EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	CASE NO.
Employee	UD468/2009 MN473/2009

claimant

against

Employer **respondent**

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. O'Leary B L

Members: Mr D. Moore
Mr A. Butler

heard this claim at Dublin on 12th October 2009
and 1st December 2009

Representation:

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Claimant(s): Mr. Andrew Whelan BL instructed by Grainne Hassett Donal Taaffe & Co., Solicitors, Malthouse Square, Smithfield Village, Dublin 7

Respondent(s): Mr. John Barry, Management Support Services (Ireland) Limited, The Courtyard, Hill Street, Dublin 1

The determination of the Tribunal was as follows:-

Respondent's Case

The operations manager LT told the Tribunal that the respondent delivered valuables and the claimant drove a security truck. The claimant reported to the control room and to the operations manager. When employees reported for work in the control room it was manually documented. If staff reported late a telephone call was placed to the control room and a member of staff deputised. The claimant applied for the position of relief supervisor. Rostering was completed in the control room for the next day and crews should not be aware of what run they were on for security reasons.

The claimant frequently undertook runs with a garda escort. Two employees undertook the delivery to ATM machines and three employees undertook deliveries with coins. There was always more than one employee on a run. The city run commenced at 6.15a.m and it could commence at

7a.m. Staff were members of SIPTU and had an agreement in 1998, which was amended in 2004. Staff were vetted for the previous ten years as part of the PSA requirement and this was completed for all employees. The claimant received a copy of the respondent handbook. Prior to the last eighteen months the claimant always facilitated the company to the best of his ability. The claimant was disciplined no more or no less than any other employee.

Towards the end of 2007 the claimant's attendance deteriorated and he had personal issues. The claimant had considerable sick leave and lates in January 2008 and some of his illness was certified. The only months that the claimant was not ill was February 2008 and he was on holidays for most of the month. On occasion he reported for work an hour late. From January to May 2008 she spoke to the claimant off the record and she tried to see if she could help the situation. The respondent could not sustain the claimant's volume of absences and lates. At a disciplinary meeting on 10 June 2008 she spoke to the claimant and his shop steward. The claimant stated that his lates were due to the volume of traffic and there was no improvement in his timekeeping and his lates. The claimant needed to improve and he told her he would have less absences. The claimant was issued with a written warning on 10 June 2008. The claimant had the right to appeal this after seven days.

A meeting was arranged with the claimant on 29 July 2008, the claimant stared out the window and had no interest in what she had to say. On one occasion in July 2008 the respondent had to telephone the claimant to establish his whereabouts, as he was an hour late. The claimant was given a final written warning and he did not appeal it. There was no improvement in the claimant's attendance. In August 2008 the claimant had three more lates and three more sick days and she spoke to him about this. The following month the pattern re-occurred. If he was late he would not contact the respondent. She invited him to a meeting on the 1 September 2008 along with his union representative to discuss his absenteeism and she suspended him without pay until the 4 September 2008. She attended a meeting on 4 September 2008 and told the claimant to look at his record. He asked for one more chance and she felt that he was not going to improve. She had a conversation off the record with him and he bought her a bottle of perfume. The claimant's father and brother worked with the respondent and she gave him every possible chance. She felt that the claimant was not going to improve after so many chances. She told him that his employment was going to be terminated.

The dismissal was appealed to AJ who was MD at the time. She did not discuss the appeal with the MD. It was not true that she had a relationship with AJ.

In cross-examination she stated that she did not send the claimant to the respondent doctor. It was company policy if an employee were ill to provide a medical certificate after three days of sick leave absence. If an employee had a pattern of medical certificates this could lead to a disciplinary. She could back up the claimant's lateness with CCTV and rosters. Lates were recorded on a manual and on an Excel report. At the time of hearing there was no clock in system in place. Formerly there was a clock in system in place, which did not work, and the respondent are in the process of getting a clock in system. She agreed that it was important to maintain accurate records regarding lates. She agreed that errors could occur on a manual system. She stated that on one occasion the claimant returned a vehicle to the respondent premises and he did not inform her of this.

In answer to questions from the Tribunal she stated that employees keep a diary. If employees were late this was reflected in their pay slips and pay was not deducted from employees who were up to fifteen minutes late. If an employee arrived ten minutes after the start time it was recorded

as a late and an employee would not be aware of this as a deduction in wages was not made. The HR manager sat in on the first disciplinary hearing. It was company practice that a medical certificate was to be supplied after a three-day absence and this was sent to HR. A standard letter was in place regarding warnings. If an employee had two sick days, which were uncertified, they were not paid for it.

She met the claimant prior to 10 June 2008 for an informal chat. Depending on the seriousness of the matter the respondent could "jump" to the next stage of the procedure. The claimant had the opportunity to improve before she dismissed him. She felt a written warning was more beneficial than a verbal warning.

OH told the Tribunal she was HR manager with the respondent and she outlined to the Tribunal the claimant's absences and certified and uncertified sick leave. She did not have records to indicate when salary was deducted from the claimant regarding absences and she did not have the claimant's medical certificates. If an employee arrived late for work they could be put on standby and another employee would undertake the run. If an employee was not available to undertake the run it would have to wait. The claimant contacted the control room sometimes and other times he did not. The claimant's lates were in excess of an hour and the reason for his lates was that he slept late. The HR manager attended meetings as an observer and note taker and she had no involvement in the decision making process. The claimant had a very high level of absences and there was not a month when the claimant was not sick.

At a meeting on 10 June 2008 LT spoke to the claimant in the presence of the shop steward. The claimant had nothing to say during the meeting and was not interested. LT chose to issue the claimant with a written warning. She was aware that the claimant was attending counselling and the respondent endeavoured to support him. She felt it was best to issue a written warning and bypass the verbal warning. The claimant had seven days to appeal the written warning and the claimant did not lodge any appeal. The next time that LT took action was on 29 July 2008 when the claimant was issued with a final written warning. The claimant was invited to a further meeting on 1 September 2008. The claimant was issued with a letter of suspension without pay on 1 September 2008.

On 4 September 2009 the HR manager attended a meeting with the claimant, LT and RQ shop steward. The claimant sat back at the meeting and at the end of the meeting he realised the seriousness of the situation. The claimant asked LT for a second chance. The claimant was dismissed and was issued with a letter of dismissal on 4 September 2008. The claimant was advised that he could appeal the decision to the country manager AJ. The claimant appealed the decision. The HR manager attended the appeal hearing on 9 September 2008 along with AJ, and the claimant, the claimant's trade union representative and the shop steward RQ. At the meeting AJ did not say he was under pressure to overrule the decision to dismiss the claimant. AJ took a break, as he had to digest all the information that he was given and return with a final decision. AJ upheld the decision to dismiss the claimant.

In cross examination the HR manager stated that if there were inaccuracies in the claimant's level of absences that he still had a high volume of absences. All of his illness was not certified and she had a record of the claimant's medical certificates. She agreed that the record keeping that the respondent had allowed for error.

Claimant's Case

The claimant told the Tribunal that he was employed with the respondent for five years. The respondent delivered coin and cash to banks. He was promoted to ATM crew leader and he serviced and repaired the ATM machines He liaised with the vans on the road and he was relief supervisor. His relationship with the respondent was good until the last six to seven months and he worked in every department in the respondent. He had a good relationship with LT and AJ. He always finished his runs and he loved his job. In the last six to seven months he did not know what happened, he was always in trouble and the respondent did not have an accurate record of his sick absences and lates. He stated that he got into his van and did his work. He never questioned his payslips. He felt that the sick leave the respondent had documented for him was incorrect and he never had uncertified sick leave. He spoke to LT about his sick absences. In June 2008 he was issued with a first written warning. There was no official discussion about his lates. At the meeting LT told him that his lates and sick leave would have to improve. He did not want to lose the counselling that the respondent provided for him, he just wanted to get on with his job and he did not want to appeal the first written warning. He had a good relationship with LT. He did not want to be in attendance at that meeting, he did not look out the window and he always cared about his job. He was reprimanded in July 2008 for his lates and illnesses.

He worked in the control room and sometimes when people reported for work he could miss people coming through. On receipt of the first written warning he did not request details of his lates. LT told him that he had seven lates and seven sick days. LT asked him if money was missing from the van and she told him someone took it. Within two days he was brought upstairs and suspended. He questioned where the information came from. He did not know how sick leave and lates were calculated. He was dismissed as a result of evidence that the respondent presented to him on a sheet. He appealed his dismissal. He attended the appeal meeting with AJ the country manager, RQ shop steward and KMH trade union representative.. OH, Hr manager changed the dates on the sheet that she presented to him. AJ, country manager discontinued the meeting, as he needed to find out what was going on. A couple of days later he was given a sheet by the HR manager and the dates on the sheet did not match the first sheet. He was informed that AJ was going to have a look at it. The claimant went home and then called in to AJ's office and AJ told him that he had upheld the decision to dismiss him. He obtained alternative employment in September 2009 and he earns €10 per hour and he did not receive a written reference from the respondent.

In cross-examination he stated that he signed the company handbook in the year when he joined the respondent. When he worked in the control room if he did not observe someone coming in he would be aware if they had reported for work depending if the van had left the premises. Some lates were not documented as late and on occasion if an employee was missing it was recorded as a late. He never accepted that he was an hour late for work. He may have been late by five to ten minutes.

LT asked him to give up work, which he undertook with another company while employed with the respondent. He felt that one of the reasons he received a warning was that he returned a van to the respondent premises as his partner's grandfather had died and he needed to mind their child. He did not accept that there was not a month when he was not absent from work. He could not recall a week when he did not receive any pay and he did not check his payslips. He chose not to appeal the first written warning as he had asked for a list of the days he was absent and was not given them. He realised his job was on the line at a disciplinary meeting in September 2008.

In answer to questions from the Tribunal when he was asked about a reference he stated that he thought he was told that a reference issued with his final salary. An employer would request a

reference from the respondent if he was seeking work. He would be aware if he received extra money in his payslip, as it would be addressed to him as crew leader. If he had unpaid days in his payslip this would not be documented but would be reflected in the gross figure. He did not check his payslip if he worked for five days. He reiterated that he never queried what was on his payslip. He did not produce his bank account when he attended meetings with the respondent. He obtained permission from LT to work elsewhere while employed with the respondent. He disagreed that he had thirty-nine days absences, twenty-two holidays, one days unpaid leave and six days force majeure leave. He agreed that he had some sick leave. Out of thirty-nine days he was absent he stated that fifteen to sixteen days were not sick absences. He could not identify what uncertified sick days that he had.

AJ the former country manager told the Tribunal that that he dealt with the claimant's appeal. He obtained information from all sides and the claimant's sick absences were not clear. The claimant pleaded for a chance to modify his behaviour. LT tried to get the claimant on the straight and narrow. The claimant had difficulties at that time. He took account of the claimant's five years with the respondent. He went through the claimant's attendance record that was presented to him. He concluded that the claimant was given plenty of chances to mend his ways and it was not fair to put the respondent in jeopardy. He took other issues into account before he made his decision to dismiss the claimant.

In cross-examination he stated that when he looked at the information he was given that the figures did not add up. When he was asked if it was ever suggested that LT had it in for the claimant he replied that the claimant said that LT did everything she could for him. There was never a question that LT would resign if he did not uphold the decision to dismiss the claimant.

In re-examination he stated that the record keeping that the respondent had in place worked in the employees favour. The record keeping in the company was fine.

RQ told the Tribunal that he was the senior training officer with the respondent. He was employed with the respondent for twelve years and he was shop steward for the past seven years. . He was familiar with the claimant's case. He was the claimant's representative at the disciplinary hearing, the suspension and final written warning. The claimant did not keep a diary, the witness kept a diary and it was not compulsory to keep a diary. The reason that the claimant was given a warning was due to his lates and sick leave. He was surprised that LT decided to dismiss the claimant. He stated that employees were entitled to thirty days sick leave after five years with the company.

In answer to questions from the Tribunal he stated that he looked at his payslip every week. He would think it unusual that the claimant did not check his payslip.

Determination

The information used by the employer to support the dismissal of the claimant was incorrect and therefore it rendered the decision to dismiss unfair. The Tribunal finds that the claimant contributed very substantially to his dismissal. When considering the remedies under the Unfair Dismissals Acts, 1977 to 2007 the Tribunal finds that re-engagement is the most appropriate remedy. This is determined on the terms that he is on his final written warning. This is to last on his record for a period of six months. He is to be re-engaged from two weeks after the date of issuing of this determination. The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 was settled between the parties at the hearing.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)