

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

Employee

-appellant

CASE NO.

UD726/2007

Against

Employer

-respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal

(Division of Tribunal)

Chairman: Mrs M. Quinlan

Members: Mr P. Pierson
Mr J. Le Cumbre

heard this claim at Tullamore on 12th December 2008 and 26th March and 27th March 2009

Representation:

Claimant : Mr David Hughes, Irish Nurses Organisation, Whitworth Building,
North Brunswick Street, Dublin 7

Respondent : Ms Mairead McKenna B L instructed by
JD Scanlon & Company, Solicitors, The Bridge Centre,
O'Connell Square, Tullamore, Co Offaly

The determination of the Tribunal was as follows:

Respondent's Case

The employee relations' manager outlined the claimant's work record since her commencement of employment as a general nurse in December 2001 on a temporary basis. In June 2003 the claimant was appointed to a permanent position of staff nurse at a local nursing home called XXXX. That appointment was subjected to the respondent's approval and confirmation of that appointment following a twelve-month probationary period. In common with other staff on probation the claimant's work performance was appraised five months into her probation and two months before the its scheduled competition. Prior to the commencement of that probationary period the respondent satisfied itself that the claimant's earlier record of absenteeism on health grounds did not prevent this proposed appointment.

This witness stated that while the respondent had no difficulties with the claimant's work performance it was unable to confirm her permanent appointment due to her level of absenteeism. That absenteeism was so "unprecedented" that the respondent did not have the opportunity to

properly appraise her work. He presented the Tribunal with her non-attendance record, which he described as excessive, compared to the average. As a consequence of her frequent long absences the respondent extended the claimant's probationary period on five occasions. That fifth extension was communicated to her by the assistant national director of human resources on 10 August 2006. The claimant was informed "your probation has been extended for a further period of three months to 30th November, 2006."

The witness was furnished with two further medical reports in September 2006 relating to the claimant's ongoing condition from the respondent's occupational health section. Apart from her other ailments and mishaps the claimant suffered a separate injury while at work in January of that year. The author of that first report dated 1 September and who reviewed her medical state felt that the claimant would "be fit to return to work on light duties (non-lifting duties)". The second report, dated 27 September, confirmed that a specialist had reviewed the claimant's condition. That specialist had noted that the claimant was now fit to return to work. The author of the second report also stated that it was her consideration that the claimant was now "fit to return to her full normal duties". That reviewer then suggested that it would be appropriate that the claimant be gradually eased back to full time work within the following two weeks. The letter writer also indicated to the witness that this timetable and pattern was not within her remit to implement. A copy of those reports was also sent to the director of nursing at Riada House. The claimant had not worked at any time during this fifth extension of her probation.

A management meeting attended by among others, the witness, the director of nursing, the assistant national director of human resources was held following the receipt of those reports and the note from the specialist. According to the witness that national director decided to terminate the claimant's employment "in light of the ongoing absence of the claimant". That decision, which was not opposed by anyone present at that meeting was based on the unlikely event that the claimant would ever be capable of undertaking fulltime duties at the conclusion of her current fifth extension. The witness was tasked with the complete drafting of the letter of dismissal that he signed and sent on 27 September.

That letter informed the claimant that her contract of employment had been frustrated by virtue of her inability to give regular and effective service to her employer. He also commented that the respondent's level of frustration with the claimant was ongoing. It also listed the respondent's record of her sick leave including her employment with an earlier employer. The witness denied exaggerating those figures but accepted that all those absences were certified and some were due to her accident at work. Prior to making that decision to dismiss, the respondent was aware of those reports. Based on those reports the witness concluded that the claimant's return to work was conditional and that she was not in a position to guarantee her future employment with the respondent.

Both the witness and the national director were conscious of the fact that the claimant's probation was extended up to the end of November 2006 but that fact was not raised between them at the meeting where the decision to dismiss was reached. The employee relations' manager accepted that the dismissal was made in the absence of any contact or communication with the claimant or her representatives. That dismissal was immediate and no notice was given to her of it. He did not dispute that the claimant had presented herself for work with certificates declaring her fit to resume work just prior to the decision to dismiss her. The witness justified the manner of this dismissal on the grounds that since the claimant was not at the time a permanent employee normal procedure in this case did not apply.

The assistant national director of human resources concurred with the observation that since this was not a disciplinary issue then disciplinary procedures were not needed to terminate the claimant's employment. This witness accepted responsibility for deciding on that termination. He reasoned that since he had authority to recruit staff and confirm that an employee had successfully completed their probation he therefore had the power to cease their employment should their probationary period prove unsatisfactory. He described this latter power as delegated authority but was unable to show documentary evidence of that power. The witness nevertheless maintained there was legal opinion that supported his view. While he accepted that he took a decision not to continue with the claimant's employment the witness was adamant that this decision did not amount to a dismissal.

The witness acknowledged that it was normal to allow a probationary period to reach its scheduled end before either confirming a permanent position or ceasing the employment of an employee. It was very rare to have to perform the latter. However, the claimant's case was so exceptional that he decided to cease her employment some two months prior to the ending of her probationary period.

In taking the decision to terminate the claimant's employment the witness reviewed "the totality of her situation". He said that her contract of employment was frustrated right from the beginning. That contract had been renewed by him in August 2006 for a further three months. When he and other managers met on 27 September and reviewed the medical reports for the claimant the witness did not interpret the contents of those reports as giving her "a clean bill of health". He regarded the comments made in those reports as imposing conditions on the claimant's return to work. The respondent was unable to comply with those conditions. Neither he nor his colleagues at that meeting contacted the authors of those reports to seek further information or clarification.

Claimant's Case

Up to August 2006 the claimant worked whenever she could. Her inability to work on a fulltime basis and complete her probation was due to her ongoing and at times life threatening state of health. While acknowledging that the respondent rolled over her probationary period on several occasions the witness said that she was never issued with any notices or warnings from her employer that it was unhappy with that situation. The respondent had never questioned the validity of her absences through ill health. In addition she was never offered any counselling nor involved in any consultations regarding her position at the respondent's. From that month onwards the claimant had made a full recovery and had "not known a sick day since".

Following a visit to a specialist and a review of her condition the claimant was issued with a handwritten note on 25 September 2006 indicating she was fit to return to work. When she called at the office of the director of nursing with that note the claimant subsequently received a call from that office asking her to report for work at 08.00 on 27 September. That news soon changed when a message from that same office told her not to report for work. The claimant contacted a trade union official who in turn got a fax from the respondent stating that the claimant's employment had been terminated.

A trade union official wrote to the employee relations' manager on 29 September seeking the reinstatement of the claimant. That official also questioned the procedures used in reaching the decision to dismiss her. In response that manager refuted the fact of dismissal and indicated her contract of employment was terminated due to its frustration. In December 2006 the respondent rejected hearing an appeal against its decision and added "Taking everything into consideration, XXXX has had fair procedures applied during the duration of her employment".

Determination

The Tribunal accepts the contention put forward on behalf of the respondent that it dismissed the claimant. Since a dismissal has taken place in this case then it follows that the Tribunal has jurisdiction to hear this case under the Unfair Dismissals Acts subject to other considerations in those Acts.

Having heard and considered the adduced evidence together with the oral and written submissions the Tribunal is unanimous in finding that the claimant's dismissal was unfair under the relevant legislation. Two medical reports and a specialist's note issued in September 2006 concerning the claimant's state of health. It is very difficult to understand how the respondent concluded from those documents that the claimant's contract of employment was now frustrated. Those medical papers gave a positive account of the claimant's well being and to read and interpret them otherwise raises issues involving the true motive and intent of the respondent towards the claimant at that time.

When a dismissal occurs or is planned certain procedures need to be applied. The respondent in this instance has shown what not to do. It arbitrarily and summarily terminated the claimant's employment. The claimant was given no notice or warnings; on the contrary her probationary periods were extended without reference to a possible frustration of her contract. Neither she nor her trade union representatives were consulted and the excuse that no procedures were needed due to the claimant's status contrasts with her rights under natural justice.

The respondent's handling of this case was clumsy, ill thought out and unnecessarily rushed. Had the employer waited until the expiration of the current probationary period then the outcome to this case might have been different.

In finding in favour of the claimant under the Unfair Dismissals Acts, 1977 to 2001 the Tribunal determines that the claimant be reinstated back to the position she held with the respondent prior to her dismissal on 27 September 2006.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

