

## EMPLOYMENT APPEALS TRIBUNAL

**APPEAL OF:**  
EMPLOYEE - appellant

**CASE NO.**  
UD2402/2011  
MN1207/2011

against the recommendation of the Rights Commissioner  
**R-108121-UD-11/SR** in the case of:

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. O'Leary BL

Members: Mr M. Carr  
Ms A. Moore

heard this claim at Monaghan on 26 March  
and 5 June 2013

#### **Representation:**

Appellant:

Respondent:

This matter came before the Tribunal by way of an appeal by the employee against the findings of the Rights Commissioner Ref: R-108121-UD-11/SR. Additionally the employee was pursuing a first instance claim under the Minimum Notice Acts

The determination of the Tribunal was as follows:-

The appellant was employed as a General Operative at one of two mushroom farms operated by the respondent. The employment began in March 2007 and sometime in 2008, following a transfer of the undertaking, the respondent became the appellant's employer.

In March 2009 the appellant was reprimanded due to his absence from work on 26 March 2009. A letter was issued to him but no disciplinary action was taken. On 22 June 2010 the appellant was observed by the general manager (GM) driving a forklift truck (FLT) which he was not authorised or licenced to drive. The previous week he had damaged an emptying belt

while driving a forklift truck. He was again warned for his actions and informed if it occurred again the respondent would go down the disciplinary route. He was also warned that he had been observed not using the clocking in and out system while on a break. It was the appellant's position that his supervisor (TS) had not objected to his driving the FLT, rather she had, on occasion, instructed him to drive it.

On 24 June 2010 an informal meeting was held with the appellant and a colleague concerning various issues. Performance issues were also discussed. At this and subsequent meetings both TS and his colleague (HC) were present in order to interpret for the appellant and, in the case of HC, to accompany him.

The appellant was on two weeks leave in August but did not return to work when planned. He was absent without leave or notification from Thursday 26 August 2010 to Tuesday 31 August 2010. He returned on Wednesday 1 September 2010 when GM spoke to him. A letter was sent to the appellant attaching the company's procedures and inviting him to a meeting. He explained that his phone was not working and he had a sore finger. The appellant could not, in the respondent's eyes, give a satisfactory explanation for his absence and was given a written warning which was to remain on his file for six months. The respondent's disciplinary procedure allows for a written appeal to the managing director (MD). Whilst the appellant did not appeal the decision his position was that he had approached MD with a view to appealing the written warning whereupon MD had become aggressive and rebuffed his intention to appeal.

In mid- November 2010 there was an outbreak of a disease in one of the mushroom houses for which the appellant and HC were responsible for the cleaning of. Both the appellant and HC staff were spoken to and the appellant accepted that he had not carried out the procedure correctly. The appellant had to be summoned to the meeting as he was two hours late and was working.

On 8 December 2010 the appellant was invited to another meeting. The meeting was scheduled for 12-00 Midday but again he had to be summoned from his position at work at 5-00pm by his Supervisor. He again stated that he had not carried out the correct procedures when cleaning the mushroom house. He was issued with a final written warning which he did not appeal.

On 4 March 2011 the appellant was issued a letter of concern regarding health and safety as he had again been driving the FLT. The appellant's position was that he had not been driving it. No formal action was taken. He was again given a copy of the disciplinary procedure.

On 14 March 2011 the appellant again took leave without authorisation. TS had tried to contact his mobile phone on six occasions but to no avail. He was called to a meeting on 15 March 2011. The appellant said that he had been in Dublin on personal business and had no credit on his mobile phone. He also stated that he had no car to travel to work in and taxis were too expensive. His wife had been contacted as she had not been in work that day also but had no explanation where her husband was. The appellant said he understood the seriousness of the situation.

GM made the decision to dismiss the appellant and wrote to him in that regard on 23 March 2011. The letter detailed the reasoning behind the decision to dismiss. These reasons were:

1. The explanation the appellant had given regarding no credit on his phone was not sufficient as it would not have prevented him from receiving calls.
2. The work roster had been drawn up on 11 March 2011 and the claimant had been made aware by TS that he was rostered to work on 14 March 2011.
3. His non-attendance at work affected morale and put extra work and strain on his colleagues.
4. The appellant, and his colleagues were expected to arrange their own travel to work and the issue had never been raised in the past.
5. The appellant's behaviour had undermined the relationship of trust and confidence respondent and the appellant.
6. The appellant had previously been absent without authorisation and he had been issued a warning.
7. The appellant was on a final written warning.

The claimant was given the opportunity to appeal the decision but he decided not to avail of the offer.

### **Determination**

The appellant's conduct in various areas brought him into continuing difficulty with the respondent's disciplinary procedures which escalated through the various stages finally concluding with his dismissal. The appellant's position was that following the written warning in September 2010 when he approached MD with a view to appealing that warning MD became aggressive and rebuffed him. The appellant's evidence in this regard was uncontroverted. Accordingly, the Tribunal is satisfied that it was reasonable for the appellant to conclude that there was no meaningful appeal procedure in place for him to avail of within the respondent. It also appears that the claimant did not fully understand the significance of the warnings given to him or that the instructions given were to be obeyed in all cases. It must follow that the dismissal was unfair. Having considered the contribution of the appellant to the situation in which he found himself the Tribunal measures the award under the Unfair Dismissals Acts, 1977 to 2007 at €5,000-00.

The evidence having shown that the appellant received his statutory entitlement to notice the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 must fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)