EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:		CASE NO.
Employee	- claimant	UD1384/2008
		RP1221/2008

against

Employer - respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. S. McNally

Members: Mr. P. Casey
Mr. D. McEvoy

heard these claims in Cork on 21 July 2009

Representation:

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Claimant(s) :
Mr. Frank Nyhan, Frank Nyhan & Associates, Solicitors,
11 Market Square, (Opposite Courthouse), Mallow, Co. Cork

Respondent(s) :
Ms. Deirdre Gavin, IBEC, Confederation House,
84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

In the written claim to the Tribunal it was alleged that in November 2008 the claimant had been wrongfully dismissed while on certified sick leave from an employment that had commenced in September 1990.

In response, the respondent submitted in writing to the Tribunal that the claimant's employment had been terminated on grounds of ill health after the respondent had, in line with its sickness policy, maintained contact (both written and verbal) with the claimant in an effort to facilitate a return to work. The respondent facilitated a review by the company doctor on a number of occasions. Both the claimant and the respondent failed to establish the likely duration of absence

and a return date in the near future. The respondent could not reasonably expect to hold the claimant's position open indefinitely where there was no evidence of the claimant's early return to work. The claimant had fair warning that the respondent was considering terminating employment. The decision to dismiss was fair as the respondent had a reasonable expectation that employees attend work on a regular basis. At all times the claimant was given the opportunity to make representations and reply to the respondent.

At the beginning of the hearing the claimant's representative stated that the claimant was proceeding under the unfair dismissals legislation. The appeal lodged under redundancy legislation was withdrawn.

In an opening statement, the respondent's representative said that the claimant had been dismissed for lack of capacity as per section 6 (4)(a) of the Unfair Dismissals Act, 1977, and that the respondent would give evidence that its procedure on long-term illness had been fully applied to the claimant. The claimant had been certified sick but, when asked for evidence about a return, could not provide one. After the claimant had been out for fourteen months the respondent could not sustain this and she was finally dismissed as per the respondent's absence policy. The claimant had been fully aware of all of the respondent's policies.

Rather than make an opening statement, the claimant's representative reserved his position.

The respondent's representative referred the Tribunal to the respondent's written policy on sickness which gave the respondent's approach and the "purpose/scope" of this approach. The Tribunal was also referred to the respondent's written policy on "long term illness absence".

Giving sworn testimony, TH (from the respondent's employee relations department) said that, after the first three days of illness, the respondent had a policy of eight weeks' paid sick leave (six weeks in Mallow where the claimant worked) whereafter an employee would go to long-term illness. A company doctor could see an employee after eight weeks to three months. The respondent had a support period for ill employees based on each employee's length of service. In the claimant's case that was up to one year after which the respondent would ask for a return-to-work date.

TH stated that a previous sick pay scheme had evolved to the later one. Regarding the claimant, he said: "She got a copy to the best of my knowledge." The Tribunal was now referred to a copy of a document dated 4 April 2001 and signed by the claimant acknowledging having received, read, understood and accepted the document as part of her conditions of employment with the respondent.

Referring the Tribunal to company documentation, TH said that the respondent had tried to put in place a "road map" for dealing with employees who were out. All employees would be aware of this from the handbook material which they received. A store manager could contact TH's department for advice.

Giving sworn testimony, GH (to whom the claimant had reported as personnel manager) said that she was twenty-five years with the respondent and that she had worked with the claimant from when the claimant had started. GH said that she had not heard of any respondent policy to get rid of

pre-1996 employees (i.e. people who had been employees in stores before those stores were taken over by the respondent). GH said that she did not believe that, in respect of the claimant, any policy against pre-1996 employees had been involved. The Tribunal was told by GH that she and the claimant were friends and would socialise together on occasion.

The Tribunal was referred to a letter dated 30 October 2007 from GH to the claimant which contained the following:

"As you are aware your sick pay ended on Saturday last the 27th of October. You will receive this last payment on this Friday the 2nd of November. However we have not received any Social Welfare Cheques from you. If you are having difficulty or delay with your claim please contacts(sic) me on this. I'm not in store until Saturday the 3rd after 12.30 p.m..

GH told the Tribunal that the claimant had gone on sick leave (by sending a medical certificate) on 12 September (2007) after having been on maternity leave. The claimant could take bank holidays and holidays and would have more weeks off. After the first three days of absence the claimant was on sick leave. GH kept in contact with the claimant though not every week. The claimant got her full entitlement under the sick pay scheme i.e. six weeks' sick pay. GH left the claimant on the payroll to make sure that the claimant would get her Xmas bonus.

The Tribunal was now referred to a letter dated 17 April 2008 sent to the claimant by CW (personnel manager in Mallow having taken over from GH) which contained the following:

"As per your last appointment with (named doctor) in which he stated that it would be at least 4 months before your return to work. Therfore(sic) I have now made another appointment for you on Friday the 25th of April '08 at 10.50 am with him to ascertain to return to work in the foreseeable future."

The Tribunal was next referred to a health referral report sent by an occupational health manager to a regional development manager for the respondent. This report was based on the above doctor's assessment of the claimant on 25 April 2008 and said:

"The company doctor states that this lady is been(sic) appropriately treated by her GP with medication and counselling due to her depression. Unfortunately, however, his opinion is that she is currently unfit to work and will be unfit for the foreseeable future."

The next document seen by the Tribunal was a letter dated 6 June 2008 from CW to the claimant which contained the following:
"I am writing to you regarding your sickness absence. Your current absence commenced on the 12/09/'07.

Our main concern is for your health and wellbeing and whether or not there is an expectation that you will achieve a level of fitness in the near future that will facilitate a return to full and normal working.

To date we have held your position open for you in the expectation that you will be fully fit to resume normal working within a reasonable period of time. As I am sure you will appreciate, we cannot continue holding your position open indefinitely.

On the 25th of April you attended for a medical examination with the Company Doctor. A copy of the Occupational Health report is enclosed for your attention.

In his report the Company doctor is of the view that you will not be fit to resume normal duties in the foreseeable future. In light of this report we now need to review your position here with us, as we cannot continue holding your position open if this is the case.

To this end, we would like you to attend a meeting within the next 2 weeks with a date, which will be suitable to you. In the event that you have an alternative view from your own doctor who indicates that you will be fully fit in the near future, please bring that report to the meeting for consideration.

You are entitled to bring your union representative or a work colleague with you.

I wait to hear from you with a date of your choice as stated above within the next two weeks."

In sworn testimony to the Tribunal CW said that the claimant had by then been out from September 2007 to June 2008 i.e. a period of ten months. CW added:

"She had been out so long. People had been out for years. I had to explain that she had a year's support but needed to return within a year."

The Tribunal was now referred to a written record of a 18 June 2008 meeting at which CW had gone through the letters with DOM (the claimant's union official) to brief him on "the different stages of contact" and at which the claimant had said that she would love to return to work but was still very depressed and was breaking down on such a regular basis that she would ring her husband to come home and take the child from her as she was unable to mind him. CW told the Tribunal that the claimant had been fairly happy about the support period given by the respondent but had been unable to give an answer as to when she would be fit to return to work. The respondent gave her until October 2008 and, according to the meeting record, the claimant was to keep the respondent "updated as to what the doctor is saying during that time".

Asked if anything had changed, CW replied: "No. She was still giving in certs."

The Tribunal was next referred to a letter dated 30 October 2008 from CW to the claimant which contained the following:

"I am writing to you regarding your sickness absence. Your current absence commenced on 12/09/08.

Our main concern is for your health and wellbeing and whether or not there is an expectation that you will achieve a level of fitness that will facilitate a return to full and normal working.

To date we have held your position open for you in the expectation that you will be fully fit to resume normal working within a reasonable period of time. As I am sure you will appreciate, we cannot continue holding your position open indefinitely.

On the 25/04/08 you attended for a medical examination with the Company doctor. A copy of the Occupational Health report is enclosed for your attention.

In his report the Company doctor is of the view that you will not be fit to resume normal duties in the foreseeable future. In light of this report we now need to review your position here with us, as we cannot continue holding your position open if this is the case.

To this end, we would like you to attend a meeting on the 4/11/08 at 11 o'clock. In the event that you have an alternative view from your own doctor who indicates that you will be fully fit in the near future, please bring that report to the meeting for consideration.

You are entitled to bring your union representative or a work colleague with you.

In the event that you do not attend this meeting, we must then assume that you do not have an alternative medical view to that of the Company doctor and, on this basis, we will have no option but to then put you on notice of termination of your contract of employment on the grounds of ill health."

At this point in the Tribunal hearing the respondent's representative said that the above 30 October 2008 letter from CW to the claimant had been predated by a 14 October 2008 letter from CW to the claimant which contained the following:

"Reference to our last meeting, we discussed to(sic) having another meeting in October. I have set a date for the 20 th of October at 2 p.m.. If this appointment is not suitable for you please contact me at your earliest convenience at (phone number given) to arrange another."

CW now told the Tribunal that the claimant could not attend because her son was sick. They "made an appointment for the 30th". They asked her if she had further information. The claimant gave them a letter saying that she would be assessed again in two or three months. This "To Whom ItMay Concern" letter from a doctors' practice was dated 22 October 2008 and contained the following.

"(The claimant) is currently still under investigation for treatment and management of her illness. We will assess her in 2-3 months time. She is currently unfit to return to work."

The Tribunal was furnished with a copy of a meeting record dated 6 November 2008 which stated that the claimant had had nobody representing her but that, at the respondent's suggestion, the claimant asked for another employee (LB) to attend. CW pointed out that the 22 October 2008 letter gave no return date for the claimant and the claimant said that she had to go by the doctor's letter which said that she would be assessed again in two to three months. The meeting record "action points" were that the claimant would be "terminated with 8 weeks' notice" and that "a letter will be sent out in the coming days". (The meeting record was signed by CW and dated "6.11.08".)

Asked at the Tribunal hearing to state the outcome of the meeting, CW replied: "As we did not have a return date we told the claimant we had to terminate." CW told the Tribunal that she drafted the claimant's termination letter which was dated 10 November 2008 and contained the following:

"I refer to our meeting with you on the 6th of November'08.

The purpose of the meeting was to discuss your long-term sickness absence and the medical report arising from your examination by the Company doctor.

As you are aware, the Company doctor expressed the view that you would not be fit to resume normal working for the foreseeable future.

At the meeting you were unable to provide an alternative medical option to that of the Company doctor. Consequently we must assume that the Company doctor's medical opinion is not in dispute.

Whilst we have held your position open for you to date, we cannot continue doing so indefinitely. In light of the Occupational Health report, there are no grounds to continue holding your position open for you given that you will not be in a position to resume normal working in the near future.

We must therefore now advise that we are left with no option but to terminate your contract of employment on the grounds of ill health. Consequently the Company will terminate your contract in line with the Minimum Notice Act effective on the 1st of Jan '09.

In the event that, at a later date, you manage to achieve full fitness and are in a position to carry out all functions associated with the role you held with (the respondent), we would be more than happy to consider an application from you for re-employment."

CW told the Tribunal that she had acted with the full approval of the respondent's regional development manager. She added that the claimant received her minimum notice up to 1 January 2009 and that this was "due to her".

CW stated to the Tribunal that she herself was thirteen years with the respondent, that she was a "pre-1996 employee" and that she had not experienced the respondent treating people differently if they were "pre-or-post-1996". She added that she did not think that the claimant had known that she (the claimant) had no contract because the claimant was "pre-1994" and that the claimant could have had her contract "gone through" with her on her return from maternity leave but the claimant had not returned. There had been a documentation "roll-out" which included a share bonus scheme and a privilege card that would give a ten per cent discount to staff who had more than a years's service.

CW said to the Tribunal that the claimant had not appealed the decision to terminate her employment to the respondent.

Giving sworn testimony, the claimant told the Tribunal that she was "much better now". She agreed with a 20 July 2009 letter from a doctor which contained the following:

"This lady has been going through a difficult time recently, she suffered from stress and has had an exacerbation postnatally of depression.

I feel she will be able to return to work in the near future when her current symptoms subside sufficiently. In fact she was fit to return recently but unfortunately suffered an exacerbation due to miscarriage."

The claimant said to the Tribunal that at the age of sixteen she had started with Q (a chainstore multiple subsequently taken over by the respondent). She started on the shopfloor but moved on to a cashdesk and customer service.

The claimant said that health problems started three months into a pregnancy and that she subsequently had post-natal depression. She was out sick, sent medical certificates which represented the position and got a letter to see a doctor who agreed that she was sick.

Asked about the June 2008 meeting, the claimant said that she had attended with her union representative but had not been able to give a date or month when she would go back to work. She was on medication which was not working. She "was building a new house". Ultimately, ML (a manager from the respondent) told her: "As of now you are dismissed." The claimant told the Tribunal that she "had a new home" and her full-time job was gone.

Regarding medication, the claimant said that she was now on medication that was suitable for her and that she was now "much better".

The claimant's representative submitted: that the respondent was a large employer with a big number of stores; that there had been no evidence that the claimant's absence had interfered with the running of the respondent: that the respondent was different from a corner-shop: and that the respondent had acted unreasonably in dismissing an employee who had an illness that was going to resolve itself. He added that the Tribunal had heard that other employees had been out due to long illness and that there had been a policy change while the claimant had been out which the claimant had found out about at disciplinary meetings. He submitted that the respondent had not discharged the onus to show that the dismissal had been fair in all the circumstances.

The claimant's representative told the Tribunal that the remedy sought was damages because the claimant did not feel that she could re-engage with the respondent and was now seeking compensation for the fact that she had lost full-time pensionable employment.

The respondent's representative accepted that the burden of proof as to fairness was on the respondent but submitted that the respondent had acted fairly and reasonably in all the circumstances. She said that the claimant had been dismissed for lack of capability after there had been no medical evidence to suggest that the claimant could return at any time in the future. For fifteen months the respondent had held the claimant's post open. The claimant attended the respondent's doctor. Reduced hours could have been given to help the claimant back. Absenteeism was a problem for all organisations. It was not necessary for the respondent to await the outcome of further tests. The respondent had made every effort to facilitate the claimant but the post could not be kept open indefinitely.

Determination:

Having considered the evidence adduced and submissions made, the Tribunal determines that the respondent was unfair by enforcing procedures that were less flexible than those of which the claimant had been on notice before her illness and under which other employees had been out on

long-term illness. Given the claimant's length of service, the Tribunal allows the claim under the Unfair Dismissals Acts, 1977 to 2007, and, in all the circumstances of this case, deems it just and equitable to award the claimant compensation in the amount of €7,000.00 (seven thousand euro) under the said legislation.

The claim lodged under the Redundancy Payments Acts, 1967 to 2007, is dismissed for want of prosecution.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)