

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
Employee - claimant

CASE NO.
UD1145/2008
MN1053/2008

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: Mrs M Quinlan

Members: Mr M Noone
Mr B Byrne

heard this claim at Dublin on 7th January 2009 and 31st March 2009

Representation:

Claimant(s) : In person

Respondent(s) :

Michael Sheil & Partners
Solicitors
Temple Court,
Temple Road
Blackrock
Co. Dublin

The determination of the Tribunal was as follows:

The claimant began his employment in 1989 with company A. When company A was split in two, at the end of 2006, staff went to one or other of the new companies. The claimant was hired by the smaller of the two companies (company B), which had six staff. The managing director of company B (MD) gave evidence that he retained the claimant as he had good experience and customers were familiar with him. When negotiating over the new position MD sought reassurances from the claimant that his previous behaviour of being frequently late and absent from work would discontinue. The claimant requested a pay rise and told MD that there would not be a problem. The claimant was given a €10k pay rise.

However, the claimant's lateness and absenteeism continued to be a problem. There were

two periods of sick leave of extended duration by the claimant, which caused problems for the respondent company, and intermittent days, which included a high proportion of Mondays. The first long absence was from 2nd July 2007 to 6th August 2007 and the second, beginning in January 2008, culminated in the claimant's dismissal in July 2008.

On 3rd July 2007 MD received a text message from the claimant stating that he was vomiting and would not be in that day. The text messages continued throughout July, with the claimant text messaging to say he would be in on a certain day and then text messaging again to say he would not be in for another day or week. The company did not receive any doctor's certificates during this time and only received one doctor's cert when the claimant returned to work in August stating that the claimant had a viral infection. MD disputed the claimant's assertion that the social welfare forms sent by the claimant for signing, so that the claimant could receive a social welfare payment, were the equivalent of a doctor's certificate. Another issue of concern to MD was that, although the claimant sent the text messages via his work mobile phone, and he had stated that if MD needed anything to give him a call, the phone was switched off when MD tried to phone. MD received no response to a letter he sent to the claimant on 9th July 2007.

MD received a phone call from the claimant on the evening of Sunday 22nd July to say that he had acute Hepatitis B, that there was no cure, and that he needed bed rest or else he could potentially die. MD was sympathetic, however the doctor's certificate submitted by the claimant, on his return, made no mention of Hepatitis B.

A company director (CD) gave evidence that he held a general staff meeting October 2007, as there was a bad atmosphere in the office. CD asked for suggestions on how to improve things. The claimant said he didn't have any problem and that he wouldn't mind getting a parking space. CD had previously spoken to the claimant in April 2007 regarding his absences and late attendance. CD had recommended the claimant for the position when company B was created and believed that the claimant would improve his work attendance. Employees were not issued with a new written contract of employment when company B was established.

The second long absence began when the claimant did not return to work after the Christmas holidays in January 2008. Initially the claimant sent a text message to MD stating that he had the flu and that he wouldn't be in. This was repeated on a weekly basis until 4th February. During that time the claimant did not answer phone calls, but he did return a text message concerning a file. MD received no reply to his letter sent on 15th January 2008 to warn the claimant about his continuing absence. A doctor's certificate was received on 7th January 2008 stating that the claimant had a viral infection.

MD wrote to the claimant again on 1st February 2008 seeking a medical report of the claimant's illness. MD did not receive a report, but received a further doctor's note stating that the claimant was suffering from anxiety and depression. The claimant had never previously said that he suffered from anxiety or depression. MD wrote on the 14th and 21st February 2008, seeking to find out when the claimant was returning to work, but received no response. On 5th March 2008 MD wrote to the claimant that if there was no response to that letter his employment would be terminated. MD received a note and doctor's cert from the claimant on 10th March. The claimant's note said the doctor considered him unfit to return to work and the doctor's certificate said that the letters from MD were not helping the claimant's recovery from his illness.

MD wrote to the claimant on 13th March 2008 stating that the claimant should return to work by the 1st April, or a date shortly after if confirmed, or else he would be dismissed. MD received a note

and doctor's certificate from the claimant on 27th March 2008. The claimant stated in the note he could not say when he would return and the doctor's certificate stated 'until further notice'. The illness was not specified. MD wrote to the claimant on the 10th April 2008 requesting that he return to work by the 6th June 2008, or else to consider his employment terminated. MD took on an extrastaff member in June to cope with the claimant's absence. MD received two more doctor's certificates stating that the claimant had depression, but no further direct communication from the claimant. MD considered asking the claimant to see the company doctor for a medical report, but decided it would be better from his own doctor.

As MD had received no indication from the claimant as to when he would be returning to work, or a medical report, he dismissed the claimant by letter on 10th July 2008.

Claimant's Case:

The claimant gave evidence that he commenced his employment with company A in September 1989 and his employment was without incident until the two companies were split in 2006. He contended that he did not have a choice which company he went to and, as he would be working alone, he asked for a pay rise. He agreed that he had said there would be no problem if he received a pay rise.

The claimant contended that some of the sick days listed by the company were exaggerated and that the company had used his holiday pay so that he would continue to be paid. He did not wish for that to happen. The claimant took sick leave in July 2007 as he was suffering from Hepatitis B. He denied ever receiving MD's letter dated 9th July 2007. He was unaware that he had to provide a doctor's certificate and that the social welfare claim forms were insufficient. He provided a doctor's cert on his return. He did not recall the illnesses that led to him taking individual sick leave days in 2007, but denied that he viewed the seven paid sick days per year as extra annual leave.

The claimant agreed he was not a good timekeeper and contended that this had never been an issue, except for one occasion when MD had shouted at him and another occasion when CD had spoken to him.

The claimant developed the flu over Christmas 2007/2008. After four weeks of sick leave his doctor diagnosed him with depression and anxiety. The claimant believed he had answered the company's letters as best he could considering his mental health.

The claimant was surprised by MD's letter, dated 15th January 2008, as he had never received a warning previously. He was unsure what a full medical report was and his doctor was annoyed that his word was not being accepted. The claimant forwarded the certificates that the doctor gave him and sometimes he put a note with it. He never attempted to speak to the company directors.

He understood from MD's letter of 14th February 2008 that his job was under threat but did not respond. Neither did he respond to MD's next letters dated 21st February 2008 and 5th March 2008.

He responded to MD's letter dated 13th March 2008 which stated that his employment would be terminated on 1st April 2008 if the claimant did not return to work by that date or give a firm date as to when he would return. The claimant stated that while he wanted to return to work he could not say when. MD responded by extending the deadline to 6th June 2008. The claimant did not correspond further with the company, save for submitting two further sick certificates dated 29th April 2008 and 22nd May 2008. The claimant was dismissed by letter dated 10th July 2008. He

considered that he was dismissed for being sick.

Determination:

The Tribunal, having had before it the evidence of both parties, are of the unanimous view that the respondent gave every opportunity to the claimant in relation to his absence, and treated him with every consideration. However, it became apparent that, despite repeated requests from the respondent for a date on which the claimant expected to return to work, they were totally unsuccessful in getting this information. Accordingly, the Tribunal is satisfied that the respondent was entitled, in the circumstances, to dismiss the claimant, and therefore, the claim under the Unfair Dismissals Acts, 1977 to 2007, accordingly fails. However, the Tribunal is of the unanimous view that the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, succeeds and awards the claimant €7230.80 (seven thousand, two hundred and thirty euro, eighty cent) in respect of eight weeks notice.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)