

## EMPLOYMENT APPEALS TRIBUNAL

**CLAIM OF:**

**CASE NO.**

EMPLOYEE

UD1569/11

- claimant

EMPLOYER

- respondent

**under**

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms F. Crawford BL

Members: Mr. P. Pierson  
Mr. O.Nulty

heard this claim at Mullingar on 28<sup>th</sup> March 2013.

#### **Representation:**

Claimant:

Respondent:

#### **Respondent's Case:**

The respondent manufactures plastic sheeting films. It has 145 employees and exports 95% of its business. KOB is General Manager.

The claimant commenced employment in early October 2004 and his role was that of trainee tableman. In 2005 he commenced six weeks training as a machine operator on the extrusion line. On 6<sup>th</sup> April 2005 the claimant sustained a workplace accident whereby the top of his finger was amputated. He had been six months in the employ of the company at that time.

The claimant visited the company doctor on site every Wednesday and submitted weekly medical certificates to the company.

The company referred the claimant to an occupational physician, TF. TF met the claimant on 1<sup>st</sup> November 2005. He recommended that the claimant was currently fit to return to work and that he be offered a period of restricted duties so that he could make a return to work.

KOB met the claimant on 1<sup>st</sup> February 2006 to explore the possibility of the claimant returning to work. KOB had light duty work available for the claimant. This was an informal discussion and he did not put anything in writing to the claimant to this effect. The claimant said that he did not want

to return to work on light duties and that he would only come back when he was fully fit. KOB deemed the offer of light duties to be reasonable.

The claimant continued to furnish the respondent with medical certificates on a weekly basis. He was asked to leave his medical certificates at reception as the respondent was concerned about safety in workplace.

The company doctor wrote to KOB on 13<sup>th</sup> March 2008 outlining the claimant's medical on-going health problems following the accident that occurred in 2005. The doctor recommended an opinion from the occupational physician on the claimant's future ability to work as a machine operator.

The claimant was paid for a full year following his workplace accident.

The claimant was referred to an occupational physician in May 2008 but failed to attend for his appointment. Towards the end of 2008/early 2009 redundancies occurred in the company. LIFO applied. If the claimant had been working at this time he would have been among the employees chosen to be made redundant. He was again requested to attend for a medical examination on 23<sup>rd</sup> January 2009 and the claimant sought legal advice. The respondent sought advice from an employer body. The respondent requested that the claimant attend for a medical examination on 10<sup>th</sup> February 2009. The claimant failed to attend that appointment also. The respondent organised a further medical appointment with an occupational physician for the claimant for 8<sup>th</sup> April 2009.

The claimant attended the medical appointment on 8<sup>th</sup> April 2009. Following the occupational physician's assessment of the claimant it was his opinion that the claimant was medically unfit to return to work.

KOB wrote to the claimant on 15<sup>th</sup> September 2010 and explained that the claimant's job could not be held open indefinitely and arranged for a follow up medical examination to be carried out by an occupational physician on 27<sup>th</sup> September 2010, the purpose of which was to determine whether or not the claimant was fit to return to work.

Following the medical examination, the occupational physician determined that the claimant was still medically unfit to return to work and that he was unlikely to be fit to return for work for at least six months. The claimant had undergone recent back surgery.

KOB wrote to the claimant on 26<sup>th</sup> November 2010 explaining that the company needed to make a final decision on his employment with the company in the following two weeks. A final decision was to be made on 13<sup>th</sup> December 2010. The claimant was asked to consider this fully and make any suggestions before the final decision was taken. The claimant had taken a civil action against the employer and this in no way centred around this decision. The respondent stated that he was a reasonable employer and wanted the claimant to engage fully with them. KOB totally refuted the suggestion that the decision to dismiss the claimant was motivated by the claimant's taking of a civil action against the company.

The claimant requested his medical reports and these were furnished to him on 2<sup>nd</sup> December 2010. Further correspondence was sent on the 14<sup>th</sup> December 2010 and the 12<sup>th</sup> January 2011 requesting the comments of the claimant, but there was no response.

As the claimant did not reply to the company thereafter the claimant's position in the company was terminated on 24<sup>th</sup> January 2011.

**Claimant's Case:**

The claimant commenced employment on 4<sup>th</sup> October 2004 as a Trainee Tableman. He subsequently trained as machine operator over a six week period and was appointed to that position on 4<sup>th</sup> April 2005. Two days later, 6<sup>th</sup> April 2005 he had a workplace accident. His finger got trapped in a machine and the top of one of his fingers was amputated.

He visited the company doctor on a weekly basis and was referred to a consultant occupational physician on 1<sup>st</sup> November 2005. At no time during this assessment had the occupational physician mentioned to him that he was currently fit to return to work. He never saw a copy of this report.

The claimant had no recollection of meeting KOB and being offered alternative work on lighter duties.

The claimant saw no need to attend the three appointments with the occupational physician which were recommended by the company as he was attending the company doctor on a weekly basis and the company doctor deemed him unfit to work.

The claimant has not been fit to work since the termination of his employment.

The claimant underwent a procedure in October 2012 and has no expectation as to when he might be fit to return to work.

**Determination:**

The Tribunal carefully considered the evidence adduced during this hearing.

The Tribunal is satisfied that the respondent tried to engage with the claimant with a view to his returning to work. The claimant refused to attend appointments with an occupational physician on three separate occasions. The claimant was furnished with medical reports and was asked for his comments and suggestions on same prior to any final decision being made on his employment. The claimant failed to respond to the company. After a period in excess of five years the claimant was still unfit to return to work.

The Tribunal is satisfied that the claimant was not unfairly dismissed from his employment pursuant to Section 6 (4) (a) of the Unfair Dismissals Act, 1977

“(4) Without prejudice to the generality of subsection (1) of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, not to be an unfair dismissal, if it results wholly or mainly from one or more of the following:

(a) the capability, competence or qualifications of the employee for performing work of the kind which he was employed by the employer to do.

The Tribunal further concludes that the respondent acted reasonably in dealing with the claimant prior to the dismissal. The respondent afforded fair procedures to the claimant and the claimant was aware that a final decision was being determined with regards to his employment after receiving notice in November 2010. Further, the claimant was afforded an opportunity of being

heard or to make any submissions to the respondent, however the claimant did not engage with the respondent.

The claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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