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Another sick note? Labour Court upholds dismissal for persistent short-term absences

The Labour Court has upheld the dismissal of a former Dublin City Council employee for persistent and excessive absence.

10/02/2020 BRIEFING

The employee, who was employed as a Waste Management Operative from May 2007 received numerous warnings throughout the course of his employment for absenteeism, time-keeping and alleged abuse of the sick pay scheme. He was dismissed in December 2016 after incurring 17 days of sick leave between April and October of that year.

This case highlights that persistent absence from work, whether certified or not, may be a justifiable reason for dismissal.

THE EMPLOYEE'S CASE

The employee appealed the ruling of the WRC that the decision to dismiss was not unfair and sought to be reinstated in his job. He argued that the decision to dismiss was disproportionate and the procedure followed by the employer was flawed for a number of reasons, including:

the absences were genuine and certified;

the employer had undue regard to prior warnings whereas the purpose of time limits on warnings are to give the employee "a clean slate" once an improvement has been achieved and should be disregarded thereafter;

the employer had failed to adequately direct him to Staff Support Services with a view to addressing any of the underlying issues which may have caused his absenteeism;

the decision to impose a final written warning was disproportionate when account was taken of the average absenteeism level of the public service; and

there were other steps and alternatives to dismissal available to the employer to address the issue.

The Employer's Case

Counsel for the employer argued that the employee's continuous absenteeism during the period of April to October 2016 constituted "*a failure to provide the Council with regular and efficient service*". It was argued that the decision to dismiss was proportionate in circumstances where, despite repeated warnings, the employee failed to take appropriate steps to tackle his absenteeism. It was submitted that fair procedures were implemented throughout the disciplinary process with due regard to the rules of natural justice. The employee in this case was represented by a trade union official at all meetings and (unsuccessfully) exercised his right to appeal the final written warning in March 2016 and the decision to dismiss in November 2016.

The employer argued that it had acted appropriately and professionally by referring the employee for independent medical assessment so as to rule out any medical or other issues that might have required reasonable accommodation. The employee had been interviewed on three occasions in

2016 but gave no personal, medical or other mitigation reasons for his absences. The Court heard that the employee had been referred to Staff Support Services for assistance back in 2012 but denied any medical issues or need for support in 2016.

While the employee had a history of warnings (including five “final” written warnings), the decision to dismiss was based on the 17 days of absence between 26 April and 11 October 2016 during which period the employee was the subject of a live final written warning and had been made aware that any breach of same would result in his dismissal. Evidence was furnished that the employee’s absenteeism during that period (17 days) far exceeded the average absenteeism rate in the Council of 5% (10 – 12 days per annum), particularly in circumstances where there was no underlying medical condition or other reason to justify the high level of absenteeism.

Counsel for the employer argued that previous warnings, regardless of their expiry, were relevant insofar as it gave rise to a genuine concern that the employee was unlikely to tackle the issue of excessive absence. The employer argued that the “*point of no return*” had been reached.

LABOUR COURT’S DECISION

The Court stated that it was not tasked with deciding whether or not the correct decision was made nor whether the Court would have made the same decision, rather the Court’s role was to determine if the decision to dismiss fell within the ‘*band of reasonableness*’, i.e. would a reasonable employer have dismissed the employee in the circumstances.

In assessing the reasonableness of the WRC’s decision, the Labour Court had particular regard to the following factors:

- the Council operated a clear disciplinary policy;
- the level of absenteeism was unacceptable and, if repeated widely within the Council, would have been wholly unsustainable;
- the employee had been afforded adequate opportunities to improve his attendance record in the past and provided with relevant supports (where needed);
- the employee was made aware of the consequences of failing to improve attendance and received sufficient warnings in advance of the dismissal; and
- the employee was represented at meetings by his trade union representative and afforded (and exercised) a right of appeal.

The employee’s appeal was dismissed and the decision of the WRC upheld as the Court:

The Respondent, having done all that was reasonably possible to explore the reasons for the continued absenteeism and having taken a series of progressive, measured and appropriate steps to reverse it, reasonably formed the view that it had run out of options and that no further action could reasonably have been deployed in the circumstances to secure the Complainant’s regular and efficient service. The fact that he was afforded opportunities to appeal each outcome of the disciplinary process, including the decision to dismiss, strengthens the Court’s view in this regard. Furthermore, in the circumstances of the case, the Court is satisfied that the decision to dismiss falls within the definition of a ‘band of reasonableness’.

COMMENTARY

Absenteeism comes at a cost. According to IBEC, absenteeism costs employers in Ireland around €1.5 billion per annum. This case highlights that employers cannot reasonably be expected to employ someone with an unacceptable level of persistent short-term absences (even where

certified) but companies must ensure that they take all appropriate measures to explore and address the reasons for absenteeism, consider all reasonable accommodations which might be made before taking disciplinary action and ensure fair procedures are followed.