

EMPLOYMENT APPEALS TRIBUNAL

Claim Of:
Employee

-claimant

CASE NO.
UD874/2007
MN692/2007

against
Employer

- respondent

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. E. Kearney B.L.

Members: Mr. M. Forde
Mr D. McEvoy

heard this claim at Clonmel on 22nd July 2008 and 2nd December 2008 and 3rd December 2008

Representation:

Claimant: Michael A. O'Brien & Co., Solicitors, Castle Street,
Carrick-On-Suir, Co. Tipperary

Respondent: Ms. Ger Moriarty, Local Government Management, Services Board, 35/39 Ushers
Quay, Dublin 8

The determination of the Tribunal was as follows:

Preliminary Issue:

The respondent's representative raised the issue that the claimant's T1A form was lodged to the Tribunal outside the stipulated six-month time limit on the 13th September 2007, as the recommendation to terminate the claimant's employment was communicated to him initially in letter dated the 8th February 2007.

The Town Clerk at the time of February 2007 gave evidence to the Tribunal. The witness confirmed that she wrote and signed letter dated the 8th February 2007. This letter communicated to the claimant that the Town Clerk recommended to the Director of Services that the claimant's employment be terminated. This letter informed the claimant that he had ten days to appeal the recommendation. The claimant did not appeal and the Director of Services

subsequently issued a letter to the claimant based on the Town Clerk's recommendation.

During cross-examination the witness confirmed that the letter of the 13th March 2007 was posted to the claimant on that date and the witness accepted that the claimant would not have received the letter until the 14th March 2007.

The Director of Services/Town Manager gave evidence to the Tribunal. The witness confirmed that he wrote letter dated the 13th March 2007 to the claimant. As Town Manager he holds an executive function. If the claimant had lodged an appeal the witness would have heard it. As the claimant did not appeal the Town Clerk's decision, the witness made the decision to terminate the claimant's employment. The letter of termination was sent to the claimant by registered post on the 13th March 2007. The letter stated that his employment was being terminated with effect from the 13th March 2007.

During cross-examination the witness accepted that the claimant could not have received the letter until the 14th March 2007.

Determination on preliminary issue:

The Tribunal considered that the letter of the 8th February 2007 was only a letter of intent. The decision to terminate the claimant's employment was set out in letter dated the 13th March 2007. However, the evidence was given that this letter was posted to the claimant on the 13th March 2007 and that the earliest date the claimant could have been aware of the decision was on the 14th March 2007. Therefore, the Tribunal finds that the claimant's T1A form was lodged within the stipulated six-month time limit on the 13th September 2007.

Background:

The claimant commenced employment with the respondent as a grade three caretaker in 2001. It was the respondent's contention that the relationship became frustrated by the incapacity of the claimant to carry out the work for which he was employed.

Respondent's Case:

The first witness was the Town Clerk from April 1995 to June 2001. She first met the claimant in 1995 when the claimant commenced employment as a water caretaker. On the 10th May 2001 the witness received a letter from the claimant's doctor, which raised an issue concerning the claimant's exposure to reagents. The letter stated that the claimant's exposure to the reagents might be related to his medical problems. This letter immediately raised concerns for the respondent. Upon receipt of this letter the witness asked the claimant to attend the respondent's doctor on the 21st May 2001. The claimant went on sick leave on the 9th May 2001 and was informed not to attend for work pending the submission of the doctor's report. The doctor's letter raised a concern as a whole as there were approximately six other water caretakers in the county and the respondent needed to know if there was also a risk factor for them.

However, the matter did not reach a conclusion, as the respondent was not informed what the claimant's condition was until 2006. The claimant met with the respondent's doctor in May 2001. The claimant gave permission to the respondent's doctor to report to the respondent as to whether he was fit or unfit for work but he did wish for his health status to be divulged to the respondent. The claimant met with the respondent's doctor on a second occasion in July 2001.

The claimant's sick pay expired on the 1st August 2001 but an extension of 26 weeks was granted until the 31st December 2001. The claimant was asked by the witness's successor to attend a consultant on the 20th December 2001, as a report from a consultant was necessary to obtain the report of the respondent's doctor. The witness was aware of this as part of her Human Resources role.

Following a telephone call to the respondent's doctor the witness received a letter dated the 15th February 2002 from the doctor which stated that the claimant had not given his consent to the communication of any medical information whatsoever to the respondent. A subsequent letter dated the 4th April 2002 was received from the respondent's doctor and stated that he had received the consultant's report and that the consultant had copied the report to the claimant. The doctor stated that he was not in a position to release a copy of the report to the respondent without the claimant's consent. This left the respondent in limbo. The respondent was in the position where a decision could not be made as to whether the claimant was fit to work or not.

The claimant's post as caretaker was specifically to run the water treatment plant. The claimant's position was covered for a period of time by another employee however, when it became apparent that the claimant was not returning any time soon another employee had to be trained fully into the role. The witness spoke to respondent's doctor again and he confirmed he could not release any information without the claimant's permission. It was the witness's belief that the matter reverted back to the claimant.

A meeting was held on the 22nd January 2004. The witness, the Town Engineer, the Town Clerk and the claimant and his solicitor were in attendance at this meeting. However, no further information was released as the claimant's solicitor outlined in a letter dated the 6th July 2004 that the claimant gave his consent to the company doctor furnishing the respondent with a medical certificate stating whether or not he was fit to attend work but that he did not give his authorisation for the doctor to report on the state of his health. The claimant was asked by letter dated the 22nd July 2004 to meet with the respondent's doctor again to enable him to report back to the respondent. The doctor wrote to the respondent on the 28th August 2004 stating that he had found the claimant fit to return to work but he did not recommend that he return to the water treatment area. The witness wrote to the doctor again in November 2004 seeking a report. However, the doctor again replied that he needed the claimant's consent before he could release any more information.

The witness stated it was imperative that the claimant would return to the post for which he was employed to do. The respondent was unaware of the claimant's condition and therefore an informed decision could not be made without this information. There was no comparable position available to offer to the claimant, as the respondent is a small enterprise with only 18 employees. Without having knowledge of the claimant's medical condition the respondent did not know what job the claimant do.

The claimant's position was initially covered for a short period, and then another employee was trained in the role. The claimant's position was filled in 2007. The position of caretaker for the water treatment plant is a core position.

During cross-examination the witness was asked which of the claimant's duties meant he had contact with substances. The witness replied that item 20 which states "*to carry out daily routine chemical monitoring tests*" and item 24 which states "*to operate and maintain the*

chlorination and fluoridation dosing equipment in accordance with the detailed instructions provided.”

It was put to the witness that only two of the claimant's 36 duties involved chemicals. The witness replied that the core function of the claimant's role was the water treatment plant and he was specifically employed for the new water plant when it opened in 1991. There is a standard set of conditions given to the water caretaker and the list was for all eventualities, it was possible that the claimant did not carry out some of the functions. As the witness had held the position of Town Clerk for a period she was fully aware of the work the claimant carried out. It would not have been possible for the claimant to carry out all of the 36 duties on a daily basis.

The witness confirmed that she did not know the nature of the claimant's illness, while she had asked the doctor he had told her he could not divulge the claimant's medical condition without his consent.

A comparable role could not be offered to the claimant because the nature of his illness was unknown. Without the information in relation to the claimant's medical condition the respondent could not make a decision as to what position the claimant was fit for. It was put to the witness that other people with specialist skills were brought in to carry out chemical monitoring. The witness replied that the respondent provides environmental technicians if problems occur with the water treatment plant and also to carry out ongoing sampling.

When the issue of the reagents was raised the Town Engineer was made aware as there were other people using the same chemicals throughout the country and they are restrictive regarding health and safety. The respondent wanted to know if the claimant had a problem as a result of these chemicals. The respondent expected to receive the doctor's report a month later, not some five years later.

It was put to the witness that the respondent could have engaged a lab technician to carry out the chemical testing. The witness replied that the sole reason for a caretaker was to ensure that the water was safe for consumption. The respondent never suggested that the claimant could not return to his role, however, without any information on the claimant's condition they were unable to make an informed decision.

The witness was asked if she accepted that the respondent's doctor has stated the claimant was fit to return to work. The witness replied that the doctor's letter had stated that he would not recommend the claimant returning to the water treatment area. An informed decision could not be taken as to the effect on the claimant. It was unknown if the claimant could do alternative work such as general operative duties. As the claimant's condition was unknown the respondent had no way of knowing how another role would affect the claimant. The witness outlined to the doctor in letter dated the 25th November 2004 that without further information the respondent could not make an informed decision concerning the claimant's employment. In 2006 medical records were released to the respondent that included the doctor's notes from the 3 September 2004 but the respondent did not see these notes until some two years later. This information was released under the Freedom of Information Act at the request of the claimant.

The Town Engineer from 1991 to 2000 gave evidence to the Tribunal that he now holds the position of Senior Engineer. The respondent has two water supplies. The water caretaker's function is to deal with the supply plant, network and water treatment plant. The claimant was responsible for the operation of the treatment plant. His role comprised of ensuring that the plant

and the processes were working correctly. The claimant received training for his role. The claimant could not have carried out the job of water caretaker without having contact with chemicals. The claimant's main duty was to ensure the continuity of supply. Record keeping was also important in order to trace back where a problem had occurred. The claimant's role required him to do daily chemical testing to monitor levels of chlorine and aluminium etcetera. The claimant's role was a specialist role and therefore he could not be interchanged to another position. The Assistant Town Foreman was also trained in the duties of water caretaker for the purposes of covering the claimant if he was on leave. The water system could not be left without a caretaker for even one day.

In 2004 two environmental technicians were brought in to provide support and monitoring from the point of view of compliance with regulations and have better service to customers. Their involvement did not change the role of the water caretaker.

During cross-examination it was put to the witness that he had emphasised only four of the claimant's 36 duties. The witness replied that the other duties were built in to operating the plant and he accepted that other duties such as reporting were important. The witness was unaware of the claimant's medical condition. The witness confirmed that the respondent had not carried out a risk assessment during his time as Town Engineer.

The witness clarified that the role of the environmental technician was to carry out spot checks and deal with customer queries and to ensure that the on site checks were completed by the water caretaker.

The Town Clerk from May 2005 to January 2008 gave evidence to the Tribunal. The witness is responsible for the day-to-day running of the respondent. The witness has worked with the respondent since 2001 and when she became Town Clerk in 2005 she made herself aware of the claimant's file. The witness first became involved in the matter in July 2005 with the then Town Manager. Correspondence ensued between the parties. The respondent asked that the claimant would give his permission for the doctor to release the report on his medical condition.

The respondent first received a copy of the medical reports from the claimant's solicitor in letter dated the 5th July 2006. The respondent reviewed the medical reports. The consultant stated in his report that finding out the background to the claimant's diagnosis by Doctor K in 1997 would help identify the cause and/or contributing factors of the claimant's condition. Bringing the claimant back to work was not considered, as the nub of the issue had not yet been reached. The respondent thought that if the respondent received the report of Doctor K it would provide more information of what were suitable duties for the claimant.

The witness wrote letter dated the 29th September 2006 seeking the report on or before the 13th October 2006. It was outlined in this letter that a further consultation with the consultant would be arranged when Doctor K's report was received. The letter outlined that any failure on behalf of the claimant to co-operate with the request would place his employment in jeopardy. However, the respondent did not receive a copy of Doctor K's report and the claimant did not attend an appointment that had been arranged.

The witness wrote memo dated the 6th February 2007 to the Director of Services recommending the claimant's employment be terminated. The claimant had been absent for six years and he had consistently failed to co-operate with the respondent in relation to the release of medical reports. The claimant had then failed to co-operate with the respondent's further requests for the

report of Doctor K. The respondent remained in a position where it was unable to determine the nature, extent and cause of the claimant's medical condition. The respondent could only conclude that the claimant was not capable of performing the role that he was employed to do. The claimant was informed of the recommendation by letter dated the 8th February 2007 and he was informed that he could appeal the recommendation but the claimant did not lodge an appeal.

During cross-examination it was put to the witness that the claimant's representative had written on the claimant's behalf in 2005 consenting to the release of the claimant's medical condition. It was the witness's understanding that the respondent's doctor still felt constrained and that he could not release the information. The doctor told the witness that he would get clarification from the claimant's solicitor and revert back to the respondent. However, there was no reply from the doctor after the 22nd November 2005.

The **first** witness was recalled on the third day of hearing in relation to this matter. She stated that the doctor felt very uncomfortable about releasing the claimant's medical information as the claimant had previously refused to this medical information being released. The doctor believed that the claimant's consent to the release of information might have pertained to specific dates only.

The **third** witness accepted that the claimant had attended the respondent's doctor on a number of occasions but when he did not consent to the information being released the matter was frustrated.

If any vacant positions arose within this period the respondent was not in a position to say whether or not the claimant could carry out the functions of the position. While the respondent's doctor stated that the claimant could not return to the water treatment area this did not go far enough as establish what was a suitable position for the claimant as his medical condition was unknown.

It was put to the witness that the claimant had applied for a job as a general operative with the respondent. While the claimant was certified to return to work without knowing the nature of his condition the respondent was unable to say what duties the claimant could undertake, the witness replied. The respondent has procedures for recruitment, which it is obliged to follow. The claimant was interviewed for the position of general operative the same as anyone else.

The Town Manager since September 2006 gave evidence. He received the Town Clerk's recommendation to terminate the claimant's employment. In anticipation of an appeal he spoke with the Town Clerk and he examined the file. However, as an appeal was not lodged the witness subsequently wrote letter dated the 13th March 2007 dismissing the claimant as the witness agreed with the recommendation of the Town Clerk.

Claimant's Case:

The claimant confirmed that he commenced employment with the respondent in 1991. In May 2001 he attended with his doctor and brought to the doctor's attention concerns he had regarding the reagents. The claimant only received the safety sheets for the chemicals in 1999 and by 2001 he was very concerned. There was one particular reagent that the claimant was concerned about. Doctor K had previously diagnosed the claimant with an illness in 1995. When the claimant raised his concerns with his doctor in 2001, the doctor immediately wrote to the respondent informing them that there was a possibility of a relationship between the claimant's medical condition and the reagents.

The claimant confirmed that he had met with the respondent's doctor on a number of occasions and with the consultant in December 2001. The consultant told the claimant that he would not need to attend with him again. The consultant referred to the claimant's condition in his report and he also referred to finding out the cause. It was the claimant's understanding that this was impossible to conclude.

The claimant provided written permission for the respondent's doctor to speak with the consultant and with Doctor K concerning his medical condition. The claimant had no issue with his medical background being discussed between the doctors but he did have an issue with his medical background being "*being bandied about by lay people*" as he was unhappy with his medical condition being released at that time. The claimant instructed his solicitor at a later stage to release any information that the Town Manager requested as he was the only person from the respondent who had asked for the information correctly.

In 2004 the respondent's doctor submitted the certificate concerning the claimant's fitness for work but there were no further developments. The claimant stated that he did not believe that he was obstructive to the respondent, as he did not have an issue with his medical information being released to other medical professionals. He attended at all of the doctors as requested by the respondent. The claimant felt very frustrated by the respondent. The claimant expected the respondent's doctor to report to the respondent. The claimant felt that he had not been treated fairly by the respondent and that the respondent was vindictive as the claimant had previously raised a matter in relation to public holidays with the Labour Relations Commission. The claimant stated that he believed the respondent could have offered him other work. The claimant did not accept that he was incapable of carrying out his position.

During cross-examination the claimant stated that while the employer was entitled to the information he did not want his personal information discussed. The claimant felt it was protraction on behalf of an individual in the respondent to ask him to attend with the consultant again although the consultant had told the claimant he did not need to meet with him a second time. The claimant stated that there was no understanding shown to him, he was aware that another employee had been offered early retirement but he had not been offered this.

In reply to questions from the Tribunal, the claimant stated that in his mind it was not necessary for officers of the respondent to know the nature of his medical condition but he thought that the doctors could have made recommendations or suggestions to the respondent. The claimant also believed that the respondent's doctor would have informed the respondent of the safe handling procedures he had drafted for handling reagents.

The claimant felt there was a breach on behalf of the respondent when Doctor K's report was sought and he did allow the report to be seen, as he felt frustrated and disillusioned.

Determination:

The Tribunal is satisfied that the respondent acted reasonably in holding the claimant's job open for some six years, whilst there were significant difficulties between the parties in relation to the claimant's medical condition.

The Tribunal finds that it was unreasonable of the claimant from 2001 – 2005 to refuse to let the respondent's doctor and the consultant disclose his medical details or health status. The Tribunal finds that the respondent had a real concern in circumstances where the cause of the

claimant's illness could have rested with the respondent. After the claimant's solicitor forwarded the required medical reports to the respondent in July 2006, a further query arose in light of the opinion of the consultant where he states "*At the present time finding out about the background to the claimant's diagnosis at the time by Doctor K would help elucidate those matters*".

The Tribunal finds that it was reasonable for the respondent on the basis of the consultant's report to seek the report of Doctor K or further medical opinion. Furthermore, the Tribunal accepts that it was reasonable for the respondent not to look at alternative employment for the claimant in the circumstances (and in any event accepts that the respondent is a small enterprise employing only 18 people) prior to the medical issues being clarified.

In light of the seriousness of the tenor of the letters written in September and October 2006, it was clear that the claimant's job was in jeopardy and at this point he chose not to co-operate with his employers in consenting to the release of Doctor K's report or submitting to further medical examination. Therefore, in all the circumstances the Tribunal finds the dismissal of the claimant was fair. The claim under the Unfair Dismissals Acts, 1977 to 2001, fails.

Accordingly, the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)