

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

EMPLOYEE – *appellant*

UD1977/2010

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: Mr. M. O'Connell B.L.

Members: Ms. A. Gaule
Mr. P. Trehy

heard this appeal in Dublin on 23rd February 2012

Representation:

Appellant: Mr. Tom O'Dwyer, Assistant Branch Organiser, Dublin
Services Branch, SIPTU, Liberty Hall, Dublin 1

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

The determination of the Tribunal was as follows:-

This case came before the Tribunal by way of the appellant appealing the recommendation of the Rights Commissioner ref: r-083409-ud-09/EH.

Respondent's case

PM the General Logistics Manager gave evidence. He began his employment with the respondent in March 2009 and his duties involve overseeing the respondent's warehouse. Prior to joining the respondent, he was a Management Consultant.

He knows all of the staff working to him and when he started TD (Personnel Manager) had told him the claimant was out on long term sick leave and was keeping him up to date on the situation. The claimant was referred to the company doctor and was invited by TD to attend a meeting in June 2009 to discuss the Doctor's report. PM was also asked to attend but he had never met the claimant prior to the meeting.

All aspects of warehouse duties involve manual handling. All staff that work in the warehouse are General Operatives and their duties include goods-in, opening and lifting boxes, and processing customer orders etc.

On the 26th June 2009, he attended a meeting with the claimant and TD. During the meeting he asked the claimant if she was fit to return to work and if not, when she thought she would. The claimant told him she was unfit to resume duties and she did not know when she would be able to return. After the meeting the claimant was informed they would consider her situation and get back to her. Based on the information they had, and the claimant's responses to their questions, they decided to dismiss her. On the 26th June, TD sent the claimant a letter of termination with an offer of an appeal.

During cross-examination PM said he had not seen a doctor's report during the meeting. He did not recall the claimant saying she was waiting for a scan, but he did recall her asking for the period to be extended which was considered by him and TD.

His only involvement at the meeting was to see if the claimant was coming back to work. The company policy is to let staff go who are out sick for more than twelve months. After the claimant left the meeting he and TD discussed her situation and met again the following morning to discuss it further. Her position was replaced.

He had no doubt AW the Appeals Manager would have asked his opinion on the claimant's dismissal. However, he did not meet AW to discuss the dismissal.

Claimant's case

SM gave evidence. On the 1st June 2008 she was in a taxi when another taxi crashed into the back of their car. She was taken to hospital where she had an x-ray and was told by a doctor she was ok to go home. The following day she was in pain and went to see her GP. Her GP gave her a medical cert which she gave to the respondent and told her managers PW and LT that she would be out on sick leave. The respondent paid her two weeks sick pay and as her back continued to give her pain, she remained absent on a medical cert and received disability benefit.

At the request of the respondent she attended the company doctor. She received a letter dated 8th June 2009 from TD requesting her to attend a meeting with him and PM. She met with them on the 25th June and was asked if she was returning to work. She told them both that she was waiting on an MRI scan and that at that time she would be able to do light duties only. She had a letter from a Consultant from the Mater hospital which she showed to TD. She asked for a role in one of the shops or in the office. TD told her there were no jobs available in those areas and PM said there was no light duties in the warehouse.

She received a letter dated 26th June 2009 from TD giving her six weeks' notice of his decision to terminate her employment. The letter gave her the option to appeal his decision to AW within 14 days.

The claimant wrote to AW asking for the decision to terminate her employment to be deferred for six months. She received a reply from AW asking her to attend an appeal hearing on the 24th July which she did, and which lasted only a few minutes.

During cross examination the claimant said she had back pain on and off. She could not

explain why PM had not seen the Consultant's report at the meeting on 26th June as she was asked to bring all the relevant information with her.

Determination

Having carefully considered all of the evidence including the submissions on the part of the respondent, the Tribunal believes the decision to dismiss the claimant was unfair.

This was based primarily on the evidence of the respondent whose witness stated in evidence that no enquires were made regarding the possibility of securing other lighter duty roles for the claimant as she requested.

Furthermore, the appeal procedure provided by the respondent was grossly defective. The respondents witness who was central to the decision to dismiss the claimant, accepted in evidence that his input to the appeal was no more than a casual conversation with the Appeals Manager.

The respondents witness could not remember when or where this conversation may have taken place. For these reasons the Tribunal sets aside the recommendation of the Rights Commissioner and determines that the dismissal was unfair.

In relation to a remedy, the Tribunal notes the respondent is currently seeking redundancies from its staff. The Tribunal also notes the claimant received two weeks sick pay from the company. Thereafter, she was in receipt of disability benefit for two years. This payment was €60 per week less than what she was receiving from the respondent. The Tribunal also notes that the claimant did not seek employment since the termination of her employment as she was awaiting the outcome of the appeal.

The Tribunal awards her the sum of €3120 representing the difference between her salary and disability benefit for 52 weeks from June 2009 to June 2010. Additionally the Tribunal awards a sum of €14,560 representing her loss of salary from June 2010 to June 2011. This represents 104 weeks compensation.

However, the Tribunal deducts a sum of €2680 to reflect her failure to mitigate her loss during a period in which she could have sought employment on lighter duties. This leaves a total award of €15,000.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)