

EMPLOYMENT APPEALS TRIBUNAL

Appeal Of:
EMPLOYEE –*Appellant*

Case No.
UD1506/2009

against the recommendation of the Rights Commissioner (reference r-060210-ud-07/JT) in the case of:

EMPLOYER –*Respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Taaffe

Members: Mr. J. Browne
Ms. M. Mulcahy

heard this appeal at Carlow on 26th January 2010

Representation:

Appellant: In Person

Respondent: Mr. John Barry, Management (Support) Services Limited, The Courtyard,
Hill Street, Dublin 1

The determination of the Tribunal was as follows:

This appeal came before the Tribunal by way of an employee (the appellant) appealing the Rights Commissioner Recommendation reference r-060210-ud-07/JT.

Dismissal as a fact was in dispute in this case.

Appellant's Case:

The appellant commenced employment in October 2006 as a cleaning operative. Prior to commencing her employment the appellant informed her line manager (hereinafter GF) that she suffered from arthritis. The appellant subsequently commenced employment working two hours per day, five days per week.

The appellant's employment continued without incident until the 7th December 2007, on which date she attended for work as normal. However, on this date two other cleaning operatives arrived and they began to carry out cleaning duties. The appellant was not informed that other cleaning operatives would be working in the premises on that date.

GF was also present at the premises. He informed the appellant that there had been some complaints about her work but he did not inform the appellant who had made the complaints against her. The appellant became upset and asked GF why complaints were only being raised with her now, some fourteen months into her employment. GF said he had received complaints about the standard of her work and that she was resting for up to fifteen minutes prior to commencing her cleaning duties. When GF asked the appellant if she wanted to go home, she replied that she wanted to do carry out her job but she was unsure whether she still had a job. GF telephoned the appellant's husband and told him that the appellant was upset. When her husband arrived the appellant went home although she did not want to leave.

The appellant was upset at home and telephoned GF to enquire if her job was still available to her. She also enquired why he had not informed her that two other cleaning operatives would be attending to cleaning duties at the premises. GF told the appellant that he did not have to inform her of this. He told her that she had not been doing her job and he also raised the issue of whether or not she was physically fit for the work. He told the appellant that she was not to return to work under any circumstances unless she had a medical certificate from her doctor stating that she was fit to carry out her duties. The appellant said that she would get the medical certificate but she enquired why GF was only asking for a certificate at this time, some fourteen months into her employment.

The appellant considered the situation over the weekend. She attended for work on Monday, 10th December 2007. When she attended for work the two other cleaning operatives were again present and carrying out the appellant's cleaning duties. The appellant did not know what to do and left the premises.

Later that day the appellant contacted GF by telephone. She informed him that she had attended for work that morning. GF told her that he had attempted to contact her but had been unsuccessful in doing so. The appellant could not understand this as she had provided him with her telephone number on several occasions. GF told the appellant that she was not to return to work without a medical certificate. The appellant said she would be willing to attend her own doctor but GF wanted her to attend a different doctor. GF told the appellant that if she were to return to work he would watch her all the time and "come down on her like a ton of bricks." He said he wanted the work done 100% not 50%. The appellant did not return to work after this conversation.

The appellant accepted that she had subsequently received correspondence from the respondent. The appellant sought a medical certificate from her doctor approximately one week later. This was submitted to the Tribunal and stated that appellant was medically fit for work.

The appellant gave evidence relating to loss.

During cross-examination the appellant accepted that the respondent had written to her on a number of occasions. The appellant accepted she had informed GF that her arthritis had deteriorated but this did not cause her any difficulty in carrying out her duties. The appellant confirmed that she had initially agreed to attend a doctor at the respondent's behalf but she later changed her mind, as she wanted to attend her own doctor. She did not contact GF about this as she did want to contact him after the way he had spoken to her during the telephone call on the 10th December 2007.

Respondent's Case:

The Human Resources Manager (hereinafter HRM) gave evidence to the Tribunal. Following a complaint from a client, GF organised a deep clean team for the premises in which the appellant was working.

GF told HRM he had spoken with the client and the appellant on Friday, 7th December 2007. He addressed with the appellant that the standard of her work had deteriorated and that the client had complained that she was resting for up to fifteen minutes prior to commencing her work. GF told HRM that the appellant had become upset, she said her arthritis had deteriorated and she was thinking of giving up her job. The respondent has a duty of care to send its employees to a doctor if needed. HRM wrote to the appellant on the 11th December 2007 outlining the meeting the appellant had with GF, that he had asked her to get a medical certificate stating that she was fit to perform her duties, as she had told GF that her arthritis had deteriorated. The letter further stated that the appellant was due to work on the morning of the 11th December 2007 but had failed to attend for work and had not contacted the respondent until later that day. The letter informed the appellant that the respondent would pay for her to attend a doctor and that an appointment was being arranged in order to ascertain if the appellant was able to continue to perform her duties. The appellant was placed on paid special leave until a doctor assessed her medical condition.

HRM subsequently wrote to the appellant on the 13th December 2007, informing her that a medical appointment was arranged for the 17th December 2007. HRM stated that she would contact the appellant once she had received the medical doctor's report. The letter stated that should the appellant be unable to attend the appointment with the doctor she should contact GF and a telephone number was provided.

The appellant failed to attend to the medical appointment on the 17th December 2007. The respondent attempted to contact the appellant but was unsuccessful in reaching her. HRM wrote letter dated 20th December 2007 to the appellant. The letter stated that although GF had contacted the appellant and confirmed the appointment with her she subsequently failed to attend the appointment with the doctor and had not contacted the respondent to inform them she would not be attending. The appellant was asked, as a matter of urgency, to contact GF to arrange a new appointment. The letter informed the appellant that should she not contact the respondent by Friday, 4th January 2008 the respondent would assume that she had terminated her employment of her own volition and would forward her a P45 and final pay. The respondent had no further contact from the appellant and assumed that she had left their employment.

HRM outlined the respondent's grievance procedure to the Tribunal. The procedure stated that should an employee have a grievance, they should first outline the grievance to their line manager. If the appellant had a grievance about GF as her line manager she could have contacted another manager or HRM.

Determination:

The Tribunal notes the uncontested evidence of the appellant in respect of the knowledge of her medical condition by the respondent prior to the commencement of her employment and in respect of the content of her telephone conversation with the respondent's representative (GF) on the 10th December 2007, which was of a bullying and intimidatory nature as outlined in evidence by the appellant.

The issue to be considered by the Tribunal is whether in the circumstances of the case it was fair and reasonable for the appellant to form the view that the behaviour of the respondent towards her led her to the conclusion that they, the respondent, were dismissing her.

The Tribunal accepts that the appellant was never made aware of any complaints in respect of her work until the 7th December 2007 and until that date was also never made aware of the imposition of additional cleaning staff to work with her on that date or indeed on the 10th December 2007. It is the view of the Tribunal, that this, in addition to the referred telephone conversation with GF, seriously and unfairly undermined her position with the respondent and rendered it fair and reasonable for her to believe that her employment was being terminated. It is therefore found that the appellant was unfairly dismissed by the respondent and that her appeal under the Unfair Dismissals Acts, 1977 to 2007, against the decision of a Rights Commissioner reference: r-060210-ud-07/JT, succeeds. The Tribunal awards the appellant the sum of €750.00 in respect of the dismissal, thus setting aside the decision of the Rights Commissioner reference: r-060210-ud-07/JT.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)