

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE - claimant

CASE NO.
UD68/2009
RP51/2009

against

EMPLOYER (In Liquidation), - 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. Behan BL

Members: Mr. D. Hegarty
Mr. J. McDonnell

heard these claims in Cork on 28 September 2009

Representation:

Claimant(s) :

Mr. Michael Deasy BL instructed by
Colm Burke & Co, Solicitors, Washington House,
33 Washington Street, Cork

Respondent(s) :

No legal representation. (A note was taken on behalf of the liquidator.)

The determination of the Tribunal was as follows:-

The written claim stated that the claimant had commenced employment on 16 November 1987 but that she had received dismissal notice on 28 August 2008 and that her employment had ended on 24 October 2008. It was claimed that she had been unlawfully dismissed and that she should be entitled to a redundancy payment.

The respondent's notice of appearance stated that the respondent had been put into liquidation on 15 December 2008 and that the claimant had not been made redundant but, rather, had had her

employment terminated. It was denied that the claimant had been unfairly dismissed.

At the Tribunal hearing the respondent's representative stating that he would listen rather than adding to the notice of appearance. The claimant's contended that the burden of proof was on the respondent to show that incapacity was the reason for the termination of the claimant's employment. He stated that the claimant would say that she got her termination letter in August 2008 and that she was subsequently told of redundancy.

Giving sworn testimony, the claimant agreed that her employment had started in November 1987. She was a general operative who had continuous unblemished service until 2003 when she became ill. She sent medical certificates to the respondent.

The Tribunal was furnished with a copy of a letter dated 28 February 2008 to the claimant from NT (head of human resources for the respondent) which referred to a meeting held that day "to review the current situation" with regards to the claimant's "ongoing absence from work" and to "discuss any options open to us". The letter noted that the claimant had informed the respondent that she was "keen to return to work on light duties" and would like the respondent "to consider a phased return to work programme" for her. The respondent requested that the claimant's GP write to the respondent "with his informed opinion of what type of light duties we should be considering and what we should avoid."

The claimant told the Tribunal that the respondent had never said that her job was in jeopardy because of illness or that her position was untenable. Others at work were out similar lengths of time and, in fact, five or six were out longer than the claimant. They got redundancy payments. Most had longer service. Employees were told that the respondent was seeking redundancies.

The Tribunal was furnished with a letter dated 22 September 2008 from the respondent to the Minister for Enterprise, Trade and Employment regarding "proposed collective redundancies" at the respondent. The letter advised the Minister that the respondent was proposing to cease operations at its factory in Cork and that, "as a consequence, all of its employees employed in that facility may be made redundant". The respondent was "therefore proposing a phased closure from end October to end December 2008".

The claimant stated to the Tribunal that she had never told the respondent that she would not be able to return and that she would have accepted an alternative job.

Questioned by the Tribunal, the claimant said that her employment had ended in October (2008) and that the respondent had gone into liquidation in December (2008). She did not know if others had left before the December closure but she did not think so. She had medical opinion that she had not been able for her work. She had understood that she would qualify for redundancy.

The claimant said that she "did not want to go down that line" when she was asked if she had been out due to a work-related injury.

In a closing statement the claimant's representative said that the claimant was not alleging her illness to have been an occupational one but he submitted that the employer (which was now in liquidation) had falsely characterised the basis for termination of the claimant's employment. He submitted that the decision to wind up the company was taken well in advance of August 2008 and that the company had not tried to find other work for the claimant because redundancy was coming.

He sought the redundancy lump sum to which he submitted that the claimant was entitled. He accepted that there could be a deduction in respect of the claimant's "post-April 2005" certified absence.

Determination:

No evidence was offered to suggest that the claimant's employment was terminated by a dismissal due to incapacity. The appeal under the Redundancy Payments Acts, 1967 to 2007, succeeds and the Tribunal finds that the appellant is entitled to a redundancy lump sum based on the following details:

Date of birth: 02 October 1968
Commencement date: 16 November 1987
Termination date: 28 August 2008
Gross weekly pay: €400.00

The Tribunal deducts all of the last three years of the appellant's employment (29 August 2005 to 28 August 2008) as being non-reckonable service for the purposes of a redundancy lump sum award.

This award is made subject to the appellant having been in insurable employment under the Social Welfare Acts during the relevant period.

As awards for redundancy and unfair dismissal are mutually exclusive, the claim lodged under the Unfair Dismissals Acts, 1977 to 2007, is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)