

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

EMPLOYEE

- claimant

CASE NO.

UD792/10
MN741/10

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: Ms N. O'Carroll-Kelly BL

Members: Mr F. Moloney
Mr N. Dowling

heard this claim at Dublin on 25th November 2011.

Representation:

Claimant: Ms Ciara O'Duffy BL, instructed by Gerrard L McGowan, Solicitors, The Square, Balbriggan, Co Dublin

Respondent: Mr. David Farrell, IR/HR Executive, IBEC, Confederation House, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

Respondent's Case:

The respondent is a supermarket located in Dublin. JC, Supervisor during the claimant's tenure interviewed him for the position of sales assistant and the claimant commenced employment on 22nd December 2006. He signed his contract of employment on 6th February 2007 and was also furnished with his job description. He acknowledged receipt of the staff handbook also on that date.

The roster was prepared mid-week and was placed on the notice board beside the clocking machine each Wednesday night/Thursday morning for staff members. The claimant was frequently late for work and JC spoke to him on a daily basis. Following the claimant's clocking in he regularly did not commence work for up to twenty minutes approximately later.

Following a disciplinary meeting on 5th July 2007 to discuss the claimant's behaviour and lateness he was issued with a verbal warning and offered a right of appeal. He did not appeal the warning. The claimant apologised for his lateness.

The claimant received a formal recorded warning on 24th September 2008 for his non-attendance at work on occasion and his continual lateness.

The claimant was late for work again on 30th August 2009. He did not attend work on the following days. The claimant telephoned JC on 3rd September 2009. JC told him that he had already received his final written warning and had breached company policy. JC contended that she had no choice but to terminate the claimant's employment that day.

The claimant's mother called into the store between 3rd and 8th September 2009 and asked JC if she would consider reinstating the claimant. JC suggested that she make an appointment to speak to the Store Manager.

RW is Store Manager and has worked in the store where the claimant was employed for ten years. Supervisors and managers had made aware of the claimant's lateness.

RW attended a disciplinary meeting with the claimant on 26th April 2009 in relation to his lateness and non-attendance at work. RW again met with the claimant on 29th April 2009 and outlined the disciplinary issues. He issued the claimant with a first written warning. However, the claimant refused to sign this letter. The claimant chose not to appeal this decision.

As the claimant's lateness and behaviour had not improved RW again met with him on 23rd August 2009 to discuss his continual lateness and seek an explanation from him. RW met with the claimant on 25th August 2009 and explained the warning and seriousness of a final written warning which he gave to the claimant. The claimant chose not to sign this final written warning.

RW was away until Monday 7th September 2009. JC informed him that the claimant had been dismissed on 4th September 2009. He spoke briefly to the claimant that day and asked him to meet with him the following day. In the claimant's absence RW held a disciplinary meeting and formally confirmed the claimant's dismissal in writing on 9th September 2009. The claimant was paid monies owed to him and issued with his P45.

Claimant's Case:

The claimant was employed as a shop assistant. He was studying at the time. Five months later he signed the company's disciplinary procedures but did not keep a copy of these.

MOR was always changing the duty rosters without telling him. RW had told him to come in every day to check the roster. The claimant contended that he might have been late for work once every three months. No one had ever told him that there was a problem with his lateness. He had complained on many occasions about the clocking machine.

The claimant never received a first written warning letter following a disciplinary hearing held on 26th April 2009. He never attended a disciplinary meeting on 23rd August 2009 nor did he

receive a final written warning letter.

On 30th August 2009 he was unwell and phoned into work and spoke to R. He, however, reported for work and worked till 8 pm. The next day he visited the doctor and he wrote a note for him. As his brother also worked in the supermarket he took the note into work for him. The following day he spoke to JC and she wished him a good recovery. On 2nd September 2009 he was unable to contact JC. When he spoke to JC on 3rd September 2009 she told him that he had no job to come back to and that he was fired with immediate effect and to hand in his uniform.

The claimant said it was not fair and that he would talk to RW the following Monday. When he spoke to RW he tried to explain that he was unwell and give him his medical certificate to cover his absence from work. RW refused to take the certificate. The claimant then said he was thinking about getting advice and RW told him to do whatever he wanted. He was never invited to attend a disciplinary meeting on 9th September 2009.

The claimant contended that he was devastated when he was dismissed. His brother and his girlfriend helped him pay his course fees and the rent for his apartment. He was not furnished with a reference and has been unable to secure work since the termination of his employment. He is doing a course in web development and is in receipt of social welfare benefit.

Determination:

The Tribunal has carefully considered all of the evidence adduced during the hearing of the matter together with the documentation submitted.

There was a complete conflict between the parties in relation to all of the evidence given during the hearing.

The Tribunal, having considered all of the evidence find that the respondent's serious procedural shortcomings were matched only by the claimant's lack of punctuality. The formal verbal and written warnings together with the dismissal letter are littered with inaccuracies, so much so that it would be unsafe for the Tribunal to rely on them.

The claimant was never formally invited to any of the disciplinary meetings. The respondent conceded that this was the case. The claimant stated that the meetings of the 26th April, 2009 and the 23rd August, 2009 did not occur or if they did occur he was not notified of the meetings and was not in attendance. Letters were submitted, albeit with inaccuracies, referring to the above meetings. It is noted that the claimant did not sign either of the letters. That is significant in light of the fact that he did sign the letters of the 24th September, 2008 and the first formal (written) verbal letter of the 5th July, 2007. On balance the Tribunal accepts the claimant's evidence that he was not in attendance at those meetings and did not receive the letters of the 26th April, 2009 and 23rd August, 2009.

Much was made of the claimant's alleged period of sick leave. The claimant received a sick certificate dated the 7th September, 2009. He did not submit this sick certificate to the respondent. It is noted that claimant did not get his sick certificate until after he was dismissed. He stated in evidence that he got a sick letter, not a certificate, on the 30th August, 2009 and that he gave it to his brother to give to the respondent. The respondent denies ever having received that sick letter or note of any kind. However, the Tribunal is satisfied that the respondent was aware of the claimant's illness due to the fact that it stated in the dismissal

letter of the 9th September, 2009 “*not making contact with your manager or the store when out sick*”.

It is clear from the clock in records that the claimant was consistently late. The Tribunal does not accept the claimant’s evidence that he was only late once or twice a month nor does it accept that the clocking in machine was flawed. The clock in system is a sophisticated handprint biometric system and if it was flawed, that flaw would affect all of the staff. There was no evidence of that. There was an inconsistency between the clock in records and the respondent’s handwritten notes. The Tribunal is of the view that regardless of the inconsistency, the claimant was still consistently late, whether he was a little late or very late is not relevant.

The claimant’s consistent lateness is what ultimately led to his dismissal. The respondent’s execution of its procedures was appalling. There were no formal invitations to meetings, no formal evidence was adduced to show that he was actually in attendance at two of those meetings, the letters following the meetings were littered with inaccuracies, the claimant was dismissed over the phone and he was not given an opportunity to defend himself. The claimant does accept that he received the dismissal letter and that he made a decision not to appeal due to his perceived “breakdown in trust”. That is surprising because he stated in evidence that he “begged for his job back” on the 4th September, 2009. He stated that he took the dismissal letter to the citizen’s information centre and following that meeting he was of the view that there was no point in appealing. The claimant does have an obligation to exhaust the appeal process regardless of what he believes the outcome would be.

A failure to follow one’s own procedures is not necessarily a fatal flaw. However, in this case there was such an appalling deviation from the procedures, so much so that it led to the claimant’s premature dismissal. That together with the fact that the claimant was dismissed over the phone was fundamentally unfair. The claimant did however contribute to his own demise.

The Tribunal finds that the claimant was unfairly dismissed and awards him € 5,000.00 under the Unfair Dismissals Acts, 1977 to 2007. The Tribunal also awards the claimant €542.83 being the equivalent of two weeks pay under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)