

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE - **claimant**

UD1001/2010

RP1385/2010

MN979/2010

WT417/2010

against

EMPLOYER - **respondent**

And appeal of the claimant against recommendation of the Rights
Commissioner R-091918-TE/POB against the respondent

TE253/2010

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997
TERMS OF EMPLOYMENT (INFORMATION) ACT, 1994 AND 2001

I certify that the Tribunal
(Division of Tribunal)

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

Members: Mr. D. Hegarty
Mr. O. Wills

heard this claim in Tralee on 16th January and 18th April 2012

Representation:

Claimant: Ms Clare O'Donoghue, Padraig J. O'Connell, Solicitors, Glebe Lane,
Killarney, Co. Kerry

Respondent: Ms Sinead Mullins, IBEC, Gardner House, Bank Place,
Charlotte Quay, Limerick

The determination of the Tribunal was as follows:-

Summary of Evidence

The respondent company sells and maintains grass-cutting machinery for golf clubs, local authorities, landscape contractors and domestic users. Its busiest period is from January to the

end of May each year. The respondent had 11 employees at the time. The claimant, a mechanic, was introduced to the respondent by a friend of the managing director (MD) and he commenced employment with the respondent, in its workshop in October 2006.

The over-run of building works undertaken by the respondent was causing some difficulties and because the Irish Open was coming up and work was well behind staff were told prior to the Christmas break that it would be a case of 'all hands on deck' after the break and no holidays could be taken, except in cases of emergency. The claimant's position was that before Christmas 2009, the respondent told them at a staff meeting that holidays could not be taken between April and July in 2010.

It was MD's position that in early January 2010 he refused the claimant's request for three weeks holidays in February 2010. The claimant told him that he was going anyway. Around the end of January/beginning of February 2010, the claimant's further request for annual leave in February was refused by MD as the company was too busy. The claimant's position was it was normal practice for MD to initially respond in a vague way to requests for annual leave but then would grant the leave on the second request. The respondent's leave year is the calendar year.

The claimant did not show for work on 2 February or make any contact with the respondent and his mobile phone was turned off. MD called to the claimant's home but there was no one there; he called to his wife's place of employment and was told she was on holidays; he phoned the friend, who had introduced the claimant, and was told the claimant was on a family holiday. The claimant's three-week absence put a lot of pressure on the respondent; he had to shift workers around and bring in two students. He discussed the problem with an independent HR consultant (HRC), who advised him to establish the full facts when the claimant returned to work.

On Saturday 20 February, the claimant came to the workplace at around 10.00am. When asked how his holiday had been, he replied 'fine'. The claimant asked if it was ok to return to work on Monday and MD replied, "No", and told him that he would have to attend a disciplinary meeting.

By letter dated 23 February 2010 MD wrote to the claimant asking him to attend a disciplinary meeting on 26 February 2010 to explain his absence from work between 2 February and 19 February. In the letter MD informed the claimant that disciplinary action would be considered and that he could be accompanied by another employee or trusted colleague at the meeting.

MD received two medical certificates by registered post from the claimant subsequent to his suspension, purporting to cover the time he was absent; one dated 02.02.2010 covering the period 02.02.10 – 09.02.10 and the second dated 22.02.20 covering the period 09.02.10 – 22.02.10; the first certificate was from a Polish doctor and the second was from an Irish doctor.

The claimant's position was that he felt stressed when MD refused him the leave and his doctor gave him a sick certificate which he forwarded to MD by normal post once he received it. After meeting MD on 20 February he enclosed a copy of the original cert with the cert dated 22.02.2010.

The claimant's position was that on return from his holiday he went to the workplace to ask MD what work was going on and was told to go home and not to come back. He told MD he would

have to get his tools, which he did and then left. When he received the letter of 23 February from MD he thought he was wanted back at work.

HRC was present at the meeting on 26 February. His function was to ensure that fair procedures were applied. The claimant came to the meeting on 26 February 2010 unaccompanied and again declined the respondent's offer to have a colleague with him. While the claimant had not been given a copy of the disciplinary procedure HRC guided him through the process. The claimant denied that he had been on holidays in Thailand and maintained that he had been at home sick during his three-week absence from work. MD found that the claimant was very quiet and unresponsive at the meeting. The claimant maintained that he had tried to contact MD during his absence but did not elaborate on this. MD and HRC took a break to discuss the claimant's responses. They felt that the claimant was not telling the truth, that he was guilty of a breach of trust and confidence and that his behaviour amounted to gross misconduct. Having considered the sanctions, they concluded that dismissal was the appropriate sanction. On resuming the meeting the decision was communicated to the claimant.

In a letter dated 1 March MD confirmed the dismissal to the claimant and informed him that the decision could be appealed within five days. MD's position was that trust was vital in the employment relationship and had he been able to believe the claimant they could have made a new start. The claimant was dismissed for taking unauthorised leave and failing to tell the truth. The compendium of other issues mentioned in the letter of dismissal did not form part of the reasons for dismissal. Although the claimant's solicitor had been in contact with the respondent immediately after the dismissal the decision was not appealed.

When the claimant started working for the respondent he was given a week off in February to go home to Poland for a court case and was given another week the following February for another court date.

In September/October 2009 MD engaged HRC to put procedures in place. HRC drafted contracts of employment but these were not issued to the employees until after the claimant had left the employment. As far as HRC was aware the claimant had not asked for a contract of employment.

The claimant's position was that it did not matter what he said at the meeting on 26 February, they wanted to dismiss him. He did not remember being offered an appeal process. The trip to Thailand was booked in early January after he had asked MD for leave. It had not mattered that he had not accrued enough annual leave at that time of year. He was stressed and needed a rest. He explained his situation to the doctor but did not tell him how long he was going for. The doctor asked him to come back the following week. When he got back his doctor was on holidays so he went to a different doctor. He went to see his solicitor before he went on his holidays and he advised him that there might be consequences if he went on holidays. He accepted that telling them at the meeting that he was at home sick and not in Thailand was a breach of trust.

He took the dismissal letter to his solicitor and they talked about it. He does not know why he did not appeal. There had been redundancies in the company. He had asked many times for redundancy but was told he could leave if he wished.

A former employee (FE) of the respondent who had worked in the store before being made redundant told the Tribunal that holidays were a major issue with the respondent. In

2005 his wife booked a sun holiday for June in March and he had given MD three months' notice of his holiday. However, when he reminded MD, the week prior to the holiday, he initially refused him leave but he argued his position and MD agreed to let him go. FE agreed he always had approval for his annual leave. In recent years MD had introduced holiday application forms and once this was signed the problem was resolved.

Determination

The Tribunal accepts that taking some three weeks' unauthorised leave from work, in defiance of MD's refusal to grant the leave, amounted to gross misconduct and that this combined with the claimant's failure to come clean, at the disciplinary meeting on 26 February, about his whereabouts during his absence, destroyed the respondent's trust and confidence in the claimant. The Tribunal notes that the respondent afforded the claimant the opportunity to be represented at the disciplinary and accepts HRC's evidence as to his function at the disciplinary meeting on 26 February and in the circumstances finds that the procedures were not inadequate. The Tribunal finds that the dismissal was fair and the claim under the Unfair Dismissals Acts 1977 to 2007 fails.

As this is not a dismissal by reason of redundancy the appeal under the Redundancy Payments Acts, 1967 to 2007 is dismissed. Where a dismissal is for gross misconduct there is no entitlement to payment in lieu of notice under the Minimum Notice and Terms of Employment Acts, 1973 to 2005. The Tribunal awards the claimant €155.84, being the equivalent of 1.6 days' gross pay, as compensation under the Organisation of Working Time Act, 1997.

While the claimant's contract of employment, containing the terms and conditions of his employment, was in existence from September/October 2009, the respondent's evidence was that the contract of employment was not furnished to the claimant until after his employment had been terminated. The Tribunal varies the Rights Commissioner's recommendation and awards the claimant compensation in the sum of €974.00 under the Terms of Employment (Information) Act, 1994 and 2001.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)