

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO:

EMPLOYEE - *claimant*

UD1266/2010

against

EMPLOYER - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. J.A. McGovern BL

Members: Mr. C. McHugh
Mr. S. O'Donnell

heard this claim in Dublin on 23rd August and 11th November 2011

Representation:

Appellant: John Murphy, SIPTU, Construction Branch, Liberty Hall, Dublin 1

Respondent: Byrne Wallace, Solicitors, 2, Grand Canal Square, Dublin 2

The decision of the Tribunal was as follows:

Respondent's Case:

On the first day of the hearing a co-director (MU) gave evidence. He explained that the company was involved in the insulation business. Over the years they mainly dealt in domestic insulation and in 2009 were awarded an installation contract with the ESB installing insulation in housing for mainly elderly people, people with a disability and mainly vulnerable people. The ESB had emphasised the clients were vulnerable and to take care how they were treated. All staff were informed. Over the first 6 to 8 week period there was a "hand-holding" scheme in place. If there were problems or queries on site an inspector with the ESB could be contacted or head office.

The staff were called to a meeting in October 2009 and informed that the contract in Galway was the only work they had on at that time. As the work was located in Galway they would be required to stay overnight. He told the Tribunal that he informed staff that time off for funerals was only allowed for immediate family. It was stated in the company handbook the claimant had signed off on.

The claimant was employed as a crew leader who overseen staff duties and also worked as a driver delivering materials to various locations for instalment. He had worked in the Laois / Offaly region and in Galway.

On January 18th 2010 he became aware the claimant wanted to take a day off to attend a funeral of a friend who had been murdered. The claimant had spoken to (AU) a Director and to (CMW) who worked in the office. The following day the claimant rang the witness who asked him when the funeral was totake place. The claimant replied he was not sure because of the circumstances. He informed the claimantthe day off was refused, as due to the limited amount of staff, if the claimant did not work, neither did his helper and the company would be down a day's work, which would not please the ESB.

On January 25th the claimant did not attend work. MU opened lists of "to do lists" the claimant had worked on which had been arranged for dates and times between the clients and head office. It appeared from 22 inspection reports that various work had not been carried out completely. These reports came to his attention that same day and he told the Tribunal that he then had to send some one else to Galway to inspect the work and complete it correctly. This brought extra cost to the respondent. He explained in one case pipes had not been insulated. Over December 2009 temperatures had dipped to minus 15 degrees. The witness told the Tribunal this was "sacrilegious". The pipes burst causing serious damage and the respondent company had to repair and redecorate the house. He got professional legal advice.

On January 27th 2010 the witness wrote to the claimant over a number of issues. These being the fact he had been told he could not take time of for his late friend's funeral but took a day off anyway, which meant he went against company rules and the lists of work not carried out by him in Galway. He was invited to a disciplinary meeting on Friday January 29th 2010 in head office. A copy of the disciplinary procedure was enclosed with the letter. He was also informed that it was important he attended the meeting and could bring a trade union representative or colleague with him.

When asked by the Tribunal had there been other issues with uncompleted work not carried out by other staff he replied there had. The staff had been disciplined but the issues arising with them had not been as serious as with the claimant.

The claimant attended the meeting but had no one with him. The witness mentioned this fact to the claimant but all he did was shrug his shoulders. The witness asked the claimant what had happened to the materials he had not installed in the various houses and he was told they were in the company van. The witness went through the 22 inspection reports with the claimant but he could not give any answers.

On February 2nd 2010 the witness again wrote to the claimant to give his decision. Due to the fact that he had taken a day off to attend a funeral when already knowing it had been refused and failing 22 inspections by the ESB with no clear answers why this had happened, he was informed he was dismissed. He was also informed he could appeal the decision to AU within 5 days.

On the day of January 25th 2010 the respondent lost 2 private jobs because the claimant had taken the day off. The respondent also lost the contract with the ESB and the Galway contract. He had not been asked to tender for contracts with them since.

On cross-examination he stated that when he asked the claimant about the details of his friend's death he (the claimant) could not recall his name or sate when the funeral would take place. When asked he said that he was not aware how the claimant's friend's untimely death affected him and the claimant had not told him. When put to him there had been no problems with the claimant's work in the Laois / Offaly region, why was he not baffled why he had 22 bad reports in the Galway region.

He explained that the failures of the claimants work were of a very serious level. When asked he explained that some of the major failures were lack of pipe insulation, no lagging jackets fitted on boilers

and eaves blocked. He said the claimant had a copy of all investigation reports before the meeting on January 29th 2010 and explained that the previous contractor had lost the contract with the ESB because they had been in financial difficulty.

The person (CMW) who carried duties in head office gave evidence. She explained that she had been working with the respondent company for 14 years and dealt with the administration, accounts and general human resources.

In mid January 2010 AU had informed her that the claimant had told him of his friend's death and needed a day off to attend the funeral. She spoke to the claimant and informed him that he could not have the day off. On January 22nd 2010 she spoke to another crew leader who informed her that he did not think the claimant would be in the following Monday as he was attending the funeral. She rang the claimant who said he was going to the funeral. She informed him that MU had told him earlier in the week he could not have the time off and he could use the weekend to visit the family and convey his condolences. The claimant was adamant he would not be attending work on the Monday. She informed MU and spent the rest of the day, till around 8.30pm, speaking to the clients on the claimant list to re-schedule the work. They were not happy.

She attended the meeting on January 29th 2010 and typed the letter of dismissal. The claimant had no one with him and was reminded he could. He gave no explanations over the uncompleted work carried out in Galway. She also attended the appeal meeting on the 17th February 2010. The claimant had a representative present at this meeting.

When asked she said she had been a note taker at the meeting but had given her opinion. She was also present at the staff meeting in October 2009 when staff were told of no time off for funerals and asked his staff's commitment to carry out the work in Galway. When asked she said the claimant did not give any different answers at the appeal meeting.

(AU) a Director gave evidence. The claimant appealed the decision to dismiss him on the 5th February and he conducted the claimant's appeal on the 17th February, 2010. On the 18th January when the claimant told him of the death of his friend, he did not know the date of the funeral and the claimant told (AU) that he would keep (CMW) up to date.

(AU) said the claimant was a very good worker. He said the claimant worked for the respondent for the past five years and the only change in work practices was draft proofing windows and doors. The failure of the claimants work was most severe and in some instances it was not done properly, or at all. The winter of 2009 was very cold and a burst pipe in an attic is far worse than a hook and eye failure to stop draft from an attic door. The training course mentioned in the claimants appeal letter was not for the ESB contract and was not relevant to the fitting of insulation.

(AU) said that during the appeal hearing the claimant did not offer any explanation of his failures other than what was in his letter of appeal. After the appeal, (AU) said he went through all of the letters, reports and notes and made the decision that the dismissal must stand.

During cross examination (AU) said it was the first time the claimant had being called to a disciplinary meeting. The claimant and (R) worked together but the claimant was the driver and in charge. Every house was not draft proofed as some have PVC windows and doors. He said damage to pipes can happen, but that the employees were to inform the office who would in turn inform the Inspector. He said when an Inspector did an investigation and gave him a report he took it on face value. He did not know how the Inspector scored the reports as it was an internal system. If there was a problem with the job, it should be written on the work sheet. The work sheet was only a guide, every attic should be insulated.

Claimant's Case:

The claimant started working for the respondent in August 2005. He had worked for another employer for the previous three years and was approached by a staff member of the respondent offering him a job. When he worked in Laois/Offaly he was doing the same work as Galway. The houses were newer than the houses in Galway and there were no issues.

On Monday 18th January 2010, he told (AU) that his friend has been stabbed to death at the weekend and that he did not know when the funeral was. (AU) told him to speak to (CMW) about it. He put it to (CMW) when she arrived and they got into a conversation about his friend. He found out the following Friday that the removal was on Saturday and the funeral on Monday. He spoke with (CMW) who told him he was scheduled to work on Monday. He told her "what can I do". He went to the funeral and when he arrived into the office on Tuesday a letter was waiting for him.

At the first hearing he gave an explanation of all of the issues. He carried out the work as required. During the appeal hearing, he tried to explain but (AU) kept on talking about an email from the ESB and about not getting paid. He felt (AU) was just going through the motions at the appeal hearing.

Under cross examination the claimant said he had signed a contract of employment and was aware that absence without leave is a serious breach. He had learned from previous employees not to bring a Trade Union Official to the disciplinary meeting. The respondent had made three staff redundant the previous week and said why could him taking one day off cause problems for the respondent.

Determination:

The Tribunal has carefully considered the evidence adduced at the hearing. It appears that the respondent did not properly investigate the incidents in relation to the Galway contract and relied solely on the investigation of a third party. The respondent also moved directly to stage four of the Company's disciplinary process. No satisfactory reason was given as to why the initial stages of the disciplinary process were skipped save for the respondent saying that the issues were so serious it merited 'fast-tracking' to stage four. There was however, no convincing evidence to this effect on behalf of the respondent particularly in circumstances where the remedial works for the Galway contract were to be carried out by other employees and not the claimant. In applying the British Leyland test, the Tribunal is required to look at the reasonableness of the respondent's actions. On balance the Tribunal feels that it is not reasonable to move to stage four where the potential is immediate dismissal. In the circumstances, the Tribunal finds that the claimant was unfairly dismissed.

However, the Tribunal also finds that the claimant contributed to his dismissal for a number of reasons. Firstly, he was clearly in breach of the respondent's policy on absence without arrangement. This policy was referred to at two previous meetings in August and October 2009, of which the claimant gave evidence he was aware of.

Secondly, based on the evidence given during the hearing, there were serious issues with the claimant's work on the Galway contract. This was particularly troubling given the work was for a vulnerable section of society. Furthermore, the claimant does not appear to have mitigated his loss to any great extent. In all of the circumstances, the Tribunal awards the claimant the sum of €5000.00 by way of compensation under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)