

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
Employee -Claimant

CASE NO.
UD1417/2008
MN1360/2008

against
Employer -Respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Cagney B.L.

Members: Mr. M. Noone
Mr. G. Lamon

heard this claim at Dublin on 8th April 2009

Representation:

Claimant: In Person

Respondent: Mr. Mark Doyle, Actons, Solicitors, Newmount House, 22-24 Mount Street
Lower, Dublin 2

The determination of the Tribunal was as follows:

Giving evidence a director of the company outlined to the Tribunal that the company provides 24hour security for a complex, which consists of offices and apartments. As per the service agreement the company provides a static guard on the front gate of the complex 24 hours per day. Initially the claimant worked day shifts on the front gate of the complex but due to the fact that the claimant was, at times, missing from his post (this was discovered by the director and the client) the claimant was, at the request of the client, transferred to night shifts. The director explained to the claimant on a number of occasions, the consequences if the claimant continued to be missing from his post.

On the 1st February 2008 the night duty manager reported an incident to the director. The night duty manager had discovered that the claimant was absent from work on Thursday, 31st January 2008 until 3.45am on the morning of the 1st February 2008. The night duty manager had unsuccessfully attempted to contact the claimant on his work phone. The night duty manager was present on the site when the claimant returned at 3.45am. He sent the claimant home and told the claimant to contact Head Office the following morning. However, the claimant failed to contact the office until Sunday evening the 3rd February 2008 when he telephoned the Operations Manager. The Operations Manager advised the claimant to contact the director the following morning to arrange a time and date to discuss the matter. When the claimant telephoned the director on the 4th

February 2009, the director requested that the claimant attend at the office to discuss the events but the claimant refused and left the company with no option but to terminate his employment.

The company was still prepared to listen to the claimant's version of events and this was outlined to him in letter dated the 8th February 2008. If the claimant had offered a genuine reason for being absent from the site the company would have endeavoured to find him another position if possible. Some months passed but there were no positions to offer to the claimant and the company issued him with a P45 which stated his date of leaving as the 11th February 2008.

Some weeks later the claimant attended at the company's office and explained to the director that he was missing from his post due to personal difficulties. The director told the claimant he could have telephoned the night duty manager and arranged for the manager to relieve him. The director told the claimant that he had created a very serious situation and that his position had been filled but the company would see if they could facilitate him with an alternative post. There were, however, no posts available.

During cross-examination the director accepted that the claimant had worked for eight years on the client's site. The director accepted that there were times the claimant was absent from his post if he needed refreshment but there were other times when the claimant was absent because he was carrying out duties on the site that were not part of his remit. It was put to the director that the client site was extremely busy and the claimant used his own initiative to assist people on the site. The director replied that it was a serious matter that he had received complaints from the client.

In reply to questions from the Tribunal, the director stated that in the year he had worked with the company he had issued a number of verbal warnings to the claimant. In a period of six months the claimant was absent from his post approximately twelve times. The director had warned the claimant that this was a serious issue but the claimant always had an excuse for his absence. The director thought the Operations Manager might have previously written to the claimant about his work performance.

When the claimant had returned to the site on the 1st February 2008 at 3.45am he had consumed alcohol. The director and the Operations Manager did not have the option of utilising disciplinary procedures because the claimant could not be contacted. The claimant did not have a personal mobile phone and the director thought that the night duty manager might have taken the work phone from the claimant.

The claimant giving evidence told the Tribunal that on the night of the 31st January/1st February "things had gotten the better" of him. It was his third time to work a night shift on the client's site. He attended for work at 8pm. At approximately 9.30pm he left his post. The claimant admitted that he had attended to a personal matter. He had consumed some alcohol but he denied that he was intoxicated.

The claimant returned to the site at 3.45am. He acknowledged to the night duty manager that the matter was serious. The night manager told the claimant to go home but the claimant disputed that the night manager had told him to contact the office the following morning. The claimant accepted that his conduct on this night was wrong but he had been dealing with serious personal problems for some time. He had worked on various client sites and he felt that the company should have shown some compassion and considered an option other than dismissal. This was the reason that the claimant approached the director some weeks later to see if an option, other than dismissal,

could be exercised. After he met with the director he waited for a decision as the director had said he would discuss the matter with his colleagues.

During cross-examination the claimant stated that he spoke to the Operations Manager on the 3rd February 2008 to find out what was happening on Monday, 4th February 2008, which was the next day that he was due to work. The Operations Manager told the claimant that the matter was out of his hands. The claimant assumed from this that the company had someone else arranged for the site. The claimant did not recall refusing to attend at the office when he spoke to the director on the telephone on the 4th February 2008. A period of time elapsed between the claimant receiving the letter of the 8th February and when he contacted the company, as he consulted a union. The claimant noted that the director's letter of the 8th February did not stipulate a time frame in which he should contact the director to discuss the matter.

In reply to questions from the Tribunal, the claimant stated that he had waited to give an explanation to the company because he did not know what to do. The claimant wanted to be sure that he would be listened to when he attended at the company's office and he needed advice before he met with the director.

Determination:

The Tribunal considered all of the evidence including the nature of the offence, the failure of the claimant to respond to an invitation given on the 4th February by the director to discuss matters and the claimant's own evidence concerning his absence from the client's site.

The Tribunal determines that the dismissal of the claimant was not unfair and the claim under the Unfair Dismissals Acts, 1977 to 2007, fails. The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, also fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)