

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE – *claimant*

CASE NO.
UD1022/2011
MN2016/2011

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: Ms O Madden BL

Members: Mr D Peakin
Mr J Maher

heard this claim at Dublin on 11th October 2012 and 14th January 2013

Representation:

Claimant(s): Mr Ronan O’Carroll BL, instructed by:
Ms Emer Cunningham
James V Tighe & Co, Solicitors
Main Street, Celbridge, Co Kildare

Respondent(s): Mr Tiernan Doherty
IBEC
84/86 Confederation House, Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

Background:

The claimant was employed as a sales assistant at one of the respondent company’s service stations. The claimant contended that he had permission to take leave from the beginning of January 2011. The respondent contended that the claimant did not have permission to take leave and failed to show up for work on 4 January 2011 or any time after that.

Respondent’s Case:

The claimant’s manager gave evidence. The service station is located close to the M50 and is very busy. He met the staff at the quarterly safety meeting on 14 December 2010. He informed

them that as January had been busy in previous years there would be no annual leave granted until after the 21 January 2011. The claimant did not indicate his intention to take leave at the meeting.

The manager received a text from the claimant on 21 December 2010. He requested 3-4 weeks' holidays from the beginning of January. The manager informed him on 23 December 2010 that he could not take holidays then. He thought that the claimant had accepted the refusal but on 31 December 2010 he received a call from the respondent company's HR advisor. The claimant had called her about a holiday request. The manager informed her that he could not spare the claimant. The HR advisor said she would phone the claimant. The last day the claimant worked was 2 January 2011. On 4 January 2011 the claimant did not appear for work. The manager tried to phone him but his call was diverted straight to voicemail. The claimant's mailbox was full and the manager could not leave a message. He referred the issue to the company's HR unit.

During cross-examination he explained that the company has an annual leave application form which should be filled in four weeks in advance of the requested leave. The form is only filled in if the manager has already confirmed that the leave can be taken. He disputed that the claimant had requested the leave in November 2010 or again at the quarterly safety meeting. He agreed that the claimant had taken holidays in January over the previous two years when the manager had been in place. They had had enough cover at those times, but they were short-staffed on this occasion and could not spare the claimant. He knew the claimant was from India. He did not know where he went on holidays.

There were no previous disciplinary issues with the claimant and he was a good worker. He did not receive any contact from the claimant after 2 January 2011. He denied that on 2 January 2011 after putting up the roster for the following week, with the claimant's name on it, he told the claimant that he could take the leave but to expect disciplinary action on his return. The claimant did not tell him that he intended to take holidays.

A manager from a different service station gave evidence. At the time he was a flexible store manager and looked after disciplinary issues, safety and leave for other managers. He was nominated to carry out the disciplinary process. He received a call from the claimant's manager on 12 January 2011. He was looking for advice regarding the claimant's absence.

On 10 February 2011 he wrote to the claimant to inform him that a disciplinary hearing was scheduled for 14 February 2011. The meeting was to discuss his misconduct in regard to the absence and advised that it could lead to his dismissal. A summary of the investigation was enclosed. The claimant was advised that he could bring a representative. The claimant did not attend the hearing and so on the same day, 14 February 2011, the witness wrote to the claimant again and advised him that a further disciplinary meeting would be held on 18 February 2011 and it would proceed in his absence if the claimant did not appear as per the disciplinary procedure. He enclosed the disciplinary procedures and another summary of the investigation. The claimant did not appear at the second meeting. The witness dismissed the claimant by letter of 18 February 2011 with immediate effect. He was advised of his right of appeal but he not avail of this.

During cross-examination the witness explained that the store manager had been interviewed for the investigation. He did not deem it necessary to speak to anyone else except the claimant. He phoned the claimant's phone number and that of his nominated next of kin.

Claimant's Case:

The claimant's representative explained that the claimant had not returned to Ireland by the time he was dismissed. He could not give the exact date the claimant returned. The letters were there when he came back. He contended that the claimant did not receive the letter of 14 February 2011, but did receive the two others.

On the second day of hearing the claimant produced his passport to confirm that his return date was 5 March 2011.

The claimant gave evidence. Originally from India, he came to Ireland in 2005. His employment as a sales assistant with the respondent company commenced in September 2007. He had no prior disciplinary issues.

He normally took leave in January to visit home. In October 2010 his manager approved his leave request and he filled in a leave request form. At the meeting of 14 December 2010 he heard the manager say that no leave would be approved for the first three weeks of January. He asked him about it afterwards and the manager told him that it did not apply to him. He booked his ticket on 20 December 2010. He told his manager on 21 December 2010 that he had booked his ticket. His manager said that he could not go as he did not have cover for the shifts. The claimant was surprised that he had changed his mind.

The claimant phoned the HR Advisor in Human Resources. She said that she would speak to his manager. She reverted to the claimant and told him that only his manager could authorise his leave. She warned him that leaving without permission could lead to disciplinary action.

On 2 January 2011 he saw that he was listed for work on the roster. He again asked his manager about taking leave. His manager said it was okay and that he could go. His name was removed from the roster.

A couple of days before he was due to return to Ireland the claimant suffered a fall and injured his back. His doctor told him to rest for a few weeks. He rang the service station on two occasions and the manager's mobile number once during the last week of January. He could not get through to the manager's mobile phone. The manager was not present at the service station on either occasion that he phoned. He spoke to two different colleagues and told them about his injury and that if the manager required his sick certificate he could forward it if required. He said that his phone was still working while he was abroad. He was certain that his message would be passed on. He was not concerned as the manager had said he could take leave.

He returned to Ireland on 5 March 2011 to find disciplinary letters and his P45. He went to the service station the following day and spoke to his manager. His manager said that it was the company's decision. The claimant asked if he could appeal but his manager said he could not and that he was dismissed. The claimant gave evidence of his loss.

During cross-examination the claimant agreed that he had received a contract of employment and had read the disciplinary and grievance procedures. He had read the handbook and completed a quiz as part of his induction. He answered in his quiz that four weeks' notice was required for leave. He contended that he had done this and filled in a holiday request form. The handbook stated that an employee was required to contact work daily if absent for more

than one day. He did not attempt to contact work during February 2011.

His sick certificate certified him from 1 February to 2 March 2011. He was not certified for 25-31 January 2011. He did not send the certificate as he did not hear back from his manager. He brought it back with him but his manager would not accept it as he was already dismissed. He did not have any missed calls from his manager while in India. He did not follow the absence policy as he was in India. He would have followed it if he had been in Ireland. He thought that three attempts to contact his manager were enough. He did not see the paragraph in the dismissal letter of 18 February 2011 which stated that he could appeal the dismissal within ten days. He did not take it further.

The claimant's representative submitted that the claimant's absence came under general misconduct within the company's guidelines and not gross misconduct. Accordingly, summary dismissal was not appropriate and a lesser sanction should have been given.

The respondent's representative submitted that the claimant had knowledge of the company's policies and procedures and had signed and acknowledged same.

Determination:

Despite having been told by his manager that holidays were not permitted until after the 21st January 2011, the claimant proceeded to go on holidays from the beginning of January 2011. Furthermore by his own admission the claimant accepts that respondent company's HR advisor confirmed that the manager could not sanction any holidays until after the 21st January 2011 and warned him of the possibility of disciplinary action if he proceeded to go on holidays regardless.

The claimant was to return to Ireland on the 25th January 2011 however due to medical reasons he did not in fact return to his job until the 5th March 2011. It appears that, in the meantime, he made no significant attempts to contact the respondent company to inform them of his circumstances. The Tribunal is therefore satisfied that the respondent company acted reasonably in invoking the disciplinary process and furthermore that on balance the decision was fair and reasonable in all the circumstances. Accordingly, the 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)