

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
Employee

CASE NO.
UD878/2007

Against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr S. Ó Riordain B.L.

Members: Mr D. Hegarty
Ms P. Doyle

heard this claim at Waterford on 26th August and 18th November 2008 and 9th February 2009

Representation:

Claimant : Mr. Hilary Delahunty, H. R. Delahunty, Solicitor, 55 Johnstown, Waterford

Respondent : Ms. Helen Barry, IBEC Confederation House, Waterford Business Park,
Cork Road, Waterford

The determination of the Tribunal was as follows:

Respondent's Case

The respondent gave evidence to the Tribunal. He has two betting shops; one in Waterford, the other in Wexford. The claimant was initially employed to do seasonal work. In early 2007 the respondent endeavoured to train the claimant up to management level in order to have her take on the role of manager in one of the shops. The claimant worked in the Waterford branch and was paid a €35 per day mileage expense, as the claimant was living in Wexford. The respondent did not know how long he would be paying this expense for, as the claimant mentioned that she might be moving to Waterford.

The claimant did not have a contract of employment. The respondent engaged a company in employment services to draw up contracts. The respondent met staff and produced contracts for them to sign. The employees engaged union representation on the matter. The respondent acknowledged that it had "got past him" that the claimant, along with other existing staff, had not signed a contract. All new members of staff have contracts of employment.

A number of incidents occurred which caused the respondent to question whether the claimant had the ability for a management role. The respondent thought that it was in April 2007 that it came to his attention that a bet was paid out to the value of €2,000 approximately, on bets for which some of the results were already known. It was the respondent's understanding that the claimant was to check the bets and she had failed to do so. The times on the bets should have been checked against the time of the matches. When this came to light the respondent contacted the claimant and dismissed her, without any hearing, for gross negligence. The respondent stated that in hindsight he realised he was wrong to do so. Due to the pressure from other staff, who were unhappy about the manner of her dismissal, the respondent re-instated that claimant and sent her for further training to the Wexford branch. There was a further incident in 2007 when the claimant was late opening the shop.

Prior to Christmas 2006 the claimant told the respondent that she had a back injury and that she needed to have an operation in 2007. The respondent agreed to this request. In 2007 the claimant provided the respondent with the dates for her back operation. It was the respondent's understanding that the claimant would be absent for up to four weeks.

During the claimant's sick leave her wages were initially given to her sister, until the sister took leave. The respondent telephoned the claimant on Tuesday, 26 June 2007 to find out how he should then pay her wages and heard a foreign ring tone. The respondent mentioned this to another employee. The respondent believes this employee contacted the claimant and told her the respondent knew she was abroad. Two hours later the respondent received a telephone call from the claimant who informed him that she was in France. The respondent had spoken to the claimant on the previous Friday and she had not mentioned that she would be travelling to France the following week. The claimant told the respondent on the 26 June 2007 that she had not informed him about going to France, as it was a spur of the moment trip with another person. The claimant said she had travelled on Monday, 25 June 2007 and would be returning on Thursday, 28 June 2007. The respondent could not believe that the claimant was able to make the journey to France as she had a wound from the back operation that had not healed. The claimant informed him that she had her wound dressed by a nurse while in France.

The respondent asked the claimant for a credit card receipt from her trip but the claimant said she could not produce this as a laser card and cash had been used. The claimant told him she had made the journey to France by rail and sea but that she had mislaid her ticket.

The respondent wrote a letter to the claimant dated the 27 June 2007 seeking a letter from the claimant's medical consultant confirming the claimant's operation and period of recuperation from the 6 June to the 25 June 2007 and also seeking a medical certificate from the claimant's doctor for the period of the 25 June to the 9 July 2007 which was the date the claimant had indicated was the earliest she would be well enough to return to work. The respondent requested the reimbursement cheques from the Department of Social Welfare in order to continue the payment of sick leave. The respondent also informed the claimant that he intended to arrange a meeting with her. When the respondent did not receive a response he sent a similar letter on the 3 July 2007. The respondent did not receive a response to this letter either and he was unable to make contact with the claimant by telephone. He wrote another letter to the claimant dated the 6 July 2007 in which he stated that as the claimant had failed to contact him, she was actually on unauthorised leave. A meeting was subsequently arranged between the parties. Prior to this meeting the respondent wrote a letter to the claimant outlining that she was suspended on pay pending an investigation into her recent unauthorised absences.

The respondent met with the claimant on the 26 July 2007 and both parties had a person accompany them to the meeting. The claimant's trip to France was discussed at this meeting and both parties raised other issues. One such issue raised was Stephen's Day 2006 when the claimant's sister contacted the respondent and told him the claimant's boyfriend had organised a trip to Rome for the claimant. The respondent had already granted holidays to two other employees for this time. The respondent agreed that the claimant could take the holidays and that he would run the shop himself. At the meeting on the 26 July 2007 the claimant said that she had not known about the holiday to Rome and that it was organised by her sister and her boyfriend.

The respondent did not receive the social welfare cheques that he had requested prior to the meeting.

The respondent formed the opinion that a holiday was incorporated into the claimant's sick leave in June 2007. The claimant continued on suspension until a second meeting in August 2007. Prior to the meeting the respondent wrote to the claimant informing her of the meeting and requesting that she bring evidence of her time in France and a letter from her doctor confirming that the claimant was abroad while on sick leave, with the doctor's approval. The respondent informed the claimant at the meeting that he felt he could no longer trust her and he outlined the reasons.

The respondent stated to the Tribunal that when he received the claimant's medical certificates he realised that she was living close to Waterford and therefore the mileage expenses she received were unjustified.

The respondent subsequently outlined the claimant's dismissal in letter dated the 10 August 2007.

During cross-examination the respondent stated that he thought there had been collusion between the claimant and her sister about the claimant's holidays in January 2007.

The respondent dismissed the claimant because of a lack of trust. He did not believe that an employee who was on sick leave should go on holiday. In considering the dismissal of the claimant he also took into account that the shop had been opened late, the holiday the claimant took in January 2007 and the mistake made with the football bet.

It was put to the respondent that the claimant was due to return to work on the 25 July 2007. The respondent replied that he had told the claimant she would not be allowed to return to work until he held an investigation into her travelling abroad while on sick leave. The respondent did not pay the claimant after he found out that she was in France. The respondent agreed that if the claimant had not travelled to France while on sick leave, he would not have dismissed her. It was put to the respondent that the claimant had not received social welfare cheques as her form was submitted late.

In reply to questions from the Tribunal the respondent stated that he believed the claimant's holiday in June 2007 was premeditated, as in January 2007 and that she was actually on a sun holiday.

A witness gave evidence to the Tribunal that he attended the meetings on behalf of the respondent. The witness took some notes of these meetings and he confirmed to the Tribunal that the respondent had asked the claimant about the circumstances surrounding her holidays in January and June 2007.

Claimant's Case

The claimant commenced employment with the respondent in April 2006 at its Wexford office. At the respondent's request she soon moved to its Waterford city branch where by the summer of that year she had acquired the position of manager. While she felt she was "thrown into the deep end" the claimant nevertheless knew enough of the bookmaker's business to "get by" there. Despite working and commuting long hours there and maintaining a weekend presence in the Wexford office the claimant continued to enjoy and value her work with the respondent. She referred to three events between the end of December 2006 and April 2007 that subsequently had a bearing on her case.

The first instance concerned the circumstances in which the witness took a week's leave. She appreciated the respondent's co-operation in granting her that leave and he never stated at the time his disapproval of it or suggested this holiday was orchestrated by her or others. The second incident focused on the results of a football bet in the Waterford branch in which the respondent lost in excess of €2,500.00. The respondent saw this loss as "a con job" and expressed his displeasure at its outcome. The claimant did not face any disciplinary sanctions for the first occurrence. However the second event resulted, albeit for a short period, in the claimant's dismissal. The respondent terminated the claimant's employment on the grounds of her inexperience only to reinstate her back to her managerial position some forty-eight hours later. The claimant indicated that the incident had not been her mistake and that no disciplinary procedures were followed.

The claimant had an ongoing adverse medical condition with her lower back, which needed professional attention. That attention was generally seen to at times which did not entail her being absent from work. However that situation changed by the summer of 2007 when she was hospitalised and later placed in recovery mode as a result of an operation. The respondent was aware of this situation and initially acknowledged it. The claimant contacted him on 22 June to say she was obliged to remain away from work for a further two weeks. She had been due back to her employment on 25 June but now arranged to contact him again on 10 July. The witness who was recovering at home accepted an invitation to take a short overseas break to France. That acceptance was partly based on the approval of her nurse that she could undertake such a trip provided her medical condition was properly treated. Such treatment was arranged and acted on by a relation of her travelling companion who was in the area in France and who had medical experience.

The claimant neither considered that trip as a holiday nor felt under an obligation to tell her employer she was proposing to undertake it. She was unable to produce any documentation of her participation in this overseas excursion. There was no written confirmation from any medical practitioner allowing her to proceed with this journey.

While abroad, the claimant received a message from the respondent over a work related matter. During a subsequent conversation the respondent sounded annoyed and was also "smart and sarcastic" towards her. She phoned him again when she returned home some days later. By 10 July the witness had obtained another medical certificate declaring her unable to attend work for a further two weeks. While accepting this, the respondent sounded none too pleased at this news. By that time the witness was worried that the respondent felt that her absences were somehow not genuine and that she was staying away from work on purpose. She acceded to the respondent's request that she visit a doctor nominated by him. That doctor in turn confirmed her condition and added that she was unfit for work "for a period of time" i.e. two weeks from 10 July 2007.

By that time the claimant had received and read two earlier letters from the respondent in relation to her ongoing absences. Among their contents was an instruction to submit sick certificates to cover those absences. The witness adhered to that requirement. Those letters also notified the claimant that she had to attend a meeting upon her return to work to discuss those absences “specifically the issue of your being abroad, whilst on sick leave”. When she returned to work on 25 July the claimant was suspended in relation to that trip pending the outcome of that investigation. She was shocked at this development.

Together with a representative the claimant met the respondent and another person on 8 August. She described this encounter as a non-friendly business chat where the respondent was “going through the motions”. At its conclusion the claimant felt she was not going to get her job back. She was surprised and dismayed when the previous three events were cited against her. The witness also believed that her overseas trip was not fully addressed at that meeting and added that there was no structure to the respondent’s investigation. A second meeting took place two days later where the claimant told the respondent she did not act in any wrongful way.

A letter dated that day issued to the claimant informing her of the respondent’s decision to terminate her employment. She felt this sanction was unfair considering her loyalty and commitment to her job and former employer. The witness indicated that the respondent failed to furnish her with terms and conditions of her employment and commented that she had not been issued with a contract of employment.

The current partner of the claimant gave evidence that he travelled with her to France in late June 2006 as a companion and friend. He was in the building trade and as he primarily dealt with cash transactions the witness was unable to produce any paper work connected with that trip.

Evidence of loss was given orally and, by agreement, written material was submitted subsequently to the tribunal.

Determination

The respondent’s letter of 10 August 2008 notified the claimant of her dismissal on the basis that she had broken the relationship of trust on a number of occasions

The claimant’s “unauthorised” absence abroad while being paid sick leave is clearly the principal issue leading to the dismissal. It is, however, presented in the dismissal letter as the last straw, the end of a sequence of previous work related events in which the respondent employer had been “more than lenient” with the claimant leaving the respondent with no other option but to terminate the claimant’s employment, on the basis that the claimant had broken the relationship of trust essential to the operation of the business.

The Tribunal wishes firstly to consider these previous collateral events which, from the evidence, comprised the following (1) The post Christmas 2006 Holiday; (2) The football bet involving an overpayment of €2,700 to a client leading to the claimant’s dismissal and reinstatement and (3) A late attendance, with a view to determining the substance of these events and their relationship to the dismissal.

The respondent’s belief that the claimant in some way manipulated the respondent into allowing her to take a week’s holidays abroad after Christmas 2006 is not supported by the evidence. There is

no doubt but that the respondent had the opportunity to refuse to authorize the post Christmas holiday and chose not to do so and there is no evidence that the claimant was aware in advance of the proposal. This aspect, therefore, cannot be advanced in any sense as a factor to be taken into account in considering dismissal. Equally, one late attendance (without any official warning having issued) by an employee who regularly worked from 9am to 6.30pm to 7pm each day cannot seriously be taken into account.

The position in relation to the football bet is more complex. The claimant gave evidence at the Tribunal that suggested that another employee was responsible for the overpayment but that this employee was not spoken to. What is certain from the evidence, however, is that the respondent at the time dismissed the claimant arbitrarily in a manner that completely ignored her rights and only reinstated her in employment because of the reaction of other staff. The Tribunal also noted in this regard that, contrary to law, the respondent employer had no disciplinary procedure in operation and had not advised the claimant, to whom he had given no written contract, of dismissal procedures. It is undoubtedly the case that the respondent blamed the claimant for the loss but, in the absence of fair procedures and her reinstatement at the time, this episode, in the Tribunal's view, cannot reasonably be accepted as a ground that can be substantively taken into account in the dismissal process.

Turning now to the principal issue of the "unauthorised" absence of the claimant abroad while on sick leave. The Tribunal is satisfied on the basis of the evidence that the claimant was legitimately out sick in the period covered by the various medical certificates, i.e. from the date of her operation on 6 June 2007 to 24 July 2007, the date before she was suspended. The Tribunal is also satisfied that, on the basis of the claimant's referral to and examination by the doctor nominated by the respondent, that the respondent accepted that she was legitimately on sick absence.

The Tribunal notes that the respondent did not furnish the claimant with a written contract and that there was no formal written sick leave scheme in operation. There was no indication whatsoever of any requirement on the claimant to seek authorization from the respondent to travel abroad if on sick leave or that failure to do so would potentially constitute a dismissible offence. The claimant was never furnished with any disciplinary procedures. The respondent has argued that the requirement to seek employer's authorization for travel abroad is a normal element of sick leave arrangements but the Tribunal heard no evidence to suggest that the claimant was aware of this. Even though she had the title as manager, she was relatively inexperienced at the time and by her evidence, which the Tribunal accepts, had no knowledge of the respondent's sick leave arrangements.

The respondent disbelieved the claimant's contention, in the absence of any supporting receipts, that she travelled to France by car on the "spur of the moment" and felt that she had gone on a package holiday somewhere else in abuse of the sick leave scheme but the claimant and her partner were adamant under oath that this was the case and that her partner's mother had provided the necessary medical care to the claimant. In so far as the absence of receipts is concerned, the Tribunal is conscious that the request for receipts was made post factum and that the evidence of the claimant of not having a credit card and of the claimant's partner in relation to his regularly dealing in cash was credible.

While it is clear from the evidence that there was a degree of overlap between the telephone communications between the respondent and claimant and the issuing of the formal letters by the respondent, the Tribunal believes that the claimant, in a situation where she knew from the correspondence that the respondent was increasingly upset about her absence, should, as a manager,

albeit an inexperienced one, have adopted a much more proactive approach in responding to the respondent and, by her inaction, she contributed to the breakdown in trust advanced by the respondent as leading to her dismissal.

The Tribunal fully understands the frustration felt by the respondent but it does not consider that, in all the circumstances, the conduct of the claimant in going abroad for a few days while sick was such as would lead to a fundamental breach of trust or justify dismissal by a reasonable employer. The Tribunal has already indicated its view that the previous collateral work events are not of such significance as would support dismissal.

The Tribunal determines that the claimant was unfairly dismissed and her appeal under the Unfair Dismissals Acts, 1977 to 2001 is allowed.

The Tribunal considers that the appropriate remedy is compensation and having regard to the respective actions of both parties and the provisions of section 7 of the Unfair Dismissals Act, 1977 as amended by section 6 of the Unfair Dismissals (Amendment) Act, 1993, determines that compensation in the amount of €16,000.00 should be paid to the claimant.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)