

## EMPLOYMENT APPEALS TRIBUNAL

**CLAIM(S) OF:**  
EMPLOYEE – *claimant*

**CASE NO.**  
UD445/2010  
MN408/2010

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: Ms F Crawford BL

Members: Mr T O'Sullivan  
Mr G Whyte

heard this claim at Dublin on 12th January 2011 and 23rd June 2011

### **Representation:**

Claimant(s): Ms Mary Duffy King  
SIPTU  
Misc Unit, Liberty Hall, Dublin 1

Respondent(s): Ms Aishling O'Sullivan  
Philip O'Sullivan & Company, Solicitors  
14 Denny Street, Tralee, Co Kerry

The determination of the Tribunal was as follows:-

### **Respondent's Case:**

The respondent's representative conceded the claim for minimum notice at the outset of the hearing. The claimant was employed as a store man in December 2007. The respondent company operates two pharmacies at an airport. A company director gave evidence that he worked as a pharmacist four days per week at the airport. He was not involved in the hiring of the claimant.

The claimant was responsible for filling the fridges with bottled water, collecting items from the store downstairs, checking deliveries, putting stock away and general tidying. It was essential that the water fridges were filled first thing in the morning. Selling bottled water at the airport is very lucrative and the company had to work hard to keep its two fridges as the airport authority sells its own water. They had to keep the fridges over 60% full. They had a monthly rolling contract with

the airport authority and so they had to be mindful of the landlord.

The claimant's performance deteriorated over time. They received complaints from the airport authority about the fridges not being properly stocked upstairs and boxes left outside the storeroom downstairs which constituted a health and safety hazard. He wasn't wearing his high visibility jacket. He was letting returns stack up over a number of weeks. He was not rotating stock in the storeroom. The witness spoke to the claimant on a number of occasions about tasks not being done and gave him a number of warnings.

Due to a drop in passenger numbers they had to reduce the claimant's hours in January 2009. They wanted him to work Monday to Friday 8am to 2pm but the claimant wanted to work three days a week so he could claim a social welfare payment for the other days. This was agreed as was letting the claimant take a short lunch so he could leave early on one day per week to play football.

During cross-examination the witness stated that he was unaware if the claimant had been issued with a written contract of employment. He wasn't aware at the time that it was the employer's obligation to issue one. He went through the claimant's duties with him several times. He documented the claimant's tasks and posted it on the wall of the stockroom. The claimant continued to under perform in the same areas. Staff from the shop helped the claimant retrieve items from high shelves as he had a fear of heights.

He and a colleague called a meeting with the claimant on April 13<sup>th</sup> 2009 to discuss the situation. He had no recollection of the claimant seeking to have a representative with him once he found out what the meeting was about or of them refusing anything to him. The witness's colleague felt that they should give the claimant another chance, which the claimant expressed thanks for. The witness typed up a letter of final written warning afterwards and gave it to the claimant. He had spoken to the claimant on several occasions previously but these were not documented. There was an undated letter which referred to a previous verbal warning and warned that a written warning would be issued to the claimant did not perform as expected. Each staff member received a handbook.

The manager of the pharmacies gave evidence. She had known the claimant prior being hired to the respondent as he worked for a catering company on the same premises. He had worked as part of a team for that company for about 8 years. The claimant told the witness that he wanted a challenge and as he had known the respondent's store man was leaving he applied for the position. When asked, the witness said that she had not asked for a reference, as she had known him for so long. When he commenced employment they went through the tasks he was to carry out daily and a task list was posted in the storeroom.

As time passed problems arose, as set out by the respondent's previous witness evidence. There would be delays in orders of stock being delivered to the shop floor by the claimant and the witness found she had to go to the basement on occasions to retrieve stock that meant there might be no one on the shop floor. The claimant was asked to make sure stock was rotated in the stockroom to make sure no stock went out of date. However, the claimant did not and the respondent lost € 3,000.00 in out of date stock.

The claimant said there was not enough room for stock in the stockroom and asked the witness and her colleague (floor supervisor) why they were ordering so much stock. Complaints were made about him not wearing his high visibility jacket, that he had an attitude and was leaving empty boxes lying around the basement. A complaint was also made of fridges left empty of stock on the

shop floors. Business and customer numbers started to decline. His hours, and other staff hours, were reduced. He was offered work at weekends but he declined. Another person was hired to work these hours. The claimant was given verbal warnings about his work. She and the company director spoke to him. When asked she said that she felt the claimant was not capable to carry out the duties. When he worked for the catering company he worked as a team but she felt he did not seem to be able to work on his own. He had been told that if he needed help all he had to do was to ring her or her colleague, the floor supervisor. There had been no problems with the previous employee.

On cross-examination she said that the claimant had complained that the shelving units in the storeroom were too high. She explained the shelving had been supplied by the owner of the airport's premises. When asked she said that she had not personally given the claimant a contract of employment. The claimant had not asked for a representative at the any meetings. She refuted the person who worked at the weekends worked full days.

On re-direction she stated that the issue of boxes and other rubbish left lying around the basement was a health and safety issue. Boxes should have been flattened and got rid of. When asked she stated that the respondent had followed their own disciplinary procedures.

The floor supervisor gave evidence. She reiterated the evidence given by the company director and the manager regarding the problems with the claimant's work.

On cross-examination she stated the claimant accepted deliveries but she and other staff would help him store it away. She told the Tribunal that the claimant had complained to him and her colleagues about his workload. She had not compiled the daily task list posted in the storeroom.

### **Claimant's Case:**

The claimant gave evidence. He previously worked on the same premises as the respondent as part of a team for a catering company for 11 years. He felt that he needed a challenge and when hearing of the opening of the position of store man with the respondent he applied and was successful in getting the job. He was not given a personal contract of employment nor a job description.

After some time his, and others, hours were reduced but this meant he could sign on for social welfare benefit for those days. He told the Tribunal that when he had been working a 5-day week he would stock the fridges the night before but when he was put on a 3-day week this could not be done. He was told by one of the employees at the airport that he was doing his job when he, the claimant, was not there.

He told the Tribunal that he felt he was doing his job and the issues that had arisen were only petty. However he did take what was said to him on board. He said that he had tried to follow the task list posted in the storeroom but sometimes he was too busy. He said he could not understand why the company was ordering so much stock considering the country was in a recession and customers numbers were down. When asked he said that he had rotated the stock, he was well aware how important it was from his previous job in a catering company. He agreed he had gone to his union for advice when the respondent wanted to reduce his hours.

He had not taken up the offer of weekend work he replied that it would have affected his social welfare benefit payment. On the last day of his employment the locks were changed in the storeroom. The manager came to him and told him the company director wanted to see him. He

did not know what it was about and was not afforded the opportunity to bring anyone with him. He was informed he was let go. He was not afforded the opportunity to appeal the decision. He gave evidence of loss.

On cross-examination he explained that he had left his previous job, as he wanted a new challenge, he wanted to work on his own and sometimes did not get on with his boss. He said the same amount of stock was being ordered even when business had declined. He got into trouble when stock was left lying around on his day. When put to him he refuted he unplugged the telephone in the stockroom so staff would have to come down and get the stock.

**Determination:**

The Tribunal have carefully considered the sworn evidence and submissions submitted by both parties over the 2 days of this hearing. The Tribunal finds that the claimant was dismissed and that it was procedurally unfair. The claimant was not offered a representative at meetings and was not given the right to appeal the decision. The Tribunal awards the sum of € 4,500.00 under the Unfair Dismissals Acts, 1977 to 2007.

The respondent conceded the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005. Therefore the Tribunal awards the sum of € 500.00, this being one week's gross pay.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)