

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NOS.

EMPLOYEE - *claimant*

MN771/2009

UD748/2009

against

EMPLOYER – *respondent*

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. J. Sheedy

Members: Ms. M. Sweeney
Mr. T. Kelly

heard this claim at Cork on 8th March and 5th May 2010

Representation:

Claimant: Ms. Louise Fogarty B L instructed by Mr. Andrew Turner of
Hamilton Turner Solicitors, 66 Dame Street, Dublin 2

Respondent: Mr. Conor Hanaway, SHRC Ltd., Heather House,
Sandyford Business Park, Dublin 18

The determination of the Tribunal was as follows:-

The respondent is a contract web printing operation that prints national and local newspapers. It began production in January 2005

On two occasions the claimant was absent during his shift and took breaks in excess of what was permitted and this led to his dismissal. An appeal was lodged and dismissal upheld. On behalf of the claimant it was argued that fair procedures were not applied and he had no idea that his conduct could amount to gross misconduct.

Respondent's case

The head of operations told the Tribunal that he joined the company six months after start up. The respondent aimed for best quality and rapid turnaround in a very competitive industry. They wanted to win extra business. The work needed to be of high quality and delivered on time, which required flexibility to be built in to the workforce. An evening paper would need to be on the street by 1.30pm or the night shift staff would work on a production deadline of 11.30pm for a paper that needs to make distribution from Dublin. The claimant was a production technician. The production/printing operates on a 24/7 basis therefore extra jobs can be taken on. Each shift is 12 hours long and staff must be there on time. Light production runs while the shifts are changing. No two days are the same therefore the team is asked to organise its own breaks. A total of one hour unpaid breaks is taken, therefore breaks need to be spread out to suit production and team leaders are asked to manage the taking of breaks. Production started in August 2006 and employees were requested not to leave until the shift had finished. Employees were paid for the entire length of the shift therefore they have to be there for its entirety. This was confirmed by an email, which was circulated to all employees in June 2007. All the team leaders were written to in relation to breaks and it was stated that a total of an hour could be taken but not altogether as it would disrupt production. This was circulated to all employees including the claimant.

The first incident in relation to the claimant happened on the Tuesday, 4th November, which was the third day of the shift, the claimant was missing for a period. There was pressure between weekly products, re-setting of equipment and they were under instruction that the Examiner had to be ready for 10.30pm each night. It was unusual to be off the site for such a length of time. The engineering manager, EM met the claimant and asked for an explanation. When he looked at the CCTV they were given to believe that it was a once off but they then discovered that there was a similar incident the previous night, Monday 3rd November. When they discovered this had happened more than once they took a closer look. The MD attended the appeal process and had not been involved previous to this. There was no admission by the claimant about the previous night and it would not have come to light had the engineering manager not been told. It took considerable resources to get to the root of it. They have a small management team and the team leaders report to witness. A lot of the communication was verbal. There was a policy regarding sick leave.

The head of operations stated that he has an open door management style. There are four teams with 11/12 on each team. People cannot be late for a shift as there is usually a live production going on at the shift changeover and the production cannot stop. They have got to deliver to meet their customer needs. Reference was made to a letter dated 8th June 2007 where the claimant was given a final written warning due to not being able to find an important spare part and his implication of a colleague in relation to it. Procedures are in place and all the parts are computerised and the claimant was trained on the system. The claimant stated that the part was not there but it was later located and he asked a colleague to state that the part had been incorrectly stored.

In relation to the claimant being missing he gave an explanation for the Tuesday but not for the Monday. The respondent was not aware that the claimant was ill and he stated that he went to the pharmacy on the Tuesday. At the meetings that were held with the claimant he was asked if he wanted a representative present and he declined. When the claimant left work on 3rd November for approximately 30/40 minutes and on 4th November he was absent for an hour the work had to be picked up by others. If the production work was done there was always maintenance to be done. The claimant's employment was terminated for gross misconduct on 19th November 2008.

In answer to questions from Tribunal members the head of operations stated that staff clock in

at the start of a shift and out at the end. There is no requirement for clocking in and out for breaks. If a team leader is not in the vicinity to report when going on break an internal phone or two-way radio is used. The claimant was given a two-way radio at the start of the shifts on the days in question. The claimant's previous work record was not taken into account in the decision to terminate his employment.

The engineering manager gave evidence. The respondent's working environment was not traditional. It is open and honest and has a team structure. The claimant was a production technician who reported to the maintenance manager. The maintenance manager reported to the engineering manager. He knew the claimant. The claimant worked day shifts for 8 weeks followed by 8 weeks of working night shifts. He spoke to the claimant about technical matters relating to maintenance. The printing schedule was busy and any down time for plant was a major issue.

The production staff members were organised into four teams. The team leaders all work on production. Safety is a dimension of the production technician role. Coaching rather than discipline deals with poor performance, when it is identified. Coaching brings an individual back on track. A personal improvement plan is used to monitor improved performance.

The claimant got two personal improvement plans while an employee. There had been an incident where he could not find a part. He had been trained to use the computer system to find parts but then he failed to use his training. For that reason he was put on a personal improvement plan. He received a final written warning for attempting to blame a colleague for his own failure to find the part.

One hour of unpaid breaks are taken on every 12-hour shift. The pattern of breaks varies but no break can exceed 30 minutes. There is an honour system for taking breaks and employees do not clock in or out when going on a break. If the team leader gives permission an employee can leave the premises for a break. All breaks must fit in with production schedules. The expected production performance is that no more than 1 in 700 runs are late.

In June 2007 there was an issue with one production team not complying with the policy on breaks. An email issued to all employees to remind them of the policy.

On 5 Nov 08 the engineering manager was aware that the claimant was due to attend for work at 7.00pm so he met him then. The claimant explained to the engineering manager that the previous night he went to a late night pharmacy. He had told his colleagues that he would be gone for 15 minutes but when he was out he decided to take all his breaks together. The engineering manager did not notice any signs of flu on the claimant. The claimant was unclear about what time he returned to work so the engineering manager suggested using CCTV footage to corroborate his story. The claimant had no problem with the engineering manager looking at the footage.

The engineering manager accepted the claimant's story and did not feel it was necessary to involve the claimant's colleagues in the investigation. The claimant was asked about other incidents and he said that he could not recall any. When he looked at the CCTV footage the engineering manager found that the claimant had exceeded his allowed breaks the previous night too. The issue was not leaving the premises but exceeding the time allowed.

The engineering manager investigated the incident. Once he had established the facts the matter was referred to senior management. He did not tell the claimant that the matter was a disciplinary matter because at that stage he was investigating. The engineering manager did not make the

decision to dismiss the claimant.

Claimant's Case

The claimant is a qualified electrician and has ten years experience as a production technician. He maintained the production machines. During a production run, he had to be there for the duration of the run. The duration of production runs varied. He worked shifts.

He had requested KVA training and was denied. On two other occasions his requests for training were denied. He felt that management were against him and were looking to get him out.

There was an incident in June 07. There was a problem with a reel stand. He identified the problem. He needed a card but could not find it. He felt embarrassed and knew that there would be trouble if he could not find it. His colleague found the part and the claimant later said that he had found it. The claimant was annoyed to be put on a personal improvement plan. The engineering manager called him to his office and told him that management were watching him. He also told the claimant that he had to show up for work if he was sick. In his opinion the respondent gave him a final written warning after consulting their solicitor and being told that they did not have enough grounds to get rid of him.

Breaks were taken during production down time. On the night shift someone would usually take a list of orders to a Chinese takeaway. This took more than 30 minutes but was not an issue. The claimant thought it likely that the engineering manager knew about the breaks. The breaks were taken openly.

On the night of the incident, the claimant had flu. He remembered the engineering manager instructing him to come to work. At about 9.30pm he asked a colleague where the nearest pharmacy was. He went to the pharmacy and got the flu tablets. Then he went home and relaxed after taking the tablets. He was home for about 40 minutes. He went back to work. He had to work through production and he had been instructed to work sick. It was the last night of working night shift. He was off sick for the following four days.

When he met with the engineering manager on 5th Nov 08, he did not think it was a disciplinary matter. He did not realise that his job was on the line. The claimant had numerous meetings with the engineering manager. The engineering manager often met him to discuss something when he arrived for work. It had become boring. He agreed to the engineering manager looking at the CCTV footage because it would show what had happened.

On 11th Nov 08 the claimant did not know his job was in jeopardy. It was an investigation with talk about his being off site. He did not think it was a big deal. He replied to every question he was asked. His absence did not put pressure on his colleagues because they too were taking a break. However when he was suspended he did talk to his union rep.

The claimant received the letter dated 14th Nov 08 outlining the case against him. In his view his relationship with the respondent had been damaged earlier.

The claimant was informed of the decision to dismiss him by letter dated 19th Nov 08 from the head of operations. He appealed the decision but the decision to dismiss was upheld by the managing director.

A former colleague of the claimant gave evidence. Breaks were flexible. If a production run went well employees would take a break. There was a bonus for getting things done on time. Occasionally it was 4.00 or 5.00am before they could take a break. People often left the site for breaks without informing the team leader.

Being put on a personal improvement plan was seen as a slap on the wrist but was better than immediate implementation of the disciplinary process.

Determination

The Tribunal carefully considered the evidence adduced and the submissions made on behalf of the parties. The incident that resulted in the claimant's dismissal was his taking a longer break than allowed on the night of 4th November 08. In course of investigating this incident the respondent discovered that the claimant had done the same thing the previous night.

The respondent satisfies the Tribunal that the behaviour of the claimant amounted to misconduct and warranted some disciplinary action. However the Tribunal finds that the claimant's behaviour was not gross misconduct and that a lesser sanction than dismissal would have been more appropriate. The claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds and the claimant is awarded the sum of €30,000.00.

The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 also succeeds and the claimant is awarded the sum of €2,307.02.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)