

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE,
- *claimant*

CASE NO.
UD2372/2010

against
EMPLOYER - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr D. Hayes BL

Members: Mr. T. O'Sullivan
Mr O. Nulty

heard this claim at Mullingar on 3rd July 2012
and 17th December 2012

Representation:

Claimant:
Respondent

Respondent's Case

The respondent company is a manufacturer and distributor of oil fired central heating products. (PC), sales manager of the respondent company, gave evidence that the claimant was one of three salesmen employed in the Republic of Ireland. The witness gave evidence that he had a telephone conversation with the claimant on 28 November 2008 during which the claimant told him that he was going to leave the respondent company before the end of the year to pursue another career. This conversation was a normal conversation, not a heated conversation. He expected the claimant to forward his resignation in writing following the conversation. The witness subsequently informed the Human Resources Manager, (JM), in writing of the claimant's intentions. (JM) then wrote to the claimant on 5 December 2008 regarding his proposed resignation and the claimant replied through his solicitors by way of letter dated 12th December 2008, denying vehemently that he was considering resigning. The witness replied to this letter by way of letter dated 16th December 2008 suggesting *inter alia* that the claimant meet with him on 19th December 2008 in order to clarify the matter. (JM) was also

to attend the proposed meeting. It was requested that the claimant contact (JM) by 5pm on 16th December 2008 to confirm his attendance at the proposed meeting. The claimant did not do so and the meeting did not take place.

Under cross-examination the witness could not recall who initiated the telephone conversation on 28th November 2008 and could not recall what precisely was said. However the witness told the Tribunal that the claimant made it quite clear that he had made a decision to leave the company. The witness denied that he said to the claimant that “Mr. K is looking for reasons to get rid of you” during their telephone conversation.

(JM) gave evidence that she had written confirmation from (PC) of the claimant’s intention to resign and she had no reason to doubt (PC). She sought to have a meeting with the claimant on 19th December 2008 to clarify the matter but this meeting did not take place as the claimant did not reply to the company’s letter of 16th December 2008. The Tribunal heard further evidence from (JM) that the claimant was absent from work on sick leave from 3rd

December 2008 following a road traffic accident. A series of exchanged correspondence between the parties during the period of the claimant’s absence on sick leave was opened to the Tribunal. The company was seeking to meet with the claimant to establish when he would be returning to work. The company had arranged temporary cover for the claimant’s area and were anxious to establish for how long the temporary cover was required. The claimant’s temporary cover was employed on a 3-month rolling contract until he was given a permanent contract post the claimant’s dismissal; at all times the claimant could have returned to work. A series of e-mailed responses from the claimant to the company were opened to the Tribunal.

The witness gave further evidence that she wrote to the claimant on 14th May 2009 seeking a detailed medical report from his doctor on his condition. This was not provided until December 2009. On 23rd February 2010 she received an email from the claimant stating that he would be able to return to work in the first week of April. She replied to this e-mail by way of letter dated 4th March 2010 stating *inter alia* that the company required an updated report from the claimant’s doctor in respect of his current condition. She requested that the claimant attend for an update meeting on 22nd March 2010 and that the doctor’s report be submitted by 18th March 2010 in advance of the proposed meeting. The claimant was also informed by way of letter dated 16th March 2010 from OC, (who took over from JM) that he may be required to attend for an independent medical, based on the content of his doctor’s report. It was normal for an employee to provide a doctor’s report first before possibly seeing the company doctor; each case is assessed on its own merits. He was also informed that a return to work certificate would not be sufficient. The claimant was not willing to provide a report from his doctor and was only willing to supply a certificate from his doctor stating that he was fit to return to work.

The report the claimant did provide was not addressed to or meant for the respondent, it was a report for his solicitor regarding the claim in relation to his accident. After this initial report only medical certificates were provided stating ‘RTA’ (road traffic accident). The respondent required a report from the claimant’s GP regarding his return to work specifically and any issues that he may have with his work in the future so any adjustments could be made. The

report addressed to the claimant's solicitor was a number of months out of date. The respondent had to repeatedly contact the claimant seeking up to date medical information; this is not normal, employees generally keep the respondent informed of their progress.

The respondent attempted to arrange a number of meetings with the claimant as they believe that if they had a proper dialogue the situation could be quickly and easily resolved. By letter of 26th March OC informed the claimant how serious the situation had become, *'Your period of absence, failure to co-operate to all reasonable requests made by the company and lack of interest in your work, customers and the business is of real concern.'* By letter of 31st March the respondent attempted to arrange a further meeting and again requested and offered to pay the claimant's doctor for a medical report.

A meeting did finally take place on 16th April 2010 where the claimant informed the respondent that supplying them with a medical report might prejudice any further claims he might have and that his solicitor had advised him that he was under no obligation to do so. Three options were provided to the claimant to supply a medical report but he was non-committal and did not give a proper response. The claimant's 'black-outs' were discussed at the meeting but there was no mention of any insurance issues. The claimant's solicitor by letter responded on his behalf stating, *'You are fully aware that you are entitled to have our client examined by the Company Doctor.'* The respondent did not engage with the claimant's representative as it was an internal matter. The claimant provided a doctor's certificate dated 28th June 2010 stating that he was fit to return to work but it was vague and didn't mention his ability to drive or any other relevant details. The respondent did not send the claimant to the company doctor as they believed the claimant's own doctor would be in a better position to give a comprehensive report.

By letter of 9th July 2010 the respondent terminated the claimant's employment stating that, *'As the company is unable to determine whether or not you are able to return to work and your obvious lack of co-operation over recent months has only added to the confusion...I have therefore no alternative but to terminate your employment with effect from 31st July 2010.'* The claimant was given the option to appeal this decision.

The appeal was attended by the Managing Director of the respondent (SC) and (KC). At the appeal meeting the claimant was very relaxed and refused to be accompanied by a work colleague. The claimant said the reason for his appeal was that he was "slightly unfairly being dismissed." The respondent was aware that although the claimant was off work he was using the company fuel card for very lengthy journeys. He informed SC that he was having trouble getting information from his doctor and he confirmed that he understood and accepted it was reasonable for the respondent to request such information. It was a conflict between information required for the Personal Injuries claim and the respondent and the respondent believes the P.I. claim took precedent. SC upheld the decision to dismiss the claimant.

The respondent was unaware until the hearing of the serious nature of the claimant's mental and physical ill health at the time leading up to dismissal.

Claimant's Case

The claimant had a serious car accident on 4th October 2008. The claimant never said he was intending to resign from his employment during the conversation of 28th November 2008. The claimant briefly returned to work but went on sick leave from 4th December 2008. The claimant offered to attend the company doctor in March 2010 and on other occasions. He was on heavy medication and was not fit to meet with the respondent before April. A meeting took place on 16th April 2010; it was very cordial. At this meeting the respondent asked for a doctor's report and were very concerned when he mentioned having 'black-outs'. The respondent said that it was the insurance company that required the medical report. The claimant does not recall stating that any other claims he may have could be prejudiced.

On 30th June 2010 the claimant was certified fit to return to work and provided a brief report to that effect. The claimant was eager to return to work. He was dismissed by letter on 9th July 2010 without notice of any on-going disciplinary process.

Under cross-examination the claimant denied that he said, "Do not put any remarks I've previously made on paper as any other claims I may have could be prejudiced". The claimant does not recall saying that he was "slightly unfairly being dismissed" or that he accepted the necessity for the medical report. The claimant was in hospital in January and asked for the medical questions in writing, as he was not in a fit state to speak to anybody from the respondent. During the period where he did not meet with the respondent he was not in a fit state to do so. The claimant was in the car for the long journeys (with petrol purchased using the respondent's fuel card) but was not driving. The claimant was also part of a community action group and as part of that group he gave press interviews and attended meetings but was driven to the destinations to speak but maintains that due to the level of medication he was on was unfit to meet with the respondent.

Determination

The claimant was employed as an area sales manager. His employment commenced in October 2007 and ended in July 2010. About one year into his employment the claimant was involved in a road traffic accident. The accident did not occur in the course of his employment. Subsequent to the accident, the claimant was absent from work, which absence was periodically certified by his doctor. On each occasion the certified reason for his absence was detailed simply as "post-RTA".

The Tribunal heard evidence of a telephone conversation, which took place on 28th November 2008, between the claimant and PC, his manager. According to PC, the claimant told him that he was intending to leave his employment to pursue other avenues. Accordingly, PC informed the HR manager, JM, who subsequently wrote to the claimant on 5th December 2008. This was responded to by a solicitor on the claimant's behalf. It was denied that the claimant had suggested that he intended to resign and alleged that, in fact, PC had warned the claimant that the respondent was trying to get rid of him. The claimant gave evidence to that effect. Each party disputed the other's version. The Tribunal does not need to determine which version it accepts. It should be noted that JM replied to the solicitors saying that the respondent intended to deal with the matter internally and would correspond directly with the claimant.

PC wrote to the claimant on 16th December 2008 denying that he had encouraged the claimant to resign and stating that he had been told by the claimant that the claimant was intending to resign. This does not appear to have ever been contradicted by the claimant. In order to clarify matters the claimant was asked to meet in a hotel in his hometown with PC and JM. He was asked to reply by return but did not do so. On 18th December, JM wrote to acknowledge receipt of a medical certificate. In her letter she asked the claimant to meet, again in his hometown on 5th January 2009. The claimant replied that he had been in hospital over Christmas and was “not up to meeting due to [his] sickness at present.” JM wrote on the 7th January saying that the claimant had provided no details of any medical conditions that might prevent him meeting his employer while on leave. She detailed a number of matters that she wished to discuss with him. These included his current medical condition and likely duration of absence; queries about deals that he had done with various customers; temporary measures put in place to cover his absence; his bonus; and unclaimed expenses. In the context of the claimant’s absence from work, none of these were unreasonable issues to seek to address. She asked to meet him in his hometown on 13th January 2009. She received no reply. She sent a further email on 12th January, to which the claimant replied. In the course of the reply he said:

“As I have already stated I am currently out sick, and in no fit state to meet, I thought you had received the sick notes from my doctor. As stated on the sick notes I am suffering from post rta. If you want a list of my problems they include back, neck, leg, stomach and bowel problems. I will be back at work as soon as I am let by the surgeon and doctors this date will not be before the 18th of Feb as I have to go back into hospital on this date and have to take my medication up until then at least.... The deals which have been done with customers should be on file... but again if you wish to send me a list I will do my best to get back to you as soon as I can. It may take a while to remember them as the medication I am on causes headaches and temp memory loss this will return to normal when I stop taking the medication.... I have no problem meeting with you ... when I get off the medication I am on and feel better.”

JM wrote to the claimant on 28th January 2009 seeking to meet him. On this occasion she offered to collect the claimant at his house and bring him to a convenient hotel for a meeting on 6th February. This was replied to by the claimant’s solicitors on 30th January in the course of which they said:

“Our client is feeling that he is being pressurised into attending for a meeting with you and other members of the Company. You will have received sick certificates from our client and you might please be aware that our client is on medication for serious ailments which have various side effects and he is currently not in a position to discuss matters with anyone which might put him under stress. Our client has indicated that you are seeking certain information so that matters may be progressed in the company and he has made every effort to assist you in this regard. He has asked that whatever information you require be put into writing and he will try at his leisure and depending on how he is feeling at any particular time to reply to such queries.

You will understand that he is under no obligation in the circumstances to do this, but he would like to assist where possible.”

JM wrote to the claimant on 15th February 2009 indicating that the respondent still viewed this as an internal matter and did not intend to reply to his solicitor. She indicated that they would wait until a later date to discuss matters but sought, as best he could, an indication of how long he might be off work. The claimant did not reply to this request and the request was made again on 18th March 2009. The claimant replied on 19th March indicating, as a best guess, a return date in early May 2009.

On 28th April 2009 the claimant told JM that he had been with his doctor and, as it was taking longer to recover, he would not be returning in May. He gave no further indication of a possible return date.

To cover the claimant's sales area, the respondent had had employed a person on a temporary three-month rolling contract. In order to ascertain for how long the replacement would be required, the claimant was asked on 14th May for a report from his doctor together with an expected return date. The claimant replied on 20th May to say that his doctor had told him that he did not need to send a report to his employer under the provisions of the Data Protection Act. JM wrote again on 18th September 2009 seeking a medical report and a meeting to ascertain whether the respondent could give any assistance in facilitating a return to work. The claimant replied on 29th September disputing that he had previously refused to meet, rather that he had been unable to meet due to his condition and medication. He said that he could not provide a medical report as his treatment was on-going. He declined the offer of assistance in facilitating a return to work as he had “received no help from the company in the early stages of [his] pain and suffering or any other help from [them] in the past [and he] must put [his] recovery in the hands of the people who have been with [him] all along.”

JM sent a further letter on 18th November in which she said that the respondent had been given no medical details of his condition beyond “post-RTA” and had therefore had no information on his medical condition. She said that the claimant had declined to meet on numerous occasions and they had accordingly been unable to ascertain what assistance he might need. He was now approaching an absence of one year and the respondent needed to have an indication of his return to work.

The claimant sent a copy of a report from his GP on 10th December 2009. This was a copy of a report addressed to the claimant's solicitors. It did not specifically address the question of any occupational impact that his injuries were having and did not consider the date of any possible return to work. It did not refer to a period of hospitalisation over Christmas 2008, other than a visit to Casualty on 17th December 2008. It did not make any reference to any limiting factors in his injuries that might have prevented him meeting his employer to discuss the matters that they wished to canvass. Specifically there was no reference to headaches or memory loss.

On 23rd February 2010 the claimant indicated that his doctor had advised that he would be fit to return to work at the beginning of April 2010. The respondent ought to meet the claimant before

his return and he was asked to attend at the South Co. Antrim head office on 22nd March. He was also requested to furnish an up-dated medical report detailing his current condition. In reply the claimant indicated that his GP had advised that there was no need for an updated report. He expressed a willingness to meet but said that head office did not suit him, there being no direct public transport link between his hometown and the head office. OC, who had taken over from JM, replied and said that the meeting was to take place in head office and that all petrol or rail expenses would be reimbursed. It was indicated that, due to the length of the absence and to allow the respondent ascertain whether an independent report was needed, an updated report was required. The claimant's solicitor replied stating that the claimant had a medical certificate indicating that he was fit to return to work and that the respondent could arrange an independent medical examination if it wished. By letter dated 26th March OC reiterated the request for a medical report. He concluded the letter by saying:

“Your period of absence, failure to cooperate to all reasonable requests made by the company and lack of interest in your work, customers and the business is of real concern. If you continue to not adhere to the requests being made by the company we will take this as an indication of not cooperating and the company may be required to consider your future employment. I cannot stress how serious this has now become. I require you to supply me with your doctor's comprehensive report on or before Friday 3rd April 2010.”

The claimant wrote to OC on 27th March and reiterated, *inter alia*, that a report from his doctor had already been furnished. OC wrote on the 31st March and requested that the claimant attend a preliminary meeting on 16th April. In the course of that meeting there was some discussion of the claimant having had a blackout while driving, which caused some concern on the respondent's part. Subsequent to the meeting the impasse over a further medical report continued.

OC then wrote to the claimant on 9th July 2010 stating that due to the respondent's inability to determine whether the claimant was fit to return to work and the claimant's lack of cooperation in this regard, his employment would be terminated with effect from 31st July. It was the respondent's view that it had been supportive and patient but that the claimant had shown a complete lack of interest in clarifying his health issues.

The claimant appealed this decision to the managing director and the dismissal was upheld.

Where an employee is on long-term sick leave, it is not unreasonable for an employer to seek to ascertain the nature and extent of any injury or illness or to ascertain the likely length of any absence. Of course, in so doing the employer must act reasonably towards the employee. For the first year of his absence the claimant refused to provide his employer with any grounds for his absence beyond the meaningless statement, “post-RTA”. When a medical report was provided, it did not deal with any occupational impact that the injuries might have. Nor did it give any basis on which the claimant could reasonably refuse to meet his employer. It was asserted on a number of occasions that it was open to the respondent to seek its own medical review of the claimant. This was of course an option. However it does not prevent the claimant from being asked for further detail in the first instance. The Tribunal is satisfied

that the respondent acted reasonably in initially requesting further information from the claimant before considering whether an independent medical review was required.

The respondent sought to meet the claimant on nine occasions, which the claimant refused to do. The Tribunal is satisfied that the claimant, for whatever reason, failed to cooperate in any significant manner with his employer in respect of his prolonged absence from work. It is not sufficient in such cases for an employee to merely periodically furnish vague medical certificates and expect an employer to be satisfied.

The claimant's refusal to meet his employer is all the more curious when his other activities are considered. He continued his horse-breeding activities and at one point contemplated driving a horsebox to Newmarket. He also took a role in an anti-wind farm protest which, on occasion, involved chairing public meetings and giving media interviews. Further, despite his insistence that medical advice prevented his attendance at meetings with the respondent, there was no medical evidence of this.

The respondent showed patience and restraint in the manner in which they dealt with the claimant's prolonged absence. It is clear that this patience was wearing thin by March 2010 when the claimant was warned that the matter had become serious and that his future employment would be considered. The Tribunal is satisfied that the claimant knew the basis and nature of the respondent's concerns. While it was not formally set out that the respondent was dealing with the claimant's on-going non-cooperation as a disciplinary matter, the Tribunal is satisfied that the claimant had been made aware of the serious consequences that further non-cooperation could have and that his dismissal was fundamentally fair.

In circumstances where the claimant failed to cooperate with the respondent to the extent that he did over a prolonged period of time, the Tribunal is satisfied that the respondent acted reasonably in its decision to dismiss.

The claim under the Unfair Dismissals Acts 1977 to 2007 therefore fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)