EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	CASE NO.
EMPLOYEE claimant	UD261/2009
	RP237/2009
	MN259/2009
	WT104/2009

against

EMPLOYER - respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 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: Mr. K. Buckley

Members: Mr. M. Forde
Ms. P. Doyle

heard these claims in Cork on 30 October 2009 and 5-7 January 2010

Representation:

Claimant(s):
Mr. Ken O'Sullivan BL instructed by
Fitzgerald, Solicitors, 6 Lapps Quay,
Cork

Respondent(s):
Ms. Catherine Griffin BL instructed by
James G. O'Mahony & Co., Solicitors,
35 South Main Street, Bandon, Co. Cork

The determination of the Tribunal was as follows:-

The claimant was a clerical officer with the respondent which was a credit union. The claimant commenced employment in March 2002 according to her claim form (in March 2003 according to the respondent's representative) but her employment was terminated (with effect from 24 December 2008) by letter dated 25 November 2008. She lodged an unfair dismissal claim with the Tribunal.

In a written notice of appearance the respondent stated that the claimant had been passed fit to return to work by two separate medical assessors but that she had refused to return to work or give the respondent a return to work date. It was stated that the claimant had been asked to nominate a return to work date failing which it would be interpreted that she was resigning from her employment but that she had failed to reply to this request.

Case for the Respondent

At the beginning of the hearing of the case the respondent's representative stated that the respondent was open six days per week and that the claimant would work thirty-eight hours over five of these days. Each employee had an entitlement to one day off out of the six days that the respondent was open each week. That day off would be flexible by arrangement with the manager.

In 2003 and 2004 the claimant worked a five-day week. In 2005 the claimant and a colleague, on return from maternity, leave asked for a four-day week. This request was granted. The claimant would be free on Monday and Wednesday. She would work Tuesday, Thursday, Friday and Saturday. However, she often took Saturday as annual leave. The respondent facilitated her when it could though the bulk of the respondent's transactions took place on the busier days at the end of the week.

Subsequently, HW (a member of the respondent's management team) wanted to go part-time. She resigned from management as management could not be part-time. HW's post was advertised. LA was offered the management position and HW got a three-day week (Monday, Friday and Saturday). The respondent wanted another teller to cover the remaining days (Tuesday, Wednesday and Thursday). A contract was offered to someone in 2007 because another teller was required.

Subsequently, the claimant came to the manager looking for a three-day week. The manager said that he would explore this but it did not prove possible to accommodate the claimant. This refusal was made known to the claimant who contacted the respondent's directors seeking to change the decision. It was contrary to procedure that a member of staff go (over the head of management) to the board of directors.

It was concluded that the claimant could not be accommodated. There was a number of meetings about this. One involved a trade union official. The respondent tried to facilitate the claimant as much as it could by giving annual leave for Saturdays which the claimant found it hard to work and by letting her work through her lunchbreak and leave at 3.00 p.m. on Fridays in 2007.

Subsequently, the claimant, after seeking a half-day for 31 May 2008 (the Saturday of a bank holiday weekend), was out sick until her dismissal by letter of 25 November 2008 with effect from

24 December 2008.

During the claimant’s time out sick the respondent was concerned at the length of her illness. No return to work date was arrived at. The claimant was seen by two of the respondent’s employment health advisers who felt that the claimant was fit to attend a return to work meeting. The claimant could not attend the said meeting because she was unfit to do so.

The claimant was told by the respondent that the respondent would have to dismiss her if she could not go back. The respondent said that a three-day week might be a possibility. The respondent could offer two of the days the claimant wanted to work but not the third. Dismissal notice was issued.

Case for the Claimant

The claimant’s representative did not contest the respondent’s representative’s contention that the claimant’s employment had commenced in March 2003. In 2005 the claimant was let go from a five-day week to a four-day week. In late 2007 she sought to go to a three-day week by asking SG (the respondent’s manager). This was for childcare for a son born in 2005. The claimant asked SG to raise this with the respondent and thought that he might do so. She subsequently sent him a letter telling him that she would contact the board of management and did so that day looking for a three-day week.

The next day, the claimant was called to a meeting with SG at which SG was very agitated saying that the claimant should not go behind his back and that there would be consequences for raising this issue with the board of management. The claimant was accused of breaching procedure. Despite what she perceived to be bullying and harassment by SG, the claimant kept trying to work for the respondent and to get a three-day week.

At the end of May 2008 the claimant, on the advice of her GP, went on sick leave. She was ultimately dismissed after the respondent got its own medical reports as to when the claimant might be fit to return.

The Tribunal was now referred to a letter dated 5 September 2008 from CMcD (an employment health medical adviser) to SG which stated that, in CMcD’s opinion, the claimant should attend a meeting with SG “and discuss her perceived difficulties”. The letter stated that the claimant was “fit to attend such a meeting” but not that she was fit to return to work.

On 19 September 2008 the claimant’s GP wrote to SG that the claimant was “unfit to attend any return to work meeting as yet”.

The Tribunal was next referred to a letter dated 8 October 2008 from SH (another employment health medical adviser) to SG which stated that the claimant had been reviewed by SH on 7 October 2008 and had said that her recent certified absence from work had been due to interpersonal issues in the workplace. The letter added that the claimant was planning to meet with SG “in the near future to discuss these issues” and that, in SH’s opinion, the claimant was “fit to attend such a meeting” and that “without some attempt at resolving this issue the situation will not progress”. The letter continued: “If the issue cannot be resolved informally, the perhaps independent mediation could be considered and I believe that once the work issues have been

resolved then she should be able to return to work."

It was submitted that the medical reports did not support the claimant's dismissal. The claimant had been out since 31 May 2008. On 16 October 2008 the claimant, accompanied by DH (her brother-in-law) attended a meeting with SG and LA of the respondent. The claimant's representative submitted to the Tribunal that the claimant had been anxious to go back.

The Tribunal was now referred to a letter dated 20 October 2008 from the claimant's GP to SG stating that the GP had reviewed the claimant on 17 October 2008 and that he was "still absolutely of the opinion that she is completely unfit for work until further notice".

A letter dated 21 October 2008 from SG to the claimant contained the following:

"I refer to our meeting last Thursday, October 16th and as promised we have reviewed the rota to see if your proposal of working Friday, Saturday and Monday was feasible.

Unfortunately, due to the current schedules we are fully staffed on Monday, however, could I suggest Tuesday, Friday & Saturday as an alternative.

I also received a letter this morning from (your GP) and I will bring this to the attention of the board as they will need to assess the situation as your doctor has indicated that this is a long term illness with no likelihood of you returning to work at the credit union in the near future."

A letter dated 3 November 2008 from SG (enclosing phone numbers and an e-mail address for SG) to the claimant contained the following:

"The Board of Directors have instructed me that they want a return to work date from you as they can not hold your position open indefinitely.

The Board of Directors is aware that two medical assessments at EHA have passed you fit for work & that this is despite your own doctor saying you are unfit for the foreseeable future.

I must now inform you that if I do not receive a reply by Tuesday November 11th next this will be interpreted as your voluntary resignation from (the respondent).

This as you will understand is a very serious step but the credit union feels they are left with no other option at this time."

A letter dated 6 November 2008 from the claimant to SG expressed gratitude to the Board of Directors and to SG for their understanding of her situation and, stating that the claimant had on that day gone to her GP, stated that the GP had assessed her and wanted to see her again on 27 November to review her again. The claimant expressed hope that she would then be fit enough to return to work. The letter concluded:

"I was very upset when I read your last letter dated 21st Oct stating that it was a long term illness with no likelihood of me returning to work at the credit union in the near future. Under no circumstances did anyone indicate that I would not be returning to work as I love my job and loveworking for (the respondent)."

A letter from the claimant's GP to SG (also dated 6 November 2008) contained the following:

"I was shown your letter of 21st October 2008 by (the claimant). I feel you have misinterpreted my medical note of 20th October 2008 outlining that (the claimant) has "a long term illness with no likelihood of returning to work at the credit union." The actual situation is that she continues to be unfit for work at present. I will be reviewing her on Thursday, 27th November 2008 with a view to getting her back to work at the earliest possible time. She is anxious to return to work as soon as I feel she is fit to do so."

The claimant's representative contended that the claimant's receipt of her dismissal notice dated 25 November 2008 was "clearly a breach of procedures" and that SG had "jumped the gun". The respondent's representative here interjected to say that the dismissal had been from the board of directors and not from SG.

Closing Arguments:

After several days of evidence, the claimant's representative stated that all claims were withdrawn except the unfair dismissal claim.

The respondent's representative stated that the respondent's defence related to the claimant's illness and incapacity to return to work after a considerable period of time out of work. It was submitted that the respondent had been reasonable in its consideration of the claimant's illness. After receiving medical certificates the respondent sent the claimant to two employment health medical professionals. It was reasonable for the respondent to look for a return to work date subsequent to its meeting with the claimant on 16 October 2008.

It was submitted that it was reasonable for the respondent to dismiss the claimant after it did not get a return to work date for the claimant and that the claimant had frustrated her employment by not accepting a three-day week offered to her albeit that one of the three days did not suit her.

The respondent's representative, citing caselaw to support the respondent's case, stated that the respondent, in face of the claimant's long-standing illness and demands on the respondent's business, had given the claimant the right to be heard and had given her prior notice that dismissal was being considered.

The claimant's representative submitted that there had been a blatant breach of procedures by the respondent in that the board and SG had been either negligent or intentional. After SG had indicated that that authority lay with the board the claimant's representative put questions to the board's vice-chairman (hereafter referred to as BV). BV had said that the decision to dismiss the claimant had been taken in May 2008. Going on that testimony, it was submitted that all arguments about medical reports from late 2008 had been smoke and mirrors. The board had been asked to furnish the claimant's personnel file before the case but had not done so.

It was also submitted that the respondent could not "move the goalposts" as to its defence by arguing that the claimant was dismissed because she was fit to go back and because she was not fit to go back. Also, BV had made the point in his testimony that there had been a downturn in the economy. Therefore, it was challenged that there had been cost implications for the respondent in the claimant's ongoing absence given that no-one had been taken on to cover for the claimant while

she was out and that no-one had subsequently replaced her. The respondent had not needed her back for cost reasons. A legal textbook was cited to support the contention that an absent employee need not be dismissed where no commercial reasons could be shown to justify the dismissal.

The claimant's representative stated to the Tribunal that SG had placed huge emphasis on the importance of the board but that, even though the burden of proof was on the respondent, no documentary proof of any decision by the board or of any instruction by the board to SG was furnished to the Tribunal although it was very important that a board have minutes. SG had indicated that he had been just a functionary but BV had said that SG gave advice and offered opinions. It seemed that the board had relied quite heavily on SG and on two medical reports which BV had never seen but had thought had been read out fully to the board. It was submitted that SG had not shared these reports. The claimant's legal team had only got them by FOI. The respondent had not accepted at the first Tribunal hearing that that it had got the claimant's letter dated 6 November 2008 but now did so accept. BV could not recall if he had ever seen that letter. SG got it but the board did not seem to have got it. Board minutes were obviously needed but were never produced. In any event, BV told the Tribunal that the dismissal decision had been taken in May 2008.

The claimant had received no written warnings with regard to previous absences. She had had very serious maternity-related issues. Such absences were not mentioned on the respondent's notice of appearance and it was not put to the claimant that past history of absence had a part in her ultimate dismissal.

It was submitted that a three-day week that was never advertised and was given to another lady (SS) was always going to SS and that the claimant was not going to get it. The respondent did not call an official from the claimant's trade union to give evidence.

Regarding the claimant's contacting the board in alleged breach of procedure, it was submitted that there had been no proper bullying procedure. The board's secretary had never said to go back and go through SG. If the respondent's procedure was that the treasurer was the next person to contact after SG it was submitted that it was not wrong to contact the board if an employee wanted to contact the treasurer by that means.

The claimant's representative said that the respondent made out that the claimant's sense of grievance about being left out of a photo and distribution of sweets was not raised with SG and JM (SG's second-in-command) but it was submitted that the respondent had imputed notice through a medical professional and that, far from the claimant having been like a spoiled child who had not got the exact three-day week that she wanted, the claimant's GP had said that the respondent was to blame for the claimant's state. The GP said that the claimant had had a problem dealing with SG. The respondent's employment health medical advisers had each only seen the claimant once. The GP thought that all was going well and said that he would see the claimant on 27 November 2008. BV said that he had differing medical reports and that he wanted medics to meet but the GP had said that he had heard nothing about doctors meeting. It was submitted that BV had instructed that this should happen and that the instruction had not been carried out. It was submitted that it was a huge omission by the respondent that there was no letter on file about this.

It was submitted that it was significant that one of the respondent's medical advisers had mentioned to the respondent the possibility of appointing an independent mediator but that there were no board minutes about this although this would have been a modern approach to alleged bullying and harassment. It was submitted that there had been no minutes to establish that the medical report

mentioning the possibility of appointing an independent mediator had ever been read out to the board.

The claimant's representative cited caselaw to support the view that the claimant was entitled to recover compensation in respect of time when she was unfit for work if her disability was cause by her employer. He did not feel that the respondent had established that its employment contract contained an adequate bullying or harassment procedure and that the respondent's dismissal letter had set her back. However, the claimant had applied for other employment to try to mitigate her loss.

It was submitted that the respondent's dismissal letter was flawed, that the claimant was not told that she could appeal and that the Tribunal should date the dismissal from May 2008 as mentioned by BV. It was submitted by the claimant's representative that the respondent had caused the claimant's illness and that the Tribunal should award the maximum compensation permitted by the unfair dismissals legislation.

Given the opportunity to respond to the submissions of the claimant's representative, the respondent's representative began by stating that SG and BV were not absent at the end of the hearing out of any disrespect but rather because a member of BV's family had been taken to hospital and because SG, who was asthmatic, had had a medical appointment.

The respondent's representative explained that the respondent had to let a case run and go with the result and that it was a matter of fact whatever the Tribunal decided regarding the claimant's loss. However, it was submitted that the date of loss was taken from the date of dismissal which was 24 December 2008. It was argued that the claimant's representative was relying a lot on what BV had said but that, as well as May 2008, October and February had also been mentioned. It was submitted that what BV had said should not be the only factor and that it was up to the Tribunal to decide what to do about the number of weeks of loss.

The respondent's representative also made the point that the respondent's written notice of appearance had not been filled out by a legal person but rather by SG. However, it was submitted that the respondent could run its case as it saw fit.

Determination:

The Tribunal notes that the claims lodged under the Redundancy Payments Acts, 1967 to 2007, the Minimum Notice and Terms of Employment Acts, 1973 to 2005, and the Organisation of Working Time Act, 1997, were withdrawn.

Having carefully considered the case made by each side, the Tribunal found that the claimant had been unfairly dismissed on 24 December 2008 but that she had contributed to her dismissal. The respondent did not handle the situation well but the claimant did say that she would have gone back to work for the respondent if she had got the particular three-day week working days she

ad wanted. In all the circumstances of the case, the Tribunal deems it just and equitable to award theclaimant compensation in the amount of €14,500.00 (fourteen thousand five hundred euro) in allowing the claim under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This ________________________

(Sgd.) ________________________
(CHAIRMAN)