

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE

- claimant

Against

EMPLOYER

- respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms O. Brennan BL

Members: Mr J. Horan
Mr S. Mackell

heard this claim at Naas on 29th April 2009 and 24th July 2009.

Representation:

Claimant: Mr. Brian MacMahon, Arthur E. MacMahon, Solicitors, Poplar Square, Naas, Co. Kildare

Respondent: Mr. Eamon Shortall BL instructed by Mr Michael Moore, Michael Moore & Co, Solicitors, 8 Merrion Road, Dublin 4

Dismissal as a fact is in dispute.

The determination of the Tribunal was as follows:-

Preliminary Issue:

Having considered the issue over the submission of the claim outside the initial six-month time limit the Tribunal finds that extraordinary circumstances existed and that the Tribunal had jurisdiction to hear the case.

Claimant's case:

The claimant commenced employment in May 2004. He was employed as a Fitter/Welder. In the afternoon of 10th April 2008 he injured his back while lifting a sheet of metal in the course of cleaning a trailer. As he did not speak English he could not report the incident to his superiors. He said that some colleagues had witnessed the incident. A colleague helped him finish his work that evening and gave him painkillers to ease the pain.

The following morning he did not attend work. His son contacted the respondent and informed him of his father's illness. The claimant visited a Polish doctor in Dublin at approximately 3.30 pm that day. His son accompanied him. The doctor prescribed painkillers. As he was still in a lot of pain he decided later that night to go to Naas hospital and his son accompanied him. A nurse took details of his injury but he did not wait to be examined by a doctor. The next morning 12th April 2008 he travelled home to Poland and was examined by his own doctor. He was prescribed a series of injections but was still unwell. He was hospitalised for three weeks. He sent his medical certificates to his daughter in law who took care of his affairs in Ireland during his absence. She in turn furnished the medical certificates to the respondent. His colleagues from the company sent him a get-well card early in May and some time later the respondent issued a P45 to his address in Ireland. He was very disappointed.

It was always the claimant's intention to return to work in Ireland. Around 30th July 2008 the claimant felt he could return to work as he had made a good recovery. However, he had received his P45 by post in mid June and understood the respondent dismissed him then. He never informed the respondent that he was not returning to work. His son had been in touch with the respondent during his illness. Because he had no income he sought occupational injury benefit from the Department of Social Welfare. He was then issued with a P45.

The claimant's son (T) gave evidence. When he returned from work on 10th April 2008 he noticed that his father was quite unwell and he accompanied him to the doctor the next day. He duly notified the respondent that his father was ill and would not be at work that day. Having consulted with his mother later that evening following his father's visit to the hospital a decision was made that his father would travel home to Poland the following morning and consult with his Polish doctor. The following Monday T informed the respondent that his father would not be attending work and asked a colleague of his father (S), who shared a house with them, to deliver a medical certificate to the respondent. He also was in touch with the respondent concerning his father's illness some weeks later. He told the respondent that he was unsure as to when his father could return to work and the respondent said that it was ok.

The claimant's daughter-in-law (U) gave evidence. Together with her husband and family she lived with the claimant. On 10 April 2008 the claimant returned from work and went straight into his bedroom. This was most unusual. When T returned from work that evening she asked him to talk to the claimant, as she knew something was amiss. Together with T they located a Polish doctor in Dublin city and insisted the claimant visit him the next day. T informed her that the claimant had tried to lift something heavy at work and had hurt his back. T took a day off work and brought the claimant to the doctor. T informed the respondent that the claimant was ill and would not be at work that day.

The claimant took tablets prescribed by the doctor but his pain did not ease. T telephoned her to check out the prescribed tablets on the Internet. On foot of a newspaper article on the Internet concerning the prescribed tablets, U decided to ring her own GP in Poland to clarify matters. That evening T took the claimant to Naas hospital but as a doctor had not attended him after several hours they both left the hospital. T was in touch with his mother in Poland and his mother booked a flight on the Internet for the claimant to return home to Poland the following day. T gave the respondent the first medical certificate from the hospital and subsequent medical certificates were posted to the respondent.

Respondent's Case:

The Managing Director (M) gave evidence. The company employs four full time staff and three part-time staff and is engaged in manufacturing and refurbishing articulated trucks. The claimant was employed as a fitter/welder. He had been engaged in similar work with a previous company. His work did not require him to lift a sheet of metal. He was a good employee and had worked with the respondent for approximately three and half years.

Thursday, 10th April 2008 had been a normal working day and no injuries/incidents had been reported from any staff member. Guidelines for reporting injuries are clearly set down in the written safety statement handed to each employee on commencement of their tenure and are also displayed on several walls throughout the company. No matter how small an injury each employee is required to report it to management and this is recorded in the company's Accident Report Book. M had taken the claimant through these procedures upon his commencement with the company. M explained that forklift trucks were provided for lifting heavy objects and no one was expected to lift a heavy object on their own.

On 11th April 2008 while in the yard with an employee discussing the planned work for the day, two employees (G & S) approached him. G relayed a message from S that the claimant was sick. The following Monday, 14th April 2008 M received a message from G that the claimant had gone home to Poland. No reason had been given for the claimant's return to Poland. He enquired from two employees on several occasions as to how the claimant was but did not receive any feedback. Three weeks later T called into his office and gave him a medical certificate covering the claimant's absence from 17th April 2008 to date. T said the claimant would not be returning to work. M enquired if the claimant was ok and T informed him that the claimant was not great and that his illness was ongoing and that he had not been looking after himself.

No further medical certificates were received from the claimant. M had not received any phone calls from the claimant or his family regarding the claimant returning to work. Subsequently, the company sent a Get Well Card to the claimant.

An employee N gave evidence. He had worked in the company for nine years. Safety and health documents were handed to each employee on commencement of employment. These documents were also displayed on various walls in the company. No employee was expected to lift heavy objects. They all worked in unison. He was unaware of any incident occurring in the company on 10th April 2008. As each employee worked in close proximity to each other everyone would be aware if any incident occurred. He was present in the yard on 11th April 2008 when a message was given to Director M that the claimant was sick and N was again present the following Monday when M was informed that the claimant had returned to Poland.

A Company Director who was also the Company Secretary (K) gave evidence. His role entailed looking after the finance, wages, purchasing and paperwork for the company. He was a First Aider. He found the claimant to be a gentleman and an excellent worker. The claimant was a good time keeper and was held in high esteem. During the claimant's tenure he had never had to caution him. The claimant was afforded time off to return to Poland on occasion at his own expense.

K worked from 7.45 to 5.45 pm on 10th April 2008. No incident was reported to him. He was responsible for the Accident Report Book and there was no entry for that day. The claimant's son handed in the first medical certificate covering the claimant's absence from work to him three weeks later. K enquired from other employees if they knew the nature of the claimant's illness but no one did. K contended that the claimant had not been dismissed from the company.

The claimant had not returned to work following his hospitalisation in Poland. On foot of a letter dated 9th June 2008 from the Department of Social Welfare, which outlined that the claimant was seeking illness/occupational injury benefit, he issued a P45 to the claimant.

Determination:

The Tribunal determines by a majority decision, with Mr. Mackell dissenting, that the termination of the claimant's employment was not a dismissal and accordingly his claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

The following is Mr. Mackell's dissenting opinion:

There is an obligation on an employer in an unfair dismissal case to show that they acted reasonably in that dismissal.

Direct evidence was given by witnesses for the employer that the claimant was an excellent worker. One, K, referred to him as a "gentleman". The witnesses for the employer also said that there were absolutely no issues surrounding the claimant's workmanship. The employer decided to terminate the employment of the claimant after the absence of the claimant from work due to sickness. The employer in evidence stated that they made no attempt to contact the claimant to ascertain when he intended to return to work. The employer gave evidence that they dismissed the claimant when they received notification from Social Welfare stating that the claimant was seeking statutory sickness allowance. They dismissed the claimant by issuing his P45. They claimed that they were trying to help him secure this allowance by dismissing him. The claimant was given no prior notice of the dismissal or an opportunity to appeal it.

Given the exemplary work record of the claimant and in the circumstances above it is clear that the employer acted in an unreasonable manner and therefore the claim for unfair dismissal should be allowed.

The following is the majority decision of the Tribunal:

The Tribunal carefully considered the evidence adduced during this two-day hearing. It is clear to the Tribunal that there is a conflict of evidence between the parties. The respondent clearly stated that they only received one medical certificate which was hand delivered by the claimant's son, covering the claimant's absence over a ten day period. That day the claimant's son also informed the respondent that the claimant would not be returning to work. No medical certificates were received in respect of the claimant's further absence from work. The claimant's witnesses clearly stated that numerous medical certificates were furnished to the respondent covering the claimant's absence but the respondent's witnesses denied this. The respondent believed that the claimant was not returning to work and that he had left work due to his illness. The respondent contended that they did not dismiss the claimant and it was only on foot of a letter from the Department of Social Welfare dated 9 June 2008 that they issued the claimant with his P45.

The Tribunal determines by a majority decision, with Mr. Mackell dissenting, that the termination of the claimant's employment was not a dismissal and accordingly his claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)