

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:

CASE NO.

Employee

- Appellant  
RP456/2008  
MN506/2008

against

Employer

under

### REDUNDANCY PAYMENTS ACTS, 1967 TO 2003 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. D. MacCarthy S C

Members: Mr. J. Browne  
Ms. K. Garvey

heard this appeal at Wexford on 16th January 2009

#### **Representation:**

Appellant: In person

Respondent: Mr. Loughlin Deegan, IBEC, Confederation House, Waterford Business Park,  
Cork Road, Waterford

#### **The decision of the Tribunal was as follows:**

##### **Respondent's Case:**

The appellant commenced employment with the respondent on the 4<sup>th</sup> May 2004. It was the respondent's case that the appellant was dismissed without notice for misconduct.

The respondent has a strong policy regarding unauthorised absences. The Christmas period is a busy time for the respondent as many workers return home abroad on officially sanctioned leave. On the 27<sup>th</sup> December 2007 the appellant and two other colleagues failed to return to work when the factory re-opened. They did not make contact with the respondent or offer any explanation as to why they had not attended for work. Employees must complete a holiday form. Only a certain number of employees are allowed to take holidays in any given week. The respondent did not receive a request from the appellant for holidays in December 2007/January 2008. Even if a request had been received from the appellant; he had used all of his annual leave entitlement during

2007.

On the 7<sup>th</sup> January 2008 the appellant and one of his colleagues returned to work. The third employee never returned. The appellant and his colleague sought out another employee in the factory to translate for them. They asked the employee to accompany them to the office of the Human Resources Manager. The Factory Manager also attended the meeting.

The appellant and his colleague acknowledged at the meeting that their absence from work was wrong, as they had no remaining holiday entitlement but they had travelled home to Poland over the Christmas period. Neither the appellant nor his colleague offered an explanation as to why their absence was justified. The first time the respondent saw a medical certificate relating to the health of the appellant's son was in August 2008.

The Human Resources Manager and the Factory Manager considered the matter and a second meeting was held on the 8<sup>th</sup> January 2008. At this meeting the appellant and his colleague were dismissed in line with the respondent's policy on unauthorised absences.

In January 2008, twenty employees of the respondent's three hundred staff were made redundant. The employees that were selected for redundancy had less service than the appellant. All but three of the employees had less than 2 years' service. The respondent used the last in first out process within certain functional groups to determine the employees that would be made redundant. The appellant was not close to the service threshold of those selected for redundancy. For example, even if there were ten more additional redundancies the appellant still would not have been selected for redundancy. The appellant was not dismissed by reason of redundancy but for misconduct for his unauthorised absence.

The General Manager made the decision that redundancies were required. The Human Resources Manager was notified of this on the 31<sup>st</sup> December 2007. The employees selected for redundancy were notified of the decision on the 4<sup>th</sup> January 2008.

The respondent's representative stated that S.8 of the Minimum Notice and Terms of Employment Acts, 1973 to 2001, applied in relation to the termination of the appellant's employment. The section states, "*Nothing in this Act shall affect the right of any employer or employee to terminate a contract of employment without notice because of misconduct by the other party.*" The employee handbook (which is also provided to staff in the Polish language) contains a section entitled "*Punctuality and Attendance at Work.*" This section outlines that staff cannot be absent from work unless specified leave arrangements or sick leave applies.

The section further states that, "*when an employee cannot report for work, he or she must directly notify their immediate supervisor or production manager no later than one hour after his/her starting time in order not to lose their attendance bonus for the week. Failure to do so will count as an un-excused absence. An employee taking unauthorised leave will be disciplined under the terms of the Disciplinary Procedure.*"

The section further states, "*Any employee who is absent through unexcused and/or uncertified absence for five or more days may be considered to have left the Company's employment and have their employment terminated for abandonment of position.*"

The respondent's business is such that an unauthorised absence could affect production. For the respondent even an absence of a relatively short period of time is a serious matter. It was

brought to all of the employees' attention that the factory would re-open on the 27<sup>th</sup> December 2007. In the appellant's terms and conditions it states, "*Your employment may be terminated without notice for serious misconduct or failure to carry out such duties as may be assigned to you by the Company from time to time.*" A small number of absent employees can have a disproportionate detrimental effect on the respondent's production.

### **Appellant's Case:**

The appellant gave evidence with the assistance of a Tribunal appointed translator.

The appellant's colleague had difficulty securing a plane ticket for the return flight to Ireland. When his colleague telephoned the respondent, the appellant asked him to communicate that his son was unwell. The respondent may not have considered this information when making their decision in relation to his employment.

The third person who did not return to the respondent's employment was the appellant's brother-in-law. His brother-in-law did not return, as he knew the respondent would make him redundant. It was very clear to the appellant that a number of employees would be made redundant.

The appellant was aware at the termination of his employment that other employees received a redundancy payment on the termination of their employment. The appellant believed he had a similar entitlement. In correspondence to the respondent (dated the 7<sup>th</sup> February 2008) the appellant requested that the respondent pay him a redundancy payment, as the union had told the appellant that he was entitled to it. When asked, the appellant stated that he had not spoken directly to a union official.

In comparison to other pre-Christmas periods the factory was not as busy. In previous years the factory was so busy that the appellant could not get holidays close to the Christmas period. In reply to questions from the Tribunal, the appellant said he was informed that he would not be able to take holidays at Christmas 2007, as the factory would be closed. The appellant therefore used his leave entitlement throughout 2007. The appellant accepted that he did not have permission to be absent from work from the 27<sup>th</sup> December 2007 to the 7<sup>th</sup> January 2008.

Some of the appellant's colleagues told him on the 27<sup>th</sup> December 2007 there would be redundancies. When asked by the Tribunal, the appellant stated that the respondent had not informed him of the redundancies.

In reply to questions from the Tribunal, the appellant answered that he was dismissed because he did not return for work on the 27<sup>th</sup> December 2007.

The appellant accepted that he had lodged duplicate claims to the Tribunal and accordingly withdrew one set of claims before the Tribunal.

### **Determination:**

An employee has an entitlement to a redundancy payment if they were dismissed by reason of a redundancy situation. The appellant when asked why he was dismissed, answered that he was dismissed because he did not return from Poland in time to resume work. That is to say, that he was dismissed for a different reason and not for that of redundancy and therefore his appeal under

the Redundancy Payments Acts, 1967 to 2003, fails.

The second question the Tribunal must consider is whether or not the appellant is entitled to an award under the Minimum Notice and Terms of Employment Acts, 1973 to 2001. The Acts provide that an employer may dismiss an employee without notice because of that employee's misconduct. The Tribunal has always taken the view that "misconduct" as stated within the Acts must be something serious and we apply a different standard to the word "misconduct" in the Minimum Notice Acts and Terms of Employment Acts, 1973 to 2001, than we apply to the word "conduct" in the Unfair Dismissals Acts, 1977 to 2001.

It is the Tribunal's view that the reasons for the appellant's dismissal did not amount to misconduct within the meaning of the Minimum Notice and Terms of Employment Acts, 1973 to 2001. The Tribunal finds in favour of the appellant and awards him €1,040.00 (being the equivalent of two weeks' gross pay).

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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