EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:		**CASE NO.**
EMPLOYEE	,	MN1098/2011
- claimant	UD964/2011	

against
EMPLOYER ***- respondent***
EMPLOYER ***- respondent***
under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. McGrath B.L.

Members: Mr P. Pierson
Mr N. Dowling

heard this claim at Mullingar on 11th February 2013
and 21st May 2013

Representation:

Claimant(s) :
Respondent(s) :
The determination of the Tribunal was as follows:-

Background:

The claimant was employed as a butcher with the respondent company from 13th May 2002. In 2004 the claimant began to feel pain in his back but continued to work 2006 when he had to attend a physiotherapist. In September 2007 he ceased work due to his on-going pain.

In March 2008 he returned to work but again had to cease in June 2008 because of his pain. In 2009 he tried to return to work but after one day he could not continue and again was on sick leave.

In October 2010 he was certified to return to work and did so on 26th October 2010. During the day he complained of back pain. His pain was so intense he collapsed. An ambulance was called for him.

On 1st November 2010 the Site Manger wrote to the claimant in his native Portuguese. It stated that due to his large period of absence and his unavailability to work they found he had

frustrated his contract and dismissed him.

Determination:

The Tribunal has carefully considered the evidence adduced. The claimant had worked as a butcher since 2002. In 2007 his workplace was taken over by the respondent company.

It is common case that the claimant had been experiencing severe difficulties of a medical nature before the respondent company took over the workplace. The net result of these medical difficulties was that the claimant was finding it increasingly difficult to perform the heavy duties required of him as a butcher in a meat processing plant. In consequence of these physical problems the claimant was certified as unfit for work for protracted periods of time. In 2007 the claimant was out from October to the end of the year. In 2008 the claimant was out from January to March and again from June to the end of the year. In 2009 the claimant was absent for the whole year with the exception of an hour in February. In 2010 the claimant was absent from the start of the year up to October 2010.

The claimant had stayed in regular communication with the employer over the duration of the absence. It is clear that the respondent were anxious that the claimant, a valued and experienced butcher, should be retained in the work-place. Over the course of time however, it became increasingly obvious that jobs in the respondent plant were, by and large, onerous and strenuous in nature. Administrator jobs had become computerised or automated and even the general operator job of sweeping and cleaning was considered too intensive as it involved the manual task of lifting debris off the floor.

Under the external supervision of his medical advisors, the claimant had returned to the workplace at the start of October 2008. The parties had discussed and prepared for this return and the claimant agreed that he would return to the trimming section of the processing plant, where it was agreed that the role would be about the lightest available in the plant. The claimant was required to wear a chainmail apron and would be required to stand at a trimming table but there would be no requirement to lift and/or carry produce. The claimant was inducted and given appropriate training for the protection of his back.

Unfortunately during the course of the working day on the 26th October the claimant became overwhelmed by the pain or spasm in his back and had to stop working. The claimant was brought to hospital by ambulance where he was discharged on medication later that same day.

In response to the situation the respondent invited the claimant to come to a meeting on 1st November 2010 to have a talk with Mr W, the factory manager. This request was conveyed through a colleague who was from the claimants own country. It is agreed that the nature and extent of this meeting was believed to be an exploration or the up-to-date position.

There is a clear conflict of evidence as to what exactly was said in the course of this meeting. The manager, on behalf of the company is adamant that the claimant stated that he knew "hewill never work as a butcher again". The respondent's HR manager confirmed this to be herunderstanding whilst the claimant says he only ever indicated that he did not know the answer to the question of the long term reality of his returning to the workplace. This was always aquestion which would have to be answered by his medical advisors.

In the evidence provided it seems to the Tribunal that no decision had been made and the

claimant left the meeting with the impression that where would be more communication/phone calls and that his doctor may still advise that he could foresee a time for his return to the workplace.

In his evidence the factory manager confirmed that after the meeting had taken place with the claimant he discussed the situation with his HR manager and went so far as to take legal advice in relation to his contractual obligations to the claimant. On foot of these discussions and advices, the factory manger formed the view that the contract of employment between the parties was frustrated incapable of being performed.

The Tribunal fully accept that the claimant had no forewarning that the meeting held on the 26th October 2010 would lead to a decision concerning his future with the respondent company. However, the Tribunal accepts the claimant was not unaware that the respondent company was focusing its attention on the on-going unavailability of the claimant for work. In this regard there were a number of letters from the respondent cumulating in one of the 7th October 2010 where in claimant was advised that his employment "was under review".

In his evidence the claimant confirmed that he understood that the factory manger had put off making an important decision regarding his employment in the letter of the 7th October 2010 and that the respondent company was minded to hear medical representations on fitness to engage in lighter duties in the alternate to a decision to terminate the employment due to "frustrating the contract".

In the circumstances the Tribunal fully accepts that he claimant knew or ought to have known that the respondent was looking at frustration of contract as an inevitable consequence of the unavailability of the claimant for employment by reason of physical ill-health.

In considering the evidence the Tribunal has to be mindful of the fact that the claimant was unavailable for work in excess of two full years prior to the 26th October 2010. The Tribunal must also have regard for the fact that this workplace does not have much requirement for non-physical jobs. Meat processing is physically very demanding and even the lightest of jobs was proving beyond the claimants physical capabilities.

On 1st November 2010 the claimant was formally notified of the respondent's intention to terminate his employment with immediate effect, on the grounds of frustration of contract. The Tribunal accepts that the letter of termination may have been blunt but could not have been completely unexpected for the claimant in light of the previous communications and the meeting held on the 1st November.

The Tribunal notes that the letter of termination included a right of appeal which was not availed of. The claimant's evidence as to why this was not availed of was not satisfactory or coherent. The claimant is claiming that termination of his employment in the manner outlinedamounts to an unfair dismissal as the decision made was made prematurely and withoutconsideration being given to alterative arrangements.

The respondent urges the Tribunal to accept that the contract was terminated by the operation of law as the contract had become inoperable. The respondent had behaved prudently and reasonable in all the circumstances. In the alternative the Tribunal has been invited to determine that the claimant can no longer perform the function he has been engaged to perform as per Section 6 (4) a of the Unfair Dismissals Act 1977.

In considering all the evidence the Tribunal is perfectly satisfied that the contract of employment was frustrated and had become inoperable. In such circumstances the Unfair Dismissals legislation has no application. Notice was not given in the letter of the 1st November and the claimant was entitled to be given statutory notice. However the Tribunal cannot direct payment should be paid in lieu when the claimant was out on certified sick leave at the time.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)