

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:  
EMPLOYEE *-appellant*

CASE NO.  
UD2498/2009

against the recommendation of the Rights Commissioner in the case of:

EMPLOYER *-respondent*

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms K. T. O'Mahony B.L.

Members: Mr G. Andrews  
Mr F. Dorgan

heard this appeal at Roscrea on 23 March 2011

#### **Representation:**

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Appellant: Mr Ger Kennedy, S I P T U, Connolly Hall, Churchwell,  
Tipperary Town, Tipperary

Respondent: Mr. John Brennan, IBEC, West Regional Office, Ross House,  
Victoria Place, Galway

**This case came before the Tribunal by way of the employee's appeal of the Rights Commissioner's recommendation 069053-ud-08/GC**

#### **Summary of the Evidence**

The appellant was employed primarily in the boning hall of the respondent's meat-processing factory. Because the respondent is involved in production, attendance is important and absenteeism is a serious problem for the respondent. If an employee is ill he must contact his supervisor before 10.30am and supply a medical certificate within three days. An allowance is made for one sick day per month but not for more than two days in six months.

On 23 January 2008 the operations manager (OM) spoke to the appellant and his union representative about his persistent absence from work. He had been absent 14 days from 31 December 2007 to 15 January 2008. This meeting was prompted by his absences over the two previous years which were at 26% in 2006 and 31% in 2007. This was one of the highest levels of absenteeism in the company. OM warned the appellant of the seriousness of the situation and that his attendance would have to improve or "there would be consequences".

Shortly after this, following an uncertified absence on 4 February 2008 OM met with the appellant on 7 February 2008 with the intention of suspending him for two weeks. The appellant's representative negotiated this sanction down to three days unpaid suspension and a final written warning. After the February meeting the appellant was aware that he was on his last chance.

On 9 May 2008 an incident occurred in the boning hall between the appellant and a senior manager (SM). The respondent's position was that the appellant was reprimanded by SM for he regarded as a less than acceptable standard of work. The appellant maintained that he was manhandled by a supervisor (SR) and verbally abused and threatened by SM, SR and another supervisor in front of a number of employees. The appellant lodged a formal complaint with OM about the incident. Statements were obtained from SM and the two supervisors involved. A meeting was held on 14 May to investigate the incident. OM, SM, the appellant and the senior shop steward were in attendance. OM concluded that both SM and the appellant "gave as good as they got". OM's evidence to the Tribunal was that he concluded that it was a once-off incident and that the appellant had not been bullied or harassed

Following the meeting of 14 May a letter of even date was issued to the appellant. This letter referred to his inferior work standard and his behaviour which was characterised as "bordering on gross misconduct" towards SM when challenged by him and in conclusion referred to his aforementioned suspension and final written warning. There is no reference in the letter to a finding on the appellant's complaint of bullying and harassment. On 22 May the appellant's trade union official/representative (TU) sought a meeting to discuss the contents of the letter of 14 May. In a response dated 26 June 2008 the respondent's HR Manager confirmed that the respondent would meet to discuss the contents of the letter as another unrelated matter. That meeting would ultimately be held on 6 August 2008. The appellant was dissatisfied with the respondent's investigation into his complaint of bullying and harassment.

Following the earlier meetings of 23 January and 7 February 2008 in relation to his absenteeism the appellant had been absent on four other occasions, all of which were certified and in total amounted to 18 days:

18 March  
31 March to 2 April  
19 May to 3 June  
4 July to 21 July

Following these absences the appellant was issued with a letter dated 22 July 2008 with the heading: 'Notice of Disciplinary Action'. In the letter OM referred to the two earlier meetings at which the appellant had been advised of the seriousness of his situation and then informed him that as a consequence of his persistent absences he was dismissed as and from 22 July 2008. The decision to dismiss the appellant was made prior to this meeting and the letter of dismissal had been prepared prior to the meeting.

The respondent's position was that the appellant's absenteeism was running at 30% up to the termination of his employment. The respondent did not send the appellant to the company doctor as the medical certificates showed that the appellant had suffered a variety of illness rather than one persistent illness, in which case he would have been asked to attend a doctor nominated by the respondent.

OM, SM and the HR manager were present on behalf of the respondent at the meeting on 6 August. The issues to be discussed at the meeting were the contents of the letter of 14 May and the other unrelated matter to be raised by the respondent. However the appeal on the dismissal was raised at the meeting and considered. The dismissal was upheld.

The appellant believes this complaint was not fully investigated and was the reason his employment was terminated. Although the appellant had been a shop steward for 12 years he had never seen the respondent's disciplinary and grievance procedures.

The appellant believes his complaint of bullying and harassment was not fully investigated and was the reason for his dismissal. Although the appellant had been a shop steward for 12 years he had never seen the respondent's disciplinary and grievance procedures. He had never been offered medical assistance or requested to attend a company doctor by the respondent.

### **Determination**

While the Tribunal notes the timing of the appellant's complaint about bullying and harassment and his dissatisfaction with the investigation into that matter it nonetheless accepts, on the balance of probability, that the reason for the appellant's dismissal was his persistent absences.

Whilst the appeal against the decision to dismiss was not on the agenda for 6 August meeting it was raised and considered at the meeting and the dismissal was upheld. Present on the panel were OM who made the decision to dismiss the appellant. This offends against the principles of fairness and natural justice. Furthermore, SM who was also present on the panel could not reasonably be regarded as a neutral decision maker in light of the fact that only a few weeks earlier the appellant had lodged a bullying and harassment complaint against him.

For these reasons the Tribunal finds that the dismissal was unfair and the claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds. However, it further finds that the appellant substantially contributed to his dismissal and taking that contribution into account it determines that an award of €2,000.00 is just and equitable in this case.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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