

## EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

Employee, - *claimant*

CASE NOS.

UD641/2008  
MN574/2008

against

Employer - *respondent*

under

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

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms P McGrath BL

Members: Mr R Murphy  
Mr J Moore

heard this claim at Dundalk on 16th October 2008 and 20th January 2009

Representation:

Claimant: Mr John King,  
SIPTU,  
Palace Street,  
Drogheda,  
Co. Louth

Respondent: Local Government Management Services Board,  
Olaf House,  
35-37 Ushers Quay,  
Dublin 8

The determination of the Tribunal was as follows:

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

The Senior Assistant Chief Fire Officer (SACFO) gave evidence. The claimant worked as a retained fire-fighter. An issue arose with the claimant in 2006 he was outside the 5 minute response area. The 5-minute response time is important because it enables the timely deployment of the fire tenders. He was 10 miles away from the fire station while he was on call. The claimant admitted he was outside the 5-minute response area and was given a written warning.

In early 2007 the claimant was again outside the 5-minute response area. When the SACFO asked

him about it, the claimant at first said he had permission to be outside the 5-minute response area. He later admitted that this was not true, he did not in fact have permission. He admitted he was between 5 and 7 minutes outside the response time area. The claimant was suspended from work. He appealed the suspension but the suspension was upheld.

At 12.15 on 6th September 2007 the alerters sounded in the fire station. It was a fire call and 2 pump appliances were required to attend. The full time crew were dispatched. A minimum of 4 retained fire-fighters were needed before an appliance could be dispatched to fire fight. The claimant phoned the SACFO in the control room and asked, 'Is that a call?' When SACFO replied yes, the claimant told him he was at the dentist. The SACFO did not mobilise the appliance because there was a crew of 3 available. Later when the fire was out and the appliance at the scene requested more water the appliance was deployed with a crew of 2. The SACFO used the control room facility to send the claimant a message on his bleeper to contact the control room. The claimant responded 80 minutes after the initial alert. The claimant came to the control room and said that he got the alerts but was unfit for work. On that morning the claimant did not inform the control room that he was unavailable for work. The claimant was aware of the procedure to follow if he was unable to remain on call. He had used the procedure on a number of occasions.

The claimant was suspended for the earlier incident for part of the period between the incident on 6th September 2007 and the resulting disciplinary meeting on 20th February 2008. The SACFO recommended termination of the claimant's employment.

The Administrative Officer (AO) giving evidence for the respondent stated he met the claimant for disciplinary issues in July 2006, relating to non-compliance with sick leave procedures, non-availability for calls and missing calls. In a letter of 1<sup>st</sup> August 2006 the claimant was given a final written warning, later reduced to a written warning, for being outside the five minute response time to the fire station. The letter defined that the claimant was expected to work within the five minute response time when on call or duty and that dismissal was the likely consequence of "further misconduct, or insufficient improvement". The claimant was informed of his right to appeal to the Chief Fire Officer (CFO).

On 20<sup>th</sup> April 2007 the claimant was seen in Dunleer town driving in the direction of Drogheda; this was outside the five-minute response time. The claimant was given a one-month suspension for being outside the response time and for claiming that he had sanction to do it. The claimant appealed the decision in September 2007, but the decision was upheld. The claimant's suspension ran from Oct to Nov 2007. The claimant's appeal, on this issue, to a Rights Commissioner in March 2008 failed.

In September 2007 a further incident occurred regarding the claimant responding to alerts. The claimant failed to respond to an alert on 6<sup>th</sup> September 2007, and arrived 1 hour and 20 minutes after the alerter sounded. AO delayed the initiation of an investigation pending any further appeal of the earlier incident and the investigation of this incident did not begin until February 2008. The management services board advised that it would not prejudice the claimant to investigate the September 2007 incident. AO wrote to the claimant on 7<sup>th</sup> February 2008 and a meeting was held on 20<sup>th</sup> February 2008. AO advised the claimant, by letter of 12<sup>th</sup> March 2008, that the decision on which disciplinary sanction would be taken when the decision of the Rights Commissioner was known. As the Rights Commissioner upheld the previous suspension AO recommended to the Town Clerk that the claimant should be dismissed.

The process of dismissal entails a recommendation from the Town Clerk to the County Manager,

who has the power to dismiss. The employee may make an appeal to the County Manager before the final decision is made. The claimant was notified by the Town Clerk of this right to appeal and he made his appeal to the County Manager on 9<sup>th</sup> May 2008. On 9<sup>th</sup> June 2008 the County Manager wrote to confirm the dismissal.

CFO gave evidence that RFF must be available to respond to all calls. The RFF terms of employment are that the RFF agrees to live and within five minutes of the fire station and must be within five minutes of the station at all times when on call. If unavailable the RFF must notify the duty officer and arrange cover. The claimant was aware of these terms of employment and of the consequences if he failed to abide by them.

On 6<sup>th</sup> September the claimant's failure to respond resulted in the non-attendance of an appliance and could have placed life at risk. The incident of 6<sup>th</sup> September 2007 was one of availability, not of attendance. The RFF must be available for all calls.

Current RFFs were given individual response times to the new Fire Station, at a different location. New RFFs would be contractually obliged to live within five minutes of the new station.

### **Claimant's Case:**

The claimant was employed as a RFF in 1999. As part of his contract he agreed to live within five minutes of the fire station. As a RFF he was permitted to hold other employment, which he did, with a builders providers (2<sup>nd</sup> employer). The claimant had an excellent disciplinary record between 1999 and 2006. The claimant wasn't aware of attendance issues being raised with him by the Senior Assistant Fire Officer in 2001.

He had only failed to respond to alerts when his alerter wasn't working. He did not know why his alerter failed to work and agreed that alerters were tested twice daily. He was aware that alerters operated within a range outside which they didn't work, but he did not accept that he was out of area. He agreed that there was an incident in 2001 when he failed to respond due to his babysitter being late. He agreed that when he started with the Fire Service he was given the particulars on the job, which included responding to the alerter and getting cover if he had to go off duty. He denied that he went to Blackpool once without securing cover.

In 2006 he received a final written warning, to remain on file for 15 months, for being outside the response time. This was reduced later to a written warning. The claimant had been outside the response time, as he had to deliver sand and cement for his 2<sup>nd</sup> employer. He didn't want to make the delivery but other employees were on sick leave. He got a letter from the company to say that he would not have to work outside his response time.

The next issue to arise was in April 2007, when the claimant was seen by AO in Dunleer. The claimant was asked by his 2<sup>nd</sup> employer to bring a mechanic home, but this journey turned out to be further than he expected. Again the claimant did not wish to do what he was asked, but he felt pressurised to do it. He panicked when asked about it and said that he had been given permission; he clarified later that that had not been the case. He accepted that this incident could lead to his dismissal. He received a suspension for one month, which was held up on appeal. He served his suspension from 26<sup>th</sup> October to 25<sup>th</sup> November 2007. He resigned from his second job in November 2007 in order to show commitment to his position with the fire service. He denied that he had been dismissed from that employment.

On the 6<sup>th</sup> September 2007 the claimant was late responding to an alert as he was at the dentist. He had been suffering from dental pain from the weekend before and contacted the dentist on the 4<sup>th</sup> September. He received confirmation of an appointment on the 5<sup>th</sup> September, but he wasn't sure if they would see him so he didn't contact the station, which he knew he was obliged to do. He regretted this in hindsight. The claimant required an extraction and believed that it would only taketen minutes. He was in the chair when his alerter sounded, though he did not hear it until he cameout of the surgery. His phone was on silent and so he did not hear the two calls from the firestation. When he came out his alerter was still sounding and so he phoned the station to say he would be there as soon as possible.

When the claimant arrived at the station the SACFO asked him if he was sick or whether he would be responding. The claimant did not feel well and so went home. He believed he had been certified sick and didn't think any thing else. He denied that AO had told him that the matter wouldbe referred to the CFO. The claimant believed that the appliances had gone to the incident withouthim, as they weren't in the fire station when he arrived. He agreed that he could have put the fireservice at risk. The claimant was surprised to receive a notice of disciplinary proceedings fivemonths later. Being a RFF was very important to him and he had appealed for a lower sanctionthan termination of employment.

A Shop Steward (SS) at the Fire Station gave evidence that there had been many meetings between the Union and management about problems with alerters. It was agreed that RFF's should have their private mobile switched on while on call as a backup. If the RFF did not respond the Fire Station called the mobile phone. SS agreed that he had been asked by SACFO to speak to the claimant about his attendance, which he did. He told the claimant that he had better improve his attendance.

### **Determination:**

The members of the Tribunal have carefully considered the evidence adduced over the course of the two-day hearing.

The employee's employment with the respondent company was terminated in June of 2008 following a disciplinary procedure (including appeal) arising out of an incident, which occurred some nine months previously on 6<sup>th</sup> September 2007. On that occasion the employee received analert from the Station requesting his attendance to respond to an emergency. The employee was oncall and knew he was rostered to be on call. On that occasion the alert was registered with theemployee who contacted the station, by phone, and explained he would be delayed as he was in thedentist.

Having been told by the station that his presence was required at the station the employee opted to continue with his dental procedure, which meant that he turned into the station some hour and half after the expected five minutes response time.

It is accepted that after the initial phone conversation between the employee and the senior assistant fire officer was terminated, the SACFO rang and paged many times as he awaited the employees arrival. It seems that the fire-fighting unit could not be sent out without the requisite number of personnel, and in the end a unit from an alternative station was required to attend the emergency.

The Tribunal cannot accept that the employee was not aware of the seriousness of his actions. The position held is no ordinary position. There is an expectation and onus on the fire fighting service

to provide an efficient service. Such a service cannot be provided where persons on call are not in a state of readiness for the entirety of the on-call period. Once the employee knew he was going to have any sort of medical procedure carried out he should have notified the station of this fact. The choice was stark, either delay the treatment until he was off-call, or have the treatment having notified his employer of his unavailability. There can be no doubt that the employee wanted the best of both worlds and thereby put the reputation and standards expected of the fire fighting service at risk. In hindsight, the employee acknowledged that he should have contacted the respondent company detailing his unavailability and failed to do so.

The Tribunal was referred to the contract of employment repeatedly and there can be no doubt that the obligation on the employee was to respond within five minutes of any call being made. The contract specifically allows for termination of employment for non-compliance.

In concluding that the respondent acted reasonably and has discharged the onus placed on it in an Unfair Dismissals case, the Tribunal notes that the respondent had been more lenient on previous occasions, but that the pattern of failing to keep the five minute rule was such that, ultimately, the employer had to take decisive action and terminate the contract of employment.

Therefore, the claims under the Unfair Dismissals Acts, 1977 To 2001, and the Minimum Notice And Terms Of Employment Acts, 1973 To 2001 fail.

Unfair Dismissals Acts

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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