EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:	CASE NO.
EMPLOYEE- appellant	UD86/2010

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

EMPLOYER- respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K.T. O'Mahony BL

Members: Mr. D. Hegarty
Mr. J. Flavin

heard this appeal in Cork on 10 November 2010
and 24 February 2011

Representation:

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Appellant(s):
Ms. Lorraine O'Brien, Mandate Trade Union,
Southern Division, IBS House, 1-2 Emmet Place, Cork

Respondent(s):
Mr. Eamonn McCoy, IBEC,
Confederation House, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

This case came to the Tribunal as an employee appeal under the Unfair Dismissals Acts, 1977 to 2007, against Rights Commissioner Recommendation r-077889-ud-09/POB.

Summary of the Evidence

In December 2004 the appellant commenced full-time employment with the respondent (a major supermarket multiple). In December 2007, following a traumatic family tragedy, which received much media attention, the claimant was absent on sick leave and came under the care of a psychiatrist. The respondent's evidence was that it has a policy of supporting an employee on long-term absence. An employee was considered to be on long-term absence after being out for

eight weeks.

In early February 2008 the claimant was invited to see the company doctor. As her sick pay ended on 16 February 2008 a welfare meeting was held with the claimant around the end of February and her shop steward later that month to establish her status and whether she could give a date for her return to work. The claimant was not fit to return. A further meeting, arranged for mid April was postponed at the claimant's request because her mother was critically ill at this time. Her mother died shortly after.

The claimant missed a meeting scheduled for 3 July but attended a meeting on 12 September 2008 to discuss the Health Referral Report based on her recent visit to the company doctor and her possible return to work. The report confirmed that the appellant was on medication for depression and fatigue and was attending a specialist for appropriate care. The doctor's opinion was that she would be unfit for work in the short to medium term as a result of bereavement and he recommended day shifts for at least a year on her return.

At the respondent's further request the claimant visited the company doctor in early December 2008. Following receipt of the Health Referral Report on that visit the appellant was invited to a meeting on 13 January 2009 and was asked to make contact to reschedule the meeting if the date was not suitable. The appellant did not show for the meeting. It was the respondent's case that the appellant failed to notify it that she would not be attending. The appellant maintained that she had left a message with customer service that she would not be attending. The meeting was ultimately rescheduled for 31 January 2009 and the appellant was in attendance. The Health Referral Report stated *inter alia:*

1. The company doctor states that she is currently under regular specialist care for her depression. Her specialist feels that she is currently unfit to return to work and the company doctor feels that due to this there is no foreseeable return to work date available. However [the appellant] has stated to the doctor that she is very keen to return to work and feels that she will be in a position to do so after Christmas; however the doctor notes that in February 2008 she was similarly optimistic.

The report continued to suggest that the appellant be given a return date of 1 February 2009 in default of which her employment should be terminated. The occupational health manager advised to arrange a meeting and plan for a phased return to work commencing on 1 February 2009.

At the meeting discussions took place on her return to work on a phased basis. The claimant indicated that she was attending the specialist clinic every three weeks. Her psychiatrist could not give a return to work date. The claimant indicated that on her return she only wanted to work 25 hours, and would only work mornings (not beyond 4.00pm) and only on the till. While the doctor had suggested a return to work date of 1 February the store manager (SM) extended this to 16 February 2009 to take account of the appellant's forthcoming visit to her specialist. SM could not recall whether the appellant was told the purpose of the meeting.

The final meeting was held on 13 February 2009, subsequent to the appellant's visit to her specialist. The appellant still could not give a return date. The respondent felt it could no longer keep the appellant's position open given that she could not give a return date and by letter of 27 February 2009 the respondent dismissed the appellant. The letter of dismissal concluded as follows:

"In the event that, at a later date, you manage to achieve full fitness and are in a position to carry out all function (sic) associated with the role you held with [the respondent], we would me [sic) more than happy to consider an application from you for re-employment." The letter did not offera right of appeal.

Determination:

The Tribunal rejected the argument made on behalf of the respondent at the outset of the hearing contending that the respondent's decision to dismiss the appellant on 16 March 2009 on grounds ofill health was vindicated by reason of the fact that at the time of the hearing before the rights commissioner on 29 September 2009 the appellant was still unfit for work. The fairness of a dismissal is to be judged on the factors weighing on the employer's mind at the time of the dismissal and on whether fair procedures were followed and not by taking into consideration someevent or state of affairs several months after the dismissal. The respondent relied on the commonlaw doctrine of frustration. The Tribunal considered the explication of this doctrine as enunciated in *Marshall v Harland & Wolff Ltd and the Secretary of State for Employment.* [1972] IRLR 90.where in its judgment the court stated:

> *"Was the employee's incapacity, looked at before the purported dismissal, of such a nature, or did it appear likely to continue, for such a period, that further performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him and agreed to be accepted by the employer under the agreed terms of his employment."*

The Tribunal also found assistance in the judgment of Phillips J in *Egg Stores (Stamford Hill) Ltd v Lebovichi* [1977] ICR at p.265 which was adopted by Sheldon J in the English Court of Appeal in *Norcutt v Universal Equipment Co. (London) Ltd* [1986) ICR 414, where he set out that there may be two kinds of events relied on to bring about the frustration of the contract of employment:

> *" There may be an event (e.g. a crippling accident) so dramatic and shattering that everyone concerned will immediately realise that to all intents and purposes the contract must be regarded as at an end. Or there may be an event, such as illness or accident, the course and outcome of which is uncertain. It may be a long process before one is able to saywhether the event is such as to bring about the frustration of the contract. But there will have been frustration of the contract, even though at the time of the event the outcome wasuncertain, if the time arrives when looking back, one can say that at some point (even if isnot possible to say precisely when) matters had gone on so long and the **prospects for thefuture were so poor, that it was no longer practical to regard the contract as still subsisting."*

The Tribunal is not satisfied that the common law doctrine of frustration operated in this case to discharge the contract of employment. It is not satisfied that further performance of the appellant's obligations in the future would either be impossible or would be a thing radically different from that undertaken by her. In the circumstances, given the nature and cause of the appellant's illness, the fact that there was a further exacerbating event in or around mid 2008 and the fact that the respondent was aware of the appellant's wish to return to work, the Tribunal cannot accept that the

"prospects for the future were so poor, that it was no longer practical to regard the contract as still subsisting."

The Tribunal feels that it is not always helpful to deal with cases of incapacity by importing the common law doctrine of frustration into contracts of employment, in particular where a statutory provision exists for dealing with the particular issue that has arisen. The respondent, in the alternative relied on section 6 (4) (a) of the Unfair Dismissals Act 1977, which deals with the employee's incapacity to do her work. In so doing, the respondent relied on the same set of facts to discharge the statutory onus placed on the employer under the Act.

In *Bolger v Showerings (Ireland) Ltd* Lardener J in the High Court set out the criteria by which a dismissal for incapacity is to be deemed fair. These include *inter alia:*

1. that the incapacity was the reason for the dismissal;
2. the reason was substantial;
3..the employee received fair notice that the issue of his dismissal for incapacity was being considered; and
4. the employee was afforded an opportunity of being heard.

Having examined the respondent's four letters to the claimant in 2008 (14 February, 13 June, 18 July, 12 December) and the letter of 5 January 2009 inviting her to meetings to discuss a possible return-to-work date there is no indication whatsoever to her in any of these letters that her dismissal is being contemplated in the event of her inability to return. The respondent's allegation that the appellant herself had raised the issue as to whether she might be let go at the meetings of 12 September 2008 and 31 January 2009 was vehemently denied by the appellant. Where dismissal is being contemplated the respondent should so inform the appellant in the clearest of terms. As the Tribunal is satisfied that the appellant did not receive "fair notice" or any notice that her dismissal for incapacity was being considered the Tribunal finds that the dismissal was unfair. Accordingly, the appeal under the Unfair Dismissals Acts 1977 to 2007 succeeds.

Taking into account the appellant's preferred remedy of re-instatement, the fact that the appellant, once she was certified fit for work, failed to mitigate her loss and failed to do so throughout a long period when the respondent was recruiting staff, it is the unanimous decision of the Tribunal that the appellant be re-engaged as of 1 September 2011 on her original terms and conditions of employment.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____