EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF: **CASE NO.**
Employee UD122/2008

against
Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P. Hurley BL

Members: Mr J. Hennessy
Mr. T. Kennelly

heard this claim at Clonmel on 25th September 2008
and 15th July 2009

Representation:

Claimant(s) : Ms Dorothy Donovan BL instructed by:
Mr. Kevin Brophy, Brophy, Solicitors, 38-40 Parliament Street, Dublin 2

Respondent(s) : Ms. Rosemary Mallon BL instructed by:
Arthur Cox, Solicitors, Earlsfort Centre, Earlsfort Terrace, Dublin 2

The determination of the Tribunal was as follows:-

Respondent's Case:

The Kilkenny store Manager for the respondent in 2004 gave evidence.

He held a meeting concerning attendance issues on November 12th 2004 with the claimant. Also in attendance was a colleague acting as a witness for the claimant (hereafter known as W) and Regional HR Manager. The claimant was offered to have a representative present but decided on a witness. He explained that he held the meeting, as the Clonmel Manager was absent at the time. The witness read a note of the meeting into evidence. The matter of the claimant being absent on certified sick leave but observed working as a DJ was discussed and how this was affecting his job. The claimant was given a verbal warning as he could give no defence.

On November 16th 2004 the claimant was sent a letter from Regional HR Manager to confirm the verbal warning. Three points from the respondent's Q and A booklet was stated in the letter:

"7.0 General lateness and absenteeism cannot be tolerated and will be constantly

monitored.

7.2 A colleague that develops a pattern of absence will be subject to the disciplinary procedures.

7.2 A colleague absent from duty, whether from illness or any other cause without prior permission, must notify the Manager on the day in question before 10 a.m."

The letter also stated, *"unless there is an immediate and sustained improvement in regards to your overall performance and attitude to work you will be subject to further disciplinary action up to and including dismissal".*

On January 24th 2005 another disciplinary meeting was held in Clonmel. The witness, the Clonmel Manager, HR, the claimant and his witness W attended. The claimant was again asked if he wished to have a representative present. The meeting referred to the claimant's first verbal warning in November 2004 and the fact that he had been late on various occasions and out on uncertified sick on two occasions since. The witness read a note of the meeting into evidence. The witness told the claimant that he was concerned that a pattern was clearly showing again and the claimant admitted having difficulty with his attendance. The issue of his hobby of Djing was also discussed and how it was affecting his attendance. The Clonmel Store Manager decided to issue a first written warning. Confirmation in writing was sent to the claimant on January 31st 2005. Again the claimant was reminded of section 7.2 of the Q and A booklet and what would happen if there was no improvement. Section 7.6 of the Q and A booklet was also quoted:

"7.6 A colleague that develops a pattern of absence will be subject to the disciplinary procedures.

Top performance is expected from everyone in (the respondent*) – all the time"*

On cross-examination he stated that he had attended the second disciplinary meeting, as the Store Manager had not been available for the first meeting with the claimant. When put to him he agreed that he could be difficult to contact anyone on the premises at the early hour the claimant had to commence work. He stated that, at the time, the claimant had a record of 36 sick days and 3 uncertified days. The company's Doctor had not assessed him. The witness could not give an accurate number of times the claimant was late for work. He stated that he had worked in the Clonmel premises as Assistant Manager from 1996 to 1998 and there had been no warnings issued to the claimant during that time.

The Manager of the Clonmel store at the time in question gave evidence. His first disciplinary meeting with the claimant was on January 24th 2005 when he issued him with a written warning.

On August 23rd 2005 another disciplinary meeting was held with the claimant relating to his non-attendance at work on August 8th and not contacting the respondent and not coming in the following day but had called in. The claimant's witness attended. They went over the incident and his previous written warning and it was explained that if it happened again "there would be no way of going back". The claimant agreed he understood. He was given a final written warning and sent an explanation in writing.

On December 31st 2005 the claimant was due in work. He texted his colleague (W) at 2.33 a.m.

saying he could not come in. He was also late the following Tuesday and did not apologise until Wednesday. He never said he had difficulty contacting the respondent and the decision was made to re-issue the final written warning.

On April 5th 2006 the claimant was sent a letter from HR concerning a meeting held on March 29th 2006. It was confirmed to him that he was suspended with full pay pending an investigation into allegations of failing to follow the proper attendance procedures. A meeting was arranged for April 11th 2006 in the Naas store. He was advised to bring representation.

Present at the investigation meeting was the Clonmel Manager, the Regional HR Manager, the claimant and 2 union representatives. The minutes of the meeting were read out to the Tribunal. The main issue was the claimant's breach in procedures and the warnings issued to him. The claimant admitted on 3 of the previous warnings he had not contacted the store but on one occasionhe had, could not get through and felt there was no point ringing after 10 a.m. He agreed he had notmade contact on the late incident of March 27th 2006.

On April 13th 2006 the claimant was issued a letter quoting sections of the company's Q and A book, confirming his 3 days unpaid suspension and was reminded that if there was no an immediate and sustainable improvement in his overall performance there would be further disciplinary action up to and including dismissal.

On June 11th 2006 he attended a meeting with the claimant and W which was chaired by the Regional HR Manager. Concerning an alleged incident on June 5th 2006. He had not opened the store on the day in question as he was late 3 hours and had not contacted a Manager. He accepted he had not made contact and said he was not aware of the procedures. The witness stated that procedures had been quoted in all letters sent to the claimant.

On December 19th 2006 another disciplinary meeting was held with the claimant, his witness and chaired by the Regional HR Manager concerning an incident on December 11th 2006. The claimant was absent from work and had texted his colleague (W). The claimant said he was very clear who he had to contact should he be sick in the future. His final written warning was extended until October 2007 that was confirmed in writing.

On May 31st 2007 the witness met with the claimant and the Regional HR Manager concerning texting his Deputy Manager stating he was sick and would not be in work. He declined having a representative or witness present. When asked why he had not rung the store later that morning he replied that he had taken painkillers and had fallen back asleep. He was informed he was suspended with pay pending an investigation and advised to bring his union representative to attend the next meeting on June 6th 2007.

On June 6th 2007 the witness, the Regional HR Manager, the claimant and his union representatives were present. A minute of the meeting was read out to the Tribunal. A history of the official warnings were read out to the claimant. On June 19th 2007 a letter of termination was issued to the claimant. He was given the right to appeal within 5 working days.

On cross-examination he said the claimant had since been replaced. He explained that when the claimant had not turned up for work on the various occasions he had to be replaced. He was not aware staff had a problem contacting the store early in the mornings.

The Regional HR Manager gave evidence. She attended the majority of the claimant's disciplinary

meetings and had written to him to confirm the decision. On Occasions the claimant admitted he had not made contact with store and therefore had not abided by company procedures.

On June 6th 2006 she interviewed the claimant's colleague (W) regarding the alleged incident on Monday June 5th 2006. He declined a witness at the meeting and stated the claimant had asked him to keep hold of his store keys and would open the store for him on the morning of the Bank Holiday Monday.

She stated that the claimant was well aware of company procedures and the consequences if he did not comply with them. She felt the respondent had given him every opportunity possible. The claimant appealed the witness decision of dismissal but it was upheld.

On cross-examination she said that the claimant had admitted not contacting the store on 3 out of 4 occasions. She stated she had made the decision to dismiss, as there had been 7 incidents of breaches of company procedures. She explained that if a member of staff was sick they were to contact a member of management or contact the service desk.

Claimant's case

On the second day of the hearing the claimant gave evidence. He commenced work on a casual basis with the respondent in 1991. In June 1994 he was offered a permanent job by the respondent and accepted. His relationship was very good with the respondent.

He had never understood the respondent's Q and A booklet in relation to the procedure of ringing in to report an absence. His legal representative put to him that from March 2003 to May 2007 it was four occasions that he did not telephone in line with the respondent's procedure. The claimant replied by saying he most likely had telephoned but did not get an answer. During this period he had contacted the respondent twice but neither the manager nor assistant manager was available. He had also texted on two occasions, as when he rang he could not receive an answer. He had separated from his wife since loosing his job in may 2007.

He always had difficulties in getting someone to answer the phone when he rang in. Several others of his colleagues also incurred these difficulties. He was a class A baker and he was not replaced. Just before he was dismissed the respondent recruited a non-national man and a C class baker. These were both on a lower remuneration than him.

Under cross examination it was put to him that he had been given a copy of the respondent's Q & A, he had also received a letter that sets out the policy on contacting the respondent, and it had been explained to him on number of occasions, so why continue to breach it. He replied that he had no difficulty in understanding the respondent's sick leave policy in relation to uncertified and certified leave.

He agreed that he had signed the incident form in November 2004, which notes a disciplinary meeting. Within this is it is noted that the claimant was given a copy of the respondent's Q & A. He was also told to request help if he needed it. This meeting led to a verbal warning. From November 2004 he was aware of what he was required to do if he was not going to report for work as rostered. The claimant said at this time he was still not up to speed on this, and did not understand it. He did recall at one of the meeting he told EB that he could not get through on at least one occasion. He had contacted MM a fellow baker on one occasion to report his absence.

He had continued to breach the respondents attendance procedures and this had resulted in another meeting in January 2005. He received his first written warning which outlines what he was required to do in the event of an absence. He agreed that the relevant parts of the Q & A were outlined in this written warning, however he had since learnt that his union had not signed up to the Q & A. He was asked whether or not if it was agreed policy was it not reasonable that he should contact the manager before 10.00am if he was going to be absent that day. The claimant re-iterated that he had difficulties getting through to the manager. He accepted that during the course of his employment he had never said he had attempted to ring the manager.

The claimant received his final written warning on the 24th August 2005. The claimant explained that from 2005 to 2006 he was experiencing difficulties in his personnel life and he could not recall if he had explained to the respondent that he could not get through by telephone. In December 2005 he texted a colleague at 2.33 am to let him know he would not be in for his shift that morning. The claimant said the respondent had never asked him why he had got in touch with his work mate at this time; he explained that he had to bring his wife to hospital that night. She had been suffering from depression at the time, while all in work knew what was going on, he had tried to keep it private.

The claimant's final written warning was re-issued to him on the 13th April 2006 and he was suspended for three days unpaid. It was put to him that the seriousness of his situation could not have been lost on him. The claimant explained his mind was not focussed on work at this time because of his home life. On the 5th June 2006 the claimant was late for work. He was due in at 7.00am but did not arrive till 10.15am. He telephoned a fellow baker to inform him of his lateness. This was in breach of the company policy, he explained at this time he was 90% sure of this policy. He did not obtain permission from the manager to start work as required if you are late over one hour. On the 11th December 2006 the claimant texted another baker to inform him that he would not be attending work. A meeting followed this incident and the claimant's final written warning was extended. He was suspended without pay on the 31st May 2007. On the 30th May he texted the Duty manager to tell him he would not be in to work. He explained he texted rather than telephoned, as he knew he could not get through. Also the procedure might have slipped his mind as he was suffering from mental anguish at that stage.

When asked if he would accept that he consistently failed in adhering to the respondent's attendance policy, he replied that he could not understand the respondent's Q & A. He thought that the respondent would have taken his years of service in to consideration and let him off one more time. He was dismissed for non-compliance with the reporting of absences from work. He gave evidence of loss.

Under re-direction he confirmed that he did not read any of the incident reports before he signed them. He reiterated he had difficulties in telephoning and getting an answer. The unions were aware of these difficulties. He had commenced employment with the respondent in June 1991 and up to 31st January 2005 when he received his first verbal warning his attendance had been excellent.

A union representative gave evidence on behalf of the claimant. He maintained that the respondents Q&A did not apply to the bakers as agreed with the company. The attendance policy in the Q &A did not meet the respondent's needs in relation to the bakers. He explained that bakers would have to ring between 5.00am and 7.00am in the morning so hence the phone system in the store would not be manned. They have previously raised this difficulty with the respondent. The norm is that the charge hand of the bakery would arrange for casual cover when a baker informs

him of his absence. No baker has ever been dismissed from the respondent for not telephoning in. He believed it was an opportunistic move on the respondent's behalf as the claimant was a Grade A baker and paid highly.

Under cross examination it was put to him that he was at the meeting on the 9th June 2006 that ultimately led to the claimant's dismissal and that at no stage was it raised that the claimant had tried to make contact before he sent the text on the 30th May 2006. This witness maintained thatanother union representative had raised the difficulties they had with management ringing in, onseveral occasions. He accepted that the claimant did not telephone on this occasion but had triedtelephoning on previous occasions. The claimant had once telephoned a senior manager to reporthis absence at 6.00am and this manager told him not to telephone again.

He maintained that if a company is going to implement an absence policy they have to ensure that the facilities to do so are available to employees. All bakers normally arose at about 5.00am in the morning and it was unreasonable of the employer to expect them to wait around to telephone until 8.00am. His position was that the absence policy did not meet the company's needs in respect of their bakers. There were informal arrangements in place were if a baker was going to be absent he could contact him and he would arrange cover. They are attempts at the moment to put a formal arrangement in place between the unions and HR for covering absent bakers. Previously a hotline was introduced on a pilot basis in one of the respondent's stores. This hotline took messages 24hours a day. The respondent withdrew this hotline with no notice to the unions a few months later.

Determination

On the totality of the evidence it would appear that the respondent had no other options but to dismiss the claimant. The respondent rigorously adhered to their policy and the final written warning was extended on a number of occasions. The Tribunal is unable to find that the claimant'sdismissal was unfair or a disproportionate response to the problems created by his behaviour. Therefore his claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)