

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

Employee

– *claimant*

CASE NO.

UD1561/2008

MN1504/2008

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. J. O'Connor

Members: Ms. M. Sweeney
Ms. H. Kelleher

heard this claim at Tralee on 1 May
and Killarney on 9 November 2009

Representation:

Claimant: Mr. Andrew McCarthy, Sectoral Organiser, SIPTU, Connolly Hall,
Upper Rock Street, Tralee, Co. Kerry

Respondent:
Regional Manager of the respondent

The decision of the Tribunal was as follows:-

The claimant, who has a degree in social science, was employed in a locum security position from 30 July 2004. After approximately one year his position changed to being a locum project worker in the respondent's Tralee hostel. The respondent provides hostels for homeless people. The respondent's clients have a chaotic lifestyle and possibly suffer from substance abuse. The hostel operates 24 hours a day, seven days a week and is State funded by the HSE. Full time and part time staff were employed, and a certain staffing level was required to operate the hostel. Because of illness, holidays, emergencies or as needs crop-up, the respondent operated with locum staff. Locum staff undertake to make themselves available to work a day or night shift on short notice. A day shift is for eight hours and a night shift is for ten hours. The nature of the employment was such that hours could not be guaranteed. Over the last eighteen months of the claimant's time working for the respondent he averaged between fifteen and twenty hours a week.

A locum staff member was not obliged to always be available for work, and a relief panel of six or seven people operated. The contract of employment required such people to be available for work when they can. An example of the operation of this procedure would be where an employee was unavailable through illness, a relief person would be telephoned to act as a replacement. While there was an obligation on the hostel manager to provide cover for a shift but there was no obligation on a relief person to accept a shift. However, it was essential that if a relief person gave a commitment to cover a shift, they do so. Generally, a relief cover should be available but if an offer was made and accepted by a relief person, that acceptance represented a commitment. If subsequently it arose that a person who accepted an offer of a shift in good faith was no longer available, such person should advise the respondent immediately. If they were unable to advise immediately, they should do so as soon as possible thereafter and they should provide a good reason for their failure. If a locum failed to turn up this invariably meant a member of the permanent staff having to remain on duty to cover the shortage.

The employment was uneventful until 21 March 2008 when the claimant met the newly appointed manager (MT) of the Tralee hostel and told him that he was sick of the respondent. MT related this dissatisfaction to the claimant's failure to obtain a permanent position with the respondent. MT asked the claimant to return and promised that he would treat the claimant fairly and give him a "fair crack of the whip". The claimant agreed and returned to work.

The claimant failed to attend work for an early shift, beginning at 7-30am on 29 April 2008. The respondent had to make alternative arrangements for the missed shift. It was the respondent's position that the claimant had not informed management of his inability to attend work that day. The claimant's position, supported by his mobile phone records, was that he had contacted the on-duty staff of the respondent the previous day to inform them of his unavailability for 29 April 2008.

No action was taken in regard to the claimant's absence on 29 April and the claimant continued to work until his last shift on 15 June 2008. However, when the respondent discovered, during the morning of Tuesday 24 June 2008, that the claimant was not going to cover the late shift, from 2-30pm that day, in circumstances where he was due to work the following Friday, Saturday and Sunday, MT took the decision to withdraw the offer of those shifts to the claimant in lieu of a satisfactory explanation from the claimant about both his absence on 24 June 2008 and his attitude to the respondent going forward. To this end it was arranged for the claimant to meet MT on 1 July 2008. The claimant failed to attend this meeting.

The claimant attended an interview for a permanent position within the respondent as a care worker on 18 June 2008 at which MT and his assistant formed two of the three members of the interview board. On 15 July 2008 the respondent wrote to the claimant to say that, whilst he had not been successful in regard to the position on offer, he had been placed on a panel of three for any vacancies over the next six months. Around this time the claimant again made known his dissatisfaction with the selection process. Whilst attending the respondent on a monthly basis in order to get Social Welfare documentation signed the claimant never arranged to meet MT to discuss his situation. In October 2008 the claimant sought his P45 from the respondent claiming to have been dismissed on 15 July 2008.

Determination:

Following the claimant's failure to attend work on 24 June 2008 it was reasonable for MT to want to meet the claimant and to clarify the situation. The claimant did not attend the meeting arranged with MT on 1 July 2008 and subsequently failed to make any alternative arrangements for such meeting. He merely turned up on an ad hoc basis expecting MT to facilitate him on the spot. The claimant was well aware that until he had met MT to discuss his situation he was off the roster. The Tribunal is not satisfied that the respondent dismissed the claimant on 15 July 2008 or at anytime. Rather the claimant resigned when requesting his P45 in October 2008. In such circumstances claims under both the Unfair Dismissals Acts, 1977 to 2007 and the Minimum Notice and Terms of Employment Acts, 1973 to 2005 do not arise

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)