EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF: CASE NO.

Employee UD646/2006

against the recommendation of the Rights Commissioner in the case of:

Employee -v-
Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. J. Fahy

Members: Mr. D. Morrison
Mr. M. McGarry

heard this appeal at Castlebar on 21st June 2007
11th December 2007
and 5th March 2008

Representation:

Appellant: Mr. Thomas J Walsh, Solicitor, 1 Mill Lane, Main Street, Castlebar, Co. Mayo

Respondent: Mr. John Brennan, IBEC, West Regional Office, Ross House, Victoria Place, Galway

The determination of the Tribunal was as follows:

This case came to the Tribunal by way of an appeal by the employee against a recommendation of a Rights Commissioner, ref: r-038400-ud-05/JT dated 12 May 2006.

At the outset the solicitor for the appellant came on record.

The date of commencement of employment was agreed to be 17th January 1983 (the appellant was employed initially on a temporary basis).

The representative for the appellant notified the Tribunal of the fact that there was a case in front of the Data Protection Commissioner regarding the use of the reports of the general practitioner by the employer for the purposes of the dismissal. This evidence had been presented by the respondent company to the Rights Commissioner's hearing, where the appellant had been unrepresented. The

book of evidence contained these reports.

The Chairman of the division said that this was an appeal of a Rights Commissioner's Recommendation and was a de novo hearing. Both sides would have any opportunity to cross-examine any witness. The Tribunal would decide what evidence was required.

The representative for the respondent stated that the complaint to the Data Protection Commissioner was made after the Rights Commissioners' Recommendation and that the Tribunal had no jurisdiction in this matter. No decision had been made regarding the medical evidence one way or another. The medical reports were procured to assess the medical condition of the appellant and her fitness to work, now and in the future.

Respondent's Case:

The first witness was the general practitioner (GP) to the respondent company. Both parties agreed that GP was going to give evidence of an expert nature. GP told the Tribunal that he was employed by the company for three years. He examined the appellant in March 2005. She had received an electric shock to her hand on the 4th April 2002. She attended the general practitioner (Dr F) that was employed by the respondent company at that time. His report indicated that the skin on her hand was not broken and she did not lose consciousness. Dr F did not dress her hand but did apply some anti-inflammatory spray as there was a slight burn to her skin. The following day (8th April) the appellant attended work to make a report of the accident. She was short of breath and was in an emotional nervous state. Dr F prescribed a painkiller and a sedative. The appellant developed a pain in her right shoulder and attended Dr F on seven occasions after that.

When the appellant presented to GP, She was taking psychological medication. She said that she was not fit and "not anxious" to return to work. She refused to participate in a trial return to work. GP made a diagnosis that she would be unlikely to return to work in the future. She had presented her symptoms for three years. GP said that it was difficult to see how a minor accident could contribute to three years' absence.

Under cross-examination, GP told the Tribunal that he examined the appellant once. The examination lasted approximately twenty minutes and he was able to diagnose her future prognosis within that timeframe. GP said that if she was unfit to return to work after three years she would be unlikely to be fit to return to work in the future. The appellant told him on that day that she was unfit. GP had further medical evidence regarding the appellant's fitness from other doctors she was attending at that time. The purpose of GP's examination was to assess the appellant's likelihood of returning to work. In his opinion, she was not fit. The appellant was attending a neurologist. GP was unaware that the report he made could lead to the appellant's dismissal. He made the psychological assessment on the appellant's state of mind himself. He did not have the benefit of the neurologist's report. He was not an expert in this area but this did not preclude him from making the decision.

The human resources manager told the Tribunal that following the incident at work in April 2002 where the appellant sustained an electric shock she had been absent from work for a period of three years and was dismissed in June 2005. Throughout the period of her absence the respondent was in touch with the appellant and she was seen on nine occasions by both company doctors. Medical reports were referred to during the course of his evidence and it was his belief that the appellant was unlikely to return to work in the near future. Correspondence was opened to the Tribunal and

any information available to the respondent was provided to the appellant. There are in the region of one thousand employees in the respondent company and where long-term absences occur a long-term disability plan is offered and the job is held open, however it would be unusual to have an employee out for three years. The details of the Income Protection Scheme were outlined to the Tribunal. Other employees on long-term absences have also been dismissed. The appellant did not at any stage during her absence give the respondent a certificate to say she would be returning to work and she was never assured that termination was not on the agenda.

The respondent met with the appellant and her solicitor on 1st June 2005 and the purpose of this meeting was to ascertain her state current state of fitness. The appellant stated that while she would like to return to work she did not see herself as fit to do so and she could not give a date as to when she was likely to return. Discussions also took place in relation to the long-term disability plan where she would be independently assessed through Irish Life and would be entitled to payment of 50% of her salary in addition to Social Welfare payment. The appellant declined payment of this benefit and witness sated that it would be unusual for employees to turn down this payment. To decline the benefit does not mean that an employee is debarred from returning to work. The appellant had been absent for three years and other employees on long-term absences were also being assessed. Witness took the decision to dismiss the appellant after the meeting of the 1st June 2005 and he felt he had no other option other than dismissal. The appellant's case had been reviewed with all the information available including medical reports and she was issued with herdismissal letter on 30th June 2005. She was paid eight weeks pay in lieu of notice even though therespondent was not obliged to make this payment.

The occupational health nurse said that she provided a health service to the employees on a full-time basis. She wrote to the appellant asking her to attend an appointment with Dr. W. She met her briefly before the appointment. The appellant met with the doctor for about 25 minutes. She also wrote to the appellant asking her to join the company's Income Continuance plan, but she declined to do so. This was a voluntary scheme. The appellant also expressed dissatisfaction with the manner of the company's communication with her.

An employee BM who worked in the personnel section of the company said that she attended a meeting in Swinford on 26 May 2005 with the appellant HR, TW, and GH. The meeting was held to discuss her possible return to work. The appellant's solicitor became irate at how the meeting was being conducted. The Income Continuance plan was discussed, but the appellant refused to take part in it. She did say she was improving, and hoped to return to work in the future, but did not give a date. The witness did not recall if HR had said at the meeting that it was not about dismissal. She did not have access to the appellant's medical file, only her personnel file. She denied that the appellant was treated differently than other Employees. She accepted that the company terminated the appellant's contract without having her re-examined medically, but she felt that the company had treated her fairly in relation to her termination, and that she had been given ample time to return to work.

HR an employee of the company in evidence said that a further medical examination was not discussed at the meeting on 26 May 2005/1 June 2005. He agreed that she did say that she wanted to return to work. He admitted that it was common practice within the company that an employee would not be informed about their entitlement to appeal a dismissal, the company would leave this process to the employee's Trade Union. He said that all employees were issued with a handbook which included a section on an appeal procedure.

Appellant's case:

She said that she began working for the company on 17 January 1983 and finished on 4 April 2002, after receiving an electric shock while at work. She was dismissed in June 2005. Before her injury she had a good relationship with her colleagues, and held a good working record. She was dissatisfied with the communication she received from the company after her injury. Her employer did not accept responsibility for her injury, although she did receive compensation for it. In relation to her examination by Dr. W., she said it lasted about 10 minutes, and largely consisted in him writing notes. Regarding the Income Continuance plan, she had no wish to become involved in it as she felt it would not benefit her. At the meeting in Swinford, HR told her that termination was not an issue which reassured her somewhat. He also asked her about returning to work, and she replied that she was hoping to do so sometime that summer. After telling her that dismissal was not an issue, she then received a letter of dismissal on 30 June 2005. She felt that she had been very unfairly treated, both in relation to her injury, and to her dismissal. She did not dispute the contents of the letter of 24 May 2005. She is now doing voluntary work and in full time education. She did work for the HSE for a few months, but has been unable to find full-time work, in spite of applying for many jobs. She is also claiming social welfare benefits.

GH the appellant's husband in his evidence said that he attended meeting on 1 June 2005. He said that the appellant felt threatened by the company's letter asking her to attend the meeting in Swinford. She contacted a solicitor to represent her at this meeting. HR said there was no question of dismissal, and that the letter inviting the appellant to the meeting was not threatening, but merely a procedural format letter, and that the company simply wanted to sort out the Income Continuance issue. He said the appellant told him that the company should not have given her medical records to the Personnel section. She was beginning to feel better, and thought she could be back at work by the summer holidays.

Concluding submissions:

Appellant's representative:

The appellant felt she had been dealt with inappropriately after her injury. Her dismissal was based on a flawed process. She had indicated that she was willing to go back to work. Her employer relied on a medical report in February 2005, but she was dismissed in June. She should have been re-examined. In addition the Doctor was in possession of information that he was not entitled to have by dint of the Data Protection Act. So, if his decision was flawed, so was the decision to terminate her contract. The remedy sought is re-instatement.

Respondent's representative:

The only medical evidence produced in this case was by the respondent. The reports all state she was unfit for work. The company kept in continual contact with the appellant, and the letter sent to her in May 2005 clearly stated that termination might be an issue. Her efforts at mitigation have been poor. The Rights Commissioner said that the procedure which lead to her dismissal was fair. The company's preferred remedy is compensation.

Determination:

The Tribunal, having heard the evidence from the respondent and the appellant, prefers the evidence of the respondent and determines that the dismissal was fair and reasonable in all the circumstances. It therefore upholds the recommendation of the Rights Commissioner under the Unfair Dismissals Acts, 1977 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)