

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE

- **claimant**

RP774/2009

UD708/2009

against

EMPLOYER

- **respondent**

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms S. McNally

Members: Ms M. Sweeney
Mr D. McEvoy

heard this claim at Cork on 11th March 2010

Representation:

Claimant :

Mr Alan O'Leary, SIPTU, Connolly Hall, Lapps Quay, Cork

Respondent :

A & L Goodbody, Solicitors, I.F.S.C., North Wall Quay,
Dublin 1

Mr Paul O'Sullivan represented the Liquidator

The determination of the Tribunal was as follows:-

At the outset the claim under the Unfair Dismissals Acts, 1977 to 2007 was withdrawn by the claimant's representative

Claimant's case:

The claimant commenced his employment with the respondent as a general operative in August 1981. He was placed on temporary lay off from 15th December 1981 to 24th May 1982. There were no warnings in relation to performance. In September 2002 he was diagnosed with cancer and following surgery had been absent from work on sick leave from September 2002 until October 2008. The respondent was supportive in his illness and the claimant complied with the absence policy. On 5th September 2007 the HR Manager (hereinafter referred to as HR) wrote to the claimant asking him to attend for a medical assessment on 17th September 2007. Following the medical the claimant was deemed fit to return to work although he himself felt unfit to do so. A letter dated 20th September 2007 issued from HR requesting the claimant to return to work on 26th September 2007. The claimant's GP had been certifying him unfit for work and the claimant confirmed by letter dated 24th September 2007 to HR that an appointment with his Radiologist and Oncologist had been arranged for October. The letter was acknowledged and the respondent confirmed that they looked forward to welcoming him back to work "in the very near future".

The claimant was then invited to attend a "progress meeting" with HR on 14th November 2007 but there was no suggestion that he could have a colleague/ representative accompany him to the meeting. The respondent appeared to be supportive of the claimant and following this meeting it was agreed to facilitate a phased return to work which was to commence on 26th November 2007. The claimant did not feel able to return to work on the appointed date. He was examined by a Medical Assessor through the Department of Social and Family Affairs on 14th December 2007 and was found to be unfit for work. On 21st January 2008 the claimant was issued with a letter similar to that which had been issued to all employees entitled "route to survival", of the respondent company and it stated that all efforts would be made to assist him in returning to work. The claimant was continuing to submit medical certificates to the respondent. By letter to the claimant, dated 13th February 2008 a meeting was scheduled for 27th February 2008. At this meeting the claimant was asked to consider a proposed schedule for a phased return to work. Two further review meetings were arranged for 10th and 24th April 2008 and a potential return to work on light duties was discussed. While the claimant had been given the all clear by his Oncologist, his GP had certified him unfit for work for an indefinite period of time.

The claimant was then asked to attend an appointment with the company doctor on 9th June 2008. In this doctor's opinion he felt that the claimant was fit to return to work on a phased basis, on light work initially and then "gradually building on that to see how he would get on". A proposed phased return date of 8th July was given to the claimant however he was unable to return as prior to this date he sustained an injury to his leg and had to use crutches. A further appointment was arranged with the company doctor for 11th July, which was cancelled by the claimant as he could not drive. By letter dated 15th July 2008 from HR, the claimant was asked to attend a meeting on 23rd July. This letter stated that failure to attend or agree a return to work date could lead to termination of his employment. This was the first time there was any mention of a threat to his job. This meeting was re-scheduled by HR for 5th August 2008. At this meeting the claimant stated that the company doctor did not examine him medically and he shouted at the claimant. His GP continued to certify him unfit for work. HR stated that she would contact his GP and the claimant was issued with a proposed schedule for returning to work on a phased basis, on light duties for week commencing 11th August continuing to week commencing 15th September 2008. The claimant was not told that he would be dismissed if he did not give a return to work date. Two days later by letter dated 7th August the claimant's

contract of employment was terminated, effective from 8th August 2008. He was entitled to eight weeks notice and was told that the final day of his employment was 3rd October 2008.

On 1st September 2008 the claimant appealed the decision to terminate his employment. He did not think it was fair since the Head of HR had agreed to contact his GP. By letter dated 3rd September 2008, from the General Manager (GM), which referred to a company briefing on 7th August 2008, the claimant was notified of "proposed collective redundancies" at the respondent company and notice was also sent to the Minister for Enterprise Trade and Employment. In this letter it also stated that the respondent company would be "honouring employees' contractual and statutory rights, including a statutory redundancy payment". In response to the claimant's appeal of his dismissal he received a letter dated 4th September from the GM stating that any appeal should be addressed to the "appropriate external body". The claimant's GP confirmed his up-to-date medical condition by letter dated 5th September 2008. In the GP's opinion the claimant would be fit to return to work on a phased basis from January 2009. On the 3rd October 2008 the claimant received any outstanding holiday money due.

The claimant did not receive statutory redundancy and his understanding was that other employees have received statutory redundancy including those who had been on long-term sick leave. He believed the respondent dismissed him in an attempt to avoid paying him redundancy.

In answer to questions from Tribunal members the claimant stated that he continued to send in sick certificates to the respondent. On 6th August 2008 he received a telephone call from a colleague that the respondent company had announced that they were pulling out of Ireland.

The Tribunal also heard evidence from a shop steward who was also a general operative and charge hand. He attended the meeting with the claimant on 5th August 2008. The claimant was not told that he needed to give a return to work date. No deadline was given for him to consider a phased return to work. It was a shock to get the letter of dismissal. He was involved in the discussions in respect of the redundancies. The company did not wish to pay redundancy to the employees. The employees were supposed to engage in redundancy discussions and they were then told of a possible take over. The employees gave their support hoping to save their jobs. The company went in to Examinership first and then went in to Liquidation on 16th December 2008. The employees received statutory redundancy through the Social Insurance Fund. A sit-in at the premises was threatened by the employees as monies were outstanding in respect of notice and a back week. The Liquidator paid the employees a loan to resolve matters. The employees were devastated.

In answer to questions from Tribunal members witness stated that in or around two years prior to its Liquidation the company was taken over by SFI. They would not accept Unions. For the first year there was no change in management but then gradually "people" started arriving. There were others on long-term sick leave like the claimant and he could not say whether or not the company was selective in trying to get these employees back to work. There were no negotiations with the Union as to whether the employees on long terms sick leave would be paid redundancy. He presumed that all employees received letter dated 3rd September 2008 in relation to collective redundancies. Witness was involved in the "company briefing" on 7th August 2008 as referred to in letter dated 3rd September 2008. While there were obvious fears, there were no indications of job losses prior 5th August, 2008. From January 2008 there was a change of tone in that personnel had arrived from the UK. The soup operations had been moved back to the UK and employees were put on a three-day week while temporary employees were not put on temporary lay off. The employees knew something was up but it was felt that anything would be better than closure. From January 2008 the HR manager started coming to Cork and they know

now that they were only playing for time.

Respondent's case:

No evidence was offered by the Liquidator on behalf of the respondent. The representative was present only to take notes.

Determination:

The Tribunal is satisfied that the claimant is entitled to a redundancy lump sum under the Redundancy Payments Acts, 1967 to 2007 base on the following:

Date of Birth	03 rd February 1963
Date Employment commenced	17 th August 1981
Date Employment ended	03 rd October 2008
Gross weekly wage	€364.00

The Tribunal deducts all of the last three years of the claimant's employment (2nd October 2005 to 3rd October 2008) as being non-reckonable service for the purpose of calculating a redundancy lump sum award.

The claimant was on temporary lay off from 15th December 1981 to 24th May 1982

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

The claim under the Unfair Dismissals Acts, 1977 to 2007 was withdrawn.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

