

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIMS OF:

CASE NO.

Employee

- **claimant**

MN638/2008

UD701/2008

against

Employer

- **respondent**

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001  
UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr K. Buckley

Members: Mr D. Hegarty  
Mr J. McDonnell

heard this claim at Cork on 5th February 2009

Representation:

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Claimant:

Mr. Patrick McCarthy, Patrick McCarthy & Company,  
Solicitors, 2nd Floor, Hanover House, 85-89 South Main  
Street, Cork

Respondent :

Mr. David Gaffney, Coakley Moloney, Solicitors,  
49 South Mall, Cork

The determination of the Tribunal was as follows:-

**Respondent's case:**

The Tribunal heard evidence from the company doctor. Following an accident in October 2006, which was not work related, the claimant broke her right wrist. This necessitated having pins inserted in her wrist which resulted in her not being able to straighten her fingers and causing discomfort and pain and having to wear a splint. Medical assessment reports were furnished to the Tribunal. In the early stages it was

hoped the situation would improve but as time went on there was very little progress and she was attending a pain clinic. She was reviewed on 6/8 week intervals from February to October 2007. There was no doubt as to the genuineness of the problem. It was unlikely that she would be able to return to work. The rate of her progress was very slow but it was hoped that the pain would settle. The fracture had severe complications that would probably never resolve fully and would take years rather than months. All jobs in the respondent company involve the use of the hands and the work is repetitive. For the type of work involved one could hardly pick a worst injury than a hand injury.

In cross-examination witness stated that he saw the claimant twice and his colleague saw her once during the period in question. He specialises in occupational injury and has expertise to determine a persons' fitness for work. In his opinion the claimant was unfit for work for the foreseeable future. She had already been seen by two orthopedic surgeons in Cork, the most eminent people in the profession and he failed to see how it would have made a difference to refer her for a second opinion. At that time light duties would involve the use of her hands and she was in severe pain which would have been aggravated by minimal movement. Since the last time he saw the claimant he did not receive communication from other medical personnel to say she was fit for work.

The Tribunal also heard evidence from the human resources manager. She outlined the details of the company sick pay policy and the requirement to submit medical certificates and the frequency for their submission on a weekly basis. The claimant had an accident in October 2006 and by letter dated 17th January 2007 witness requested the claimant to give her an update on her situation at that time in relation to returning to work. A further letter dated 25th January 2007 acknowledged the claimant's telephone messages in response to the aforementioned letter and again requested the claimant to keep in contact over the following weeks and give an update on her progress and again enquired as to when she would be able to return to work. Witness outlined her difficulty in not being able to leave phone messages for the claimant. A lot of the claimant's work was repetitive but very specialised involving the inspection and positioning of components. It would take ten weeks to train an employee on this particular job. The respondent was anxious to get the claimant back to work.

The claimant had been seen by the company occupational physician on 12th February 2007 and by letter dated 14th June 2007 she was asked to attend another appointment on 6th July 2007. The medical assessment report following this appointment recommended that she was unfit for work for approximately two months and that she be reviewed in six to eight weeks to assess her progress. A further re-assessment appointment was arranged for 15th October 2007 and the report that followed stated that the claimant's progress was very slow and that she was unfit for work for the foreseeable future. By letter dated 19th October 2007 the claimant was informed that

the respondent was considering terminating her employment on the grounds that she was unable to provide them with a reasonable work date and this was also the view of her GP and the companies occupational physician. She was however afforded the opportunity to respond with medical evidence and she was requested to ask her GP if he would be in a position to ascertain a reasonable return to work date and to confirm

in writing. No response was received either from the claimant or her GP. A decision was made to terminate the claimant's employment as there was no likely return to work date for the foreseeable future. This decision was conveyed by letter dated 13<sup>th</sup>

November 2007. The claimant was given eight weeks notice and her employment was to terminate on 11<sup>th</sup> January 2008. The claimant was given the option to re-apply at a future date in the event that she felt she was in a position to resume employment. No communication was received from either the claimant or a representative on her behalf until she lodged form T1A with the Tribunal on 7<sup>th</sup> July 2008. Between October 2007 and January 2008 the claimant did not submit medical certificates.

If representations were made on behalf of the claimant regarding her capability to carry out lighter duties the respondent would have taken this into account. However there was no communication in this regard.

In cross-examination witness stated that the claimant's referral to a specialist was not discussed. If the claimant or a representative had reverted to the respondent following the letter of 19<sup>th</sup> October 2007 she would have been afforded the opportunity to have a second opinion. To her knowledge there was no light work available in the inspection area and it would be the norm to have a GP or other medical person make representation on the claimant's behalf. She could not go against medical advice in relation to the claimant.

During re-examination witness stated that in general if a doctor recommended light duties an employee would be phased back into work but this was not the advice given on the claimant's behalf.

In answer to questions from Tribunal members witness stated that the decision to dismiss the claimant was taken on the basis that she was unfit to work indefinitely.

### **Claimant's case:**

Giving evidence the claimant stated that she commenced her employment with the respondent in August 1986. She worked as a machine operator. She had a non-work related accident in October 2006 where she broke her right wrist and was not in a position to go back to work. After the accident her fingers contracted and she was referred to an orthopedic surgeon. She was treated by three different doctors and was then referred to a pain specialist. She attended all the medical appointments arranged by the respondent and she always returned all telephone calls from her employer. In relation to light work there were areas where the work was visual and these related to inspection, testing and quality control. Light work was never discussed. She sent in medical certificates every week.

When she received letter dated 19<sup>th</sup> October 2007 which stated that termination of employment was being considered, she panicked. The respondent wanted a return date and she could not get one from her medical advisers. She was in fear of losing her job. She went to her GP and received a letter in relation to going back to work. She posted this letter after 19<sup>th</sup> October but did not have a copy. She thinks she still sent in medical certificates after that, there would be no reason not to have done so. She does not remember getting the letter of dismissal dated 13<sup>th</sup> November 2007.

She had worked for the respondent a long time and she did not think there was ever a problem with her attendance. In December she started on a back to work scheme and she would go back to the respondent if there was work available.

In cross-examination witness stated that after the 19th October 2007 when she went to her GP she got a letter and she felt she could have gone back to work and done a different job. She did not contact the respondent after receiving the letter of 19th October, threatening dismissal as she thought the doctor would explain to the company and she could not understand why this was not the case. When she received her P.45 she was in a state of shock and went to her solicitor. After twenty-two years service she felt they could at least have called her for interview. She did not telephone the human resources manager as she did not know what to do. She felt it was unfair having worked with the respondent for that length of time. The claimant remains on Disability Benefit because she suffers from pain. She has been assessed by the Department of Social and Family Affairs and they would stop the payment of Disability Benefit if she was fully fit to work. At the moment she looks after children through the back-to-work scheme and does not have the use of her fingers. She feels she would be able to do the work she was employed to do with the respondent.

During re-examination she stated that through the back-to-work scheme she is trying to learn new skills so that she does not have to rely on her hand. When she was certified by her medical advisors she was under the impression that the position was protected.

In answer to questions from Tribunal members in relation to her job being under threat, while she discussed the matter with family nobody advised her to contact the respondent. She never considered ringing the respondent in relation to other positions in the company as she thought that the company doctor would contact them. The injury happened when she fell while out walking. She was under the impression that her job would be kept open indefinitely when it was a genuine illness and she was certified by her doctors. She did not receive the dismissal letter in November. The respondent only became aware during the course of the hearing of this case of the letter from her GP after 19th October 2007.

**Determination:**

The claimant's claim is for unfair dismissal. The basis of the claimant's case is that she had suffered a non work related injury necessitating a lengthy period out of work and that the respondent did not make sufficient effort to rehabilitate her back into the work force or offer her alternative employment.

The Tribunal is satisfied that the claimant suffered a very serious injury. It was also accepted by the respondent that the claimant was an exemplary employee. Evidence was given by an expert medical witness on behalf of the respondent. No medical evidence was called on behalf of the claimant.

The expert medical witness was of the view that the claimant's injury was very

complicated and it was unlikely that her symptoms would ever fully resolve. When asked if lighter duties were appropriate, he said that if it had been a foot injury that a sitting position might have been appropriate. However, the use of hands were essential in the claimant's job and that you could hardly pick a worse injury for functionality of the wrist than that suffered by the claimant.

The respondent indicated that they had difficulty in contacting the claimant by phone and therefore wrote to her to keep in contact. The respondent company eventually wrote a letter on the 19th of October requesting the claimant to obtain a return to work date from her GP. According to the respondent they did not receive a response. According to the claimant she obtained a letter from her GP and posted it to the respondent. The respondent said that no such letter arrived.

The respondent company wrote again on the 13th of November 2007 indicating that on the basis that they had not received a response to their earlier communication that they had come to a decision to terminate the employment of the claimant. No response was received to this letter until the claimant's solicitor's letter of the 7th of July 2008 was received by the respondent company. The claimant did not produce a copy of the GP's letter stated to have been sent by her to the respondent company. Her GP was not called to give evidence.

No sick notes or paperwork was received in the interim.

The respondent stated that if any representation had been made to the company with regard to re-deployment that it would have been considered. No evidence was forthcoming from the claimant that such representation had been made.

In the absence of contact the respondent company was obliged to come to a decision. The Tribunal found that the lack of communication on the claimant's part was fatal.

The Tribunal was of the view that the respondent did everything that could be reasonably expected under the circumstances and had no option but to terminate the claimant's employment when the claimant could not be certified fit for work for the foreseeable future.

The claim under the Unfair Dismissals Acts 1977 to 2007 is dismissed.

The claim under the Minimum Notice and Terms of Employment Act 1973 to 2005 is also dismissed as the claimant received eight weeks notice of termination of employment.

The Tribunal has no doubt that the claimant suffered very serious injury and it was accepted by the respondent that she was an exemplary employee. The lack of communication was fatal on the part of the claimant. The respondent did everything

that could be expected and they had no option but to terminate her employment when she could not be certified fit to work for the foreseeable future.

The claim under the Unfair Dismissals Acts, 1977 to 2007 is dismissed. The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 is also dismissed as the claimant received eight weeks notice of termination of employment.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

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

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