

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:
EMPLOYEE

CASE NO.
RP1778/2010

against

EMPLOYER
under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey B.L.

Members: Mr J. Flanagan
Ms M. Maher

heard this appeal at Dublin on 6th April and 14th July 2011

Representation:

Appellant : Ms Mary Duffy King, SIPTU, Liberty Hall, Dublin 1

Respondent:

The decision of the Tribunal was as follows:

Since the respondent maintained that the appellant was still an employee of the company it felt it had no case to answer regarding the appellant's alleged cessation of employment with it.

Appellant's Case

Through a number of takeovers and transfer of undertaking process the appellant commenced employment with the respondent in April 2003. He classified his status with the respondent as a delivery driver who undertook heavy work. In late 2008 and in the service of his employer the appellant suffered such injuries as a result of a road vehicle crash that necessitated him acquiring medical certificates stating he was unable to work from that date. Those certificates were issued regularly and continued to be furnished to the respondent up to and beyond the appellant's application for redundancy.

In early November 2009 the Labour Relations Commission published a proposal for the orderly closure of the respondent's predecessor at two locations. Under the title Redundancy Terms was the heading Long Term Absence. This read as follows: *On receiving a doctor's certificate confirming full fitness to return to work by 27th November the company will apply the terms of this agreement. Other cases will be reviewed by the company on person-by-person basis.*

The appellant received a letter from the respondent dated 9 November 2009 stating his position

with the company was being made redundant with effect from 27 November. The appellant denied receiving a further letter dated 12 November addressed to him at the same address and sent by the same person. That letter effectively rescinded the information contained in the letter of 9 November and placed him in the long-term absence category. In the meanwhile and notwithstanding the contents of the 12 November letter the appellant obtained a medical certificate from his doctor stating he was fit to return to work. That certificate was not produced in evidence. He handed that certificate to the respondent albeit in an unsatisfactory way.

An independent health assessment report organised by the respondent issued to the head of human resources on 18 November following a medical examination of the appellant a day earlier. The last paragraph of that report written by the examining doctor read as follows: *... it is my opinion that the nature of his job, which involves driving and significant manual handling with pulling of heavy trolleys with linen would exacerbate and worsen his problem. Therefore, I feel it is likely to cause his problem to get worse if he were to go back to this nature of employment. Therefore, I declare that he is unfit to go back to his job.* The appellant added that his former job no longer existed at that time. Also at that time another certificate had been furnished to the respondent declaring him unfit for work up to early December 2009. A copy of that certificate was again not presented into evidence.

Two further letters written by the same human resource person on behalf of the respondent and both dated 27 November 2009 were received by the claimant. Not only did those letters confirm the claimant's redundancy it also contained payment details related to his departure from the company. As far as the appellant was concerned this was "the end of the story" as the plant where he was employed was closing and as no alternative was offered to him he was to receive a redundancy package. However on hearing that his former colleagues had received their redundancy packages and he had not the appellant contacted his trade union. When a redundancy package still failed to materialise by May 2010 he submitted an application to the Tribunal under the above Acts.

Respondent's Case

The head of logistics and general manager at the relevant time said that the respondent's attitude to the appellant was that he remains an employee who is still absent on sick leave. He suggested that the appellant continued to act like an employee following the closure of the plants as he continued to submit medical certificates from his doctor declaring him unfit to attend work. This witness felt that the unseen medical certificate dated 12 November 2009 declaring him fit to return to work was designed to allow the appellant comply with the general agreement on redundancy between the company and the trade union. In response to that certificate the company sent him elsewhere for a medical examination and in accepting the report findings it was clear to all concerned that the appellant's job no longer existed. The respondent had to be certain that the appellant met the criteria for redundancy and since that certainty was not established then the company was not willing to make him redundant.

The respondent through its human resource section treated the redundancy situation as a group issue. There was no person-to-person contact. This manager accepted that the respondent's two letters to the appellant on 27 November were not rescinded but had been sent in error. Besides when the plants closed there were still driving positions available. The appellant remains unfit for work.

Determination

By majority decision, (Ms. M. Maher dissenting), the Tribunal finds that the claim under the Redundancy Payments Acts, 1967 to 2007 fails. The claimant was still an employee and was still submitting sick certificates to the respondent. This was acknowledged by the respondent in evidence. The claimant maintained that he was entitled to redundancy under the terms of an agreement reached by S.I.P.T.U. and the respondent at the Labour Relations Commission. However, one of the terms of that agreement states that persons on long-term sick leave had to submit a doctor's certificate stating fitness to work. The claimant did not come within this agreement for reasons stated above, was still on sick leave and was still submitting certificates to the respondent.

Dissenting opinion of Ms. M. Maher

The proposals drawn up by the Labour Relations Commission on November 4, 2008, and agreed by both sides, states on redundancy terms: "Long-Term Absence: On receiving a doctor's certificate confirming full fitness to work by 27th November the company will apply the terms of this agreement. Other cases will be reviewed by the company on a person-to-person basis." The claimant had a reasonable expectation that his case would be reviewed as to redundancy entitlement or the possibility of alternative suitable work.

By majority decision, (Ms. M. Maher dissenting), the Tribunal finds that the claim under the Redundancy Payments Acts, 1967 to 2007, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

