

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

EMPLOYEE - *claimant*

MN329/2009

UD330/2009

WT141/2009

against

EMPLOYER - *respondent*

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997
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 B. Byrne

heard this claim at Tullamore on 9th September 2009
and 26th November 2009

Representation:

Claimant(s) : Ms Mary Ward, Michael Ward & Co, Solicitors, O'Connell
Square, Edenderry, Co. Offaly

Respondent(s) : Mr. Eamonn McCoy, IBEC, Confederation House, 84/86 Lr. Baggot St,
Dublin 2.

The decision of the Tribunal was as follows:-

Respondent's Case

The first witness for the respondent hereafter known as LK, gave direct sworn evidence that she was the Personnel Manager and the claimant reported to her through his line managers. In November 2008 the claimant requested leave to return to Nigeria as he was going to be elected as

king of his local village in Nigeria. He had already availed of his full allocation of annual leave as he had taken four weeks annual leave in April 2008. He did not return from this leave allocation at the required date but returned to work after a period of six to eight weeks. In relation to this unapproved leave, the claimant explained the reason for his late return to work. The explanation was accepted by the respondent company and no disciplinary action was taken against the claimant.

When the claimant sought further leave in November 2008 he was granted one weeks unpaid leave from 10th November 2008 until 16th November 2008 and he was due to return to work on 17th November 2008. The witness informed the claimant that this leave was granted by means of a phone conversation. It was made clear to the claimant that his position would not be held open for him beyond the 17th November 2008 if he did not return to work on that date. This expected return date was further stated by way of letter from the respondent to the claimant dated 10th November 2008. The witness went on maternity leave immediately after this and had no further involvement with the claimant.

Under cross examination she confirmed that she had a good working relationship with the claimant and his work performance was fine. She is positive that the unpaid leave allocation granted to the claimant was for a one week period only.

The second witness for the respondent hereafter known as ND, gave direct sworn evidence that she replaced LK in November 2008 when LK went on maternity leave. Her role from November 2008 was acting Personnel Manager. There was a handover process involved and ND was briefed in relation to the claimant's absence. She had never met the claimant prior to becoming acting personnel manager and was expecting the claimant to return to work on 17th November 2008. When he did not return to work on this date she posted a letter to him at his home address requesting that he contact her by 21st November 2008 to explain his absence. This letter issued on 17th November 2008 but no reply was received.

She then spoke with the claimant's line manager hereafter known as SR, who confirmed that LK had granted one weeks unpaid leave to the claimant and he was due to return to work on 17th November 2008. She wrote again to the claimant on 24th November 2008 informing him that his employment was now at an end due to his failure to explain his absence from work. On 1st December 2008 the claimant returned to work and was advised that his employment had been terminated.

Under cross examination she confirmed that post issued to the claimant was sent by registered post. This post was not returned to the company as undelivered, however she did not have written evidence that the post had been delivered. She was unaware if the claimant had made a phone call to the respondent company prior to 24th November 2008 and there is no record of this phone call having been received. She agreed that her letter of the 24th November 2008 did not enclose the claimant's payslip and P45 as stated in that letter. The P45 was issued from head office in Dublin at a later stage. She confirmed that the claimant's union representative was not contacted or informed during the process, and the claimant was not offered representation during the discussion when he returned to work on 1st December 2008. She confirmed that she contacted an official from the respondent company in head office in Dublin in relation to the decision to terminate the claimant's employment. She could not recall the name of this official. She followed company procedures in relation to his dismissal.

In reply to questions from the Tribunal she agreed that guidelines outlined in the company handbook concerning serious misconduct were not adhered to, and time frame policies in relation to

the issuing of letters concerning absence without leave was not followed.

The next witness hereafter known as SR gave evidence that she was the claimant's line manager in November 2008 when he was given one week's holidays. He was due to return from holidays on the 17th November 2008 but did not return until the 1 December 2008.

Claimant's Case

The first witness hereafter known as MOB gave evidence that she worked as a general assistant at the respondent's customer service desk. In November 2008 she received a phone call from the claimant. The claimant said he was calling from Nigeria and wanted to speak with a duty manager. The witness tried unsuccessfully on two occasions to contact a duty manager. The claimant then asked her to inform SR that he was unable to return to work when he was due to and the witness passed on this message. Under cross examination she confirmed that she did not receive any further telephone call from the claimant.

The claimant gave direct sworn evidence that he commenced working for the respondent on the 9 May 2006. In April 2008 he booked 4 weeks holidays to return to his native Nigeria. He did so as he was chosen to be king of his local village. He was unable to return to work until 6 weeks had elapsed due to the processes involved in his native village regarding his kingship. When he returned to work he explained the position to his employer and his explanation was accepted. He did not receive any warning and no disciplinary action was taken against him. The position of kingship possibly necessitated him returning to his local village at a later date and he explained this possibility to LK.

In November 2008 he had to return to Nigeria and he sought and was granted two weeks leave. While in Nigeria he realized that he would not be in a position to return after two weeks and he telephoned his employer and spoke with MOB. He attempted to speak with his line manager SR but could not do so. He left a message with MOB stating that he needed to take one extra week and he returned to work on the 1 December 2008. Upon his return he was informed by the personnel manager that as he had not returned to work when due, he should return his privilege card and he was fired. He was not afforded the opportunity of having a representative with him at that meeting. He was told he would be contacted by the following Friday, 5 December 2008 but he was not contacted again until he received his P45 in January 2009.

The claimant denied that he received a letter from the respondent dated 10th November 2008 advising him that he had been granted one week's holiday and he was due to return to work on 17th November 2008. He denied receiving a letter dated 17th November 2008 requesting him to explain his absence, and also denied that he received a letter dated 24th November 2008 stating that his employment was at an end due to his failure to explain his absence from work. He is currently driving a taxi and earns €31.00 per week from this after expenses.

Under cross examination he accepted that the respondent had treated him well when he returned late from Nigeria in May 2008. The process in his local village in Nigeria has to do with tradition and he had to fall in line with that process. Because of this he was not in control of his return date. He agreed that he had received training in absence reporting and accepted that the reports of his absences were not in line with company procedures. He acknowledged that he had been made aware of the company's disciplinary procedures as part of his training but these grievance procedures were not mentioned to him at the time of his dismissal.

The next witness gave sworn evidence that he has worked for the respondent for the past 14 years. He is a shop steward. He was not notified when the claimant was dismissed and he was not included in any stage of the dismissal procedure. The first time he heard of any difficulties was after the claimant was dismissed. He had previously been involved in cases where employees had been dismissed and this was the first time he had not been told that an employee had been sacked.

Determination

The Tribunal having carefully considered the evidence has noted the failure of the respondent to adhere to any of the procedures in effecting the dismissal. This included their failure to provide the claimant with a representative when attending the disciplinary hearing that culminated in his dismissal. The Tribunal also noted the discrepancy in the evidence given to the Tribunal in the sending of the P45. In the circumstances the Tribunal finds that the claimant was unfairly dismissed but that there was an element of contribution on the part of the claimant.

The Tribunal considered the remedies under the Unfair Dismissals Acts and determined that compensation was the most appropriate remedy. The Tribunal therefore awards the claimant the sum of €10,000.00 under the Unfair Dismissals Acts 1977 to 2007. The Tribunal further awards the sum of €606.00 being the equivalent of two weeks pay under the Minimum Notice and Terms of Employment Acts 1973 to 2005. No evidence was produced to support the claim under the Organisation of Working Time Act 1997 and accordingly the said claim fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

