

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE - claimant

CASE NO.
UD45/2009
MN47/2009
WT24/2009

against

EMPLOYER - respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005 ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms N O'Carroll-Kelly BL

Members: Mr W Power
Mr P McAleer

heard this claim at Cavan on 8 July 2009

Representation:

Claimant(s): Mr Paul Madden
Paul Madden & Company
Solicitors
The Diamond
Clones
Co Monaghan

Respondent(s): Mr Terry Cummins
IBEC
Confederation House
84-86 Lower Baggot Street
Dublin 2

The determination of the Tribunal was as follows:-

Respondent's Case:

The claimant commenced her employment with the respondent company, a large chicken processing factory, on 18 April 2007 and was dismissed on 13 October 2008. The production manager (PM) gave evidence that the respondent company has a workforce of 450 employees, with a large proportion of non-Irish nationals. PM has responsibility for the holiday roster. During the

week beginning 15 September 2008 the claimant sought the following two weeks off from work, but PM was unable to authorise it. He said that two weeks later would be fine. It was a common occurrence for PM to have to refuse holiday leave applications owing to the business being a fresh food supplier.

The claimant told PM that she had a pain in her face, which he interpreted to mean she had a toothache. He did not detect any sense of urgency in her request. The claimant attended work on 22 September for six hours before leaving. A colleague informed PM that she had left. On Tuesday 23 September the claimant did not attend work and a doctor's certificate was given to the wages office. This set off alarm bells in PM's head, an employee having had holiday leave refused and then going on sick leave.

On Wednesday of the first week PM phoned the claimant and heard an international dial tone on the line. He delivered a letter to her home requesting that the claimant contact PM regarding her absence. PM received no contact from the claimant. A second sick certificate was received from the claimant, dated 30 September 2008, covering a further week off. On 7 October 2008 PM sent a message through another employee stating that he wished to see her. He met the claimant on 8 October 2008. A SIPTU trade union representative was present and a Polish interpreter. PM told the claimant that the company viewed very seriously that the claimant had taken the law into her own hands and taken time off. PM suspended the claimant, with pay, but this was not put in writing as it was not company procedure. However, PM agreed that through a clerical error the claimant was not paid while on suspension and she is due the payment.

The next meeting was held on 13 October 2008. The claimant said that she had had a toothache and had gone to Poland for treatment. PM told the claimant that the company had 450 employees, with three or four going to the dentist every week, and that two weeks was not required for dental treatment. PM dismissed the claimant for taking an unauthorised absence.

PM agreed that he had carried out the investigation and looked at all the facts. He considered the situation, and previous similar situations. He took that into account when making his decision. The claimant said she would appeal the decision. The company received notification of the appeal from SIPTU, but later received notification from a solicitor for the claimant stating that she was bringing a claim to the Tribunal. The internal appeal therefore, was never heard.

During cross-examination PM stated that while the company accepted the doctor's certificate, some doctors certified patients for a longer period of time than others. PM had arranged for the SIPTU representative to be present at the meeting and he believed that the claimant had time to step out and consult with the representative during the meeting. There were no minutes taken at the meetings, as it was not company procedure. The claimant was told of the seriousness of the meeting, but was not advised in writing.

The company received a translated Polish doctor's certificate from SIPTU, with the notice of appeal, stating that she had received dental treatment in Poland involving tooth extraction, and indicated that the claimant had suffered from tetanus and had been prescribed antibiotics. PM contended that the claimant had not expressed any urgency when seeking the time off.

PM considered that if an employee was unfit to work then they were also unfit to travel. PM considered that he had fairly investigated the situation by looking at all the facts. He considered that the claimant had flown to Poland where she stayed for at least a week, after having been refused leave for that period. PM had offered the claimant two weeks leave in October. PM felt he

had no other option but to dismiss the claimant. PM considered that he would still dismiss the claimant if he had had all the documentation available to him that was now available.

The general manager (GM) of the respondent company gave evidence that the company has a strong ethos and good communications with the trade union. The company would not refuse time off if it were important; however there had been a lack of communication between the claimant and the company. Employees are allowed a paid hour to attend a doctor or dentist if necessary and must provide a certificate. GM considered that there were facilities in Ireland able to treat a problem, like the claimant's, although it might be costlier. However, it would be difficult for the company if everyone went to their own country for treatment.

GM is the appeals officer in the company. The SIPTU office in Cavan wrote to GM concerning the appeal. When GM received a letter from the claimant's solicitor he informed SIPTU. Their view was if a solicitor were involved they would not be. The internal appeal, therefore, never took place.

Claimant's Case:

The claimant gave evidence that the first time she sought leave was on 19 September 2008. On 20 September she attended her dentist, who advised her that she needed to see a specialist. She was advised that the treatment was very expensive and that she would have to wait months for an appointment. The claimant decided it would be better if she went to Poland. She had a colleague bring the doctor's certificate to work as she was in severe pain. The claimant booked a ticket to Poland for the 24 September and underwent surgery on the 25 September. The claimant was given antibiotics and pain relief.

The claimant returned to Ireland on 27 September 2008. She still felt unwell and went to her doctor a second time for a certificate. When the claimant went to work with the second certificate she was told that a manager wished to speak to her about her absence. The claimant went to the SIPTU office on 28 September and they told her they would send her Polish medical certificate to her employer and explain her absence. When the claimant attended work on 8 October 2008 a SIPTU representative asked her what had happened.

She attended a meeting with PM, the SIPTU representative and a Polish interpreter. The claimant explained that she had been to Poland for dental surgery. PM told her that she was suspended while he decided what to do. The claimant returned for another meeting. PM stated that if all employees did as she did the company would go out of business and told her that she was being dismissed. The claimant was not given any opportunity to speak to the trade union representative alone.

During cross-examination the claimant stated that she had sought five days leave and had not stated that she intended to go to Poland. The claimant did not approach PM with a medical certificate or explain why she needed time off, as she wanted to be fair to the company and use her annual leave in order to seek treatment. The claimant did not seek union advice, as she was unaware that the union dealt with such issues. The claimant went to a solicitor as she was waiting for a response from the union, but did not receive one.

The claimant had dental pain from the beginning of September and had been taking painkillers, but the pain got worse. The claimant believed she would need a week off for treatment. The claimant disputed receiving the letter from PM, but went to SIPTU, as she was concerned about her situation. The claimant stated that no one informed her of her right to appeal until she went to the Cavan office of SIPTU on 13 October 2008.

Determination:

The Tribunal is satisfied that the dismissal was unfair and that there wasn't a satisfactory investigation into the claimant's circumstances, and the claimant did produce satisfactory documentary evidence to corroborate her oral evidence. However, the Tribunal feels that there was an onus on the claimant to exhaust the company's appeals process, and her trade union representative and her solicitor should have advised her of this. However, having considered all of the evidence and documents submitted, the Tribunal find that the claimant was unfairly dismissed and accordingly awards her €2,500 (two thousand, five hundred euro) under the Unfair Dismissals Acts, 1977 to 2007.

The Tribunal finds that the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, succeeds and awards the claimant €450.91 (four hundred and fifty euro, ninety-one cent) in respect of one week's notice. The claim under the Organisation of Working Time Act, 1997, is dismissed as no evidence was adduced in respect of that Act.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)