

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

EMPLOYEE - claimant

CASE NO.

MN247/09

UD257/09

WT95/09

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: Ms P. McGrath BL

Members: Mr E. Handley
Ms. A. Moore

heard this claim at Naas on 1st February 2010.

Representation:

Claimant:: Mr. Tom O'Dwyer, 237 Landen Road, Ballyfermot, Dublin 10

Respondent: Mr. Michael O'Neill, Solicitor, Kingscourt, 33 South Main Street, Naas, Co. Kildare

The determination of the Tribunal was as follows:-

Respondent's Case:

The head man (DB) gave evidence. He was in charge of the stable yard and about 35 employees. He has worked for the respondent for twelve years and was second in command to the respondent (Mr. P).

The claimant was employed as a yardman. His work entailed looking after 4/5 horses on behalf of their owners and feeding and exercising them. Each employee is assigned 4/5 horses per annum. The claimant looked after the yard and attended race meetings. He was paid expenses for his attendance at race meetings. Employees worked from 6 am to 11 am and 4 pm to 5.30 pm approx. during the summer season. They had a break from 11 – 4 each day. They worked from 7 am/7.30 am to 12 30 and from 4 pm to 5.30pm approximately during the winter season.

He recalled that the claimant commenced working for the respondent in May 2003. He was pleasant but was absent from work for quite a number of days during his tenure. Sometimes he was late by up to two to three hours and the claimant had said he had slept it in.

DB contended that the claimant voluntarily left his employment on 16 January 2007 and that he had received his P45 but that he came back the next day and resumed work straight away. The P45 received by the claimant was revoked.

In the summer of 2008 DB received a telephone call from the claimant who told him that he was being let go. DB telephoned Mr. P who was hesitant in taking the claimant back. Then Mr. P said he would give the claimant one more chance and it was to be his last chance but left the final decision to DB as to whether the claimant could come back to work. DB subsequently telephoned the claimant and said he could return to work. The claimant was delighted.

DB referred to a list of various dates in 2007 and 2008 on which the claimant was absent for either part of the day or a full day. No explanations were offered for his absences during this period nor were medical certificates produced. In the claimant's absence his workload was shared between other employees.

In general conversation, DB had conveyed verbal warnings to the claimant and told him that it was possible that he could lose his job.

The claimant was not present at work on 14th August 2008 and he did not return to work after that date. All payments owing to the claimant were duly paid.

Under cross-examination DB contended that the claimant had received his contract of employment and grievance and disciplinary procedures. DB said the claimant had received written warnings, which would have issued with the claimant's pay cheque. He did not recall the claimant contacting either him or Mr. P following 14th August 2008. He saw no reason why the claimant did not come back and work out his notice.

DB did not feel obliged to contact the claimant following his non-attendance at work on 14th August 2008. The normal procedure was that if the claimant was running late he was to contact him.

Claimant's Case:

The claimant gave evidence. His employment with the respondent commenced on 30th May 2003. He never received a contract of employment nor grievance or disciplinary procedures.

In 2004/2005 he received one written warning from the respondent. If he was late for work he received a verbal warning. All employees regularly received these.

If he slept it in on any day he would ring DB and ask if he should come in. He was often told to take the rest of the day off, as they were not too busy. He found the respondent hard to get on with but found DB to be reasonable.

On 14th August 2008 he received a telephone call from his cousin (LG) who also worked for the respondent. She relayed the message to him that he was sacked. He then rang the respondent who

told him he was sacked. DB had told his cousin to say that he was sacked.

He did not receive any written warnings in 2008. He was never informed that he was being dismissed for gross misconduct.

Following his dismissal he received one day's pay the following week. He subsequently telephoned the respondent's secretary concerning his notice entitlement and one week's notice was subsequently forwarded to him.

He secured part-time work for a short time before Christmas 2009 and one day's work in January 2010. He had left his CV in some yards and bars. He is in receipt of the job seekers allowance and is unemployed at present.

Under cross-examination the claimant contended that DB had told LG to telephone him and inform him of his dismissal on 14th August 2008. That day he was due in at work at 7 am. He had slept it in. At 9 am he received a telephone call from LG informing him that he was sacked. He tried to contact DB then but his phone rang out. He subsequently telephoned the respondent who told him "you are sacked, good luck".

Quite regularly he received verbal warnings. Regarding the list of dates outlining his absences from work, the claimant said he could have slept it in on these dates, could have been ill and not slept all night and he could have rung in. On one of the dates mentioned he had to bring his daughter to hospital.

Verbal warnings were regularly given out in the yard. "Sack him he's gone" or "you are on your last warning" were conveyed to staff all the time.

Determination:

The Tribunal has carefully considered the evidence adduced during the course of the hearing.

The claimant was dismissed in circumstances where he had had a pattern of turning into work late or not at all. In the course of the hearing the claimant was presented with a list of dates on which the employer states he had turned in late or not at all and the claimant could neither confirm nor deny the correctness or otherwise of the particular list but did accept that he would sleep in from time to time or alternatively might have an uncertified sick day. Examination of the said list demonstrated that the claimant did turn in late or not at all on average about once a month. It is worth noting that the claimant's job required him to work thirteen out of every fourteen days

The respondent's witness was very fair in presenting his evidence. The instructions to dismiss the claimant on 14th August 2008 came from Mr. P, the overall boss of the yard. The respondent's witness relayed this decision to the claimant by way of a co-worker, a relation of the claimant who also worked at the yard.

The claimant was shocked that he was being dismissed as the culture in the yard included regular threats to be dismissed for under-performance or lateness. So when he was actually dismissed he was not forewarned and not in a position to adequately deal with the situation.

What is surprising to the Tribunal is the almost complete lack of procedures for the disciplining and warning of employees. With a staff of 36 people under his charge the employer should have a

disciplinary procedure in place and same should be brought to the attention of employees and the steps in any such procedure should be made known in an holistic way. There were no formal verbal or written warnings given to the employee that could be produced or averred to before this Tribunal. It was accepted by the claimant that he had once received a written warning. This was in 2004.

In considering this fact, the Tribunal cannot understand why the claimant was not given a final written warning that coming into work late could give rise to his immediate dismissal. Instead of following any set procedure the employer went straight for summary dismissal on 14th August 2008.

The Tribunal cannot find, taking all matters into consideration, that the instantaneous dismissal of the claimant in the circumstances presented in evidence was fair.

In light of the foregoing, the Tribunal finds that the dismissal was unfair. In assessing compensation the Tribunal does take into account that the claimant conceded that there had been absenteeism and the Tribunal accepts that the professional running of a stable has to be affected by that. Accordingly, the Tribunal awards the claimant €19,000.00 under the Unfair Dismissals Acts, 1977 to 2007 and also awards the claimant €1320.00 being the equivalent of three weeks notice under the Minimum Notice and Terms of Employment Acts, 1973 to 2005. The claim under the Organisation of Working Time Act, 1997 fails for lack of prosecution.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)