

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE *-claimant*

UD141/2011
MN152/2011

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. P. Hurley
Members: Mr. J. Hennessy
Mr. F. Dorgan

heard this claim at Thurles on 1st October 2012
and 10th December 2012

Representation:

Claimant: Mr. Ger Kennedy, Siptu, 4 Church Street,
St John's Square, Limerick

Respondent: Mr David Humphreys BL instructed by Mr. Joseph P Kelly, James J Kelly & Son,
Solicitors, Templemore, Co Tipperary

Background:

The respondent company is a mining company and the claimant worked as a miner with the respondent.

Respondent's case:

The Tribunal heard evidence from the night superintendent (BM). He explained the hierarchy of the mine which is: the general manager, the mine manager then the night shift manager(s), the shift captains and the shift captain. He is the night shift manager and the mine captains report to him and the shift bosses reported to the captains.

The claimant worked as a miner and primarily as a truck driver.

The witness gave evidence as to a disciplinary warning that was given to the claimant. The warning was a final written warning to the claimant because he did not show for work on 17, 18, 19 and 20 February 2009 and had not contacted his supervisor on those dates. He had been previously counselled for the same problem. The respondent skipped through the verbal warning and the written warning and went directly to a final written warning.

The mine crew consisted of 14 staff. Two were on annual leave and when one worker does not show for work it means a loss of 10% of work output. This has a knock-on effect on the whole cycle.

The claimant phoned the payroll officer on 18 March 2010. The payroll officer said to the HR manager, the witness and to his supervisor that she found the claimant to be incoherent. The witness and the claimant's shift boss (TM) phoned the claimant at 9.15 am and they found him to be incoherent. They requested that he attend the company doctor at 9.45 am. (TM) phoned the surgery at 10.00 am and was told that the claimant had not attended. At 10.30 am the claimant phoned to say that he was on his way to the doctor. Later on that day the claimant sent (TM) a text message to say that he did not attend the doctor because he had to baby sit.

A document outlining the sequence of events was opened to the Tribunal:

“In February 2009 the claimant was given a final warning for missing time without notifying his supervisor, this followed a series of incidents where he took unauthorised leave from work. The final warning was maintained on his file for one full year until February 23 2010.

In February 2010, the following events occurred:

February 14

The claimant texted his supervisor (TM) to inform him that he was having great craic on a night out and that he would not be in work on Monday (Monday 15), but would work Tuesday to Saturday for that week , he did not show up for Tuesday or Wednesday of that week.

February 17

The claimant texted TM to state that he was sick and would be back to work the following Monday 01 March.

February 19

The claimant returned to work and explained to (TM) and the mine captain (KL), that on February 18 he had attended his doctor who gave him a sick note, retroactive from 14 to 22 February.

Dr. POC the company doctor had discussions with the claimant that week.

February 23

The claimant was asked to attend a meeting with (TM) and (BM) and bring a shop steward. Following discussions conditions below were put in place. The final warning would be put in place for another year the claimant would be required to attend counselling which would be put in place by Dr. POC in consultation with Dr. PR the respondent would require a statement at the end of counselling from Dr. POC to state that he had constructively engaged with the counselling The claimant was suspended with pay until further notice

February 24

The claimant returned to work on the recommendation of Dr. POC and the approval of the respondent. The reason for his return was due to the time lag in arranging the appropriate counsellor.

March 18

The claimant phoned (TG) (the payroll officer) and requested that she inform his supervisor, (TM) that he would definitely not be at work that day. He was due into work at 7.00 am. (TG) noted that the claimant sounded somewhat incoherent. She informed (TM,) (BM) and (TMcK) of the phone call.

(BM) and (TMcK) phoned the claimant at 9.15 am and requested that he attend the company doctor (Dr. POC) at 9.45 am as the claimant had said he was ill due to a sick stomach. (BM) and (TMcK) also noted that the claimant sounded incoherent. The claimant agreed to attend the doctor. At 10.15 (TMcK) checked on the progress at the doctor's office and was informed that the claimant did not attend.

Later in the day (TMcK) again checked on the claimant's attendance at the doctor and was told that he did not attend.

Later in the evening, the claimant texted (TM)to say that he did not attend the doctor because he had to baby sit his children.

March 19

The claimant informed (TM) that he attended his own doctor who prescribed medication for his stomach and that he couldn't attend work until at least the following week.

March 26

The claimant was asked to a meeting with (TM) and (TMcK) and requested to bring a shop steward. At the meeting the facts to date were discussed and the claimant was informed that he was suspended with full pay until further notice. (JS) attended as the shop steward and pleaded with the company to give the claimant another chance. The respondent's stance was that the claimant was not telling the truth

Note from TMcK

The claimant phoned me on Friday 26 March stating that he had attended his Doctor at 10:00 and told him the full story regarding his problems. (The doctor was told of his personal problems.....appointment with counsellor.

He admitted that he had lied throughout the periods of investigation and that his problems were associated with the respondent. Even though he knows that he could be dismissed he was phoning me to say sorry and that the company had been more than fair to him. I thanked him for being honest and said that the company would get back to him with a decision shortly.

March 30

The claimant was requested to attend a meeting with (TMcK) along with his shop steward (SMcP). He was told that the company had decided to give him one final chance based on the following conditions being met:

1. he would attend counselling
2. he must engage constructively with the counselling – to be verified by Dr. POC
3. he uses the alcohol tester every time the testing is in place
4. his attendance is excellent
5. he attends the company doctor when requested by the company for good reason

March 31

The claimant returned to work

The claimant did not show for work on 17 to 19 May 2010 inclusive. His shift boss decided to put this down as annual leave and the witness understood that the claimant's mother had been unwell. They wished the claimant to succeed in his undertakings.

The claimant returned to work on Thursday 20 May. The claimant did not show for work on 21 May. The claimant said his daughter had bad tonsillitis. The claimant was due to be in work on Monday 24 but he did not show. It was normal for miners to arrive at 6.30 am to 6.45 am as the trucks left at 8.00 am sharp. It was also the normal practice for employees to phone before 7.00 am if they were not going to be in work. They did not get any communication from the claimant. It was also possible for an employee to phone and the security staff can relay information to the supervisors; the security staff work throughout the night.

They asked the claimant to attend a disciplinary hearing for 25 May. The claimant attended the meeting and present was (KL) the minecaptain, the witness, the claimant and the shop steward (JT) and another.

The claimant told them that on the night of 22 May he was out with his wife in a local hotel and she had to be brought to hospital.

The witness explained that they considered the matter, that the claimant was on a final written warning, they considered the claimant's absences for March. They therefore decided to dismiss the claimant. They wrote a letter of dismissal to the claimant dated 26 May 2010 and sent the letter.

The Tribunal heard evidence from (KL) the mine captain and from (BK).

The Tribunal heard evidence from (TMcK) the HR manager.

Claimant's case:

The claimant gave direct evidence that he worked for the respondent mining company since March 2008. His work was underground and generally involved moving waste. He was absent from work from 17 – 19 May 2010 as his mother was sick. He returned to work and completed the evening shift on 20 May 2010. He was due at work on the following day but did not report for work as his daughter was sick. He contacted his employer and informed them of this. He was due to report for work again at 7am on 24 May 2010 but had accompanied his partner to the accident and emergency department of his local hospital until 1am on the night of 24 May. As a result he tried to contact his supervisor at 6.05am to inform him that he was unable to report for work. He was unable to contact his supervisor but left a voice mail message

informing him that he was unable to report for work. He also texted a work colleague informing him of the position. He gave further evidence that he offered to provide the company with phone and medical records supporting his version of events but the company did not allow him to submit these records at his disciplinary hearing. He told the Tribunal that in the year prior to his dismissal that he had a tough year personally and he was attending family therapy at the time of his dismissal.

He accepted that he had received two previous written warnings for absenteeism prior to his absence in May 2010. He was aware of the importance of contacting a supervisor if he was going to be absent from work. He accepted that in February 2010 he agreed to attend for counselling which had been put in place by the respondent company. He was suspended on full pay at that time and his employer agreed to allow him return to work. He knew that he could not afford to miss further days from work going forward. He accepted that he missed a further day from work on 18 March 2010 and asked his employer for a final chance which was granted to him. He was absent from work on 21 and 24 May 2010 but these absences were due to his daughter's and partner's illnesses. He made every effort to contact his supervisor to inform him of his absence and only left a voice mail message and texted a work colleague when that effort failed. He proffered medical records to support these absences but his employer did not rely on those records. He did not appeal his dismissal and left the matter in the hands of his union representative.

Determination

After hearing two days of evidence concerning the circumstances leading to the claimant's dismissal including an examination of the documentation proffered by both parties the Tribunal is unable to find any defect in the procedures used or adopted to terminate the claimant's employment. The claimant was offered an internal appeal within the respondent company but did not avail of this offer. Further, the substance of the case indicated that the respondent acted as beneficially as they could in assisting the claimant with his personal difficulties over a protracted period. The Tribunal is satisfied that the dismissal was not unfair and the claims under the Unfair Dismissals Acts 1977 to 2007 and the Minimum Notice and Terms of Employment Acts 1973 to 2005 fail and are hereby dismissed.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)