

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

EMPLOYEE - *claimant*

UD1171/2009

against

EMPLOYER - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan
Members: Mr. A. O'Mara
Mr N. Dowling

heard this claim at Navan on 25th March 2010
and 2nd June 2010

Representation:

Claimant(s) : Ms. Lorna Lynch BL instructed by Patrick Branigan & Co., Solicitors,
Teach An Chúinne, Dyer Street, Drogheda, Co. Louth

Respondent(s) : MacCarthy & Associates, Solicitors, 10 Upper Mount Street,
Dublin 2

The determination of the Tribunal was as follows:-

Respondent's case

The Managing Director of the respondent company gave evidence that the company supply commercial premises with wash room services, installing and servicing wash room equipment. The company employs 10 service drivers and operates out of 4 depots. The claimant was appointed as a service driver on 5 November 2007 and was a very satisfactory employee. The company had no difficulties with his work performance.

In January 2009 the claimant was absent on sick leave and required a knee operation. The company struggled along in his absence and existing drivers covered his absence. The company made several unsuccessful attempts to contact the claimant during his absence on sick leave. The company eventually made contact with the claimant and a meeting was arranged for 22 April 2009 at a hotel in Co. Kildare. The company's service manager along with the witness and the claimant were present at the meeting. The witness asked the claimant when he was returning to work and the

claimant replied that he would not be returning to work as he had obtained work somewhere else. The witness asked where that work was and the claimant replied that he would rather not say. The witness then drafted a letter of resignation which the claimant signed. The claimant was paid what was owed to him and the company subsequently hired another service driver.

Under cross examination the witness confirmed that he had little day to day contact with the claimant. The company operates a performance based bonus policy and the claimant almost always received his bonus. The claimant had aggravated a previous injury while servicing a machine for a customer of the respondent and the company had no difficulty with the claimant seeking surgery. The witness was unaware that the claimant had a cruciate ligament injury and the required recovery period was 10 – 12 weeks. The claimant supplied a medical certificate for the period from 28 January 2009 to 28 February 2009. The witness did not personally attempt to make contact with the claimant during his absence but the service manager did on a number of occasions.

The witness confirmed that the company did not pay the claimant during his sick leave absence. He confirmed that during the course of the meeting of 22 April 2009 the claimant informed him that his G.P. and consultant stated that he was fit to return to work. He denied that he told the claimant that he was not coming back to work. He also denied that the claimant did not know the nature of the meeting on 22 April 2009. Following the termination of his employment the claimant was paid one months salary plus his holiday entitlements. This was not a goodwill payment but the witness could not explain why the months salary was paid as it was almost one year ago. This payment was not made on the basis that the claimant sign a letter of resignation. He was not aware that the claimant had not obtained alternative employment since the termination of his employment.

In reply to questions from the Tribunal the witness confirmed that the service manager organised the meeting of 22 April 2009 to find out when the claimant was returning to work. Prior to that meeting the company were not aware that the claimant had clearance to return to work. The company did not request that the claimant attend a company doctor. The company did not receive medical certificates from the claimant for March and April and they did not write to the claimant seeking certificates. He had no recollection of the claimant stating that he was willing to attend the company doctor.

The next witness gave evidence that the claimant informed him that he had injured his knee while working at a customer's premises in July 2008. He was working from a ladder when he injured his knee. The claimant was generally in work after the accident and the injury did not inhibit his work performance. The witness told the Tribunal that the claimant had also informed him that he had been having ongoing problems with his knee as a result of playing soccer. In January 2009 the claimant went to hospital for an operation on his knee. The witness spoke to the claimant by telephone on three or four occasions while the claimant was on sick leave and arranged a meeting with him for 22 April 2009. The purpose of the meeting was to arrange a date for the claimant's return to work and to make arrangements for the return of a company vehicle to the claimant. The witness attended the meeting along with the Managing Director of the company (the previous witness). At the meeting the claimant said he had made a good recovery from the injury and wanted to return to work. He did not say that he wanted to finish working for the company.

The witness told the Tribunal that the Managing Director then said to the claimant that "you are not coming back to work" and he recalled the Managing Director writing out a letter of resignation for the claimant to sign. The Managing Director said that the injury is going to be an ongoing problem and is going to affect the claimant's work performance. The claimant appeared taken aback by this but the Managing Director was not going to allow the claimant return to work.

Claimant's Case

The claimant gave direct evidence that he commenced working for the respondent company in November 2007. He was employed as a service driver. He delivered hand paper towels and dispensers to customers of the respondent. In July 2008 he was working from a ladder replacing an air freshner refill in a customer's premises. He was stretching and slipped from the ladder injuring his knee. Following the accident he reported the injury by phone to the service manager. He attended a physiotherapist that evening and received treatment in the weeks following the accident. He continued working in those weeks but was in a lot of discomfort and had his knee strapped. He confirmed that he had twisted his knee some years previously and had a scope carried out at that time when the injury was diagnosed as swelling.

In January 2009 he had an operation on his knee and was informed by his surgeon that the recovery period was 12 weeks. He informed his employers of this position and kept in regular contact with the service manager from January 2009 to April 2009. He spoke with the service manager on approximately 6 occasions while he was absent from work on sick leave, keeping him informed of the position after each medical appointment. He also informed the service manager that he was prepared to attend the company doctor if he was requested to do so. He recalled having a phone conversation with the service manager whereupon a meeting was arranged for 22 April 2009 to arrange for him to return to work.

He attended the meeting on 22 April 2009. The Managing Director and the service manager were present at the meeting. The Managing Director told him that he (the claimant) would never fully recover from his operation. He wrote out a letter of resignation and a letter offering one month's salary. The witness tried to discuss arrangements for his return to work but the Managing Director did not want to know and was only interested in getting him to sign the letters. He did not want to finish working for the company and did not reply to the Managing Director that he would rather not say who he was going to work for.

The witness confirmed that he was in receipt of disability benefit from January 2009 until mid April 2009. He was not available for work during that period of time. He has been in receipt of unemployment assistance from 24 April 2009 to the present time. Since 24 April 2009 he has sought alternative employment but has not been unsuccessful. He has attended a number of job interviews, has registered with FAS and signed up with the Drogheda partnership.

Determination

The Managing Director of the Respondent Company gave evidence that, in January 2009, the claimant was absent on sick leave and required a knee operation. This was as a result of a work related accident in July 2008. The company did not take on any other driver to cover for the Claimant during his absence and managed by getting existing drivers to cover for the claimant. According to this witness the company made several unsuccessful attempts to contact the claimant during his absence on sick leave. The company eventually made contact with the claimant and a meeting was arranged for 22 April 2009 at a hotel in Co. Kildare. The company's service manager along with the witness and the claimant were present at the meeting. The witness asked the claimant when he was returning to work and the claimant replied that he would not be returning to work as he had obtained work somewhere else. The witness asked where that work was and the claimant replied that he would rather not say. The witness then drafted a letter of resignation which the claimant signed. The claimant was paid what was owed to him and the company subsequently

hired another service driver. The meeting of the 22nd of April was not arranged by this witness but by the service manager. This witness further confirmed that he had little day to day contact with the claimant and did not make any attempt to contact him during his absence. Under cross examination the witness: (i) denied that the claimant was unaware of the nature of the meeting of the 22nd April; (ii) denied that the payment made to the claimant was on the basis of the claimant signing a letter of resignation; (iii) denied that he told the claimant that he was not coming back to work.

The companies' service manager gave evidence that he was in contact with the claimant on three or four occasions during the claimant's absence on sick leave and it was he who arranged the meeting of the 22nd April. The purpose of the meeting was to arrange a date for the claimant's return to work and to make arrangements for the return of a company vehicle to the claimant. The witness attended the meeting along with the Managing Director of the company. At the meeting the claimant said he had made a good recovery from the injury and wanted to return to work. He confirmed that the claimant did not say that he wanted to finish working for the company.

The witness also gave evidence to the Tribunal that the Managing Director told the claimant that he was not coming back to work and that the MD wrote out a letter of resignation for the claimant to sign. The witness also gave evidence that the MD told the claimant at the meeting that the injury was going to be an ongoing problem and that it would affect his work performance. The claimant appeared taken aback by this but the Managing Director was not going to allow the claimant return to work.

The claimant's evidence was that he commenced working for the respondent company in November 2007 as a service driver. In July 2008 he was injured during the course of his employment. In January 2009 he had an operation on his knee and was informed by his surgeon that the recovery period was 12 weeks. He informed his employers of this position and kept in regular contact with the service manager from January 2009 to April 2009. He spoke with the service manager on approximately 6 occasions while he was absent from work on sick leave, keeping him informed of the position after each medical appointment. He also informed the service manager that he was prepared to attend the company doctor if he was requested to do so. He gave evidence that the service manager arranged a meeting for the 22 April 2009 which was, he understood, to arrange for him to return to work.

The meeting on 22 April 2009 was attended by the Managing Director, the service manager and the claimant himself. The Managing Director told him that he (the claimant) would never fully recover from his operation and he wrote out a letter of resignation for the claimant to sign in return for which he was given one month's salary. The witness gave evidence that he tried to discuss arrangements for his return to work but the Managing Director did not want to know and was only interested in getting him to sign the letter. The claimant did not want to finish working for the company and did not reply to the Managing Director that he would rather not say who he was going to work for.

There is a clear conflict of evidence between the evidence of the Respondent MD and the Claimant in relation to what happened at the meeting on the 22nd April 2009. Indeed the Tribunal notes that there is a conflict of evidence on the Respondent's MD and its Service Manager also in relation to what transpired at this meeting. The Tribunal determines that there was a clear dismissal of the claimant by the MD at the meeting on the 22nd April 2009. It is abundantly clear from the evidence that the MD told the claimant that he was not coming back to work. The Tribunal further

determines that the respondent's treatment of the claimant was not how a reasonable employer would treat an employee in the circumstances. There was a lack of fair procedures and having regard to all the circumstances there were no substantial grounds justifying the dismissal within the meaning of Section 6 (1) of the Unfair Dismissals Act 1977. For all the reasons set out the Tribunal determines that the Claimant's dismissal was unfair.

The Tribunal determines that the most appropriate remedy is to reinstate the claimant to his position.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

