

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYEE

CASE NO.
UD382/2009

against the recommendation of the Rights Commissioner in the case of:
EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr D. Hayes BL
Members: Mr M. Kennedy
Ms M. Mulcahy

heard this appeal at Dublin on 25th September 2009
and 3rd December 2009

Representation:

Appellant(s) : Mr Ramon O'Reilly, SIPTU, County Councils Branch, 3rd Floor, Liberty Hall,
Dublin 1

Respondent(s) : Ms. Ger Moriarty, Local Government Management Services Board, OLAF House,
35-39 Ushers Quay, Dublin 8

This case came before the Tribunal by way of an employee appealing against the recommendation of a Rights Commissioner under the Unfair Dismissals Acts, 1977 – 2007 ref r-060598-ud-08/RG.

Determination

The claimant was employed as a general operative. Initially he was engaged on a seasonal basis. He was given permanent employment on 6th February 2003.

Over the years he had problems with his attendance and with his being at work under the influence of alcohol.

On 6th July 2005 he received a verbal warning in respect of poor attendance. This lasted on his file for six months. Within the six months, on 21st December 2005, he was, by mid-morning, very drunk and had admitted to consuming alcohol at work. As a result, on 23rd January 2006, a final written warning was issued. Under the respondent's disciplinary procedure this would remain on his file for fifteen months.

On 19th May 2006 he received a further final written warning in respect of poor attendance. It was the respondent's opinion that there was sufficient reason to recommend his dismissal. However on the basis of representations made by his trade union official and his undertaking to effect a marked improvement it was decided to issue a warning. A number of conditions were attached, including one that he attend the respondent's staff welfare officer and participate in such courses as she recommended. Within two weeks the claimant had to be written to so as to remind him of this condition.

Subsequently the claimant was absent without notice on 20th and 23rd June 2006. Then on 24th July 2006 he was intoxicated at work and was sent home. This led to a further disciplinary hearing on 22nd November and on 4th December he was issued with a further final written warning. This time it was decided that he should also be suspended for two weeks. He was advised in relation to the required improvements and warned that otherwise the likely consequence was dismissal. He appealed against the suspension and so as to alleviate the hardship, it was postponed until the new year.

On 29th June 2007 the claimant was drinking at work to the extent that he was unable to carry out his duties. On 3rd July he attended a disciplinary hearing and on 17th July he was notified that dismissal was being recommended. He had accepted that he had been drinking. The respondent took into account his family circumstances. However, the severity of the incident and the number of warnings already given were taken into account and the decision to recommend dismissal was taken.

This recommendation had to be affirmed by the county manager. The respondent's disciplinary procedure provided that:

"If dismissal is being recommended, the employee has a right to a full hearing by the County Manager before a decision is taken. An appeal against a recommendation for dismissal should be made, in writing, to the County Manager, within 10 working days of the date of the decision to recommend dismissal. The Manager will arrange that a full investigation will be carried out within 4 weeks, which may include a meeting with the staff member and Line Manager concerned. Following this review, he/she will reply in writing outlining the outcome of the appeal."

The county manager conducted the review. He read the claimant's file and the proceedings of the disciplinary process. He sought a written submission from the claimant. This was furnished on his behalf by his trade union representative. The county manager had regard to this submission. He took the view that it did not raise any issue on the facts or on the procedure adopted. He considered whether dismissal was an appropriate response in the circumstances and whether sufficient efforts had been made to assist the claimant. Given the number of previous warnings, he felt that he could not regard this incident as a one-off. He did not seek a meeting with the claimant. He took the view that the respondent's procedures gave him a discretion in this regard. Given that the claimant's submission did not raise any issue that had not been fully considered at the disciplinary hearing he did not see the need for a meeting. Nor did he seek a medical report in respect of the claimant's condition before making his decision.

The claimant told the Tribunal that he had been offered treatment down the country. It was not that he refused treatment but he could not leave his ill mother at night. He had suffered a number of bereavements and was taking anti-depressant medication. Things got too much for him and he started to drink to excess. Most commendably he has now stopped drinking. He has not had a drink for over a year and attends AA meetings. Balanced against this is his poor record over a long

period; the numerous warnings he received both for absenteeism and consuming alcohol at work; the respondent's efforts to get him to engage in treatment; and the general forbearance shown by the respondent. Also, the trigger for the dismissal was not prolonged bouts of absence caused by alcoholism rather it was for one instance too many of being drunk at work.

This is a sad case, particularly given the successful efforts made by the claimant in the last year or thereabouts to remove alcohol from his life. However, the Tribunal's function is not to decide what it would have done in the same situation. The Tribunal must satisfy itself that circumstances existed that would have allowed a reasonable employer to come to the same decision. The Tribunal must also be satisfied that the procedures used were fair.

Given the number of warnings, over a reasonably short period of time, received by the claimant, the Tribunal is satisfied that the decision to dismiss was reasonable. In fact the respondent had shown itself prepared to give several opportunities to the claimant. By no means could it be said that the respondent rushed to the decision taken or that it was unconcerned about his situation.

The Tribunal is satisfied that the hearing required to be conducted by the county manager does not necessitate an oral hearing or a personal meeting. On the face of it, it is understandable that a person may take 'hearing' to mean 'oral hearing'. The Tribunal was referred to the judgement of the Supreme Court in O'Donnell v. Tipperary (South Riding) County Council [2005] IESC 18. Complaint had been made that there had been an absence of a hearing. Delivering the judgement of the Court, Denham J quoted the High Court, with approval, as follows:

"Now, the term 'hearing' doesn't necessarily comprehend an oral hearing in any given case and what is required in any given case will depend on the facts of the particular case."

It might be better, from the point of view of clarity, if the respondent's disciplinary procedure referred to an 'investigation' or a 'review' rather than a 'hearing', in this context.

The Tribunal was urged by the claimant's representative to find unfairness because of the failure to seek an up-to-date medical report. It is certainly the case that, where an employer wishes to dismiss an employee due to ill-health absence, it is prudent to obtain such a report, particularly where there is a dispute about the medical condition or its likely prognosis. This is not such a case. The Tribunal is satisfied that the respondent was under no obligation to seek a medical report.

The county manager did not personally notify the claimant of his decision. He delegated this to an administrative officer, having notified him of the decision. It is, of course, essential that the decision be that of the county manager himself. While the disciplinary procedure does provide that the county manager will, following his review, reply in writing outlining the outcome of the appeal, the Tribunal is satisfied that this is something that he can direct be done on his behalf.

In all the circumstances, the Tribunal is satisfied that the claimant was not unfairly dismissed. Consequently the recommendation of the Rights Commissioner is affirmed.

This _____

(Sgd.) _____
(CHAIRMAN)

