

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:  
EMPLOYEE (*claimant*)

CASE NO.  
UD1970/2010

Against

EMPLOYER (*respondent*)

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Dr. A. Courell B.L.

Members: Mr. D. Morrison  
Mr M. McGarry

heard this claim at Castlebar on 17th April 2012

Representation:

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Claimant(s) : Mr. Gary Mulchrone, Gilvarry & Associates, Solicitors, Unit  
9, N5 Business Retail Park, Moneen Road, Castlebar, Co Mayo

Respondent(s) : Mr. Alastair Purdy, Purdy Fitzgerald, Solicitors, Kiltartan  
House, Forster Street, Galway

The determination of the Tribunal was as follows:

### Background

The respondent is a Seafood company with between 38-40 employees, dealing mainly in the sale of mussels. The claimant was a factory operative and commenced employment in August 2006. On 30<sup>th</sup> September 2009 the claimant produced a sick cert which stated she had occupational asthma. The respondent arranged for the claimant to attend the company doctor, who reported on 22<sup>nd</sup> October 2009 that the claimant had a mussel allergy. As their primary business was in dealing with mussels, the respondent could see no alternative role for the claimant without exposure to mussels.

Both parties made detailed submissions.

### Respondent's Case

Giving evidence, DK stated that the company is a family run business for the past 50 years, dealing mostly in mussels. The claimant worked on the frozen side, dealing in the inspection of

mussels. When the claimant produced a sick cert on 30<sup>th</sup> September 2009, DK consulted with HR and Management. The claimant agreed to see the company doctor, the result of which showed an allergy to mussels. A meeting took place with the claimant and her husband on 11<sup>th</sup> November 2009 to discuss the results and alternatives. Cleaning was ruled out as it involved contact with mussels. The claimant agreed to contact the respondent the following Monday with any suggestions and the company were willing to hear what she had to say. The claimant did not contact the company as agreed. The respondent wrote to the claimant on 23<sup>rd</sup> November 2009 indicating no alternative but to terminate her employment.

Letters between the respondent and the claimant were opened to the tribunal. DK stated that the claimant was given time to consider the matter and to suggest alternatives. She did not ask for a second opinion on the diagnosis. There was no other work there for the claimant.

In cross-examination, DK stated that he is the Production Manager with the respondent company. He reports to the MD and the Development Manager. He denied that the claimant discussed going to Lithuania for a second opinion. 90% of the business is related to mussels. Crab work is dealt with on a seasonal basis, September to December. The office cleaning job was discounted at the meeting as it was part-time and the claimant asked for additional hours which were not available. He did not hear of an incident involving the claimant and a cigarette break.

Giving evidence, NI the Russian translator who was at the meeting on 11<sup>th</sup> November, 2009 stated that if the claimant had mentioned going to Lithuania for a second opinion, she would have put it forward at the meeting through her translation.

The General Manager (GM) stated that she took the notes at the meeting on 11<sup>th</sup> November, 2009. The claimant did not ask for time to go to Lithuania at the meeting. The office cleaning job was only for 1hr per week.

In cross-examination, the GM stated she noted everything said at the meeting of 11<sup>th</sup> November 2009. If the claimant had mentioned going to Lithuania, it would not have been a problem. She did not re-call a smoking incident with the claimant. The claimant was replaced the following January/February. She spoke to the Doctor about the claimant's allergy with regard to providing protection/masks. The Doctor said the claimant could not work there because of the mussels.

In reply to the Tribunal, the GM stated the decision was made on health grounds.

### **Claimant's Case**

Giving evidence, the claimant stated that she was on an inhaler for asthma in November 2009. She did not have an allergy towards mussels. She has eaten mussels since her dismissal with no reaction. At the end of September while on sick leave she asked the respondent for a week and a half to get a health check in Lithuania. She was told the respondent would consider it. When her sick leave ended she was given a free appointment with the company doctor. She had a note from a doctor in relation to asthma. She wanted to get a full test. She asked twice about going to Lithuania.

The claimant was given time at the meeting to discuss options. In relation to the smoking incident, the claimant stated she could not recall a date. It was about 6pm and they were told if

they were continuing work, they could have a 5 minute smoke break. Everyone stayed on the factory floor and the claimant went to take the break. The GM asked her why she was going for a smoke and told her that she was to finish for the day. There was a change in their relationship after that. This was about 3-4 weeks before the meeting of 11<sup>th</sup> November. She said she knew she had a health issue but did not know the diagnosis. She wanted to go to Lithuania as it was cheaper and she knew the language. The test she went for in Lithuania after her dismissal was more detailed than the Irish one. In Ireland the check only covered her bloods and respiratory. The results she received in Lithuania did not matter as she had lost her job. The claimant gave evidence pertaining to loss and her efforts to mitigate the loss

The claimant stated she could have continued her work with the respondent.

In cross-examination, the claimant said she was first aware of an illness at the end of August 2009. She went to the respondent on 30<sup>th</sup> September with a cert stating asthma and unfit to work in her present occupation. She was on an inhaler at the time. The claimant did not want to go to the company doctor and wanted to go to Lithuania instead. She asked the respondent on 30<sup>th</sup> September and again at the meeting of 11<sup>th</sup> November 2009. The claimant accepted she was given an opportunity to suggest alternatives. She suggested the office cleaning but it was rejected due to the lack of hours and it was a part-time job. She was at the respondent's premises the Monday, Tuesday and Wednesday after the meeting of 11<sup>th</sup> November but was not allowed to work.

In re-examination, DK denied the claimant asked on 30<sup>th</sup> September about going to Lithuania. Had he been asked, it would have been no problem at all.

Giving evidence, the claimant's husband stated that he was at the meeting on 11<sup>th</sup> November 2009. During the meeting, the claimant asked about going to Lithuania to find the real cause of her illness. That was the second time she asked. He was also present the first time she asked on 30<sup>th</sup> September when she brought the sick cert to the respondent. The respondent said they could not allow that and offered their own doctor instead. He is still working with the respondent.

In cross-examination, the claimant's husband stated that the claimant mentioned Lithuania on 30<sup>th</sup> September and 11<sup>th</sup> November. She asked because she wanted to know the real reason why she was sick. When it was put to the witness that the Russian translator did not remember the mention of Lithuania, he said that she is translating every day. He remember alternatives being discussed but there would not have been a lot of hours involved and there was nothing else available.

## **Determination**

The respondent acted reasonably in all of the circumstances, in particular, the medical evidence ie the claimants own doctor's report and no issue arises in respect of procedural fairness sufficient to render the dismissal unfair. Therefore, it is the decision of the Tribunal that the claim under the Unfair Dismissal Acts, 1977 to 2007, fails.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)