

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE– *claimant*

UD2187/2009

against

EMPLOYER– *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey B.L.

Members: Mr. W. Power
Ms. N. Greene

heard this claim at Dublin on 4th January and 23rd May 2011

Representation:

Claimant: Mr. Paul Henry of SIPTU, Level 3, Liberty Hall, Dublin 1

Respondent: Mr. David Farrell of IBEC,
84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

The fact of dismissal was not in dispute.

Respondent's Case

The head of security gave evidence. The claimant was employed as one of a total of five fire wardens. A fire warden is on duty when the oil jetty is open, 24 hours a day 362 days a year. The fire warden ensures compliance with fire safety regulations and acts as the respondent's eyes and ears. The fire warden works in close cooperation with the harbour police.

At any time 2 fire wardens are on the duty rota, 2 are off duty and the fifth is on standby and available for work. If a fire warden is unable to come on duty at short notice, the fire warden on

duty must remain on at the end of his 12-hour shift until the standby is contacted and arrives to relieve him. If the absence continues it results in longer hours for the remaining fire wardens.

When the claimant was appointed to the post of fire warden he was well qualified.

The claimant was dismissed as a result of his behaviour in August 2008. Following a period of leave the claimant was due to work return to work on 6 August. The claimant was scheduled to work 4 consecutive night shifts. Shortly before his shift should start the claimant phoned the Oil Jetty Control Room and informed the duty officer that he was sick and could not attend work. The duty officer informed the head of security. The head of security immediately phoned the claimant but his phone rang out. During the next hour the head of security phoned the claimant twice more but did not get through to the claimant. The claimant did not attend for any of these 4 scheduled shifts. This created a problem for the head of security because he had to arrange an alternative fire warden to cover the shifts. Also the fire warden on duty and waiting to be replaced by the claimant was working his first shift after an extended period of sick leave.

The claimant was again scheduled to work 4 consecutive night shifts starting on 12 August 2008. The claimant phoned the harbour police and informed them that he would not be coming to work that night. The claimant asked for the phone number of the head of security. When the harbour police contacted the head of security he immediately phoned the claimant but the claimant's phone went to voicemail. The head of security left a voice message for the claimant.

On 17 August 2008 the claimant phoned the head of security and informed him that he had been sick and was staying with his father. On 18 August 2008 the head of security suspended the claimant without pay pending a disciplinary hearing. This decision was made taking account of an agreement signed by the claimant on 17 July 2008.

The background to this agreement was that the claimant was off work from April to December 2007 due to alcohol related problems. The claimant attended a rehabilitation course and the respondent covered his absence by using overtime and contract staff. Once he was certified medically fit the claimant returned to work. In June 2008 the claimant failed to turn up for 4 shifts and did not contact the head of security during that time. The claimant had been drinking again. The claimant went to the company doctor for an assessment. The medical report was hopeful that this event 'represents a single blip on his overall path to recovery.' A disciplinary hearing was held on 3 July 2008. The result was that the claimant was given a final written warning that would remain valid for 2 years and as an alternative to dismissal the claimant was asked to sign an undertaking. There were 4 terms to the undertaking. One of which was that the claimant would contact his manager directly in the event of a further absence and remain in contact with his manager.

A disciplinary meeting was arranged for 3 September 2008. The head of security and the HR manager attended the meeting. The claimant, accompanied by his union representative, attended. The claimant was asked to explain his absence from work on 6 August 2008 and also to explain his failure to follow the correct procedure with regard to his absence. The claimant stated that he had followed the procedures then in place. He was on his way to work on the first day of his absence when he felt unwell. The head of security could not consequently contact the claimant because the claimant's phone got wet and did not work. The claimant then travelled by bus to stay with his father.

The meeting was adjourned to enable the respondent to confirm with the claimant's doctor that he had attended for a medical consultation on 6 August 2008. Also statements from the claimant's

colleagues regarding his phone calls were to be faxed to the claimant's representative.

The disciplinary meeting was resumed on 5 September 2008. There was a discrepancy concerning the time the claimant said he had phoned the Oil Jetty Control Room and the time the claimant's colleague received the call. The claimant also admitted that he had not attended his doctor on 6 August 2008. He attended his doctor at a later date and the doctor had backdated the certificate.

The respondent obtained a medical report dated 22 September 2008 that supported the claimant's account of his illness. On 10 October 2008 the head of security and the HR officer met the claimant and his representative to inform them that they would recommend to the CEO that the claimant be dismissed.

The claimant had a history of phoning in sick and then turning off his phone. The head of security was the claimant's manager and needed to hear from the claimant if he was unable to attend for work. The claimant worked in a critical safety area.

The head of operations gave evidence. He heard the claimant's appeal against the decision to dismiss him. The head of operations did not re-open the case. His role was to check that the claimant was given a fair hearing. He asked if there was any new information. Also he considered whether the punishment fit the crime.

The dismissal letter was not read at the appeal hearing on 23 December but it was referred to. The head of operations did not review the paperwork on the case. He had the outcome of the disciplinary process and the head of security informed him of the agreement signed by the claimant in July. The head of operations did not consider moving the claimant to another area.

From the viewpoint of the head of operations the question was, could they give another chance to a man who had lied at a disciplinary meeting. The head of operations upheld the decision to dismiss the claimant.

Claimant's Case

The claimant gave evidence. On 11 May 2007 he told the respondent that he had a problem with alcohol. He was sent for a medical assessment. The doctor told him to go to the appropriate services. It was 5 months before he obtained a place on a residential program. For part of that time he was on the streets. He failed to attend some medical appointments during that period, his life was chaotic. He did not tell the respondent he was homeless.

The claimant did not feel that the respondent supported him during this period. The claimant did everything the respondent asked but he felt threatened in response. He felt that the disciplinary meeting in May 2007 punished him for his honesty.

In June 08 the claimant fell off the wagon. He was again sent for a medical assessment and called to a disciplinary hearing. He signed the undertaking because he had no other choice. He did not like signing the document that would allow the head of security to visit his house. The claimant felt that the terms of the agreement were unfair. However the gun was to his head and he would have signed anything to keep his job.

The claimant considered that he had been a very flexible employee. He worked significant overtime and on occasion stayed on for up to 2 hours at the end of a 12 hour shift.

When the claimant was sick in August 2008 he phoned the Oil Jetty Control Room. His colleague said that he would phone the head of security. This was the procedure followed by his colleagues and he did what everyone else did under the circumstances. The claimant accepted that he should have phoned the head of security but he did not. The claimant had made contact with the respondent and did not feel that he needed to make further contact. He had contacted the HR officer to inform her that he was suffering from a hernia. The claimant's sickness was not alcohol related.

The claimant did phone the head of security and was told not to bother sending in a medical cert because he was off the payroll.

At the first disciplinary meeting the claimant did say he had attended his doctor when he had not. The claimant felt under stress and was worried about his job. When he did go to his doctor the cert was backdated. The claimant had put in a lot of effort in during the year.

At the appeal hearing the claimant and his representative pleaded that he be given another chance. He had been sick and his illness was not alcohol related.

The claimant is presently fit to work. He had an operation to repair his hernia and had recovered from the stress.

Determination

The Tribunal carefully considered all the evidence adduced. The incident that ultimately led to the claimant's dismissal was his failure to attend his scheduled shift on 6 August 2008. His absence continued for the following 7 shifts on his attendance schedule. After that he was on unpaid suspension. This incident occurred about a month after an absence from a scheduled shift resulted in the claimant being issued with a final written warning that was to remain on his file for a period of two years. The claimant had also signed an agreement that required him to contact the head of security directly on any occasion he was unable to attend work.

The claimant phoned his colleague on 6 August 2008 and informed him that he was unable to attend work that evening. While this call did not fulfil completely the terms of the agreement the Tribunal is satisfied that the phone call did inform the respondent about the claimant's sickness. The Tribunal noted that the claimant was unhappy with having a more stringent absence procedure than the one used by his colleagues. The respondent did not attach sufficient weight to the nature of the claimant's illness and the fact that his illness was not a recurrence of his previous difficulty when making the decision to dismiss him. Accordingly the Tribunal finds that the claimant was unfairly dismissed. The claim under the Unfair Dismissals Acts 1977 to 2007 succeeds.

The claimant accepted that he was aware of the absence procedure and did not comply with it. As a result, by his inaction he contributed his dismissal. The Tribunal awards the claimant the sum of €6000.00.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)