

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIM(S) OF:

CASE NO.

EMPLOYEE

*claimant*

MN1381/2010

UD1435/2010

WT596/2010

Against

EMPLOYER

*respondent*

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005  
ORGANISATION OF WORKING TIME ACT, 1997  
UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. D. Mac Carthy S C

Members: Mr J. Flanagan  
Mr F. Keoghan

heard this claim at Dublin on 17th April 2012  
and 8th June 2012

Representation:

Claimant(s): Mr. David Dodd BL instructed by Mr Shane Healy, Healy O'Connor,  
Solicitors, 77 Sir John Rogerson's Quay, Dublin 2

Respondent(s): Mr. Niall Neligan BL instructed by Mr. John Greene, PC Moore & Co,  
Solicitors, 17 South Great George's Street, Dublin 2

The determination of the Tribunal was as follows:-

**Respondent's Case**

AG told the Tribunal that the respondent is a family business which was established twenty years ago. It supplied, maintained and serviced PC equipment and had a wide range of customers and a retail shop. The claimant was employed in June 2008 as a service manager. The claimant looked after corporate customers and customers on site. The service manager's role was the lynchpin of the respondent. There were issues regarding the

claimant's absenteeism and performance. The claimant did not bring in new business and the respondent lost customers due to the claimant not undertaking his work. On the 18<sup>th</sup> September 2009 the claimant had his second performance review. There were difficulties in relation to the claimant's paperwork, his absenteeism and late timekeeping. His absenteeism continued and in November 2009 there was no improvement, the respondent was losing business and she had other staff to consider.

She offered the claimant three different options, if he wanted to leave the respondent there would be no hard feelings. He could take a ten per cent reduction in his salary or he could work as a subcontractor. The claimant agreed to a ten per cent reduction in his salary and asked her to hold off until January 2010. As a result of the claimant not completing the service book the respondent lost money. She did not give the claimant a written warning regarding his poor performance. She met with an independent consultant regarding the claimant's absenteeism, lates and not handing up paperwork.

On the 28<sup>th</sup> January 2010 the claimant left work. She received a text from the claimant on the 2<sup>nd</sup> February 2010. She wrote to the claimant on the 15<sup>th</sup> February 2010 whereby she informed him that she would be obliged for a medical certificate. On the 22<sup>nd</sup> February 2010 the claimant still had not returned to work. On the 10<sup>th</sup> March 2010 she wrote to the claimant's solicitor as he had not furnished another medical certificate. In a letter to the claimant dated the 19<sup>th</sup> March 2010 she informed the claimant that she had no option but to conclude that the claimant had abandoned his employment and his P45 would be forwarded to him.

The respondent was given information from two sources that the claimant was working elsewhere. She believed that the claimant was not returning to work. The respondent did not act on that information at that time and at that stage the claimant's absenteeism was the respondent's main priority. The respondent sought independent advice at this time and was advised that the claimant had abandoned his job. She was of the view that the claimant was not bullied and she told him if there was a problem to inform the respondent.

The second witness for the respondent Ms. D told the Tribunal that she is an administrator of a school which comprised three houses. She was responsible for the utilities, water, electricity and gas. Employees in the M office had to move out as it was being refurbished. On the 20<sup>th</sup> April 2010 she met T McK to organise the move of the network and she was accompanied by the claimant. They discussed the network and looked at the IT Cabinet. The claimant gave her his e mail address. The claimant did not invoice her directly on the 22<sup>nd</sup> April 2010. She was not aware that T McK was a friend of the claimant's.

### **Claimant's Case**

The claimant told the Tribunal that every day was a struggle to undertake his duties with the respondent. Mr. M made it very difficult for him and Mr. M told him he was useless and that if the claimant wanted to leave the respondent at any time he could do so. He was told he was useless every half hour and Mr. M showed him other employees CV's.

In April 2009 he had a medical problem which was a delicate issue. He was absent from work for a couple of weeks. He did not want Mr. M to discuss the nature of his illness. On his return to work his fellow employees joked and laughed about his illness and Mr. M had told his

colleagues the nature of his illness. The claimant worked very long hours from 8.30a.m. until 8.30p.m. He was brought to the office at 5.55pm every day. An argument took place regarding why he could not obtain money from customers. He was employed to provide a service as best he could.

After his dismissal he was ill and he could not work for ten months. He was in receipt of social welfare benefit at this time. He was suffering from depression and anxiety. He then stated that the doctor told him to take two weeks off and then a further three weeks. He then stated that he had made a mistake when he said he could not work for ten months. He undertook some consultancy work at the end of 2010.

In cross examination he stated he was a director of an umbrella company but he was not a shareholder. When he was starting to become a graphic designer he had to have a domain name online. He registered the domain name on line and he had to have a limited company to create a domain name. When put to him that under his contract of employment there was a restrained trade clause he replied he never worked for company M. He could not recall if he was in work on the 27 January 2010. He never worked for or on behalf of company C.

### **Determination**

Having regard to all the evidence adduced the Tribunal finds that the respondent has not shown that the dismissal was just and equitable having regard to all the circumstances. It has been established by Tribunal case law that before an employee is dismissed for poor work performance or attendance he should be warned. There were no such warnings in this case. The Tribunal would also weigh up whether dismissal is proportionate. In the present case we find against the respondent on both grounds.

The Tribunal cannot accept the respondent's argument that the claimant "abandoned" his employment by being absent for a few days and sending in medical certificates late. This was clearly a dismissal.

On the other hand we were not impressed by the claimant's evidence. The Tribunal awards the claimant compensation of €11,500.00 under the Unfair Dismissals Acts, 1977 to 2007. The claimant is entitled to one week's gross pay in lieu of notice in the amount of €721.15 under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

The claim under the Organisation of Working Time Act, 1997 is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

