

## **EMPLOYMENT APPEALS TRIBUNAL**

CLAIM(S) OF:

CASE NO.

Employee

MN219/2009

UD221/2009

**claimant**

against

Employer

**respondent**

under

### **MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005 UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms P. McGrath BL

Members: Mr. C. Ormond  
Mr. N. Broughall

heard this claim at Dublin on 21st July 2009

Representation:

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Claimant(s): Mr Brendan O Hanlon, Mandate Trade Union, 9 Cavendish Row,  
Dublin 1

Respondent(s): Mr. Duncan Inverarity, Solicitor, BCM Hanby Wallace, Solicitors,  
88 Harcourt Street, Dublin 2

The determination of the Tribunal was as follows:-

The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 was withdrawn prior to the hearing.

### **Respondent's Case**

The HR manager told the Tribunal she was employed by the respondent for thirty years and has been HR manager in Blanchardstown since 2002. The claimant commenced employment as a sales assistant in 2000. The procedure in the respondent regarding absenteeism was that a meeting was arranged after six weeks of an employee being absent. The claimant had been employed as a nighttime shelf packer. The claimant was ill on 10 August 2007 she had cartilage problems with

her knee and it was agreed that she would submit monthly medical certificates. She also had other health problems. It was unclear how long the claimant was going to be absent from work. On 6 September 2007 the claimant informed the HR manager that she had an appointment with an Orthopaedic Surgeon on 20 September 2007 and that she would contact her. The claimant did not contact the HR manager and she wrote to the claimant on 6 November 2007. The claimant contacted her by telephone and told her that she had surgery on her knee and they agreed to meet in March 2008 when the claimant expected that she would have recovered. She attended a meeting with the claimant on 21 March 2008 and the claimant told her she was awaiting two consultant appointments for other health problems that she had.

The HR manager had a meeting with the claimant on 18 June 2008 and she told the claimant she could return to work on the checkouts. The claimant told her that this was not suitable for her. They agreed to meet in August 2008 to review the situation and a meeting took place on 23 August 2008. The claimant could not furnish a return to work date and a letter was sent to the claimant on 3 September 2008 advising her that an appointment had been made for her to attend the company doctor, which the claimant did on 23 September 2008. The claimant was asked to attend a meeting on 4 October 2008 and both the HR manager and the claimant discussed the doctor's report. The company doctor indicated that she was not fit to return to work as a nighttime person. She asked the claimant to go to her own doctor and see what he had to say. She sent the claimant a letter on 19 November 2008 requesting her to contact her before the 25 November 2008 to discuss the situation. The claimant telephoned her on 20 November 2008 and told her that she would be absent from work for another year at least. The HR manager told her that she could not keep her job open indefinitely. The claimant told the HR manager "do whatever you have to do". She had a good working relationship with the claimant and she felt that she might return to work as a sales assistant. She had no alternative but to write to the claimant in December 2008 and terminate her employment.

In cross examination she stated that the claimant was aware if she did not provide a return to work date her job could not be kept open indefinitely. She spoke to the claimant on 20 November 2008, the claimant was agitated and she told her she would be out of work for at least another year. The policy in the respondent regarding sick leave was if an employee was absent from work a medical certificate should be submitted after three days. The claimant was a good employee and she tried to facilitate her in a different role. The claimant has been replaced. The claimant was aware of the consequences of her not returning to work.

### **Claimant's Case**

The claimant told the Tribunal that on 20 November 2008 she telephoned the HR manager to inform her that she had a report from her GP. The HR manager told her she had no choice but to terminate her employment. The claimant was not afforded the opportunity to discuss the report with the HR manager. The claimant was angry on hearing this over the telephone after the service she had given to the respondent. She had a meeting with the HR manager in October 2008. The claimant was never told that her job was in jeopardy. The HR manager asked her to obtain a report from her own GP and she thought this report would be different than the company doctor's report.

In cross-examination she stated she could not recall if she attended a meeting with the HR manager on 4 October 2008. She recalled a conversation she had on the telephone with the HR manager who told her if she could not furnish a return to work date there was no alternative but to terminate her employment. She contacted the HR manager to inform her that she had her GP's report but she was informed that the HR manager was on holidays and she did not request to speak to anyone else

as she had dealt with the HR manager regarding this matter. Her GP told her that she would not be able to return to work for another year. She received a letter from the respondent on 19 November 2008 advising her to attend a meeting on 25 November 2008 to discuss the situation. She could not recall discussing with the HR manager that the respondent was unable to retain her post for another year. She is still unable to work and has to have further surgery.

## **Determination**

The Tribunal has carefully considered the evidence adduced. The claimant's employment was terminated after a fifteen-month absence due to illness. There can be no doubt that at the point of termination there was no long-term prospect of the claimant returning to work. Indeed, the evidence adduced before the Tribunal confirmed that this continues to be the case.

In running its affairs the Tribunal accepts that the respondent must be allowed to terminate employment where persons are unavailable to work. Considerable leeway has been given by the claimant's HR manager in this regard and the Tribunal notes that a good working relationship had existed between the claimant and her HR manager.

However, the HR manager did indicate to the claimant that before termination occurred that the claimant would be allowed the opportunity of rebuking the employer's medical advice or at the very least provide the employer with a medical timeframe for returning to work.

Ultimately the claimant's medical report did not rebuke the employer's medical prognosis nor does it set out a timeframe for return to work. However, the employer should formally have satisfied itself on the content of the claimant's medical report before terminating the employment. In fact, the employer effected the termination over the telephone when the content of the report was made known.

This amounted to little more than a procedural difficulty and does not affect the overall entitlement of the employer to terminate.

In the circumstances the Tribunal awards the claimant compensation of €800.00 under the Unfair Dismissals Acts, 1977 to 2007

As the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 was withdrawn prior to the hearing no award is being made under this Act.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

