

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
Employee
MN54/2009

CASE NO.
UD52/2009

against

Employer

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 M. Gilvarry

Members: Mr. D. Morrison
Mr P. Clarke

heard this claim at Sligo on 1st September 2009

Representation:

Claimant: Mr. Anthony McCormack, Siptu, Sligo Branch, Hanson Retail Park, Cleveragh,
Sligo

Respondent: Mr Noel Kelly, Kelly & Ryan, Solicitors, Teeling Street, Sligo

The determination of the Tribunal was as follows:-

Claimant's case

The Claimant commenced employment as a deli assistant with the respondent on the 19th April 2007. On the 27th June 2008 at 6.40am she telephoned the store and spoke with the duty manager (M). She informed M that she would not be in to work that morning as her sister had been taken in to hospital the night before and she had no one to mind her son. After 10.00am she received a telephone call from DC a director of the company, asking her where she was. She asked if he had not received her message that she had left with M earlier that morning. She explained to him why she was not in work but DC did not accept her explanation. DC informed her that if she was not in by 10.30am not to bother coming back as she would not have a job. She has not spoken to DC since that day.

She went to the social welfare office who told her that she could obtain job seekers allowance. She rang the respondent and asked for her P45 and applied for the job seekers allowance. In respect of her application she received a letter from social welfare, stating that rather than her statement that

her employment was terminated by her employer, the respondent had said that she had received a number of warnings from her employer for not showing up for work. Therefore as she lost her employment through her own fault she was not entitled to this allowance for a number of weeks. She called to the social welfare office and refuted this. She received her job seekers allowance. She was unemployed for four months but is now working twenty hours a week.

Under cross-examination a number of dates were put to her where she failed to turn up for work. Two occasions she could not recall, on one day she said she was not due to work that day and another was unpaid leave as a friend was getting married. It was put to her that during the course of the phone call with DC she had said to him “**** you” and he had responded to her by saying her manner was disrespectful and she was to be disciplined. The claimant denied this had happened. The claimant did not agree that after this conversation DC had left a number of messages on her phone in the following days asking her to contact him. It was put to her that another employee had completed the social welfare questionnaire, and that DC maintains that the claimant was a good employee and he would employ her again. The claimant said she would not go back as her current job suits her and her relationship with the respondent would not be the same.

Respondent’s case

DC a director gave evidence. The respondents have a number of retail outlets and have over 100 employees. The claimant was a good employee but her attendance was patchy and she had a tendency not to turn up to work. He recalled one occasion where another employee had to ring her and another where somebody had to go to her house and get her. It was becoming an issue but no formal warnings were given to her. At Christmas the claimant had a flare up as they had a hygiene audit which they failed as she had refused to come to the store with the relevant documents.

On the 27th June 2008 he received a phone call from the duty manager (C) of the store informing him that the claimant was not coming in to work and they were in dire straits for staff. C asked him to telephone the claimant, as the claimant was not answering his calls. C was the duty manager that morning not M who the claimant had telephoned. He telephoned the claimant in the presence of two other employees SMcG and HM. He asked the claimant why she was not in work, she told him that her sister was in hospital and she had no one to mind her son. He informed her that they were very stuck for staff and he would appreciate it, if she could come in to work as soon as possible. The claimant then told him that she wasn’t coming in to work and if he didn’t like it he could **** off. He told the claimant that her behaviour was very inappropriate and that her attitude was a disgrace. She was heading towards disciplinary procedures and that her general attitude would have to improve. The claimant responded by telling him where he could stick his job and that he could **** off and then she hung up.

He made several calls to her the following day and two or three times after that. On one occasion he left a message but the claimant did not return any of his telephone calls. HM rang him to inform him that the claimant had telephoned seeking her P45. The respondent has no record of correspondence from social welfare, it was possible that they had received a questionnaire, which was completed and sent back without keeping a copy of same. He has spoken with SIPTU about the re-engagement of the claimant. When he received a letter from SIPTU in respect of the claimant he contacted them by phone straight away. He felt it was appropriate that the claimant be reengaged in another one of their stores.

Under cross-examination he recalled he had indicated to the colleague (JMC) of the claimant’s representative that the claimant had been rude during the course of the telephone call. On the second occasion in discussion with the union he had told them he was prepared to reinstate the claimant in another store but all of a sudden the negotiations had ceased.

He did not recall receiving a letter from the claimant's union on the 14th July 2008; he had spoken to JMC on three occasions. He had tried to ring the claimant on the following Monday after the incident and about another three to four times after that. On the first phone call he had left a message and after that the claimant's phone just rang out. He had then received a letter from the union and had spoken to JMCon two or three occasions.

Next to give evidence was SMcG who was present when DC rang the claimant on the 27th June 2008. He could only hear DC's side of the conversation and he concurred with DC as to what he had said during the course of the telephone conversation. Also that at no stage did DC tell the claimant not to bother coming in. He had no other involvement.

HM who was also present at the time of the telephone call to the claimant gave evidence and agreed with the previous evidence given in respect of this call. HM is an office administrator, she obtained the record of claimant's absences from the computer system.

Under cross examination she explained that the claimant did not clock in as the system could not read her handprint so hence her hours had to be recorded manually. On one occasion she had to ring the claimant at about 9.00, as she had not turned up for work. She telephoned the claimant who told her that she had texted S at 1.00am in the morning to say she would not be in that morning until 11.00. She informed the claimant that S was not the manager on duty that morning and her actions were not sufficient. This witness had no recollection of the form from social welfare in respect of the claimant. The claimant telephoned her on the 8th July 2008 seeking her P45. She would have informed DC of the claimant's request.

Determination

In this case there are differences between the parties recollection of the conversation between the Claimant and DC on the 27th June 2008. The Tribunal finds on the balance of probabilities that the claimant was dismissed by DC, after speaking rudely to him on the phone. This was disproportionate and in breach of fair procedures, and the dismissal was therefore unfair. However the Tribunal finds that the claimant substantially contributed to her own dismissal.

The Tribunal therefore finds in favour of the claimant. The Tribunal determines that the appropriate remedy is compensation. The Tribunal further finds that the Claimant failed to make adequate efforts to mitigate her loss. We therefore award the claimant €1000.00 under the Unfair Dismissals Act 1977 – 2007 and one weeks pay to the amount of €285.12 under the Minimum Notice and Terms of Employment Acts.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)