EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:	CASE NO.
EMPLOYEE	UD1253/2010 MN1201/2010 RP2276/2009

Against

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J Flanagan BL
Members: Mr D Peakin
Mr J Dorney

heard this claim at Naas on 27th October 2010 and 20th December 2010

Representation:

Claimant: Mr Philip Treacy, Solicitor,
Phepotstown House, Kilcock, County Meath

Respondent: Mr Michael O'Neill, Solicitor,
Kingscourt, 33 South Main Street, Naas, County Kildare

Claimant's case

The claimant commenced employment with the respondent in June 1975. The claimant went on sick leave in November 2007 and has not returned to work since that date. In April 2009 the claimant believed he was fit to return to work on a part time basis and asked the respondent if this would be possible. It was the intention of the claimant to continue to claim Social Welfare Illness Benefit. Normally a person may only claim this benefit while unfit to work. However, there was a provision under the scheme which allows a recipient to engage in part time-work of a rehabilitative nature (known as "the exemption").

It was the claimant's evidence that the respondent agreed with him that this was a good idea and the respondent had said he was going to get back to him later. The claimant said he did not hear back from the respondent and so the claimant approached the respondent again in July 2009. The claimant says that the respondent then told the claimant that there was no work available for the claimant. The

claimant said that it was in August 2009 when he presented a form RP50 to the respondent and requested payment of a redundancy lump sum. The claimant also sought his P45. However the claimant received neither his P45 nor a redundancy lump sum. Subsequently the claimant lodged this claim with the Employment Appeals Tribunal.

The claimant stated that he remains medically unfit for work to date and continues to claim Illness Benefit. He also stated that he was unable to predict when, if at all, he would become fit to return to work.

Respondent's case

The respondent stated that the claimant went out sick from November 2007 and had not returned to work since. Medical certificates were received for part of this time but had ceased some time in 2008. Therefore the respondent believed that there had been a frustration of contract and that the claimant had effectively left the employment in November 2007.

The respondent acknowledged that the claimant had requested to be allowed to return to work on a part time basis in April 2009. It was the respondent's evidence that the claimant did not mention any scheme whereby he could retain an entitlement to Illness Benefit and still work. The respondent said that in answer to this request the respondent told the claimant that his job was still available to him on a full time basis but that he would have to provide medical evidence that he was fit to resume work.

The respondent gave evidence that he had received a verbal request sometime in July 2009 from the claimant for a redundancy lump sum payment on the basis that other employees of the business had received such payments. However the respondent told the claimant that he was not being made redundant and that his job was there for him if he chose to return. Subsequently in August 2009 the respondent received a form RP50 from the claimant. However the respondent did not sign this form or return it to the claimant because he had already informed him that his job was not redundant.

The respondent did not issue a P45 to the claimant and further stated that it was still open to the claimant to return to work if he could provide medical evidence that he was fit to do so.

Determination

Detailed written submissions were received from both parties after the conclusion of the oral hearing.

There were only minor disagreements between the parties as to the facts and insofar as there was a conflict of evidence the Tribunal prefers the evidence of the respondent.

The Tribunal finds that the claimant was not dismissed by reason of redundancy or at all.

The Tribunal also finds that the claimant's contract of employment was not terminated by reason of frustration or for any other reason.

Having considered the evidence adduced the Tribunal finds that no termination of employment occurred and that the claimant was at the date of the hearing an employee on sick leave from work.

The Tribunal finds that the claimant did not explain to his employer that he intended to return to work in accordance with "the exemption".

The Tribunal did not hear any evidence that the claimant's disability was of a type which could benefit from the carrying out of rehabilitative work. The Tribunal has no evidential basis for concluding that the respondent employer had work of a rehabilitative nature available to provide to the claimant. The Tribunal therefore concludes that the claimant was unfit to carry out the work for which he was employed and that no suitable alternative work was available to be provided by the employer such that the refusal of the employer to permit the employee was for reason of incapacity and not for reason of redundancy.

The usual reason for making an employee redundant is for the purpose of reducing headcount. If an employee is already absent on long term sick leave there may be little benefit to an employer to making that employee redundant as headcount is already reduced by that employee being on sick leave.

The Tribunal notes the respondent's argument that the contract of employment had been terminated by way of frustration. The Tribunal is of the view that the termination of a contract of employment by way of frustration is not automatic. Where an employee suffers a long term incapacity to perform the work for which he was employed to carry out it is usual practice to call on the employee to present himself as fit for work by a certain date and only if the employee fails to make reasonable compliance with that request is the employment considered to be terminated by way of frustration. Inapplying the doctrine of frustration to a contract of employment it is important to bear it in mind thatan employee on sick leave is an employee who is absent from work with the leave (as in permission)of the employer for reason of illness and as such the employer has agreed to suspend temporarily thecontractual term that the employee be available for work. A contract of employment cannot be said tobe frustrated where the contractual requirement which cannot be fulfilled is itself suspended. In orderto rely upon the doctrine of frustration the employer must first restore the contractual requirement tobe available for work by bringing the period of sick leave to an end. An employer who unreasonablyrefuses to grant or continue sick leave may be held to have unfairly dismissed the employee. In thiscase there was no evidence that the employer sought to bring the period of sick leave to an end ortake any steps to rely upon the doctrine of frustration.

It was indicated to the Tribunal that the claimant's job is still open to him provided he can satisfy the respondent as to his medical fitness to carry out the duties for which he had been employed. The respondent stated before the Tribunal that an independent medical examination of the claimant would be required to satisfy the respondent of the claimant's fitness before a return to work could be permitted and the Tribunal finds this requirement to be perfectly reasonable.

The Tribunal accepts the respondent's contention that due to the nature of the work involved, namely specialised and intricate joinery work, which involves machinery, the furnishing of a satisfactory medical certificate was even more necessary for both insurance and health and safety reasons.

The claimant was absent from work from November 2007 and only furnished medical certificates up to the 12th May 2008. The Tribunal notes that the employer appears not to have made any great issue of that failure to provide medical certificates at the time and finds that the respondent in effect waived this requirement and extended sick leave without medical certification.

The Tribunal accepts the respondent's submission that the right to return to work and continue to receive illness benefit is subject to very specific requirements. These requirements were that the part-time employment be for not longer than 20 hours per week; that a letter from the employer, outlining the type of work available and number of hours involved be provided; that a Form IB141A be completed by a doctor and an independent medical examination may also be required. The written permission of the Department is also required before the work can be undertaken. The Tribunal

accepts that none of these requirements were brought to the notice of respondent nor did the claimant even notify or discuss with the respondent his intention to rely upon the exemption.

There was insufficient evidence before the Tribunal that the claimant's disability was caused by a work related injury and the Tribunal does not accept this claim. The Tribunal notes that the claimant was not pursuing a personal injury claim before the Courts.

The Tribunal notes the assertion by the respondent in written submissions that "the Claimant's jobwas still open provided the Claimant satisfied the Respondent as to the Claimant's medical fitness towork".

The Tribunal finds that the claimant was at the material times an employee of the respondent absent on sick leave and that no termination of employment or of the contract of employment had occurred.

The claimant furnished the Tribunal with the cases of Zuphen v Kelly Technical Services (Ireland) Limited and Marshall v Harland & Wolff Limited. The Tribunal has carefully considered these cases and is of the view it is not necessary to deal with them in light of the Tribunal's finding that the employee was not dismissed.

If the respondent wishes to bring the claimant's employment to an end by relying upon the doctrine of frustration nothing in this determination is intended to stand in the way of the respondent attempting such a course of action. On the other hand, if the respondent is satisfied to leave theclaimant on continuing sick leave nothing in this determination is intended to discourage therespondent from doing so.

In circumstances where an employer can manage without retaining an employee there is no obligation under the Redundancy Payments Act to make that employee redundant. Similarly, where an employee loses the capacity to perform the work for which he has been employed there is no obligation on the employer to invoke the doctrine of frustration and the employer is fully entitled to leave the employee on continuing sick leave.

An argument was advanced upon behalf of the claimant that the nature of the work for which the claimant had been employed (joinery) was such that the injury which he suffered was reasonably foreseeable (a back injury) and that the incapacity which resulted from this foreseeable injury caused the claimant to be unable to continue in his employment such that the claimant had been constructively dismissed. Essentially the argument is that employer negligence causing an incapacitating injury to an employee is a form of constructive dismissal. The Tribunal rejects this argument. The Tribunal was not provided with evidence sufficient to prove that the claimant's back injury was caused in the course of his employment and did not have some other cause. The Tribunal does not regard itself as some kind of court of personal injury. Where an employee suffers an incapacitating injury in the course of his employment the courts provide an adequate remedy and it isperfectly commonplace for the courts to make an award for personal injury that includes compensation for loss of earnings and/or loss of employment. The Tribunal is a statutory tribunal andits jurisdiction is limited to that established under statute. There appears to be neither need norstatutory basis for the Tribunal arrogating unto itself a jurisdiction in tort.

Constructive dismissal is defined as the termination by the employee of his contract of employment with his employer, whether prior notice of the termination was or was not given to the employer, in circumstances in which, because of the conduct of the employer, the employee was or would have been entitled, or it was or would have been reasonable for the employee, to terminate the contract of employment without giving prior notice of the termination to the employer. It may be reasonable for

an employee to regard his employment terminated by way of a constructive dismissal in circumstances where the conduct of the employer exposed the employee to unacceptable risks. There was insufficient evidence before the Tribunal to prove that this respondent had exposed the claimant to unacceptable risk. The Tribunal does not accept that even where it is established that an employee suffered an incapacitating injury in the course of his work that this of itself constitutes conduct by the employer or proves conduct by the employer amounting to constructive dismissal.

Therefore the claims under the Minimum Notice And Terms Of Employment Acts, 1973 to 2005, the Redundancy Payments Acts, 1967 to 2007and the Unfair Dismissals Acts, 1977 to 2007 must fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)