

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
EMPLOYEE – *claimant*

CASE NOS.
UD273/2009
MN269/2009

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. T. Taaffe

Members: Mr. T. O’Sullivan
Mr. N. Broughall

heard this appeal at Dublin on 27th July and 1st October 2009

Representation:

Claimant: Ms. Eugenie Houston BL instructed by Mr. James Evans of
Murphy & Evans Solicitors, Unit 13A Main Street, Ongar, Dublin 15

Respondent: Ms. Edel Kennedy of ESA Consultants, The Novum Building,
Clonshaugh Industrial Estate, Clonshaugh, Dublin 17

The decision of the Tribunal was as follows:

The fact of dismissal was not in dispute; therefore the respondent gave evidence first.

Respondent's Case

The development manager gave evidence. The claimant started work as a power washer but he took well to the work and strove to better himself. Two more experienced colleagues trained him in the work.

During August and September 2008 business was difficult. Securing new contracts was difficult. He had a meeting with the claimant to discuss lay-off or alternative positions with him. The claimant was not prepared to take a position that paid less than he was earning at that time. The loss of earnings would have been between €70 and €90 a week. So he was laid off for a period of three weeks starting on 6th October.

On 20th October 2008, another manager of the respondent company phoned the claimant and left a message for him that there was work for him. The claimant replied by text message that he was ill and would be in touch later in the week. On 21st October the development manager was in Maynooth. He went to a private house that the respondent had worked on earlier in the year. He took some photographs of the work done for use in promotional material. He did not have the householder's permission to be there or to take photographs. They had worked on the front of the house. The householder did not contract work on the back of the house due to lack of funds. The development was surprised to find the claimant working on the back of the house.

On 22nd October a sick cert from the claimant was faxed to the office. When he saw the cert, the development manager returned to the private house to see if the claimant was again working there. He found the claimant and an ex-member of his staff at work there. The owner of the house had been very happy with the work done by the respondent company on his house. The development manager thought it likely that the house owner would have come back to them for the remainder of the work if the claimant had not taken the work.

The claimant was invited to a disciplinary hearing on 31st October 2008. For the development manager the issue was one of trust. It would be difficult for him to work with someone he could not trust. The claimant sent in a sick cert and yet he was on site working. The meeting was the claimant's opportunity to defend the allegation.

The former quotations manager gave evidence. On the day he was laid off the claimant sent him a text message asking for the phone number of the house owner. He did not reply and a few days later the claimant again sent him a text message asking for the number. On 31st October 2008 he forwarded the first text message to the development manager.

A director of the respondent company gave evidence. The company suffered losses in August and September 2008. They looked at alternatives to laying the claimant off. However he was laid off for 3 weeks. When he was asked to return to work he sent a text message to say he was ill. He sent in a sick cert but he was obviously not ill as he was working on a site. It became a matter of trust.

She liked the claimant but was disappointed by his behaviour. The company was struggling to secure his job and he went to work for an individual they had tendered to. At the disciplinary meeting the claimant offered no remorse or understanding of his actions.

The director accepted the claimant's right to find alternative work while he was on lay off. He had done this on an earlier period of layoff.

Claimant's Case

A former colleague of the claimant gave evidence. The respondent fired him. He was working on a site for a competitor company in Dublin in October 08 when the development manager's brother approached him and enquired if the claimant was working there. The claimant was not there.

The claimant gave evidence. He started working for the respondent as a general operative in October 03. He did not have a contract. He worked for a while as a foreman but the development manager pulled him aside and said that he was not reliable and not the man for the job. He went back to restoration work but his wages were not reduced. He had a number of altercations with the development manager over the years.

On the day his second lay off was first mentioned the development manager told him there was no work. He was given 3 choices: accept a pay cut; cancel his pension or lay off. He was given 4 hours to consider the matter. He felt that he should not be laid-off as he was the longest service employee. Also if a lay off was required he thought all employees should work a three or four day week. A week later he was laid off.

The claimant obtained 9 days work from the employer of his former colleague. Then he met the owner of the private house at a football match. The following Saturday he and two others started work on the back of the house. The development manager visited the house when the job was about half way through. He did send the text saying he was ill. He was not formally asked to return to work.

At the meeting on 31 October 08 he was given the letter of 6 October. He tried to get his point across but the development manager informed him that it was a hearing. Later he got a letter saying 'they did not find my reasons good enough and terminating my contract'.

He appealed the decision to dismiss him to the managing director. He brought a letter from the owner of the private house to the meeting. He was asked to start from the discussion of alternatives to the lay off. He was not asked about who supplied the tools and materials for the work on the private house. He had to work to pay his mortgage.

The letter turning down his appeal was not written on the respondent's headed notepaper and was delivered by ordinary post.

The claimant established his losses.

Determination

The Tribunal carefully considered the evidence adduced. The Tribunal accepts that the respondent had less work on its books in 2008 and needed to adapt to the changing circumstances. Also while the claimant was on lay off he was free to seek alternative employment.

The Tribunal is not required to agree with the decision by the respondent to dismiss the claimant. The issue for the Tribunal is whether the decision was reasonable in light of all the circumstances. The finding of the Tribunal is that it was reasonable for the respondent to take the view that it was gross misconduct on the part of the claimant to say he was ill and to send in a sick cert to cover a period he during which he was working. The claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 also fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)