

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
Employee

CASE NO.
UD417/2006

MN259/2006

Against

Employer

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. O'Leary B L

Members: Mr P. Pierce
Ms. E. Brezina

heard this claim at Dublin on 1st February 2007
and 26th April 2007

Representation:

Claimant(s): Ms. Cathy Maguire BL instructed by Daniel Spring & Co., Solicitors,
50 Fitzwilliam Square, Dublin 2

Respondent(s): Mr. Rody Horan SC instructed by Mr. John Dunne Matheson Ormsby Prentice,
Solicitors, 30 Herbert Street, Dublin 2

The determination of the Tribunal was as follows:-

Background

This is an incapacity case under Section (4) of the Act of 1977. The claimant was employed by the respondent since September 1985. In September 2001 she went on Maternity Leave, returning in May 2002. After her return she was unhappy with the duties she was assigned to, and took a case against the company under the Maternity Protection Act. This came on appeal to the Tribunal and she eventually won her claim in January 2005. In August 2004 she had a miscarriage and subsequently was absent from work on sick leave until her dismissal on 28th October 2005. Medical reports from both the claimant's GP and from a doctor appointed by the respondent agree that the claimant was not fit to return to work at this point. The claimant had not given any indication as to when she would be fit for work. During her sickness, she supplied medical certificates advising the respondent that her absence was due to 'miscarriage', 'post-natal depression', 'anxiety/depression'. The last medical certificate she supplied cited 'work related stress'. At this point she had been absent from work for over a year. Between

May 2002 and August 2004 the claimant worked for the respondent with no issues arising. The miscarriage she suffered in August 2004 was the catalyst for her illness. For the first six months of her illness, the respondent paid the claimant. In October 2005, the respondent made the decision to dismiss the claimant as someone was needed to fill her role and she was unable to return to work.

The claimant became ill before the determination of the Tribunal under the Maternity Protection Act was issued. The occupational health doctor nominated by the respondent reported 'problems at work' as a substantial contributor to her illness. There was no mention of her dismissal until she submitted a medical certificate citing 'work related stress' dated 14/10/2005.

This provoked a strong reaction and she received a letter dated 21/10/05 warning her that her dismissal was being considered. She was asked to respond within seven days. She telephoned to set up a meeting but a few days later received a letter, dated 28/10/05, dismissing her with immediate effect. Had she been an employee of the respondent on 1st November 2005, she would have been the recipient of €8,000 in respect of an employee share scheme.

Respondent's Case

The HR Director of the respondent company told the Tribunal that he was employed with the respondent for the past nine years. In the respondent there were a number of business arrangements, which looked after domestic sales and export sales. He recollected that the claimant returned to work after a period of maternity leave in June 2002 until August 2004 when she had a miscarriage. From June 2002 until August 2004 the claimant had an impeccable attendance record. The company was satisfied with the claimant's performance. The claimant brought a case on appeal under the Maternity Protection Act 1994 from the Rights Commissioner to the Employment Appeals Tribunal in early 2004. The claimant had a miscarriage in August 2004 and she has not returned to work. The claimant forwarded medical certificates from August 2004 until the termination of her employment in October 2005.

The claimant was confirmed as suffering from work related stress on 14 October 2005. The position as of 21 October 2005 was that the claimant was unlikely to return to work for a period of four to six months. He received a letter dated 18 March 2005 addressed to Dr. O' B from Dr J (the claimant's physician) in mid to late October 2005. He received a letter from the consultant occupational physician dated 4 October 2005, which confirmed that it would be unlikely that the claimant would return to work for a period of four to six months. The situation was that the claimant was absent from work for fifteen months and he was in possession of two medical reports. Both programmes of recovery did not indicate how soon the claimant would return to work. The respondent's medical personnel were willing to review the situation in four to six months. The business of the respondent had to continue. He sent a note to the claimant, as he needed to obtain finalisation in the matter. He was of the opinion that the claimant could not return to work. During this time a colleague/mentor passed away in August.

In 2005 Pernod acquired another business and due diligence was completed on 21 August 2005. The respondent acquired significant number of new brands. Prior to 2005 the respondent had two distilleries, one in Bushmills and one in Cork and it now had one in Cork. The spirit was placed in a cask where it aged for a number of years and it was then blended and sent for bottling. He was of the view that there was a very high value in work in progress. Post August 2005 Diageo owned Bushmills. There was a period of six months when a hand holding exercise would be carried out by Bushmills but in January 2006 that was no longer the case.

A temporary employee was hired in December 2004 until March 2005. In March 2005 another person was employed until September 2005. The financial manager Mr. E M was heavily involved in the acquisition when the claimant was absent. The activities were carried out as best they could and it was a combination of manager and temporary individuals. The respondent recruited an accountant GC in mid July 2005 who is still employed by the respondent. GC undertook most of the functions that the claimant undertook. Another accountant was recruited in 2006 and it was an ongoing role.

On receipt of the medical certificates the HR manager sent the claimant a letter on the 21 October 2005 in which he pointed out to her the length of her absence. He had medical evidence, which did not indicate an early return to work. He sent the letter dated 21 October 2005 by normal and registered post. He was the author of the letter, which was sent to the claimant on 28 October 2005. He was not privy to a telephone conversation between the claimant and the chief executive, PD and he was not aware if the claimant met the chief executive. He did not accept that the respondent was antagonistic towards the claimant and it facilitated the claimant as best it could. The claimant had been absent from work for fourteen months and there was no clear prospect of when she would return to work. A decision was made to terminate the claimant's employment. The respondent was always satisfied with the claimant's work. The claimant was paid from August 2004 until January 2005.

In cross examination when asked that it was no surprise that the claimant suffered work related stress and that the company doctor flagged the fact that the claimant was very unhappy with the job and also that it was no surprise that the claimant's absence was on grounds of work related stress he responded that the claimant was sick in August 2004 as a result of a miscarriage. All medical certificates were consistent with this and this was the first time that work related stress was mentioned. The claimant worked right through to August 2004 and there was never a question in relation to the claimant's work. The respondent received a report on 4 October 2005, which indicated that it would be four to six months before the claimant would return to work. When asked how he could have been perplexed with the medical certificate in October he responded that the claimant was not in work for a year at that time. He was perplexed that the certificate related to work related stress when previous certificates indicated depression. When asked what steps he took to ameliorate the claimant's work related stress he responded that the claimant was not in work. Had the claimant returned to work post October 2005 the company could and would have worked with her. He could not comment on the opinion of one doctor to another. He agreed that if he had told the claimant to move to a different area it might have alleviated her situation.

The respondent did not intervene when an employee was absent on sick leave. If there was a prospect of returning to work all eventualities might be explored. The claimant was absent due to illness and he obtained another opinion that she would not be fit to return for another period of time. The respondent was not in a position to take any further action. When asked that in July 2005 he hired a permanent employee to undertake the claimant's function he responded that the two roles were the same. He refuted that he recruited an employee who was going to undertake the claimant's role. GC commenced work on 24 October 2005. There was a job of work to be done, and there was uncertainty about the claimant's return. When asked how did dismissing the claimant sort out the respondent's operational difficulties he responded it would give him an additional person to carry out activities.

The content of the letter, which he sent to the claimant, was very clear and the prognosis of return to work was some distance down the road. The claimant was absent from work for twelve to fifteen months. When asked that the claimant was employed since 1985 and she was given one

week to provide him with evidence he responded that the respondent had to get some finality one way or the other. The claimant received the letter dated 21 October and if she wanted to make any intervention the respondent would have considered it. He agreed that the claimant telephoned PD chief executive on 28 October and she wanted to meet with him. The witness did not consider revising his decision on 28 November. When asked when the claimant was given one weeks notice that her job was on the line why it was done in such a rush he responded that it was the decision he took at the time. The claimant was on protracted absence and there was no prospect of an early return and a decision was made to terminate the claimant's employment. When asked why the decision took effect immediately he responded it was his decision. When asked was he aware that the claimant was entitled to notice he responded that she was not in work for fifteen months.

When asked if he was aware of a notice relating to profit sharing in 2005 he responded that it issued every year on 1 November. The decision to terminate the claimant's employment was in no way linked to profit sharing. It was the custom and practice in the respondent that when an employee was absent on a prolonged basis it could be apportioned accordingly.

The respondent could not create a position that did not exist and the claimant never returned to work. When asked if the claimant was well enough to work in January 2006 would there have been a position for her with the respondent he responded that he would have worked with it.

In re-examination the witness stated that the first mention that the claimant was suffering from work related stress was in a note dated 14 October 2005. He stated that the claimant would have been entitled to two twelfths or three twelfths of €7,923.91 profit sharing.

In response to questions from the Tribunal when asked that the claimant was entitled to more than seven days notice of termination of her employment he responded that she was. He accepted that the letter dated 28 October was written before the expiry of seven days. He was aware that the claimant was in contact with the chief executive's secretary. When asked if the respondent ever paid the bonus for a period of sick leave he responded it depended on the period of sick leave. When asked if he was aware of the Minimum Notice and Terms of Employment Acts, 1973 to 2001 he responded that he was aware. When asked that he was aware that he should apply it and when asked if the claimant's absence related to misconduct he responded "no". When asked that this was the only exemption that he could not give the claimant her minimum notice he stated he was not aware of it.

Claimant's Case

The claimant told the Tribunal that she commenced work with the respondent in 1985. By the time she commenced her maternity leave in 2002 she held a position in senior management. When she returned from maternity leave she was unhappy about the role that she was assigned to. She took a claim to the Employment Appeals Tribunal under the Maternity Protection Act 1994. She suffered a miscarriage in August 2004 and attended the final day of the Employment Appeals Tribunal hearing in September 2004. She received her determination from the Tribunal in January 2005. The claimant was then absent on sick leave. She received the Tribunal decision in January 2005.

The only approach made in setting up an appointment with the respondent was in March 2004/September 2004. In March 2004 she last spoke to the HR manager and she had no discussions with the HR manager. In 2005 she attended for a medical examination. She received a letter dated 21 October 2005 from the HR manager on the 24 October 2005. The HR manager stated in the letter that he was perplexed that she had work related stress. She first attended her GP in

November 2002. The claimant was under pressure and she hoped that the company would accept that she suffered from work related stress. She felt at one stage that the respondent had their minds made up. She telephoned the chief executive on 28 October 2005 and she was informed that he was not in the office. She spoke to his secretary who informed her that as soon as the chief executive returned she would let him know that the claimant had contacted him. She made a further call at 3p.m. to the chief executive's office and she spoke to his secretary.

The claimant had worked with the respondent for twenty years. When she was dismissed her confidence was shattered and she was endeavouring to improve this. She had reached a high level in work but had not completed her final accountancy examinations. She has two subjects to complete.

In cross-examination the claimant stated that her biggest problem was her lack of confidence. She was still suffering from anxiety and stress and for every two steps forward she was taking one step back. Her health probably started to improve in March/April 2005. She attended the GP every month to obtain a medical certificate, which had to be submitted to Social Welfare. She was not taking medication. When asked if her GP who she had attended for eighteen years was the best person to make an opinion on her health she responded that she was in the best position to decide that. One of her colleagues died in 2004, he was ill for six months before he died and the claimant was upset over this and she was also upset about another colleague who died in 1990. Her father was also ill and he required surgery. When asked why she did not respond to the letter of 21 October 2005 before 28 October 2005 she responded that she found it very difficult to contact the respondent. In this letter the respondent considered terminating her employment and she hoped that the respondent would not do this. When asked in regard to the five-page letter dated 2 November 2005, which she sent to the chief executive she responded that she sent it after she received her letter of termination on 28 October 2005. She felt that the chief executive was not aware of her side of the story. When asked that the chief executive had no difficulty in meeting her she responded that she received a letter from the chief executive dated 16 November 2005 in which he confirmed that he was prepared to meet her. She felt that there was no point in meeting with the chief executive. The chief executive stated that he did not accept that the respondent had done anything wrong.

When asked if she had made attempts to obtain alternative employment she responded that she was not in a position to do that. When asked when she expected to be in a position to obtain alternative employment she responded that she has to complete her final accountancy examination. When asked if she would accept a job at a lower rate of pay than which she earned previously she responded that she earned €93,000 per year and if she was offered a job with a salary of €50,000 or €60,000 there was a huge difference. She then said that if she felt that it was a job that had good prospects and if it offered a salary of €50,000 she would possibly apply for it. She did not appeal the decision to dismiss her.

In answer to questions from the Tribunal when asked why she did not telephone Mr. DOF the HR manager she responded that she dealt with the HR division and they were aware that she was unhappy since May 2002. She felt that that HR had not listened to anything that she had said to them. She felt in November 2005 that it was better for her to go to Court.

Determination

Having carefully considered the evidence and the submissions by both parties the Tribunal determine that the procedure adopted by the employer in dismissing the claimant was unfair by reason of the fact that undue haste was used. It is the Tribunal's opinion that after twenty years service with the respondent the claimant should have been spoken to by members of management prior to making the decision to dismiss her. Therefore the claimant was unfairly dismissed and the Tribunal believe that the most appropriate remedy in this matter is compensation.

The Tribunal determine that by reason of the fact that the claimant was unavailable for work due to illness and remains so up to the date of the last hearing of the Tribunal and no indication could be given by her as to when she would be available she has suffered no loss. The Tribunal therefore awards her the minimum permitted compensation in respect of salary for four weeks in the amount of €7,132. The Tribunal are of the opinion that the bonus should have been paid to the claimant and thereafter award her the sum of €1,980 and the total amount of compensation being awarded under the Unfair Dismissals Acts, 1977 to 2001 is €9,112. The claimant is entitled to eight weeks minimum notice in the amount of €14,264 under the Minimum Notice and Terms of Employment Acts, 1973 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

