

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:
EMPLOYER

-appellant

CASE NO.
UD2368/2009

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

EMPLOYEE *-respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. Clancy

Members: Mr. G. Andrews
Ms H. Henry

heard this appeal at Ennis on 14th June 2011

Representation:

Appellant: Mr Chris O'Donovan, IBEC, Regional Director's Office, Gardner House,
Charlotte Quay, Limerick

Respondent: Mr. Ger Kennedy, SIPTU, 4 Church Street, St John's Square, Limerick

This case came before the Tribunal by way of an employer appeal the of Rights Commissioner Recommendation ref: r-074548-ud-09. Hereinafter the appellant will be referred to as the employer and the respondent the employee.

Appellant's (employer) Case

The employer is a medical instrumentation company. The employee worked as an operative in the employer's factory. The employee signed her contract of employment on the 13th of February 1991, which includes dismissal procedures. The employee was also issued with a company handbook in 2000, updated in 2006 and agreed with SIPTU. The employee applied for parental leave and force majeure leave; both application forms were taken from the company handbook.

The employee was on sick leave from the 30th of April 2007. The long term sick leave procedure was enacted by requesting a meeting with the employee by letter of the 10th of September 2007. The letter outlined that the meeting was, *'to discuss your suitability and availability to return to work for (the employer) in the future.'* The employee submitted a medical report dated the 12th of September 2007 stating that she was unfit to return to work at that time. As a result of that report the employer did not contact the employee again until the 9th of October 2007 where they

informed her an appointment had been made for her with the company doctor. This appointment was made for the employee as part of the employer's investigation procedures.

The employer received the report from the company doctor dated the 18th of October 2007, which stated,

'she is presently unfit to return to work. I would like to see her again in about 4-6 weeks time. Hopefully by then there will be some improvement ...and maybe in a position to give a likely return to work date.'

The employer did not follow up on this report, as they did not want to aggravate the symptoms as outlined in the report from the employee's doctor.

On the 23rd of October 2008 the employer made a second appointment for the employee with the company doctor. The report concluded that, *'with regards to work, it is unlikely that this patient will be able to return to work for the foreseeable future.'*

The employer wrote to the employee on the 27th of November 2008 requesting a meeting *'to discuss your suitability and availability to return to work for (the employer) in the future.'* This meeting was held on the 3rd of December 2008. The employee did not bring a representative to this meeting; the employer believes this was due to the confidential nature of matters to be discussed. The employee's personal circumstances and sick leave were discussed at the meeting and the employer pointed out the absence section in the staff handbook. The absence section states that,

'where an employee is suffering from a long term illness and there is no expectation of a return to work within a reasonable timeframe, the company may eventually declare the contract of employment at an end.'

The employee informed the employer that she understood that they could not keep her position open indefinitely but she would be back by the following March; the employer responded quoting the company doctor as saying it would be a year before she would be fit to return to work.

Following that meeting the employer decided to dismiss the employee. The decision was made as a result of the discussions with the employee and the company doctor's conclusions; he did not think she would be fit to return to work. The employer informed the employee at the end of the meeting that she was dismissed and of her right to appeal this decision. The employee was upset and said that according to her doctor she could return to work in three months; in response the employer pointed out the company's grievance procedure.

On the 15th of December the employer received a letter from the employee's doctor stating she would be able to return to work in March 2009. SIPTU did not make any representations on behalf of the employee. If the employer believed the employee would have been fit to return to work in March he would not have dismissed her.

The employee was not explicitly informed she could bring a representative to the meetings or that the meetings could lead to dismissal; she was aware she could have a representative and the employer pointed out the absence section of the handbook which stated her contract could be cancelled.

Respondent's (employee) Case

The employee worked for the employer for 20 years as an operative. The employee was on sick leave when she received a letter requesting she attend a meeting in December 2008. The employee

understood this meeting was to find out when she would be able to return to work. Prior to this meeting the employee visited the SIPTU office for advice; she was informed that this could not be a dismissal meeting so did not request a representative.

The meeting was held on the 3rd of December 2008. At the meeting the prospect of returning to work was not mentioned; the employer informed her that she was dismissed. The employee was not advised she could have a representative at this meeting. The company's medical report which was relied on for dismissal was not shown to the employee; it was posted to her house post dismissal. The employee was never issued with an updated copy of the company handbook; she has the older version which does include the same long-term illness policy. The long-term illness policy states, *'No action will be taken before a full investigation has been carried out by the company and the employee has been informed of the process.'*

The employee was not aware of her right to appeal the decision to dismiss her. To date the employee has been unavailable for work.

Determination

Having carefully considered the evidence adduced by both parties the Tribunal find that the employer failed to follow their own procedures as outlined in the company handbook. The long-term illness policy states that *'No action will be taken before a full investigation has been carried out by the company and the employee has been informed of the process,'* the Tribunal find that such rights were not afforded to the employee.

The Tribunal varies the recommendation of the Rights Commissioner **ref: r-074548-ud-09** and having regard to all the circumstances finds that re-instatement as defined in Section 7 (1) (a) of the Unfair Dismissals Act 1977 is the most appropriate remedy.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)