

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYEE – *claimant*

CASE NO.
UD1455/2009

against the recommendation of the Rights Commissioner in the case of:

EMPLOYEE
v
EMPLOYER – *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms F Crawford BL

Members: Mr G Andrews
Ms A Moore

heard this appeal at Dublin on 23rd July 2010 and 19th November 2010

Representation:

Claimant(s): Mr David Miskell
Mandate Trade Union
O'Lehane House, 9 Cavendish Row, Dublin 1

Respondent(s): Mr Michael McGrath
IBEC
Confederation House, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

This case was brought before the Tribunal by way of an employee appealing the recommendation of a Rights Commissioner under the Unfair Dismissals Acts, 1977 to 2007, ref: r-069439-ud-08/JT.

Respondent's Case:

The respondent company operates a chain of supermarkets. The Store Manager of the claimant's branch gave evidence that he commenced at the branch the claimant worked at in March 2008. The claimant operated a till at the checkout. She had been an employee for nine years when she went on sick leave in October 2007. She was suffering from anxiety, panic attacks and depression. The

claimant was dismissed after being on sick leave for nine months. The Personnel Manager dealt with the claimant regarding her absence. Under the company sick pay scheme sick leave is paid for eight weeks. After eight weeks the employee is considered to be on long term sick leave which is unpaid. This is contained in the staff handbook. The staff handbook states that 'it will not be possible for your Manager to keep your position open indefinitely in cases of long term absence'.

Management are provided with a policy document for dealing with long term sick leave. Management seek a return to work date within twelve months. This document is not supplied to staff members.

The Store Manager was present at a meeting on August 21st 2008 with the Personnel Manager, the claimant and her trade union representative. They discussed the Occupational Health Manager's report on behalf of the company produced in July 2008 and the claimant's psychiatrist's report. The company's Occupational Health Manager reported that the claimant was unfit for the foreseeable future and was unlikely to return within the following year. The claimant's psychiatrist's letter stated that the claimant would be unfit to return to work until January 2009.

The purpose of the meeting was to determine an exact return to work date. He did not consider that January 2009 was an exact return date or that it was a reasonable time frame and he therefore concluded that there was no fixed return date. There was no note produced of the meeting. He decided to terminate the claimant's employment.

During cross-examination he stated that the policy of managing sick leave was always followed in the store. He consulted with the Human Resources section of the respondent company. The management guidelines instructed that the length of long-term sick leave tolerated by the company depended on the service of the employee. The policy was not agreed with the trade unions. Employees were unaware of this as it was not detailed in the staff handbook or in the contract of employment. He was looking for a return to work date within twelve months of the commencement of the claimant's sick leave. The Store Manager also confirmed that the company never sought clarification from either the company doctor or from an alternative comparable expert to assess the report of the claimant's Psychiatrist report considering the variation given on return to work dates.

He agreed that only the letter dated July 28th 2008 informed the claimant that her job was at risk. None of the previous letters made reference to it. He didn't think it was appropriate to inform an ill person that their job was at risk. He didn't offer the claimant the opportunity to appeal the decision as he did not expect there to be any change in her return to work date within the five days normally allowed for appealing. He agreed that it was a breach of the company procedures. During the year that the claimant was on sick leave the company carried out a review of long-term absences throughout the company.

The Personnel Manager of the Store gave evidence that she was involved in the decision to dismiss the claimant. Before deciding to dismiss the claimant she considered the medical evidence and whether there was a definite return to work date.

After an employee has been on sick leave for more than three months they are sent to the company doctor. The claimant attended the company doctor on three occasions. The witness wrote to the claimant on several occasions regarding doctor's appointments and to invite the claimant to discuss the situation. She spoke to the claimant on the phone so that the claimant did not have to attend the Store.

The first review from the doctor stated that the claimant would be unfit for work for at least six weeks. The claimant did not return to work after the six week period. The claimant missed the next doctor's appointment due to getting her dates mixed up. She attended the next appointment on April 4th 2008. The claimant attended a further appointment on July 17th 2008. The report from this appointment was that the claimant was unlikely to return within a year.

On foot of this report the witness invited the claimant to a meeting to discuss the situation as the company could not hold the claimant's job open indefinitely. In her letter to the claimant she requested that if the claimant had an alternative view from her own doctor she should bring such a report with her to the meeting. The letter to claimant included that:

In the event that you do not attend this meeting, we must assume that you do not have an alternative medical view to that of the company doctor and, on that basis, we will have no option but to then put you on notice of termination of your contract of employment on the grounds of ill health.

The claimant attended the meeting and produced a report of her treating Psychiatrist which stated that she would be fit to return the following January. The witness did not consider this to be a reasonable time frame. She was following a guideline issued to management which stated that employees with less than ten years' service are expected to return to work within nine months of commencing sick leave. Employees with more than ten years' service are expected to return within 12 months. The witness was looking for a return date within 12 months. She would not have terminated the claimant's employment if her return date had been within 12 months. A return date in January would mean that the claimant was absent for fourteen months. The claimant's employment was terminated on September 26th 2008.

During cross-examination the witness stated that the policy regarding the length of sick leave tolerated according to the length of service was not documented. The claimant was unaware of it. The policy is not written for employees. She did not notify the claimant that her job was at risk until the letter of July 28th 2008.

She agreed that the claimant provided a medical opinion from her psychiatrist, but she did not consider it to be an alternative opinion. She did not know what qualifications the company's Occupational Health Manager held. It was not part of company policy to get a second opinion in regard to the report submitted by the claimant. It was not stated what period of time was too long to be on sick leave. The witness confirmed that although the Psychiatrist report stated that the claimant would be "unfit to work until January 2009" she was of the view that this was indefinite and not definitive.

The witness did not have the claimant's file anymore as it had been submitted to the HR department when the claimant first lodged a claim with the Rights Commissioner Service. A copy of a receipt of a staff handbook was submitted which appeared to have been signed by the claimant, but it had not been filled in the normal way and was not dated. The witness liaised with her regional manager regarding the dismissal. She agreed that January was too far as a return date.

Claimant's Case:

The claimant's employment commenced in October 1999. The employment was uneventful until she went on sick leave in October 2007. She started having difficulties with where she was living and began having panic attacks which made her life very difficult. She applied to the city council to move to another location. She was put on a priority list to move.

She kept in touch with the Personnel Manager by phone. The communication between them was always friendly. She missed one of the company doctor's appointment's as she mixed up her dates. Her psychiatrist recommended that she would be able to return in January 2009 and she was strongly motivated to get her life back on track.

During cross-examination the claimant contended that she had not been given a copy of the staff handbook. She agreed that the Personnel Manager treated her reasonably while she was on sick leave and did not pressurise her to return to work. She considered that she had gone to the meeting with a return to work date.

She did not contact the Store Manager to appeal the decision as it was not offered and she felt he made it clear that he did not want her to return.

The claimant confirmed that she wished for re-instatement in her previous employment. The claimant also confirmed that she had been out of work since the dismissal and also that she had been able for work from January 2009.

Determination:

This matter comes before the Tribunal by way of an Appeal from the Recommendation of the Rights Commissioner.

The Tribunal concludes that the respondent herein did not give adequate regard to the Psychiatrist report which was tendered by the claimant nor did the respondent seek an alternative comparable report from a competent Expert given the contents of the report and the clear return to work date set out in the report. At all times, it is accepted that a prudent employer has a right to make decisions based on Occupational Health professionals, however when an alternative view has been advanced by a competent expert in a Specialist field, this should have been investigated.

The Tribunal also concludes that the claimant was unaware as to the policy document relating (which was accepted by the respondent) to the duration that an employee could be off work and how long her employment would be left open to her from the Long Term Illness Policy as there were no details in either the Staff Handbooks or the Contracts of employment. The claimant was also given no details by her employers as to what was defined as a reasonable return date to work. There was a guidance given to management only. The claimant was further given no Right of Appeal and that there were breaches of procedures by the respondent in the manner in which she was terminated from her employment.

Having carefully examined all the evidence that was tendered in the Appeal (including all submissions made by the Parties and case law opened to the Tribunal on behalf of the respondent) the Tribunal unanimously finds that the claimant was unfairly dismissed under the Unfair

Dismissals Acts, 1977 to 2007.

In the circumstances, the Tribunal awards the following redress to the claimant which the Tribunal considers in all the circumstances to be appropriate; that the claimant be re-instated by the respondent in the position which she held immediately before her dismissal on the same terms and conditions on which she was employed immediately prior to that dismissal and such re-instatement to be deemed to have commenced on the day of the dismissal, subject to the acknowledgment and provision that the claimant is only to receive remuneration from the 1st February 2009.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)