

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee

UD980/2007

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr L. Ó Catháin

Members: Ms M. Sweeney
Mr D. McEvoy

heard this claim at Cork on 12th June 2008
and 1st October 2008

Representation:

Claimant :

Ms Helen Boyle B.L., instructed by Mr. Colm A. Houlihan,
Colm A. Houlihan & Co., Solicitors, Berwick House, 4 Tuckey Street, Cork

Respondent :

Mr Lorcan Connolly B.L., instructed by Mr John Lynch, Whitney Moore,
Solicitors, Wilton Park House, Wilton Place, Dublin 2

The determination of the Tribunal was as follows:-

The respondent is a pharmaceutical wholesale company where the claimant was warehouse supervisor and worked for the respondent for thirty-three years.

Respondent's case:

The Tribunal heard evidence from the operations manager, hereinafter referred to as OM, with responsibility for the Cork branch. They deal with pharmacies and have a wide variety of drugs on the premises. On Monday 25th June 2007 the claimant made a request for a day's holidays on

Wednesday 27th June and witness granted the request. Witness had two days off on the Thursday and Friday and on the Wednesday he left instructions that certain tasks were to be done while he was absent on the two days. When he returned to work the following Monday he noticed that the claimant's desk was untouched. He then made enquiries with a warehouse operative, Mr C who verified that the claimant was on site. Another employee Mr H who would fill in as acting supervisor told him that the claimant was not at work on the Thursday and Friday. When he checked the clocking in system it showed the claimant as having been clocked in on both days. Mr C then admitted that the claimant was not on site but that he had clocked him in. Mr C was told that the consequences could be serious and asked him to write a statement. This statement verified that on Tuesday 26th June the claimant asked him to clock him in on the Thursday and Friday and since the claimant was his manager he felt he had to do as requested but he then realised it was the wrong thing to do. The clocking in record showed the claimant as having been clocked in and out on the Thursday but the Friday showed him as having clocked in only.

This was a potential case of gross misconduct and he reported the matter to the director of operations for Ireland, hereinafter referred to as DOI and to the human resources manager for Ireland hereinafter referred to as HR. The DOI was on holidays and witness himself was on holidays after that but he left a statement for him including the one given by Mr C. On 30th July Mr H was interviewed and he re-confirmed the incident. If Mr H had been instructed to be supervisor in the claimant's absence he would have been on site at 8am instead of his normal starting time of 8.30am. Mr H verified that the claimant phoned him on the direct warehouse line at approximately 10.15am on the Wednesday and he sounded erratic, said he was having problems, was unsure if he would be at work on the Thursday and did not want the witness to know the situation. Mr H assumed the role of supervisor on both days when he got to work and found that the claimant was not on site. The DOI took over while witness was on holidays. Witness was called to give evidence at the appeal stage where the claimant was present with his legal representative and that was his final involvement. The decision to dismiss was upheld.

The disciplinary procedures provide for an appeal and the claimant would have been familiar with these procedures as he was part of the management team. Managers are expected to abide by the same rules and regulations as the other staff and would be expected to set the example. The claimant refused to accept that he requested Mr C to falsify his clocking. Mr C who was a junior and had to take instructions from his supervisor was suspended and docked pay.

In cross-examination witness stated that prior to this there was never an issue with the claimant. He had no influence on the statement made by Mr C.

The Tribunal also heard evidence from Mr C who had been employed by the respondent for about ten years. He worked as a warehouse operative. He recalled the week in question when on Tuesday 26th June the claimant asked that he clock him in on the Thursday and Friday. Witness was on holidays on the Friday, driving for another individual, but he came in and clocked the claimant in as requested. He felt it was a strange request but he did it as the claimant was his supervisor. The following Monday he was asked if the claimant was at work on the Thursday and Friday and at first he said yes. The second time he was told it was a serious allegation and he then said the claimant was not present on those two days. He was asked to write a statement and he verified the handwritten statement that he wrote in the van on his own without help from anyone. He said he had nothing further to add when contacted by the DOI. He knew that what he did was wrong, admitted his wrongdoing and was sanctioned accordingly.

In cross-examination witness said that he and the claimant would normally arrive to work at the same time, witness would take the keys, clock card, open the shutters, swipe them both in the claimant would be straight behind him. This practice was going on for a couple of months.

In answer to questions from Tribunal members regarding the request to clock the claimant in on the Friday, witness said the while the claimant knew he did work for this other individual it did not occur to him to tell the claimant he would not be in on that day.

The next witness to give evidence was Mr H who has worked with the respondent for twenty-five years. He verified the evidence as given by the operations manager regarding the claimant's telephone call to him on Wednesday 27th June 2007 stating he might not be in the following day. He took over as supervisor on the Thursday and Friday as the claimant was not at work. There was no mention of the claimant going to Spain. He did not mention anything to the claimant as he assumed that he would ring the operations manager. The normal procedure if going on holidays would be to contact ones supervisor. He was interviewed on 30th July to give his side of the story and he was then requested to go to the appeal hearing. His position is classed as that of general operative.

In cross-examination witness said he was aware the claimant was taking holidays and he was aware he was not coming in on the Wednesday. There are twelve to fifteen employees in the warehouse. He had worked with the claimant a long time and had no difficulty with him.

In answer to Tribunal questions witness stated that he started work at 8.30am on that Thursday and Friday and he took over as supervisor both days at 9am as the claimant was not in. For the following two weeks he was in at 8am as the claimant was on holidays.

Evidence was also given to the Tribunal by director of operations for Ireland (DOI), who is based in Dublin. While he was on holidays the OM in Cork told him of the claimant taking two days leave without permission. As the OM was going on holidays himself he wanted to bring him up to speed on the incident. Witness returned from holidays on 16th July 2007 and while he had Mr C's statement he asked him to attend for interview. Mr C had nothing to add to his statement and apologised for what he had done. Mr C was told the matter was serious and he suspended him for a day and after that he was suspended for a week. Later that day, ie 16th July, he spoke with the claimant, told him of the allegation and informed him he would have an opportunity to answer questions later in the week. The claimant acknowledged he was not at work, that he had contacted Mr H and intended to follow up but he did not do so. He also stated that he did not instruct Mr C to clock him in. He was told of his right to have representation he was a member of SIPTU. He then spoke with Mr H and he confirmed having received the telephone call from the claimant and that he felt he was agitated.

There was a formal meeting later that week on 19th July, which was attended by the SIPTU representative and the HR. Witness outlined the allegations and the fact that the claimant had instructed a junior member of staff to clock him in. He again acknowledged that he was not at work, contacted Mr H and did not instruct Mr C to clock him in. The matter was then considered. The claimant held the number two senior post if the manager was absent, the respondent was governed by the Drugs Advisory Board. He had an opportunity to take time off and had instructed a junior member of staff to clock him in. The claimant could not be trusted and the sanction was

dismissal. He told the claimant and his representative of his decision and said he would take the weekend to further consider the matter. There was a complete breakdown and he had misled the respondent. By letter dated 23rd July 2007, the claimant's dismissal on grounds of gross misconduct was confirmed and he was told of his right of appeal within five days. The claimant had always denied he had not instructed Mr C. He was not on site for those two days but he did not say why he was absent other than family reasons were mentioned. The claimant did appeal the decision and witness had no further involvement.

In cross-examination witness stated that while he is based in Dublin he would spend at least one day per month in the Cork branch and if the OM was on holidays the claimant would report to him. It is company policy for all staff to clock in including witness himself. The claimant abdicated his own supervision on the two days in question and this was not acceptable as per company procedures. One cannot take time off without permission. He was happy that the statement given by Mr C was accurate having interviewed him on 16th July 2007. Before making the decision to dismiss he did think of the claimant's long service but all the staff looked on the claimant as a leader, he instructed a junior to clock him in and he based his decision on all of the facts as outlined.

The Tribunal also heard evidence from the managing director of another area of the respondent company, which is independent of the wholesale side of the business. He was requested to conduct the appeal process. He wrote to the claimant on 31st July 2007 and attached all relevant documentation. Both parties were represented at the appeal hearing and it was a lengthy and thorough process. The claimant confirmed that for family reasons he could not attend work. A holiday had been booked in January of that year. He had a company phone, which showed he was in Spain and he confirmed that he left on the Wednesday night. Up to that point witness was led to believe that the absence was for family reasons and he refuted that he had asked Mr C to clock him in. The holiday issue only came to light in the last ten minutes of the appeal hearing. The respondent deals with pharmaceuticals and they need to be sure of their staff. It was extremely grave. He upheld the decision to dismiss the claimant. There was no issue raised regarding procedures and both parties participated strongly at the appeal hearing. When the phone records showed that the claimant was in Spain he could not refute the evidence.

In cross-examination witness stated that having heard both sides he believed Mr C that the claimant asked that he clock him in on those two days and the claimant only came clean about the holidays at the end of the five to six hours investigation. The fact that the claimant had an abundance of holidays was irrelevant. If the OM was not there he would be happy he might not get caught out. He could believe that the claimant would think he could get away with it. When his wife made an error in the booking of the holiday why did he not ring the respondent and put the process in place. It was a serious breach of trust.

Claimant's case:

The claimant in his evidence told the Tribunal that he commenced his employment with the respondent in September 1974 and he is just over fifty years old. He worked in various posts and has been in his current position of warehouse supervisor since 1992. He never encountered problems with the respondent. He had booked holidays to go on Friday 29th June 2007. He was off on Wednesday 27th and he was then going to work on 28th and 29th and was to finish at approximately 3pm on the 29th. He then had the next two weeks off and was due back on 16th July.

He got twenty six days leave per annum and carried over twelve days to be used the following year. He had booked his holidays from work three months in advance. He spoke to the OM on the

25th about taking the 27th off and there was no problem. He had also spoken to Mr H to cover for him on the 27th. On Tuesday 26th he and the OM spoke regarding the loss of one of their contracts and they spoke about cutting back hours which was agreed would be left aside until September. The OM had told him he would be absent on the Thursday and Friday which would mean that the claimant would cover for the OM and Mr H in turn would cover for the claimant. If the claimant was missing the OM would leave a note for him to follow up on things. The OM worked mostly in the office. He thought the OM was on a course on the Wednesday and the OM left notes for the claimant for the Thursday and Friday and there was no question but his instructions would be carried out. The claimant and another supervisor would help each other out if under pressure. His plan was to leave at 3pm on the Friday and while he would usually leave at 4pm there would be no problem as he could work through lunch.

On Tuesday 26th June he received a call from Mr C requesting the Friday off and the claimant asked him to contact the OM regarding opening up. Two people were needed to open up to put on the lights, computers and assemble orders. The claimant dealt with the orders. In 2004/05 the swipe cards came in. Mr C would walk in with the claimant and he would swipe both cards. If the claimant was in later Mr C would be after swiping him in. This never caused a problem and the general operatives clock out at lunchtime. The claimant's salary and bonus was not affected by swiping in and out. Every long weekend he would be called in on the Saturday and on some other Saturdays he would also be called in. He did not swipe in or out at weekends and he was never brought to task about it. Prior to having the alarm company on board he could be called in at 2am if the alarm went off. In relation to Mr C asking for a day off on the Friday he organised to have another colleague Ms M to cover the opening up in the morning. The claimant's intention was to come in on the Thursday and Friday and he did not ask Mr C to clock him in. At 9.30 to 9.45am on the Wednesday when his wife was getting the tickets for the holidays she realised there was a mistake in the tickets and they were flying out on the Wednesday. He phoned Mr H and told him he would not be at work on Thursday as there was a family problem. He probably said he would ring him on the Thursday but he did not do so. He knew that Ms M would keep the place going and he thought he might be able to defer the flights. There were times when the OM and claimant were absent on the same day and Mr H would cover them both. When he spoke to Mr H it is true that he sounded distracted. It was not possible to change the flights and he went on holidays on Wednesday night.

After the holiday he returned to work on 16th July 2007 and on meeting Mr C at 7am he was told that his swipe card was gone. The claimant did not think anything of it. At 10.45am the DOI called him upstairs and laid down the law to him. The claimant felt he had made up his mind. He was told to leave any valuables and to leave the branch, after thirty-three years. The OM was on holidays however the DOI contacted him that Monday. Had he known the purpose of this meeting the claimant would have brought someone with him. The claimant was then asked to leave the premises and to leave the keys. He then contacted the union and a meeting was arranged for 19th July with the respondent. At the end of this meeting he felt that the respondent had made up its mind and they wanted him out. He was not given a chance to confront Mr C. After the meeting he told his union representative that he was passing the matter on to his solicitor. On 23rd July the DOI phoned him and he was fired after thirty-three years. He then received a letter dated 23rd July confirming his dismissal. He later attended an appeal hearing and he highlighted the practice which had developed with Mr C swiping him in. He also had a conversation with Mr C in relation to his statement where he stated that the OM had asked him to make an apology at end of the statement. Mr C also told him about his suspension. In relation to the appeal hearing the claimant was the last

to give evidence and he said he was in Spain. He did not say he was on holidays as he felt embarrassed. He did not deny he was on holidays.

The reason he did not ring the OM on the Wednesday was because he thought he was on a course and he would not ring him if that was the case. If he had known he was going on holidays on Wednesday rather than Friday there would not be a problem as Mr H would cover. After losing his job he went to his general practitioner who said he would certify him if he found suitable employment. He wants his job back and after thirty-three years it was his life. It was a seven day job not five. It's a lie that he asked Mr C to swipe him in and it was of no advantage to the claimant to ask him to do so. There was no gain for the claimant, however if he was under pressure for holidays there may have been some gain. The claimant then gave evidence of his efforts to gain alternative employment. There had been another incident regarding swipe cards two months previous to this where one girl swiped the other out and they received a verbal warning. The OM said it would not happen again. The only time he saw the Disciplinary Procedures was when the DOI posted them to him after the first meeting.

In cross-examination witness said that when the problem arose on the Wednesday it was Mr H he contacted rather than the OM as he thought the OM was on a course. He realised he was probably in a state of panic. He did not instruct Mr C to clock him in on the Thursday and Friday to save two days holidays, he had twenty-six days holidays. On the Tuesday he spoke to the office supervisor and told her that the OM would be away on Thursday and Friday and he asked her to approve his wages.

In answer to questions from Tribunal members as to why he did not "come clean" on 16th July when he returned after the holidays, he said that he dealt only with the Cork branch and the OM was not there. He got on well with the OM and it was not a big issue. When the DOI brought him in that day he felt intimidated and he should not have been there on his own. He did not think it serious and he had nothing to gain by asking Mr C to clock him in. He could have phoned in sick. He was never asked what the family problem was and he did not try to hide the fact that he was in Spain. He did not think he would be treated in that manner after thirty-three years. As far as he knew he did not tell Mr C he was going to Spain but he knew he was going on two weeks holidays. He arrived home from the holidays on Wednesday 11th and he did not go to the respondent on the Thursday or Friday as he was not thinking straight.

The last witness to give evidence was the claimant's wife. She told the Tribunal they were married twenty-seven years. She booked the holiday on the 1st January, on the internet to go out on Friday 29th June and return on Wednesday 11th July. It was not a package holiday, they were going to a relatives home. They always go on holidays on a Friday and it was her job to get the cases and passports ready. On Wednesday am she spotted her error and panicked, shouted to the claimant that she had got the dates wrong. His reaction was to change the dates and he then said they would go and sort it out when they came back. It was her fault.

In cross-examination witness said that the flight time was 16.20 and they live close to the airport. She only discovered the error on Wednesday and realised she should have checked earlier.

In relation to the remedy sought the claimant is seeking compensation.

Determination:

The Tribunal noted that no disciplinary matters arose during the claimant's long service with the respondent. On the evidence the Tribunal have no option but to accept that the claimant's actions constituted gross misconduct, therefore termination of employment was fair in the circumstances. The claim under the Unfair Dismissals Acts, 1977 to 2001 is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

