

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:  
EMPLOYEE *-appellant*

CASE NO.  
UD1100/2011

against the recommendation of the Rights Commissioner in the case of:

EMPLOYER  
under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms J. McGovern B.L.

Members: Mr G. McAuliffe  
Mr J. Jordan

heard this appeal at Dublin on 1st May 2013

#### **Representation:**

Appellant:

Respondent:

This appeal came before the Tribunal by way of an employee appealing against a Rights Commissioner's Recommendation under the Unfair Dismissals Acts (reference: r-095902-ud-10/SR).

#### Summary of evidence:

The respondent is a large retail company with a number of shops. The appellant was employed from May 1993 as a sales advisor until the time of her dismissal in May 2010.

During 2009 the appellant was asked to transfer to the food section of the store. It was the appellant's evidence to the Tribunal that this was not possible due to a historical non-work-related injury. This was confirmed by the respondent's doctor at the time of the injury. However, it was the appellant's evidence that when she raised this issue as an objection to the transfer, she was initially told there was no position for her if she did not transfer. However, the appellant was subsequently offered a transfer to the café section. The appellant did not take up this offer as she was absent on sick leave from 5 May 2009.

The appellant continued on sick leave throughout 2009. Contact was made a number of times between the parties in 2009 and at the beginning of 2010. A meeting was held between the parties on 1 March 2010. The appellant confirmed at the meeting that she was unfit to return to work at that time but it was agreed that she would provide a return to work date following her test results in April 2010. A letter issued to the appellant after the meeting reminding her that the company could not continue to keep her role open indefinitely and that if she was unable to provide the agreed return to work date of 10 May 2010 in line with the contract of employment, then the company would have no alternative but to dismiss her from the employment on grounds of ill health.

The appellant failed to provide the respondent with a return to work date and the company terminated her employment on grounds of ill health by letter dated 10 May 2010. The letter stated that the appellant had the right to appeal this decision and the appellant subsequently lodged an appeal. The appellant did not receive a response but subsequently she received a letter from the respondent stating that an application for work from her would be welcomed once she was fit. A subsequent letter dated 12 July 2010 outlined that while the letter of dismissal had stated that the appellant had the right of appeal, as her employment had terminated on grounds of ill health it would not normally be company policy to consider an appeal. The letter further stated it would not be appropriate to consider an appeal since the appellant remained unfit for work.

A Human Resources Manager gave evidence to the Tribunal regarding the respondent's management of attendance policy. The witness did not deal directly with the appellant. For absences longer than three days an employee is expected to make contact with the human resources department and keep them informed in relation to an expected return to work. For absences of up to one year the respondent has a duty of care in relation to meeting with the employees and also considering the potential of an employee returning to work. However, if there is no expected return to work date after one year, the position cannot be held open. It was the appellant's evidence that the respondent did not offer her the opportunity to attend the occupational health advisor nor was she invited to attend an independent doctor.

The appellant confirmed that she was in receipt of disability benefit until in or around six months ago. However, in the interim six-month period the appellant stated that she has not made efforts to mitigate her loss as she is now suffering with a further illness. During cross-examination the appellant confirmed that she did not reapply to the respondent company when she became fit for work. The appellant confirmed that even if she had received an appeal she was unable to work at that time.

### **Determination:**

Having considered the evidence adduced in this case the Tribunal is satisfied that the onus of proof borne by the respondent has been discharged and that the termination of the appellant's employment does not constitute an unfair dismissal.

The Tribunal is satisfied that the contract of employment was frustrated given that an employee is required by the respondent to provide a return to work date after an absence of one year. As the appellant was not in a position to provide such a date the contract was indeed frustrated and remained so, regardless of whether or not the respondent had heard the appellant's appeal. In addition the appellant adduced evidence that she has not sought work as she has been unable to do so. The appeal under the Unfair Dismissals Acts, 1977 to 2007, fails. Accordingly,

the Tribunal upholds the Rights Commissioner's Recommendation  
(reference: r-095902-ud-10/SR).

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

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