

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:  
EMPLOYEE -**claimant**

CASE NO.  
UD1028/2010  
MN1004/2010

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: Ms. M. Levey B.L.

Members: Mr. M. Flood  
Mr M. O'Reilly

heard this claim at Dublin on 3rd October and 14th December 2011

Representation

:

Claimant : Mr. John McGuiggan B L instructed by  
Ms Sarah McGrath, Pádraig O'Donovan & Company Solicitors, Abberley Law Centre,  
High Street, Tallaght, Dublin 24

Respondent : Mr Matthew Jolley BL instructed by  
Ms Emer Boyle, Flynn O'Driscoll, Business Lawyers,  
26 Upper Pembroke Street, Dublin 2

The determination of the Tribunal was as follows:

### **Respondent's Case**

DG the Managing Director told the Tribunal the respondent supply, install and service catering equipment to restaurants, businesses and supermarkets. The claimant was an engineer and he serviced hot air equipment. He was employed on a basic salary, with a mileage and lunch allowance. The claimant commenced employment with the respondent as the business was starting out. At that time and as there was a lack of engineers and overtime was available.

The business operates a next day service and an on-call service for its customers. The claimant was mainly based in Leinster but asked to travel to other locations as required. The claimant would come into the office, take the parts needed for the job and may be out of the office for two days at a time. Staff would normally travel up and down to the customer on the same day, and if they stayed overnight it was not an issue.

The claimant was on call over the Christmas period of 2009. DG was in Limerick working on a major contract. On St Stephen's Day he called the office and asked for the person on-call to come to Limerick to commission the equipment that was installed. He was told that the person on-call could not be contacted and he had to get another engineer to do the work. On 12 January 2010, DG wrote to the claimant requesting him to attend a disciplinary meeting on the 18 January.

On the 18 January 2010 the claimant, his colleague KR, DG and CH attended the meeting. It was held on the respondent's premises. At the meeting they went through the problems the respondent had with the claimant and told him he was being let go. The meeting itself was short.

On 22 January DG wrote to the claimant confirming his dismissal with immediate effect.

The Tribunal was told that the claimant's disciplinary record was available, but BN who wrote the letters was not available on the day to prove the documents.

Under cross examination

DG accepted that the claimant did not have a written contract of employment. He said the claimant received a copy of grievance, disciplinary and suspension procedure with his payslip.

DG said he could not say if he had seen a doctor's note for the claimant.

DG said that engineers could not reschedule their work. All calls had to go through the office. He said some supermarkets dock them points for slow responses and this could have an impact on renewing a contract.

DG said he did not accept that snow had prevented the claimant from working over the Christmas period.

The financial controller who had no direct involvement in this case told the Tribunal that as a consequence of having trouble with the staff grievance, disciplinary and suspension procedures were distributed to the employees with their pay packs in July 2009.

One of the directors of the company added that these procedures were deemed to be an agreement between the respondent and the employees. However input from those employees was not sought. This director while having no input into the content of the letters sent to the claimant by the operations' manager in March and August 2009 felt it was still fair to have issue with the

warnings contained within those letters. She maintained that attitude notwithstanding had the claimant submitted a medical certificate to account for some of his reported absences from work. As regards the incident this witness viewed the claimant's behaviour as contrary to the above procedures.

The respondent wrote to the claimant on 12 January 2010 seeking his presence at a disciplinary meeting to discuss his failure "to attend work on three occasions in the last two weeks". The witness listed those occasions for 7 and 8 January 2010 and an unspecified date in the period between the previous Christmas and the New Year. The former date referred to a trip to Limerick that the claimant was scheduled to attend but did not. During that same period the witness had no recall of receiving a phone call and photograph from the claimant describing his injuries and facial appearance. When he returned to work the respondent was sympathetic to the claimant due to his injuries and no formal action was taken against him.

The witness produced a copy of notes she took in reference to the claimant's absences on 7/8 January. Those notes recorded phone calls between the respondent and the claimant. She understood that he was unable to report for work those days because his car would not start. The claimant was very apologetic at the disciplinary meeting on 18 January 2010 in which this director attended. Following consultations with another director the respondent wrote to the claimant on 22 January confirming his dismissal. This witness justified that sanction on four listed occurrences as set out in the disciplinary procedure.

### **Claimant's Case**

The claimant commenced employment as a service engineer with the respondent in January 2007. His job entailed calling on clients to install and maintain certain in equipment. While his travels were concentrated in the greater Dublin region he occasionally travelled further afield on company business. At all times he used his own vehicle and in return received allowances for its use. In addition to his scheduled hours the claimant was from time to time rostered on an on call basis.

The claimant accepted that he acted in breach of procedures to some extent in the reported incidents in August 2009. On those occasions he handed in a medical certificate and also fulfilled his obligations to a supplier without any adverse effect to the company's reputation. No procedures were in place in March 2009 to be breached.

From Christmas 2009 to the New Year the claimant's status was to be on call for duty. During that same period he sustained injuries as a result of an assault and phoned and spoke to one of the directors about that. He even sent her a picture of his facial wounds. He informed her that he was unable to work due to his appearance but remained on call apart from one day during that time. The claimant said that he knew nothing about a trip to Limerick during that period and that it was not mentioned to him when he reported back to the respondent in early January 2010. He was due to work the full week commencing 4 January.

By 7 January weather conditions had deteriorated so much that the claimant concluded that to attempt to drive his car was too dangerous and risky. He phoned the respondent's office that morning to excuse himself from work. He repeated that exercise the following day for the same

reasons. When he returned to the company premises on 11 January he was placed on suspension. That was followed by a disciplinary hearing a week later which concluded in his dismissal. The claimant assumed his dismissal was solely related to his absences from work on 7 and 8 January. He was not offered an appeal against that decision.

### **Determination**

Having considered all the evidence the Tribunal is of the view that the dismissal is unfair.

In its evidence the company placed emphasis on the incident whereby the claimant did not turn up for a scheduled call-out to Limerick. Another incident related to a period of a few days where the claimant submitted a sick note on return to work. On another occasion he did not turn up for a scheduled delivery and unilaterally rescheduled that delivery. There was confusion in the evidence of the respondent's witnesses regarding which incidents gave rise to the dismissal. The occasion where he rescheduled his appointment and turned up to work at the re-appointed time does not form part of recurring absences. When this is taken out of the equation there is no history of persistent absences by the claimant in this case.

The claim under the Unfair Dismissals Acts, 1977 to 2007 is allowed and the claimant is awarded €40,000.00 as compensation under those Acts.

The appeal under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 succeeds and the appellant is awarded €1076.90 under those Acts.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

