

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:  
Employee

CASE NO.  
UD480/2006  
MN305/2006

Against

Employer

Under

**UNFAIR DISMISSALS ACTS, 1977 TO 2001**  
**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms P. Clancy

Members: Mr G. Phelan  
Dr. A. Clune

heard this claim at Limerick on 3rd October and 21st November 2007

### **Representation:**

Claimant : Ms. Karen O'Loughlin, SIPTU, 4 Church Street, St. John's Square, Limerick

Respondent : Mr. Colm Costello, c/o Michael Carroll, Solicitors,  
Bridgewater House, Islandbridge, Dublin 8

The determination of the Tribunal was as follows:

### **Respondent's Case**

A general practitioner and chief medical officer with the respondent outlined her role in the termination of the claimant's employment. The witness initially medically examined the claimant at a pre-arranged appointment on 1 November 2005. That examination was related to the claimant's application for a permanent position with the respondent. The claimant tested positive on two illegal substances on that occasion. She was unable to give information on those substances but added that she had attended a party the previous night and "anything could have been spiked". The claimant further commented that she had no record of taking those substances but had consumed so much alcohol at that party that she "may not have known everything that happened". The witness said that the two substances in question were either not associated with "spiking" drink or did not dissolve in drink.

Upon confirmation that the claimant tested positive for illegal drugs the witness certified her unfit for work. The witness explained that the presence of one of those substances in the claimant's body precluded her from permanently working in a safety critical position. The second substance also prevented her from undertaking such duties for at least two years. The witness wrote to the respondent's management stating she was not suitable for safety critical employment. She did not disclose the details of the claimant's case to that management. She only indicates whether an employee is either fit or unfit for work from a medical perspective.

Following the initial medical examination and its results the claimant agreed to and undertook an in-house counselling course. She also attended further pre-arranged medical examinations that recorded negative tests for those drugs. The witness added that until the claimant completed three clear medical tests that she would not recommend that she return to work. However, there was no guarantee that management would then provide her with alternative employment. The witness had advised the claimant of the consequences of her medical condition and the possibility that the respondent might not offer her alternative employment. She commented that geography played a role in such positions and that there might not be a non-safety critical position available locally for the claimant.

A copy of an email was submitted as evidence. That email dated 19 January 2006 contained the witness's handwritten response to the question whether the claimant was to be taken off the payroll. The witness replied in the affirmative and added with immediate effect. The first section of the email stated that both the district and station manager indicated they had no non-critical duties either then or for the future. The witness said she viewed the question differently from what it apparently stated. Earlier that day she had sent a memorandum to the district manager in Limerick informing him that the claimant was permanently unfit for safety critical duties. She sought advice on whether alternative duties could be made available to the claimant.

The district manager took responsibility for dismissing the claimant by letter dated 6 February 2006. He accepted that this was a summary dismissal and that notice was neither given or a payment in lieu made. That letter strongly suggested the claimant was dismissed on medical grounds. The witness confirmed that he relied on that reason in terminating the claimant's employment. That letter did not contain any reference to non-safety critical positions and the witness said that there were no current vacancies for those positions, which he described as backroom jobs. There was no appeals procedure from medical reports nor would the witness "override" such reports.

The witness had responsibility for the train service in a wide area centred at Limerick railway station. He said that the claimant had been employed on a part time basis as a gatekeeper on a line that carried two to three heavy cement trains a day. That job was considered as safety critical task. The witness was familiar with the respondent's drugs and alcohol policy and that the issue was not "new ground" for him. He had been in contact with the office of the chief medical officer and had heard through "the grapevine" that the claimant had been "knocked" by the chief medical officer. He learned of her circumstances from his own staff. An email issued from his secretary on 19 January 2006 in response to the chief medical officer doctor's memorandum earlier that day. His secretary asked whether the claimant was to be taken off the payroll.

### **Claimant's Case**

The claimant could not explain how she tested positive for drugs as a result of a medical examination on 1 November 2005. She suggested her drinks might have been spiked at a party she

attended the previous night but also conceded that she had so much to drink that she had no memory of taking drugs. Subsequent to that medical the witness did not enquire from the other partygoers as to how traces of illegal substances were detected on her person. She did not report that incident to the Gardai. The claimant was certified unfit for work from 1 November 2005 and also taken off the payroll from that date. She agreed her job was a safety critical position and accepted that the respondent's trust and confidence in her was "shattered" due to the results of those tests.

The witness said she got the clear impression from the chief medical officer that if she passed three further tests then she would get a non-critical safety job with the respondent. She had no recall of receiving warnings or notice of possible dismissal nor was she subject to any disciplinary procedure. The claimant had never seen a drugs policy issued by the respondent and did not have access to a staff notice board. When the claimant received her dismissal letter dated 6 February 2006 she then contacted her trade union about her situation. That dismissal letter lacked details on the reasons for her dismissal and did not notify her of a possible appeal to that decision.

### **Determination**

Having considered the adduced evidence and submissions the Tribunal finds that in the circumstances the claimant was unfairly dismissed. The respondent's procedures lacked transparency, clarity and a clear structure. She was not subjected to a disciplinary process and it was unreasonable for the respondent to keep the claimant on prolonged suspension without pay. In addition the respondent held out an expectation to the claimant that a position could be available to her had her three medical tests subsequent to 1 November 2005 been satisfactory to them.

In awarding the claimant €3000.00 under the Unfair Dismissals Acts, 1977 to 2001 the Tribunal takes into account the claimant's own contribution to her dismissal and her attempts at mitigation of loss.

The appeal under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 succeeds and the claimant is awarded €1980.00 for four weeks' notice.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

