

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

Employer
- Appellant (The Employer)

UD649/2008

against the recommendation of a Rights Commissioner R-058598-UD-08/SR
In the case of

Employee
- Respondent (The Employee)

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. McAveety

Members: Mr. R. Murphy
Mr. P. McAleer

heard this appeal at Cavan on 28 January and 6 April 2009

Representation:

Appellant: Ms. Kerry Molyneaux, IBEC, Confederation House,
84/86 Lower Baggot Street, Dublin 2

Respondent: Mr. Declan Ferry, Assistant Organiser,
SIPTU Cavan Branch, Ashe Street, Cavan Town

The determination of the Tribunal was as follows:

This appeal arose as a result of an employer (the appellant) appealing against a recommendation of a Rights Commissioner R-058598-UD-08/SR in the case of an employee (the respondent)

The employee joined the employer on 9 October 2006 and worked for them as a welder. During the probationary period of his employment, an incident occurred in December 2006 where the employee was found to have been using the employer's materials for his own use. As a result of this incident the plant manager (PM) on 8 January 2007 suspended the employee for one week and issued him with a final written warning and recommenced his probationary period. According to the employer's disciplinary procedure this warning had a shelf life of twelve months.

On 31 August 2007 the employee, who is right-handed, was involved in an industrial accident whereby he sustained a soft tissue injury to his right hand. The employee was taken to hospital and received a medical certificate for one week. The employee received a second medical certificate from the hospital for one week from 6 September 2007. The employer operates a sick pay scheme whereby employees receive 90% pay for the first two weeks and 70% pay for the next six weeks.

The claimant then submitted a further medical certificate from his GP on 14 September 2007 for two weeks. The employer's human resource manager (HR) became concerned that the employee's recovery was taking longer than had been anticipated and as a result requested a private investigator (PI) to observe the employee. This was done on 25 and 26 September 2007 and PI observed the employee moving a wheelie bin, adjusting the saddle on a bicycle which he then rode and carrying a tool box.

Having received PI's report HR expected the employee to return to work and was surprised that the employee submitted a further medical certificate covering the period from 29 September until 12 October 2007. On 5 October 2007 HR wrote to the employee to request him to attend a meeting on 9 October 2007 to investigate the extent of his ongoing injury. He was further asked to inform his union representative (UR) of the meeting. The employee failed to respond to the letter of 5 October 2007 from HR and did not attend the meeting. On 10 October 2007 HR wrote to the employee and alleged that the employee was undertaking gainful employment whilst absent from the employer. The employee was asked to attend a meeting on 15 October 2007 at 2-30pm to discuss the matter. This letter warned the employee that the allegation was so serious as to potentially warrant dismissal for breach of trust.

In the event the employee returned to work on 15 October 2007, presented his certificate of fitness to return to work to his supervisor, and worked his shift normally. HR became aware that the employee had returned to work and the meeting, which had been scheduled for 2-30pm, was convened shortly before 4-00pm. At this meeting the employee was shown photographs taken by PI on 25 and 26 September 2007. The employee suggested that his GP had told him that he could perform light duties. The employee, whilst accepting that he had a part-time job other than with the employer, insisted that he had not been working on this part-time job whilst off work with the hand injury. As a result of this meeting the employee was suspended without pay pending a further meeting which was to involve PM. This was later amended to suspension with pay. The employee was asked to provide information from GP supporting his contention that GP had told the employee that he was fit for light duties. He was also referred to an occupational health specialist (OH) acting on behalf of the employer and was examined by OH on 18 October 2007. On 24 October 2007 OH wrote to HR and included in this letter OH states that GP did not consider the employee fit for light work before his return to work on 15 October 2007. OH states in the letter, "In my opinion, 5 weeks is a long period of absence for a soft tissue hand injury and the photographic evidence appears to contradict the medical evidence. However, I did not have the opportunity to examine the employee during his period of absence and therefore am not in a position to challenge GP's opinion, which is based on a contemporaneous medical assessment".

A disciplinary hearing attended by PM, HR, the employee and UR took place on 25 October 2007 at which the employee continued to insist that GP had told him that he was fit for light duties. A further issue arose here where the employer's position was that the employee had not been seen by GP on all occasions when he had been issued with medical certificates. The disciplinary meeting was adjourned until 30 October 2007 to allow the employee to get further information on this issue, as his position was that he saw GP on each and every occasion he was issued with a medical certificate. In the event the employee was unable to supply any further evidence to support his contention and PM dismissed the employee, considering the fact that he was still on a final written warning, for breach of trust and procedures. The letter of dismissal of the same date cites "ongoing behaviour and disregard for the rules and procedures of the company have led to an ultimate breach of trust". An appeal to the managing director was heard on 1 November 2007. The failure of this appeal was notified by letter of 5 November 2007.

Determination

The Tribunal are of the view, that once HR became concerned about the length of the employee's absence from work subsequent to their receipt of the 14 September 2007 medical certificate, it was open to the employer to request that the employee attend with OH. This was not done until after the employee had returned to work and the disciplinary process had commenced. Rather instead, the employer embarked upon surveillance of the employee on 25 September 2007. This was probably due to the fact that initially allegations were made about the employee working other than for the employer during his absence.

Whilst the employer may have had doubts about the fitness, or otherwise, of the employee to return to work at no time was the employee absent from work without medical certification. In addition, even though an issue arose that the claimant may not have been seen by his GP on all occasions when he had been issued with such medical certificates, and that therefore, the employer had some doubt as to the representations made by the employee to the GP to procure such Certificates, no medical evidence contradicting or challenging the views stated by the GP was adduced by the employer. OH in her letter of 24 October 2007 made it clear that she did not have the opportunity to examine the employee during his period of absence and was therefore not in a position to challenge GP's opinion, which was based on a contemporaneous medical assessment.

All in all, the medical evidence presented by the employer against the employee is weak. The surveillance report is of no significance in determining whether or not medically, the employee was fit for light duties or not. For all these reasons, the Tribunal must accept the medical certificates of the GP as presented by the GP and find that the dismissal was unfair.

However, the Tribunal does note that the employee did not willingly participate in the disciplinary process and have noted his failure to attend the disciplinary meeting scheduled for 9 October 2007. Furthermore, the Tribunal are not convinced that the employee always wanted to return to work, but that his GP would not allow him to do so.

The Tribunal have considered the various remedies pursued by the employee. They are satisfied based on the evidence before them, that the relationship between the parties has irretrievably broken down and that the remedy of reinstatement is not an option.

Accordingly the Tribunal measures the award under the Unfair Dismissals Acts, 1977 to 2007 at €5,000-00

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)