EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.

Employee UD906/2008, MN836/2008
WT376/2008

against

Employer

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey BL

Members: Mr. A. O'Mara
Mr. N. Broughall

heard this claim at Dublin on 11th May, 6th and 10th July 2009

Representation:

Claimant: Mr. Raymond Ryan BL instructed by
David M. Turner & Company, Solicitors, 32 Lower Abbey Street, Dublin 1

Respondent: XXXX

The determination of the Tribunal was as follows:

Background

Counsel for the respondent outlined to the Tribunal that the claimant was dismissed as he was medically unfit to work. The claimant was employed as a bus driver and had an eye condition. The respondent looked for alternative employment for the claimant in the respondent and none could be found.

Counsel for the claimant stated that the claimant was medically retired in February 2008. The respondent stated that it was the view of the CMO that the claimant was unfit to work due to an eye condition. There was a serious lack of fair procedures in the dismissal and the claimant will challenge the validity of the dismissal. The claimant was unfairly treated because he supported

another bus driver who had a case in the High Court.

Respondent's Case

EL the occupational physician told the Tribunal that he worked alongside the chief medical officer. In 20 December 2005 he met the claimant in relation to blurred vision and light affected his eyes. The claimant was certified on sick leave by his GP. The claimant was assessed and treated in the Eye and Ear hospital. The claimant had a collection of fluid at the back of his eye, which interfered with his vision. This was diagnosed as CSCR (Central Serous Choroid Retinopathy. The standard required to drive heavy vehicles was 6/12 in one eye and 6/5 in the other eye. His right eye did not reach the standard required by the respondent.

The claimant was not able to drive a commercial vehicle and he may be able to do so in the future. He continued to see the claimant. The claimant was ill for three to four years and there was a likelihood he would be fit to return to work. The respondent had waited a reasonable period. Over a two-year period the claimant was given an extension of sick leave on ten occasions. The respondent looked for alternative work for the claimant on a number of occasions. On two occasions the claimant was informed that non-driving work was available. He was not aware if the onus was on the respondent to look for alternative employment for the claimant.

It depended on the illness as to when the respondent would make a decision and it could be six months and it could be twelve to eighteen months.

In cross-examination he stated that the claimant was certified sick by his GP. He did not place the claimant on sick leave. The claimant told him that he was stressed out and was having sleep difficulties and blurring of vision. The claimant had work and non-work related issues in August 2003. The claimant was suspended on a number of occasions. The claimant was dismissed and he did not know why he was suspended or dismissed. Dr. W was employed by the respondent in 2003 and in August 2003 he indicated that the claimant had abdominal pain and stress. Three incidents occurred when the claimant was employed with the respondent he was attacked, an inspector assaulted him and another inspector suspended him. The claimant was in difficulty with his performance and attendance and he was suffering from stress. In September 2004 the claimant had personal difficulties and he moved house. The claimant was dismissed, as it was a disciplinary matter. Meetings took place regarding the claimant's suspension. He attended a meeting with the claimant on 8 February regarding alleged systematic bullying and harassment.

In February 2005 the claimant was not represented at an appeal hearing. The respondent upheld the decision to dismiss the claimant. Between July and September 2005 the claimant was ill for five weeks. Managers monitored staff who were in work. Poor attendance was pointed out and if it was a medical matter it may be assessed by the CMO. Three to four letters were sent to the claimant regarding his attendance. In February 2005 the claimant spoke to him regarding an argument with a member of staff. The claimant was suspended and reinstated. In July 2004 the claimant changed unions and in July 2004 he was suspended. The claimant told him he was seeking an injunction in the High Court and he was sacked on appeal, this occurred in February 2005. In April 2005 he suggested counselling and he gave him the contact numbers for counsellors. The claimant was not depressed or suffering from posttraumatic stress. The respondent availed of an employment assistance officer service, which was a confidential service. He met the claimant on more than sixteen occasions. The claimant suffered from irritable bowel syndrome for twenty years, this was a stress related condition. The claimant was taking medication for stress, irritable bowel syndrome and migraine. The witness determined the claimant's fitness to

drive and the claimant was fit to do so in February 2005 and 21 April 2005. He told the claimant he would give him an extension for a further two months. He met the claimant in June 2005. The claimant had undergone a tube test and his stomach was raw. He was not aware if the claimant's GP diagnosed that the claimant was stressed due to work. On 1 June 2005 the claimant told him he was sick the previous day. The claimant was abused in relation to a query from an inspector and he told the inspector he needed to go to the toilet. The claimant saw his GP after this and was certified fit to return to work. The claimant mentioned to his GP that he had irritable bowel syndrome. The doctor spoke in public about this and the claimant was upset. The claimant accepted at a meeting on 5 May that he had approximately nineteen absences in 2004, and thirteen days up to June 2005.

The respondent had an absence control programme in place. The claimant felt he was unfairly treated. The claimant had a problem with bullying, harassment and intimidation and he was unable to work. The respondent did not have authority to investigate the employment assistance scheme. IBS was mentioned in September 2001 and the claimant joined the respondent in October 2001. Prior to joining the respondent the claimant underwent a medical examination and vision charts were used for the eye test. The CSCR was not active at the time the claimant commenced employment with the respondent. The claimant reached the standard required. The cause of CSCR was unknown and there was no evidence that stress caused CSCR. In British literature it stated that there was no correlation between the two. In June 2005 the claimant had IBS and he asked the respondent if it could forward his GP copies of reports and permission for this was refused. The specialist reported to the GP. In June the claimant was in hospital. He asked the GP for a copy of a letter regarding IBS. The claimant mentioned that it was a pre-existing condition but the medical certificates did not indicate all the illnesses that the claimant had. The claimant told him that he was dismissed and he was devastated. The witness went to the claimant's GP and he told him he was not prepared to share his report. It was a management decision that the claimant enter an attendance control plan. If an employee had a grievance it was dealt with. At the last meeting with the claimant the claimant requested that he be taken off the attendance control plan. On 28 September 2005 the claimant was suspended for two weeks with no pay and it was very stressful for him. He told the claimant that the core issue was his availability for work. The claimant was fit on 28 September, he was not depressed and there was no posttraumatic stress. The claimant visited his GP on 7 November 2005 and did not return to work with the respondent, as he was not fit to work after that date. In September 2005 he did not expect to see him for six months. In December 2005 he saw the claimant regarding his absences from work and the claimant would have attended his GP on that day.

The company policy regarding sick pay was that staff were entitled to full pay for four weeks. Staff were entitled to seventy per cent rate of pay after a sick absence of six weeks. If an employee was not recommended for an extension the employment would be terminated. The cut off point for paying an employee was twenty-six weeks. The claimant was given a ten-week extension and there was a possibility his condition may have improved.

In a letter to the claimant's GP dated 12 April 2007 his consultant ophthalmologist and vitro retinal surgeon indicated that he did not feel that the claimant should be asked to retire for medical reasons from his job at this point as his vision may improve further and he may be able to return to work.

In February 2006, April 2007 and November 2007 there was no difference in the claimant's vision. The claimant was not reaching the standard required and was not likely to reach the standard. The blister cleared in 2006 and if the blister disappeared it left an impairment.
After each visit they discussed treatment and what the future held. The claimant was not prepared

to give permission for the release of ongoing reports and the claimant did not want to share his medical history. He gave a letter to the claimant for Mr. C and a consent form and the claimant did not sign it. He was not aware if anyone in management asked the claimant for a report, the medical unit was private and he was not in regular contact with managers.

The medical report was not shared with anyone. Dr. H was not a company doctor. He did not agree that it was unfair of the respondent to retire the claimant on ill health grounds. The claimant was absent from work for over two years and there was no improvement in his vision. Extensions to employment were not a right for an employee. He accepted that there was a lack of fluid at the back of the claimant's eye and he was not going to reach the required standard. He concluded that the damage was done when there was no improvement in the claimant's condition. CSCR was first mentioned in December 2005. It was not possible to give a date when the damage was done. He examined the claimant and assessed him over months and years. In July 2007 the claimant mentioned about illness and retirement on grounds of ill health. If there was a prospect of an employee returning to work further extensions would be given. The claimant's vision was the same in February 2008 as in February 2006. He accepted that the claimant was unable to drive a commercial vehicle but that he had improved and there was no fluid or blister on the back of his eye. He examined the claimant on 6 February 2008 and he had not improved or reached the required standard. A number of people who had CSCR had detached retina. Laser treatment could do damage and could bring the blister flat up. He did not discuss laser treatment with the claimant. There are specific legal requirements to drive a bus. He accepted that it was possible that there may be an improvement in the claimant's vision. In January 07, July 07 and May 07 he asked if there were any non-driving duties that the claimant could undertake. Once the work did not involve driving it did not matter what work the claimant undertook. After this he did not make further enquiries regarding alternative employment for the claimant. The ideal solution was for employees to return to their original job.

Financial matters did not impact on the medical report. The longest period of sick leave he had witnessed was beyond five and a half years. If someone was absent beyond six months the chief medical officer needed to know. He spoke to the chief medical officer on 21 February 2005 and again on 1 June 2005, on 29 June 2005, 21 December 2005 and on 12 January 2007. He discussed the report with the chief medical officer on 14 November 2007. At the meeting on 14 November 2007 the witness and the chief medical officer felt that a cut off point of eighteen months February 2008 appeared to be reasonable**.** He mentioned phototherapy to the claimant and the consequences and side effects of treatment were explained. After the 16 August 2006 he met with the claimant on approximately seven occasions.

The claimant had been ill previously but was back in work promptly. His vision was not good a week or two after 7 November. Usually there would be an improvement after a month. The sooner the retina was put back the better it would be, the retina was detached for a couple of months. A meeting arranged for 6 February 2008 was scheduled for fifteen minutes and occasionally when they met he undertook tests. There were no general tests available for CSCR. Diagnostic testing was done in the eye department only and what was important was did the claimant reach the vision standard for driving. The claimant was not fit and did not reach the legal standard of 6.2 and 7.5 in the other eye. This extended over a period of two years and he looked at all the reports that were provided. His specialised in occupational medicine and in fitness for work. He did not have a note of the discussion he had with the chief medical officer in February 2008. He told the claimant if he had further evidence available he could forward it to the chief medical officer. The witness signed all memos. The only case he would discuss with the chief medical officer the recommendation of the chief medical officer.

In re-examination he stated that the decision to dismiss the claimant was based on his eye condition.

In answer to questions from the Tribunal he stated that no further information was provided on 6 February. In December 2005 he was monitoring the claimant. He kept a copy of the claimant's sick certs. He needed to advise the respondent what the future might hold for the claimant and it was useful to have specific reports. He advised the claimant verbally that he had the right to appeal the decision to the chief medical officer. The claimant mentioned five different illnesses on a form before he took up employment. He met the claimant many times and knew him well. The claimant appeared to have suffered from IBS and migraine for a long period of time.

The human resources manager told the Tribunal that he wrote to the claimant on 26 February 2008 effectively informing him that his employment with the respondent was to cease at the end of that month. According to the witness and the letter writer that news was relayed to the claimant on foot of a recommendation from the office of the chief medical officer that the claimant be retired on health grounds. It emerged however that the chief medical officer did not personally make that recommendation but based it on the opinion of an occupational physician employed under the auspices of that office. The witness acted on the recommendation of the chief medical officer and thus sent that letter. He added that the claimant was now incapable of performing the job he was employed for and since running a business was the respondent's priority the "plug had to be pulled" on the claimant's employment. It was the view of the witness that the claimant had not been dismissed but had rather been retired.

The witness indicated that the examining physician told the claimant in early February 2006 that he was recommending his retirement on health grounds. At that time that doctor also advised the claimant of his right to appeal that decision. The claimant did not appeal that decision to the chief medical officer as was his right and since no appeal was lodged the chief medical officer subsequently issued what the witness called his recommendation. That recommendation amounted to an irreversible and unappealable decision to terminate the claimant's employment.

The witness and others aired the colloquial term "on the books" on a number of occasions. It appeared this referred to retaining unproductive staff as nominal employees only as distinct from gainfully employed personnel. Unproductive staff consisted of, in the main, of employees who were absent from work on health grounds. Such staff were generally kept "on a list" for up to two years in the hope they would either recommence in their original jobs or be redeployed elsewhere within the respondent. While the claimant was on such a list he was in a "junior" position and there was not suitable alternative work available for him at the time of his termination. Besides it was a question of a "lucky dip" as to who got an offer of such work. Another aspect of being "on the books" was that the respondent was unable to recruit and replace someone having that status.

The human resources manager confirmed that the claimant had not actually worked since November 2005 up to the time of his retirement. His sick leave had been extended up to ten times and the respondent could not keep people like the claimant on indefinitely or as the witness put it "forever and a day". By February 2008 the claimant was not in receipt of any remuneration from the respondent. After twenty-six weeks' sickness benefit the claimant reverted to his income protection scheme. The witness stated that all outstanding monetary entitlements had been discharged to the claimant upon his retirement.

Since the witness was not privy to medical reports he had no knowledge of a letter from an eye

specialist who was treating the claimant. The claimant neither approached nor presented a letter from that specialist to him. That letter read in part:

I would like to say that I do not feel Richard (the claimant*) should be asked to retire for medical reason from his job at this point in time.*

That letter was dated 5 November 2007 and addressed to the claimant's doctor.

Another human resource person said that her office was informed by letter from the chief medical officer's office that the claimant was to be retired on medical grounds. Upon receipt of that letter she in turn contacted the claimant by phone to appraise him of his entitlements. Those entitlements did not include an appeal against the chief medical officer's recommendation. However human resources had no details on the medical grounds justifying retirement but the witness added that had it been a disciplinary issue then the claimant had a right to appeal. She was not aware that the claimant could have appealed a doctor's decision from the chief medical officer's office to the chief medical officer. The witness understood that the claimant had been given at least two weeks' notice of his retirement.

Claimant's Case

The general secretary of the claimant's trade union had some familiarity with the claimant's ongoing situation with the respondent. The witness was surprised and disappointed that such a young man was experiencing problems with his eyesight. While the claimant accepted his job was "on the line" due to those problems the witness told him that staff had been kept "on the books" for lengthy periods and in excess of two years. The witness and his trade union had succeeded several times in maintaining that status for its members beyond that time. The witness spoke to the human resource section about the claimant's case as he believed there was a good prospect that the claimant's sight would improve. The witness never heard of an appeal against a decision from the chief medical officer's office to retire somebody. However, it was possible to appeal a recommendation from one of its doctors to the chief medical officer. A possible avenue of appeal against a recommendation from that office lay with the civil authorities.

A former bus driver, shop steward and health and safety officer who was retired on medical grounds in late 2006 described the term on the books as a play on words. That status which lasted for three years gave rehabilitating staff a "bubble of safety" as they sought either redeployment or their former jobs back. Staff could be left on that list for up to six years irrespective on the nature of their illness. Contrary to what the human resource manger stated there was no restriction on the respondent to recruit and replace staff still on the rehabilitation list. In the witness's case he was given five weeks' notice of his retirement by the human resource manager. Up to this hearing the witness never heard of an appeal from a recommendation from an occupational physician in the chief medical officer's office or from that office under any circumstances.

Prior to commencing employment as a bus driver with the respondent in October 2001 the claimant had what was termed a medical condition. That condition related to stress. Between his commencement date and the beginning of his long term sick leave on 7 November 2005 the claimant had been absent from duties for up to seventy days on around thirty separate occasions. At that time his sick leave was related to stress that was generally work related. While absent from work on that extended sick leave the claimant was diagnosed with an eye condition called Central Serous Choroid Retinopathy (CSCR). This mainly affected his right eye. The consultant ophthalmologist and vitreo-retinal surgeon who both diagnosed and treated the claimant forwarded

his reports to the claimant's own medical doctor. The occupational physician in the respondent's chief medical officer's office also received copies of those reports. By that time the claimant was attending that physician who was happy "to go along" with those medical reports. The claimant at one stage suggested to that physician that he would welcome a disinterested specialist examine him. In 2007 there was a general discussion among the occupational physician, the claimant, and the human resource manager about medical retirement. The witness indicated that he did not want that option. Instead he expressed his wish to stay "on the books". In early November that consultant ophthalmologist and vitreo-retinal surgeon wrote to the claimant's doctor informing him that the claimant was making further progress. That letter also stated that while the claimant was still unable to drive a bus that situation might change should there continue to be further improvement in his visual acuity. There was also the possibility that stress might cause a recurrence of his eye condition.

The claimant met the occupational physician in early February 2008 for what he described as a run of the mill medical. The witness insisted that at no time during that meeting did that doctor refer to medical retirement for the claimant by the end of that month. The first he learned of this decision was when he spoke to an employee from the human resource office on 26 February, three days before his announced retirement date. His "head was all over the place" on hearing that news. That employee informed him that there was no appeals process against that decision as it originated in the office of the chief medical officer. Due to that news the witness did not approach the manager of human resources about his situation. Since the occupational physician did not tell him of his forthcoming medical retirement the claimant was not informed of an appeal against that decision.

The witness expressed puzzlement and mystery on the respondent's haste in retiring him especially when his condition was improving. He felt badly treated compared to other staff who were kept "on the books" for several years. However, he accepted that on 29 February 2008 he was still not capable of driving a passenger carrying bus. Subsequent to his cessation of employment with the respondent and as a result of ongoing treatment the claimant has been declared medically fit by the consultant ophthalmologist and vitreo-retinal surgeon to drive buses. The claimant expressed a strong desire to resume duties as a bus driver.

The consultant ophthalmologist and vitreo-retinal surgeon who treated the patient explained the nature of this CSCR that afflicts certain people. While the exact cause of that ailment is unknown patients who have it are more likely to suffer from stress than those who do not have it. The majority of patients however fully recover from it within twelve months of it being diagnosed. The claimant was an exception to this, as his sight in his right eye had still not reached the accepted standard to allow him to drive a bus up to and post February 2008. Since the vision of the claimant was showing signs of improvement by November 2007 the witness was confident and optimistic that given time the claimant's sight would recover to such an extent that he could be declared fit to undertake his original work duties. He stated that opinion in a letter to the claimant's doctor in November 2007. The witness was surprised at the lack of dialogue from the respondent in this case.

This specialist claimed that the office of the chief medical officer did not fully understand the CSCR condition. He commented that the claimant should have been given further time by the chief medical officer to allow his vision to improve sufficiently to drive a bus.

Two further letters from the witness were referred to. The first letter dated 7 July 2009 gave a brief history up to January 2008 of the specialist's treatment and diagnosis of the claimant's ongoing eye condition. By that stage he still did not meet the non-statutory required standard for driving a bus despite the continuing improvement in his vision. The second letter dated two days later and

referred to an examination undertaken by one of his colleagues on 17 June 2009 while he was on annual leave. That letter read in part:

On examination on that date Richard's (the claimant) visual acuity in both eyes was 6/6. There was no evidence of an active CSCR lesion in either eye both on clinical examination and on OCT testing.

As suggested in my previous letter Richard's,(the claimant) vision has recovered completely following his treatment. Richard now meets the visual standard for driving a commercial vehicle.

The witness was not surprised at the claimant's recovery but added that it was always possible that his stress levels could again cause a return of CSCR, as there was a twenty to thirty percent chance of that happening.

The claimant's own doctor confirmed that he treated him for stress from 1993. That stress was due to domestic and work situation. He had "no idea" whether letters from the claimant's specialist were forwarded to the respondent. It was his view that the claimant was fit to return to work, as he was not suffering from any illness.

Determination

The Tribunal is of the view that the claimant was not unfairly dismissed. There was no medical evidence before the respondent to enable it to determine when the claimant was available for work. He had been given extensions to his sick leave on at least ten occasions and while the claimant was not in receipt of any remuneration from the respondent, it could not keep the claimant on indefinitely. Having heard the evidence of the claimant's occupational physician he was not in a position at the time of the termination of employment to give any indication as to when the claimant was likely to be fit to resume work. This coupled with the previous extensions of time given to the claimant indicates that consultation and discussion on the issue would have been fruitless. Thus the action taken at the time was reasonable in all the circumstances. Therefore the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

No evidence was adduced regarding the Organisation of Working Time Act, 1997 and the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and therefore no award is being made under these Acts.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)