribunal can consider.

The Tribunal find that the claimant did not exhaust his obligation to mitigate his loss. There was little evidence proffered as to the efforts made to find alternative employment.

The Tribunal find that the claim under the Unfair Dismissals Acts 1977 to 2007 succeeds and awards the claimant €25,000.00 as compensation.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)