

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

EMPLOYER

UD248/11

- appellant

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 N. O'Carroll-Kelly BL

Members: Mr. L. Tobin
Ms M. Maher

heard this appeal at Dublin on 31st May 2012 and 23rd November 2012.

Representation:

Appellant:

Respondent:

Background:

This case came before the Tribunal by way of an appeal by the employee against the recommendation of the Rights Commissioner reference r-090294-ud-10/JT

The respondent is a retail company and has many stores countrywide. Five stores are located in Dublin. The appellant worked in store D and commenced his employment in August 2003. Sixteen hundred employees are employed in the Dublin stores.

Respondent's Case:

TK a human resources manager with the respondent gave evidence to the Tribunal that he commenced employment with the respondent in March 2009. Store D within which the appellant was employed was part of TK's remit. The appellant was absent from his role from the 22nd January 2007, due to illness. In his role as a sales advisor, the appellant was expected to work in all areas such as the food department, textiles and stores.

TK's predecessor (CM) had referred the matter to an occupational health advisor (SP). The appellant gave his consent to SP receiving a report from his specialist. SP reverted to TK with an occupational health report in June 2009. The report outlined that the appellant's

specialist had stated that the likelihood of the appellant returning to his previous job which involved lifting and other physical activity was doubtful. He further stated that if it were possible to assist the appellant in adjusting his workplace it would be ideal. In summary, the specialist stated that returning the appellant to his prior work would not be advisable from a health perspective.

TK subsequently arranged a meeting with the appellant to discuss the report. When they met on 30th July 2009 they discussed the appellant's health and well-being and the appellant concurred with the contents of the report in that he said he would be unable to return to his position within the store due to his health difficulties. TK did not have a note-taker present at this meeting but took his own notes and he encouraged the appellant to have a representative at the meeting.

A subsequent letter dated 31st July 2009 issued from TK following this meeting in which he informed the appellant that the position of finance advisor was advertised. This was in light of the appellant stating at the meeting that he was unable to return to his role but that he would be able to work in other areas such as payroll, finance or administration. The letter instructed the appellant that should he be unsuccessful in his application for the position, he was required to contact TK in order to discuss his future employment with the respondent. TK stated that at the meeting on 31st July 2009 he had made it clear to the appellant that if he could not return to work the respondent would be unable to hold his position open.

The appellant was unsuccessful in his application for the finance position. TK contacted the appellant by telephone on 27th August 2009 and reminded him of the previous meeting. The appellant confirmed that there was no change to his health and that he was unable to carry out his role as sales advisor. By that time the appellant was absent well over two years.

A letter dated 2nd September 2009 issued to the appellant and informed him that as he could not return to work in his previous role and due to an absence of any suitable vacancy, the respondent was left with no option but to terminate his employment on grounds of ill health. TK stated in evidence that the appellant had not provided a return to work date which would have allowed him to consider lighter duties for the appellant.

During cross-examination TK was asked what conversations were held with the appellant to rehabilitate him into the workplace in light of what the specialist stated in his report. TK replied that to consider this issue the respondent needed a return to work date or a medical certificate stating that the appellant could return to work on lighter duties. It was put to TK that the report did state that the appellant could not carry out lifting duties. TK replied that he did not have any further information to say that he should consider lighter duties. The appellant continually told him that he could not carry out his role or return to work.

In reply to questions from the Tribunal, TK stated that there no position within either the stores or the shop floor which the appellant could have been offered. The finance role the appellant applied for was the only one available in Dublin within the areas of finance, payroll or administration.

Appellant's Case:

The appellant outlined his role as a sales advisor to the Tribunal. The appellant's employment was largely uneventful until he became ill in January 2007. The appellant did not receive

adiagnosis of his illness until October 2007 and this was later followed by surgery during March 2008. In the intervening period the appellant received a letter from the then human resources manager. He made contact with her following this letter and it was agreed by both that the appellant would contact her with updates on his illness and subsequent treatment.

When the appellant was contacted by SP he gave his consent to his specialist being contacted and issuing a report on his health. It was the appellant's understanding of the specialist's report that at that particular time the specialist did not foresee the appellant returning to lifting duties and other parts of his role due to health difficulties but that the specialist also posed the question that perhaps the respondent could find another role for the appellant and that he should return to work

The appellant stated that some two weeks later after this report, he received a report from the hospital in England where the surgery was performed. The appellant stated that had the specialist had knowledge of this report at the time of writing his, he may have been even more positive about the appellant's health but as it was he was saying that the appellant could return.

However, at all times the respondent stated that if the appellant could not carry out lifting duties or spend time in the cold store than he could not fulfil his role as sales advisor. It was the appellant's understanding of the occupational health report that it set out what the respondent should do and that it stated that the respondent should try to accommodate the appellant. The appellant stated that TK repeatedly asked him what was his return to work date for his position and when would he be able to lift and spend time in the stores. The appellant suggested that he could carry out roles in payroll, the textiles section or the café but there were no long-term employment options discussed with him in the meeting with TK.

At that meeting on 30th July 2009 it was not specified to him that he could be accompanied at the meeting. The appellant said to TK that if they were discussing his future than he would like to have EA present as he had worked with her a long time but this request was refused by TK. The appellant then raised the issue of being accompanied by the union but TK refused this.

The appellant enquired from TK if there was even a temporary alternative position but TK told him there was nothing available. The appellant enquired what would happen if a suitable position arose in a reasonable timeframe but TK told him that the human resources department could not watch all the time for positions.

As the appellant left the office following that meeting he saw the finance position advertised on the noticeboard. He went back to TK and told him that he would be suitable for the position as he was a qualified accountant as well as having held responsibility for food stock management, he had completed an ECDL course and he held a diploma in Java. However, despite this the appellant was not called to interview for the position. He was told that 15 candidates had applied and six were called to interview for the position.

When the appellant was informed that his application for this position was unsuccessful, he was told that nothing else was available. His employment was subsequently terminated. The appellant stated that the respondent company did not consider alternatives. The appellant had thought that the company would try something to bring him back to work maybe even part-time hours but the company would not even consider this on a short-term basis.

The appellant has been in contact with his doctor on a monthly basis while in receipt of

disability benefit. His doctor now agrees that the appellant is ready to return to work. The appellant has not secured alternative work since the termination of his employment.

During cross-examination it was put to the appellant that the occupational health report quoted the appellant's specialist as stating that it was not advisable for the appellant to return to his prior work. The appellant replied that he could have returned as a sales advisor but with different duties than he had previously held as not all sales advisors had lifting duties or spent time in the stores. The appellant also highlighted that the specialist had said that if the respondent could assist the appellant in adjusting his workplace it would be ideal. The appellant accepted the medical evidence but stated that his dispute was with the manner in which the company implemented what was stated in the reports.

By letter dated 14th September 2009 the appellant appealed the decision to dismiss him. CW, HR Manager with responsibility for the respondent's stores countrywide heard the appellant's appeal on 7th December 2009.

The reasons for the appellant's appeal were that he had recently received a medical report from his general practitioner which stated that he was improving month by month and continued to make an excellent recovery, that he personally felt that at his current rate of recovery he would be able to resume his employment with the respondent over the coming months, fulfilling all the roles and responsibilities set out in his contract of employment and the appellant also enclosed a medical report from his general practitioner.

The appellant's role entailed numerous tasks. He was fit to carry out three of these tasks only. Having read the medical report submitted by the appellant CW concluded that the appellant would not be able to return to his role. The appellant himself and his consultants had said that he was not fit to return to his role. The respondent's criteria entailed an employee, following a period of sick leave, being fit to return to the job they previously held. CW contended that certain accommodations would certainly be considered following a period of sick leave, such as reducing hours, a contract and rotas. CW contended that policy is policy and there was no deviation from that.

The respondent has now a recruitment ban in place. The company does not replace anyone on maternity leave or anyone retiring.

By letter dated 14th December 2009 CW upheld the decision to dismiss the appellant on grounds of ill health.

Determination:

The Tribunal has carefully considered all of the evidence together with the documentation handed in during the hearing and the submissions furnished during the hearing.

The appellant was dismissed from his employment on the 2nd February, 2009 following a long period of illness. The medical evidence that was before the respondent at the time of the dismissal and at the time of the appeal hearing was that the appellant was unfit to return to the same position he was in prior to the illness. No date or time scale was given as to when he might be available to return. The respondent stated that the policy of the company is that when employees are returning to their position following an illness they will facilitate them but only if they are fit to return to the same role. The appellant was not fit to do so. The respondent also

gave evidence that they did make an enquiry into other possible positions but there were none available. They also stated that there has been a recruitment ban for the last year and staff that retire or leave are not being replaced.

The Tribunal is of the opinion that the respondent failed in its moral obligation to the appellant. They should have explained the company policies to him and should have explained that without a return date they had no option but to dismiss him. However, despite the respondent's shortcomings they were within their rights to dismiss the appellant in the circumstances.

The appeal under the Unfair Dismissal Acts 1997 to 2007 fails. Accordingly, the Tribunal upholds the recommendation of the Rights Commissioner under the Unfair Dismissals Acts, 1977 to 2007, reference r-090294-ud-10/JT.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)