

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
Employee

CASE NO.
-appellant UD772/2008

against the recommendation of the Rights Commissioner in the case of recommendation reference: r-062176-ud-07/JW.

Employer- respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Mac Carthy S C

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

heard this appeal at Wexford on 15th January 2009

Representation:

Appellant: Mr Michael Wall, SIPTU, Town Parks, Wexford

Respondent: Mr. Adrian Twomey, Advokat Compliance Limited, Dun Barra,
Dunanore, Bree, Enniscorthy, Co Wexford

The determination of the Tribunal was as follows:

This case came before the Tribunal by way of an employee appealing against the Rights Commissioner recommendation reference: r-062176-ud-07/JW.

Respondent's Case:

The manufacturing manager gave evidence to the Tribunal. The claimant reported to his team leader and manufacturing manager. The claimant returned from a period of six weeks sick leave on the 30th October 2007. On his return the claimant made a request to his team leader for nine days leave to have dental work carried out in Spain at the end of November. The team leader could not grant approve this request as the claimant had used all of his annual leave entitlement for 2007 and the company was very busy.

The team leader informed the manufacturing manager and he in turn addressed it with the claimant on the 8th November 2007. The witness informed the claimant that he could arrange for the claimant to work two or three days extra time for time-in-lieu but leave constituting nine days was not possible, as the company was very busy at that time. The witness also informed the claimant

that other staff had also been refused leave at this time. The claimant said that he would have to go to plan B and that the three days offered to him were not enough but he did not explain why he needed additional time.

The claimant attended a meeting on the 16th November 2007 at which a shop steward, the human resources manager and the manufacturing manager were in attendance. It was outlined to the claimant that he was not approved for time off at the end of the month and that if for whatever reason he became unavailable for work during this period, the company would have an issue with it. It was further explained that if the claimant claimed sick leave for the period he would not automatically be included in the sick pay scheme and that the company would require him to visit a doctor in Ireland. These points were covered again in another meeting with the claimant and his shop steward on the 19 November 2007.

The manufacturing manager also outlined in writing to the claimant the consequence of a breach if he was to take an unapproved absence at the end of November 2007. It stated,

“You have a history of unapproved absence from your job. There was an issue previously brought before a Rights Commissioner (XX). This involved the company taking a decision to dismiss, which was muted to a suspension and an agreed Final Written Warning for unapproved absence at a Rights Commissioner hearing on 8th August 2005.

If you take unapproved absence from work at the end of November it will become your second time to be involved in a grave offence of the same nature and for which you are already on a Final Written Warning.

If you go ahead and take unpaid absence for this period the company also interprets it as deliberate breach of a reasonable company instruction.

You are entitled to due process and the company will participate in all agreed disciplinary procedures. However, please be absolutely clear that the company will dismiss you from your employment if you take unapproved leave in the context explained herein.

You are fully equipped with the knowledge of the company position in the matter and the consequences of your actions have been explained to you. You are informed in advance and are given the opportunity for Representation.

Please remember that if an issue arises it will be because of a decision that you will have chosen to make and not the choice of the company.”

The claimant instead received dental treatment on the 4th December 2007, of which the company was aware.

On Monday, 3rd March 2008 the claimant submitted a medical certificate for a period of one week. The certificate was from a doctor stating that the claimant was suffering from a dental infection and was unable to attend work from the 3rd March until the 10th March. The certificate was dated the 1st March 2008. The witness was concerned in light of the conversations during November 2007 and decided to request that the claimant attend the company doctor. The company was unable to contact the claimant and therefore wrote to the claimant on the 5th March 2008. The letter stated that the company required the claimant to attend the company doctor as per the work rules. The letter was hand delivered to the claimant’s post-box on Wednesday, 5th March 2008. The

claimant was asked to attend the company doctor no later than Thursday evening. The company did not receive a response. The company wrote again to the claimant asking him to attend the company doctor before the end of the week.

On the 6th March 2008 the claimant's daughter contacted the company and stated that the claimant was undergoing root canal treatment and would be unable to attend the company doctor that week.

The company wrote to the claimant on the 6th March 2008 inviting him to attend a meeting on the 7th March 2008 so that he could explain the circumstances surrounding his current absence from work. A written response was received from the claimant's daughter who stated that the claimant was unable to attend the meeting on the 7th March 2008 due to further extensive root canal treatment on the 7th March 2008 but that an appointment was made with the company doctor for the 10th March 2008. The claimant was subsequently contacted on the 10th March 2008 and asked to attend a meeting at 2pm.

The claimant attended the meeting at which the shop steward and representatives of the company were also present. The witness asked the claimant about his absence and the claimant stated that he had travelled to Spain for dental treatment. At the meeting the claimant said that he could either "face the circus" before he went or on his return. The company adjourned the discussions pending a full disciplinary investigation and the claimant was suspended with pay pending the outcome.

A disciplinary investigation was held on the 11th March 2008 at which the claimant was represented by a shop steward and a union official. The investigation covered all of the issues and advised that the possible outcome could be the dismissal of the claimant.

A further meeting was held on the 12th March 2008 and the claimant was informed of the findings of the investigation. The manufacturing manager and the human resources manager made the decision that the claimant should be dismissed and a letter of dismissal was delivered to the claimant which stated that the substantive issues relating to the claimant's dismissal were:

- *Taking unapproved leave in the full knowledge of the disciplinary consequences*
- *Taking unapproved leave against a background of a suspension and Final Written Warning for taking unapproved leave*
- *Unavailability to see the Company Doctor or to meet or talk to the Company as per your obligation under the Works Agreement and as per advice to you in writing in November.*
- *Irreparable damage to trust in you and to the employer/employee relationship.*

Section 7.12 of the company's works booklet outlines that any employee, who is disciplined for any offence, may appeal against the Company's decision, such appeal should be made through the Union official within 3 working days of the decision.

During cross-examination the witness stated that a final written warning remains on an employee's file for six months. The witness agreed that therefore the final written warning given in 2005 had expired.

Pertaining to the claimant's request for leave in November 2007 the claimant had requested the nine days over two different periods because of the root canal treatment. The witness stated that he was aware the claimant had dental problems and that dental treatment is not covered under the respondent's sick pay scheme.

The witness was asked why the claimant was requested to attend a company doctor during the week he was certified in March 2008. The witness replied that he was unaware that the claimant was in Spain at that time.

Claimant's Case:

The claimant gave evidence that he has over thirty years service with the company. The claimant made provisional plans after undergoing treatment in late 2006 to have further dental treatment in Spain in March 2008. The claimant had previously undergone dental treatment in Spain.

In November 2007 the claimant originally sought time off to undergo dental treatment. The claimant informed the team leader and the manufacturing manager that he needed nine days leave over a period of three weeks. They both informed him that it would not be possible to approve this leave. The claimant told the manufacturing manager that there was a plan B and he presented details of his flights. The manufacturing manager said that he would think about it. The claimant did not expect that the nine days would be covered under the sick pay scheme but he thought he could have worked up the hours as he had often done with the agreement of a previous manager. The treatment the claimant needed could not be completed in three days taking into consideration the appointments and logistics. The offer of three days from the company was not sufficient. When the claimant was subsequently asked to attend a meeting and presented with a document outlining consequences of taking the leave, he was surprised.

From November 2007 the claimant suffered pain and discomfort. In December 2007 the claimant attended at a clinic in Dublin for an emergency filling and his team leader was aware of this. At this clinic the claimant received a quote for the rest of the treatment he needed.

In January 2008 the claimant was absent from work for a few weeks with a back injury. The company doctor signed him off work for this period.

The claimant had provisional plans made to undergo further dental treatment in March 2008 and he had booked some cheap flights. The claimant was not sure about his trip to Spain until he visited Doctor B on the 1st March 2008. The claimant made the decision to go ahead with his treatment in Spain when Doctor B informed him his dental health would only get worse. The claimant only confirmed his appointment with the dentist in Spain on the 1st March 2008. There is a significant difference in the cost of dental treatment in Spain compared to Ireland.

During cross-examination the claimant stated that it was easier to get appointments for dental treatment in Spain than with his dentist in Ireland. It was put to the claimant that he had attended appointments with other practitioners and had been told prior to March 2008 that he required the dental treatment. The claimant replied that he was unwilling to attend someone other than the dentist he attended in Spain, as he was content with the dental work he received there. The claimant underwent dental treatment in Spain in the third week of his absence for a back injury in early 2008. It was at this time that he made the provisional plans for the dental work for March 2008.

It was put to the claimant that it was open to him to apply for leave for the period in March 2008. The claimant replied that as it was for dental treatment he did not think of it as a holiday. The claimant did not approach the company about his need for time off for dental treatment in March 2008 as he had "been down that road with them before" and the claimant believed he would be

stonewalled in relation to the company accommodating his dental treatment.

In reply to questions from the Tribunal, the claimant stated that he accepted that the reasons given by the company in refusing his leave in November 2007 were genuine. That was the reason he was surprised to receive the subsequent correspondence from the company in relation to the matter. The claimant was nervous about opening the matter with the company again in March 2008.

Doctor B gave evidence that the claimant has been a patient of his since 1984. The claimant attended the doctor on the 1st March 2008 and told him that he was going to Spain for root canal treatment, as it was considerably cheaper. The doctor examined the claimant on this date. It was the doctor's opinion that the claimant required extensive treatment to his left lower gum and he had dental decay. The claimant had a dental infection and required root canal treatment. The claimant also needed treatment on the other side of his mouth and his dental health would continue to decline without treatment. The claimant asked the doctor for a medical certificate for a period of one week, as he had sourced a dentist in Spain to carry out the dental work.

During cross-examination Doctor B confirmed that the claimant had not contacted him previously about his dental situation but Doctor B stated he was not a dentist.

In reply to questions from the Tribunal, Doctor B stated that the claimant would be unfit for work by virtue of the dental treatment that he would undergo over a period of consecutive days.

Determination:

The Tribunal carefully considered the evidence adduced at the hearing. It is evident that the claimant had been previously given clear warning not to take unapproved leave and informed of what the consequences of such leave might be.

When the claimant indicated to the manufacturing manager that he had a plan B, this put the manufacturing manager on alert. Despite this the claimant still continued to pre-book and pre-plan and chose to travel to Spain for treatment. The claimant could at that stage have approached the company about his need for leave to attend for dental treatment in March 2008. However, the claimant (having pre-planned) attended the doctor and obtained a medical certificate to invoke the company's sick pay scheme but failed to comply with the company's sick pay scheme guidelines and attend at a nominated company doctor/consultant as per the agreement. The Tribunal finds that the appeal of the Rights Commissioner's recommendation under the Unfair Dismissals Acts, 1977 to 2001, fails. Accordingly, the Tribunal upholds the recommendation reference: r-062176-ud-07/JW.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)