

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE – *claimant*

CASE NO.
UD1712/2010
MN1663/2010

against

EMPLOYER – *respondent*

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr T Ryan

Members: Mr T O'Sullivan
Mr O Nulty

heard this claim at Drogheda on 19th September 2012

Representation:

Claimant(s): Mr Oisin Clarke BL, instructed by:
Ms Megan Shannon
Paul W Tracey
Solicitors
24 Marlborough Street, Dublin 1

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

The determination of the Tribunal was as follows:-

Background:

As dismissal was in dispute the claimant gave evidence first. The claimant was employed as a sales assistant in a supermarket. He had an accident at work in June 2009 and was then on sick

leave until the termination of his employment in May 2010. The respondent company contended that the claimant's failure to respond to its letters during April 2010 and into May 2010 led it to assume that the claimant had no interest in resuming his employment and conveyed this to him by letter of 10 May 2010.

Claimant's Case:

The claimant gave evidence that from the end of April to the end of May 2010 he went to the UK for treatment of the injury he had sustained at work the previous year. When he returned in June he discovered letters from the respondent company which informed him that his employment with the respondent company had ended. He phoned the store twice and left messages, but he did not get a response. He had not intended to resign.

During cross-examination he stated that he had not advised the Personnel Manager that he was going to the UK, but he had said it to another member of staff while he was dropping off a 'sick' certificate. He had attended the company doctor on 23 February 2010. No follow up appointment was made.

He agreed that he received a letter from the Personnel Manager dated 6 April 2010. The letter requested that the claimant attend a welfare meeting on 12 April 2010 at 1pm. The claimant did not attend the meeting. He went to the store earlier that day and left a 'sick' certificate at the customer services desk. He was told that the Personnel Manager wasn't in. He left a message at the desk to tell the Personnel Manager that he couldn't attend the meeting later that day as he had a medical appointment.

He agreed that he received a letter dated 13 April 2010. The letter stated that the claimant had failed to attend the meeting on 12 April 2010 and that he had not contacted the Personnel Manager to state that he would not be attending. He was requested to contact the Personnel Manager by noon on 18 April 2010 to reschedule the meeting. He contended that he left a message for the Personnel Manager. He found it difficult to contact her sometimes. It was hard for him to physically visit the store.

He believed that he had received the letter dated 20 April 2010 from the Personnel Manager which invited him to a welfare meeting on 26 April 2010. He did not attend the meeting. He contended that he did not receive the letter dated 28 April 2010. The letter requested the claimant to make contact with the Personnel Officer by 3 May 2010. The company issued all letters by registered and ordinary post at the same time.

He contended that he did not see the letters dated 4 May 2010 and 10 May 2010 until early June 2010. The letter of 4 May stated that "failure to make contact as requested will leave the company with no option but to assume that you are not returning to work..." The respondent's letter of 10 May 2010 stated that as the claimant had failed to make contact "the company has no option but to assume that you are not returning to your position with [the company] and your employment is now at an end." He contended that he phoned the store twice and left messages after reading the letters, but received no response. He contended that he did not receive his P45.

In response to the Tribunal the claimant stated that he had not written to the company during April or May 2010. Regarding sick certificates he sometimes had difficulties getting to the doctor or the store.

Respondent's Case:

The Personnel Manager gave evidence that she tried to engage with the claimant about his absence and to assist him in coming back to work. She had difficulties contacting the claimant during his sick leave. She frequently had to contact him to ask him to provide sick certificates. He often sent in two or three at a time. He failed to contact her prior to the meeting of 12 April 2010. He did not make contact as instructed by letter before noon on 18 April 2010. She received the company doctor's report on 18 April 2010 and contacted the claimant by letter of 20 April 2010 to ask him to a meeting to discuss it on 26 April 2010. The report stated that the claimant "appeared to be quite disabled at the time and unfit for work." The claimant did not attend and there was no contact from him. She did not receive any of the messages the claimant contended he left for her. The Personnel Manager was unaware that the claimant had gone to the UK for treatment.

The claimant's employment had been terminated as the claimant had completely disengaged from the process. If he had told her that he was going to the UK she would not have written to him or terminated his employment. She just wanted the claimant to contact her. The claimant did not make contact to report that he did not receive his P45. She did not receive any messages from him after she sent the letter of termination.

During cross-examination the Personnel Manager stated that monthly sick certificates were acceptable. She only wrote to the claimant for a certificate if she hadn't received one. Any phone calls she had with the claimant she referred to in subsequent letters to him. She accepted that it may have been difficult for the claimant to get doctor's certificates due to financial difficulties from being out of work. However, the sick leave policy required certificates to be supplied.

The large volume of letters to the claimant was due to the lack of response from him. The person the claimant contended he left messages with was a customer services assistant and not a manager. He could have asked to speak to the duty manager. There was a log book at customer services in which messages were recorded. The Personnel Manager checked the log book for messages from the claimant and asked the staff if the claimant had left any messages. The claimant's phone had been disconnected. She contended that she had followed company procedures but did not have a copy of the procedures with her. She had sent three letters without any response and so assumed he didn't want to return.

Determination:

The claimant was injured in an accident at work in June 2009. The respondent Personnel Manager gave evidence that she tried to engage with the claimant about his absence from work and to assist him about coming back to work. The claimant failed to respond to many of the letters sent to him by the respondent and failed to attend a pre-arranged meeting on the 12th

April 2010 to discuss his continuing absence. The claimant gave evidence that he did not receive many of the letters and furthermore that he attended the UK for treatment between the end of May and the end of June 2010.

The respondent's Personnel Manager, by letter of the 4th May 2010, requested the claimant to contact her by 12 noon on the 8th May 2010 and further advised that failure to make contact would leave the company with no option but to assume that the claimant would not be returning to work with the respondent. By letter dated the 10th May the respondent referred to its letter of the 4th May 2010 and previous letters trying to contact the claimant and stated that as the claimant had failed to make contact (as requested in its letter of the 4th May) that the respondent assumed that the claimant was not returning to his position and that his employment was now at an end.

The Tribunal considered whether the respondent should have dealt with this matter in accordance with its own Disciplinary Procedure but decided that there was no reason for it to do so as the claimant had refused to properly engage with the respondent. The claimant should have known that if he failed to notify the respondent that he was not living at his normal address and that he was actually having treatment in England that he cannot hold the company accountable for the fact that he did not receive letters relating to his employment. He cannot use his failure to notify the respondent of this as an excuse for his employment coming to an end. The claimant should have made it a priority to contact the personnel manager; it was not sufficient to leave messages with other employees of the respondent that he was trying to contact her. He should have written to her, by registered post if necessary, that he was having difficulty contacting her.

In the way that the Tribunal expects an employer to behave reasonably it also expects an employee to do likewise. The respondent acted as a reasonable employer would have acted having regard to all the particular circumstances of the case. By failing to engage with the respondent the claimant frustrated his contract of employment and effectively dismissed himself. Accordingly the claimant's claims under the Unfair Dismissals Acts, 1977 to 2007, and Minimum Notice and Terms of Employment Acts, 1973 to 2005, fail.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____
(Sgd.) _____
(CHAIRMAN)