

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE
MN365/2010

CASE NO.
UD358/2010

Against

EMPLOYER
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 M. O'Connell B.L.

Members: Mr M. Carr
Mr F. Barry

heard this claim at Dublin on 27th May 2011

Representation:

Claimant: Mr Pat Brady, 24 Henley Park, Churchtown, Dublin 14

Respondent: No representation listed

Respondent's case

The H.R manager JB for the respondent company stated that the claimant began work in July 2007 as a shop assistant. He was employed on a part time basis and worked various hours as he was still attending school.

The claimant received a contract of employment and received a hand-book of policies and procedures.

Rosters are done fortnightly in advance for the business.

The claimant failed to show up for work on 5th 8th 9th and 12th August 2009 even though he had been rostered to work. The company was unable to contact him and had to arrange additional cover at this time.

The claimant had booked annual leave for weeks beginning 16th August 2009.

The respondent did not see him again until 1st October 2009. On his return he was asked for an

explanation for his absence. He said that he didn't realize that he had been rostered. He was told that was an unacceptable excuse as rosters are done 2 weeks in advance. The claimant had been missing on seven occasions during the year and a final written warning was issued.

Two weeks after returning to work in October he went missing again. He was rostered for 18th 21st 23rd and 24th October and did not show up for work.

A note was handed into the office by the claimant on the 19th October asking for days off.

On 29th October he made a return call to the respondent company and was invited to attend a disciplinary meeting, he stated that he handed in a request form but could offer no other satisfactory explanation. He was told by JB that staff had been spoken to and nobody had been asked to cover for him.

He asked for a second chance and was told there were no more chances and a decision was taken to dismiss him. On 29th October the claimant was contacted and told he was dismissed. A letter then followed up the dismissal advising that an appeal could be lodged within 7 days of receipt.

Claimant's Case

The claimant gave direct sworn evidence. He commenced employment with the respondent in 2007. An opportunity arose for him to go away in August 2009. He had already requested annual leave and he arranged to have additional shifts covered. His supervisor told him he didn't care who worked it once it was covered. The colleague who was providing cover went sick and because he was abroad he did not get any phone calls regarding the situation. It was an understanding that shifts could be swapped informally and was not always done through H.R.

The dates in October which he had not worked had been requested as days off. He was unsure of the date of the request, and couldn't confirm or deny it may have been the 19th October.

He received a telephone call on 27th October and was told his employer needed to speak to him as he was supposed to be at work the previous day. He understood he was in a bit of trouble but explained that he did not know he was rostered to work. He was not advised that he could have a third party with him.

The meeting on 28th October lasted approx, 10 mins and he was asked to explain his absence. He told the respondent he had checked the rosters and was not down to work until that day - Wednesday 28th.

In his opinion the rosters he checked may not have been properly displayed.

The claimant was told by the respondent company on 29th October 2009 that they would have to let him go. He requested his P45 and a written explanation. He did not use his right of appeal, he had seen other employees being let go and did not want to work for the respondent again. He did not receive letter of 1st October which was final written warning and received no explanation as requested at the time of dismissal.

The determination of the Tribunal was as follows:-

Dissenting opinion

Mr. Frank Barry dissented with the majority opinion of the Tribunal in relation to the position the Tribunal took in deciding to deduct 20% of the award because the claimant failed to “exercise” the full disciplinary procedures which included the Appeal Process.

The Tribunal heard that the claimant, who received notification of his dismissal, was also informed that he had a right to appeal the decision to a higher level. The claimant told the Tribunal that he didn't appeal as he had seen others being let go.

Having considered all the evidence, and in particular the claimant's view of previous appeals from dismissals within the company, Mr Barry in dissenting, considers it would not be just and equitable to make a deduction from the original award of €7,384 in respect of the claimant's failure to invoke the appeals' procedure.

Mr Barry's opinion is that the employee has a right to an appeal but was under no obligation to exercise it and had a right to refer his case to the E.A.T. for a full hearing.

He therefore should not suffer any loss because he consciously, or otherwise, decided not to submit to the company's appeal procedure and it is his opinion that it was not unreasonable for the claimant not to do so in these circumstances, therefore the claimant is entitled to the full award of €7,384 made by the Tribunal.

Determination by majority decision:

The dissenting decision above makes way for the determination by majority decision.

There is a conflict between the evidence given by the claimant and the respondent in this case. Firstly the respondent allegation that the claimant failed to show up for work on four specific dates in August 2009. This was denied by the claimant who asserted that he had arranged appropriate cover. Secondly, the respondents allegation that the claimant failed to attend work as scheduled on four specific dates in October 2009 was also denied by the claimant.

In relation to these dates, he stated that he had informed the respondent of his unavailability to work. However the Tribunal noted that he was not certain of the date on which he provided the notification.

In relation to procedures used the Tribunal is extremely critical of the respondent.

The final warning given was undated and its receipt could not be confirmed to the satisfaction of the Tribunal.

On its own evidence the respondent accepted that the claimant when notified of a dismissal meeting was not told he could be accompanied by a 3rd party. The claimant said that when notified of the meeting it was not described as disciplinary although he was aware that the respondent had concerns.

In these circumstances the Tribunal believes that the dismissal of the claimant was unfair.

The Tribunal awards the sum of €7,384.

However, despite being notified of his right to appeal the dismissal, the claimant decided not to pursue this course of action.

He said he was aware of the appeal mechanism and said he had no knowledge of how it would operate or about the identity of the person who would preside over it.

The Tribunal believes that he should have utilised the appeal procedure in the first instance and makes a deduction of 20% to the award made, reducing it to €5,904.

No evidence was adduced under the Minimum Notice and Terms of Employment Acts, 1973 to 2005

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

