EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF: CASE NO.
Employee UD670/2005

WT181/2005

MN481/2005

against
Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J. Sheedy
Members: Mr G. Phelan
Dr. A. Clune

heard this claim at Limerick on 24th October 2006
and 25th October 2006

Representation:
Claimant:
Mr. H. Pat Barriscale, Holmes O'Malley Sexton, Solicitors,
Bishopsgate, Henry Street, P.O. Box 146, Limerick

Respondent: Mr. Tom Mallon BL instructed by
Mr. Seamus Given, Arthur Cox, Solicitors, Earlsfort Centre,
Earlsfort Terrace, Dublin 2

The determination of the Tribunal was as follows:

Preliminary point:
The Tribunal heard submissions from both representatives on a preliminary point as to whether the claims were submitted on time or not. Having considered the submissions the Tribunal unanimously determines that the claims were submitted on time, as the claimant was not dismissed on the date in question and to date no form p45 was given to the claimant.

Respondent's case:
The Tribunal heard evidence from the respondent's human resource director. The claimant was injured at work and he was made aware of this. Court proceedings ensued and these were settled. The claimant received €310,000.00 as settlement. The witness was not aware if part of this settlement was for the claimant's non-ability to return to work. He was know that the claimant didnot return to work.

The witness told the Tribunal that all employees had insurance with Irish Life insurance, covering long-term disability insurance and this provides for a 60 % of income and maintains their pension contributions, should they be disabled. The insurance company insists that the employee remains on the company books because if the employment is terminated then the employee would no longer receive long-term disability and pension contributions would end. If an employee is on long-term disability they still get a Christmas bonus.

The witness explained that the claimant received a Christmas bonus, as did other employees who were on disability or other leave. The claimant received advertisements for positions in error, as they had to keep him "on the books" as they were undergoing major changes and re-filling all positions in the company. If they had removed the claimant from their books he would not have received a long-term disability nor would his pension be paid.

The witness did not agree with the letter of 10th March that the claimant "has remained an employee". Regarding the letter 18 th May 2005 and claimant's ability to perform duties the overriding policy of the company is that employees must be able to do work throughout the factory because they can be transferred. The company does not as a policy have light work. There is a policy in place whereby employees can be phased-in over four weeks if the medical report states they are fit to resume work. The work is high speed and demanding, some is quite physical.

Claimant's case:
The claimant told the Tribunal that on the day the settlement was agreed in the High Court he said that he could have earned the amount in the respondent company and asked about his job in the respondent company. They told him that the job was not for discussion on that day. Hr told them that he would go back to his job. He accepted the settlement on the understanding that he would go back to his job some day.

He received regular correspondence by post from the respondent company. Some positions were advertised to him. He considered some of these positions. He applied for a canning line attendant position and was successful. It was not subject to a medical but was to seniority. He was still on the "seniority books" of the respondent company. When he wanted to return to work in December 2004 he got a letter to say that there was no work available. A few days before this letter he had received his Christmas bonus.

The claimant re-iterated that he understood that "someday" he would return to his job. After he received the correspondence from the human resource director to say that there was no job available he lodged his claim for unfair dismissal.

Cross-examination:
The claimant explained that he did not speak to the respondent's legal team on the day f the settlement he spoke only to his legal advisors. He was asked about his fitness to work and he explained that the job he applied for in the company would be filled on a temporary basis until he was fit to take it up and his union told him this. The claimant was asked to clarify if his evidence was that he was not fit until June 2005 and he agreed. When it was put to him that he settled his personal injury case in February 2004, and it was not on the basis that he had a right to return to the respondent company he replied, "I think I had a right to some day". It was put to him that the case was on the basis he was not fit to return to the respondent company and he replied, "I don't know". He agreed that he was certified disabled in December 2004 and up to June 2005.

The claimant was asked by the Tribunal to explain the job he was offered. He explained that he received a letter from the respondent to say that he was successful, the job was filled on a temporary basis on illness cover relief when he got his final medical certificate he went in to the respondent company and "that's when it all started".

Submissions:

Respondent:
At least half of the compensation for settlement that the claimant got was for future loss. The PIAB guidelines for the injuries he was compensated for amount to €100 K at the very most and could be in the region of €60K to €70 K. The claimant knew that a portion of the award was for future loss. His employment came to an end and his employer compensated him for loss of earnings. The claimant is before the Tribunal to ask to be compensated again.

Should the Tribunal find against the respondent, the respondent submits that the claimant had no loss, because on his own evidence he was unfit for work to a time. After this he made no serious efforts obtain work. The claimant is a competent welder and told the Tribunal that he did not want to work as a welder because "it is dirty".

The claimant's standard answer that "he didn't understand", was his "fall back" position and the claimant did understand the position.

Claimant:
The Action was settled and the claimant gave uncontradicted evidence that he checked on the day of settlement about his job, "the job not up for discussion today". Regarding the Christmas bonus the respondent case that it was an error was the "best (the witness) could come up with".

The claimant stated in evidence three times that it was never specified to him (that award was partly for future loss).

The claimant welded gates as a part time hobby.

Determination:
The company issued the claimant a letter of 23rd December 2004, stating that no more work was available to the claimant, and this was without notice. The Tribunal does not accept that the claimant was automatically dismissed on this date. The claimant's actually date of finishing with the company was June 2005. The claimant submitted his form T1A on 03rd June 2005, therefore was timely in submitting his claims.

Furthermore the claimant was offered an opportunity to apply for another position in the company. Having regard to the aspect of the case whether the respondent had light work available or not or whether work available was of comparable nature to the claimant's work the respondent company should have sent the claimant to their doctor to be examined to ascertain if the claimant was fit for work.

The Tribunal awards the claimant the sum of €28,000, under the unfair dismissals act.

Under the minimum notice and terms of employment the Tribunal awards the claimant the sum of €8,728.00, as compensation in lieu of notice.

No evidence was adduced under the organisation of working time act.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)