

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE – **Claimant**

UD427/2011

against

RP558/2011

EMPLOYER - **Respondent**

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J. Smith

Members: Mr D. Morrison
Ms R. Kerrigan

heard these claims at Donegal Town on 3 May
and Letterkenny on 12 July 2012

Representation:

Claimant:

Respondent:

The determination of the Tribunal was as follows:

The claimant worked in the respondent's confectionery sweet factory in Donegal from 1970. The employment was uneventful until 1 October 2007 when the claimant, who was a highly regarded fitter, was promoted to the position of production co-ordinator/quality controller. The respondent had around 50 employees until August 2010 when the loss of some 30 of these positions was announced. It was the respondent's position that the claimant's position was not among those being made redundant.

It was common case that the claimant did not find the transition to his new role to be an easy one. A significant part of his new duties involved ensuring that the respondent's product complied with the strictures set out in standards set out by the British Retail Consortium (BRC). The claimant attended two BRC quality management courses and was assisted for some twelve months by a member of staff (QA) from the respondent's head office.

After QA left the factory the claimant found his role quite demanding and it was common case that it was not unusual for the claimant to work weekends in order to cope with his workload. The respondent became dissatisfied with the claimant's performance and on both 15 and 22 September 2009 conducted performance review meetings. The meetings were conducted by

the general manager (GM) and a director (AD) of the respondent and attended by the claimant who was accompanied, at the first meeting only, by the purchasing manager (PM). The review focussed on three main areas; Daily planning in the factory, Staff management and Quality BRC.

The notes of the first meeting show that in conclusion management would continuously monitor the situation, would invest in an interpersonal management course for the claimant and speak to him again within one month. In the event GM and AD spoke to the claimant again on 22 September 2009 and at this meeting the claimant was warned that failure to carry out his duties after further training would result in the disciplinary code being invoked.

During the summer the claimant underwent a surgical procedure and, from 30 September 2009, the claimant went on sick leave with his initial medical certificates citing post-operative complications. However, from 19 October 2009 the medical certificates stated that the claimant was suffering from stress.

On 23 September 2009 the claimant's solicitor wrote to GM to question the threat of disciplinary action against the claimant and sought to clarify various aspects of the claimant's terms and conditions, his disciplinary and sick leave records. Correspondence continued between the claimant's solicitor and GM with the respondent suggesting that, if the claimant had a problem, it was open to him to invoke the respondent's grievance procedure.

On 26 November 2009 GM wrote to the claimant to enquire if he could obtain a possible return to work date from his GP. On 17 December 2009 GM again wrote to the claimant asking him to attend for consultation with a company appointed doctor on 4 January 2010. On 18 December 2009 the claimant's solicitor wrote to GM to suggest that it was not yet possible to give a return to work date for the claimant and, in light of the fact that the claimant was now consulting a psychiatrist, it would be better to allow the psychiatrist to prepare a report before the claimant saw the company doctor.

Eventually the claimant attended the company doctor on 6 July 2010. He took a copy of the psychiatrist's report, dated 12 March 2010, for the company doctor. The psychiatrist found that the claimant was suffering from a major depressive disorder for which he was prescribed medication. This report suggested the claimant would need to remain off work for at least six months and, if possible, should return to the occupation he held prior to October 2007 as a return to his present employment could trigger a relapse of his depressive illness.

The company doctor's report, dated 12 July 2010, stated that the claimant was receiving appropriate treatment, his condition was ongoing and would require treatment into the future and would remain medically unfit for a minimum of six months. The report concluded that the claimant would have difficulty returning to work in the future.

On both 14 & 28 July 2010 GM wrote to the claimant's solicitor to state that, in view of the afore-mentioned medical reports, he wished to meet the claimant to discuss them. In the second of the letters GM stated that it was not possible to keep the claimant's position open indefinitely. The claimant's solicitor wrote to GM on 6 August 2010 pointing out the difficulties in arranging for the claimant to meet GM, the claimant's length of service and asking what options were open to the claimant regarding his future employment, including what position of employment would be available.

On 1 September 2010 GM wrote to the claimant's solicitor to state that following the medical reports he must now commence the termination process regarding the claimant's employment. Following a reply from the claimant's solicitor the following day, GM wrote to both the claimant and his solicitor on 6 September 2010 terminating the claimant's employment with immediate effect due to his inability to return to work due to medical illness.

Determination:

The Tribunal has come to a majority decision in this case with Mr Morrison dissenting. The majority were satisfied that the claimant's employment ended by reason of redundancy and that he is entitled to a lump sum payment under the Redundancy Payments Acts, 1967 to 2007 based on the following criteria.

Date of Birth	7 November 1954
Employment commenced	1 October 1970
Employment ended	7 September 2010
Gross weekly pay	€808-18

This award is made subject to the appellant having been in insurable employment under the Social Welfare Consolidation Act, 2005 during the relevant period.

There was a period of non-reckonable service, by reason of illness in excess of 26 consecutive weeks from 31 March 2010 until 7 September 2010.

It should be noted that payments from the Social Insurance fund are limited to a maximum of €600-00 per week.

In his dissenting opinion Mr Morrison found that the claimant could not have been dismissed by reason of redundancy as the job the claimant had been performing still existed on 6 September 2010 when he was dismissed on medical grounds. The question which therefore arises is was the dismissal fair and reasonable in all the circumstances. The medical reports of both parties were agreed that the claimant was going to be incapable of returning to his position due to his illness. In those circumstances it was reasonable for the respondent to terminate the claimant's employment.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)