

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIMS OF:

CASE NO.

Employee

- *claimant*

MN878/2008  
UD943/2008

against

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: Mr J. Sheedy

Members: Mr. M. Forde  
Mr K. O'Connor

heard this claim at Cork on 11th March 2009  
and 20th May 2009  
and 21st May 2009

Representation:

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Claimant :

Mr Stephen O'Donoghue B.L., instructed by Mr Terry English, Murphy English & Co.,  
Solicitors, 33-34 Cook Street, Cork

Respondent :

Mr Duncan Inverarity, BCM Hanby Wallace, Solicitors, 88 Harcourt Street, Dublin 2

The determination of the Tribunal was as follows:-

At the outset counsel for the claimant withdrew the claim under the Minimum Notice and Terms of Employment Acts 1973 to 2005.

**Respondent's case:**

The Tribunal heard evidence from the store manager, hereinafter referred to as (SM), of the branch where the claimant worked as textile manager. The claimant had moved to this store a short time prior to her going on sick leave. The claimant had been absent on sick leave from 18<sup>th</sup> June 2007.

She had also been absent prior to this in relation to a neck injury and she attended a “back to work interview” on 28<sup>th</sup> May 2007. SM had two weeks holidays around this period and the claimant contacted him and told him she would be back to work. She then sent a text message to the regional manager indicating she would be back the following week but she did not do so. The claimant did not contact SM after this but sent in medical certificates on a weekly basis. By letter dated 2<sup>nd</sup> July 2007 SM told the claimant she was in breach of company policy in relation to absenteeism and asked her to contact the store with a view to establishing a return to work date. The claimant did not receive this letter as it was sent to an incorrect address. A further letter dated 31<sup>st</sup> July 2007 was sent to her asking that contact be made with SM as a matter of urgency however this letter was not received by the claimant. Section 5.4 of the Employee Handbook, Long Term Absence, was opened to the Tribunal and SM stated that the claimant had been out a long time and it was important that she keep in contact with him and to have regular meetings. SM then asked HR with her and the claimant said she would be back to work on 25<sup>th</sup> June 2007, but she did not do so. Over a period of the next thirteen weeks, apart from sending in medical certificates, no contact was made other than on one occasion she contacted witness at the beginning 1<sup>st</sup> week of the sick leave and her sending a text message to the regional manager.

By letter dated 9<sup>th</sup> August 2007 SM again outlined the claimant’s breach of the company policy and urged her to make contact with a view to setting up a meeting in the store. It was his understanding that she received this letter but the claimant did not make contact with witness. He then sent a letter dated 27<sup>th</sup> August 2007 asking her to attend their company doctor at a scheduled appointment on 3<sup>rd</sup> September 2007 and to make contact in advance to confirm same, however witness did not hear from the claimant and she failed to attend at the appointed time. Her continued absence was referred to in letter of 7<sup>th</sup> September 2007 where it was stated that this was her final opportunity to make contact with the store and she was asked to attend a meeting on 14<sup>th</sup> September or make contact to arrange a suitable time. If she did not make contact it stated that in her absence the respondent would have no alternative but to make a decision in respect of her future employment. There was no contact from the claimant and she did not attend the meeting however she did telephone witness after 14<sup>th</sup> September but he was unsure of the precise date. The claimant attended a meeting with SM on 18<sup>th</sup> September 2007 to discuss a possible return to work date. She stated that she had received only two of the aforementioned letters and witness gave her copies of the two missing ones. Her medical condition was discussed and she stated she would not be in a position to clarify a date for return to work until after a medical appointment on 24<sup>th</sup> September. She agreed to attend the company doctor and to contact witness on 25<sup>th</sup> September to report on her appointment the previous day. She did not make contact with witness but continued to send in medical certificates on a weekly basis.

The claimant attended a further meeting on 1<sup>st</sup> November 2007 and she reported that she was not happy with a visit to the company doctor on 8<sup>th</sup> October in that she felt it was a “very poor examination”, however she agreed to a further visit if necessary. The claimant’s concerns were conveyed to the company doctor and he met with her again on 7<sup>th</sup> November 2007 and also discussed the matter with her general practitioner (GP). The report from the company doctor dated 7<sup>th</sup> November indicated that while the claimant was undergoing medical investigations he felt she was fit to return to work. In view of the claimant’s continued absence from work and her lack of contact with the respondent, witness wrote to her on 16<sup>th</sup> November and asked that she confirm her availability to attend a meeting on 22<sup>nd</sup> November 2007. The claimant did not make contact and neither did she attend the aforementioned meeting as requested. A further letter dated 23<sup>rd</sup> November to the claimant stated that this was her final opportunity to make contact with the store and that failure to do so may leave the respondent with no alternative but to “make a decision regarding your future employment with the company”. Once again there was

no contact from the claimant. By letter dated 3<sup>rd</sup> December 2007 the claimant was requested to attend a meeting on 10<sup>th</sup> December 2007 to discuss her continued absence. This letter stated that failure to attend this meeting would lead him to conclude she was no longer interested in her position with the respondent and that a decision would be made in her absence.

The claimant telephoned witness on 4<sup>th</sup> December and a meeting was arranged for 6<sup>th</sup> December. This meeting was positive and her condition looked to be improving. She was asked to visit her GP and request a return to work cert and to make verbal contact with witness on 10<sup>th</sup> December 2007. No verbal communication was received as requested however a medical certificate was received on the 10<sup>th</sup> certifying her absence until 17<sup>th</sup> December. By letter dated 12<sup>th</sup> December the claimant was asked to attend a meeting on 18<sup>th</sup> December to discuss her absence and to establish a definite return to work date. It also stated that failure to establish a return to work date could lead to termination of her employment. It appeared that this letter crossed with letter dated 13<sup>th</sup> December 2007, which was the first written contact from the claimant. In this letter she explained that she was not at home to receive this registered letter as she was in the hospital. She received this letter on 3<sup>rd</sup> December 2007. A further letter dated 18<sup>th</sup> December 2007 issued from the claimant where she stated that witness was aware from a previous meeting that she had a hospital appointment on the 18<sup>th</sup> December and yet he requested a meeting for that same day. She also stated that her GP did not agree with the views of the company doctor regarding her fitness to return to work. She was still awaiting blood test results and would then discuss with her GP as to a likely return to work date.

As the store was very busy during the Christmas period and the claimant was awaiting further tests, the next letter sent to the claimant was dated 20<sup>th</sup> January 2008 and he received no contact from her.

By letter dated 25<sup>th</sup> January 2008 the claimant was to make contact with the store on receipt of the letter and to confirm her availability to attend a meeting on 31<sup>st</sup> January 2008. There was no contact from the claimant and a further letter issued to her dated 31<sup>st</sup> January 2008 where it stated that if she was not back at work on or before 25<sup>th</sup> February 2008 her employment would be terminated on that date. By letter dated 7<sup>th</sup> February 2008 from the claimant she stated that she had a medical appointment on 19<sup>th</sup> February and was hoping to discuss a return to work date with her doctor. She suggested meeting with witness on 22<sup>nd</sup> February. Witness issued a letter dated 12<sup>th</sup> February to the claimant however the claimant's letter was received after its issue. In this letter witness again indicated the position of the respondent that if she did not return to work by 25<sup>th</sup> February her employment would be terminated. On Saturday 23<sup>rd</sup> February witness met with the claimant where they discussed her medical progress and previous correspondence. She was again told that her employment would be terminated if she did not return to work by Monday 25<sup>th</sup> February.

The claimant did not return to work as agreed on Monday 25<sup>th</sup> February. That morning witness received a phone call from her mother in law stating that as she was getting ready to come to work that morning she had an accident and had to be taken to the Mercy Hospital. Later that day the claimant rang him and a letter was also sent from the hospital. The claimant's employment was terminated by letter dated 26<sup>th</sup> February 2008. A return to work date had been agreed and the claimant did not return to by 25<sup>th</sup> February deadline. It was felt that the process could not continue any longer. The claimant was his assistant manager, a key position and this was a very busy store. In the claimant's position she took responsibility if witness was absent and reported to the regional manager. He had to get support during her absence. The claimant would also have a lot of other staff reporting to her. From day one his intention was to establish a return to work date for the claimant and he felt progress was being made. \_

In cross-examination witness stated that there was no issue with medical certificates in relation to

the claimant. In general letters were drafted on his instruction by human resources in Dublin and 90% of the time the letter was sent out on that day or the next day. The policy in relation to absence applies to all individuals and contact must be made within an hour of the absence. If a call came through to the switch in the cash office a message would be passed on to witness. If he received a telephone call from the claimant he would have taken a note of it. It was standard practice to send letters by registered post but he could not say if all the letters were sent in this manner. As the meetings with the claimant were not disciplinary it was not necessary to get her to read and sign the notes of such meetings. He accepted that the claimant did not get a number of the letters at the appointed time and some letter crossed in the post. In relation to telephone contact from the claimant witness stated that there was a direct extension and there was not difficulty in getting in touch with him. He accepted that the claimant made some phone calls during her absence. On three occasions the claimant said she was coming back to work and she did not do so. Witness was totally frustrated when she did not return on 25<sup>th</sup> February. If the claimant's communication had been better it might have changed things. He has been working with the respondent for in or around twenty five years and he had never come across this length of absence. The process had come to an end and he could not keep the claimant's position open. Witness disputed that the claimant had the right to appeal her dismissal.

The Tribunal also heard evidence from the operational regional manager (ORM) for the Cork and Kerry area. He knew the claimant for a long number of years and she reported to him when she worked in another store. He outlined the importance of her position in the store. He received two text messages from the claimant on 26<sup>th</sup> June and 24<sup>th</sup> July 2007 and these were read to the Tribunal. Earlier in June the claimant contacted him in relation to her illness and he asked her to report directly to her store manager. After 24<sup>th</sup> July he had no further contact with the claimant.

In cross-examination witness stated that when the claimant was in another management position in their Bishopstown store she had his mobile telephone number. Operations regional managers have mobile telephones for ease of contact but this is not the case for store managers. He did not receive a telephone call from the claimant on 3<sup>rd</sup> or 4<sup>th</sup> September 2007 in relation to an appointment with the company doctor.

### **Claimant's case:**

The claimant commenced with the respondent in April 1997 on a part-time basis initially and then full time. She was approached by ORM to go forward for a management role and she then worked in various stores and finally as department manager in Douglas Court. She worked as manager in drapery. On 18<sup>th</sup> June 2007, am, she rang the SM and told him she had to go to her doctor as she had a skin condition on her face and hands. Her husband rang SM and she also rang him that evening. She received a medical certificate and she sent a text message to ORM on 26<sup>th</sup> June telling him the rash was getting worse. Her husband or family member would bring the medical certificates to the store as she could not go there herself because of the skin condition. She recalled having a conversation with a lady from HR regarding the skin condition and that she would be returning to work that Monday. She was out for three weeks and that proceeded into her holidays which were agreed with ORM, and she was due back at work on 30<sup>th</sup> July 2007. She was on her honeymoon from 16<sup>th</sup> – 29<sup>th</sup> July and she sent one text message during this period. The Sunday before she was due back at work she rang to get her hours but she was ill and was unable to return to work. She spoke with another lady from HR who spoke to SM about her telephone call. She rang into the store as she was unable to return on the appointed date and spoke to the security guard and asked him to get SM to ring her but she did not receive any call.

The first two letters from SM she did not receive and she had a meeting with him on 18<sup>th</sup> September 2007. Depending on when the letter were sent out and they might not have left Dublin on the date as given on the letter. She could be at the doctor and would get a note to collect a letter at the post office and as she does not drive she would then have to get two buses to collect the letter. If this was at a weekend there would be a further delay therefore it was much later getting some of the letters. In relation to letter dated 9<sup>th</sup> August 2007 from SM she did try contacting him through the number for the store. She would ask to speak to SM and would then be put on hold. She was in the Douglas Court store three weeks before she became ill. She knew two or three staff by name in the cash office but did not know all the names. When she was put on hold they would try contacting SM and while holding on for quite a while she would hear the girls saying SM was not there. She would then ring back and leave a message to have SM ring her. She had a phone when she was on the floor and she had numerous problems with it. Sometimes she could not hear and the phone would go dead. At times she was transferred through to the service desk and would be told SM was at a meeting or on a day off. On one occasion when she was told he was at a meeting she was asked to ring back again and when she did he still was not available.

When she received a letter dated 27<sup>th</sup> August 2007 to attend the company doctor on 3<sup>rd</sup> September she was very unwell and could not get the bus. She phoned ORM on the 3<sup>rd</sup> or 4<sup>th</sup> September to explain her situation. She did not ring ORM at the start of June. She spoke to ORM regarding her heart condition and he told her to contact SM. The first time she was in hospital with the heart condition was 11<sup>th</sup> July 2007. She did not see minutes of any meetings but SM may have read over a few points from a previous meeting. At the meeting of 18<sup>th</sup> September 2007 she stated she was willing to attend the company doctor. She was due to attend her cardiologist the following Monday and she told SM she would ring him after that. She phoned the store on the Monday or the Tuesday and could not get in contact with SM. She then asked to speak with HR and she promised to pass on the message to SM. On 28<sup>th</sup> September she received a letter regarding the appointment with the company doctor and she had a consultation with him on 8<sup>th</sup> October 2007. The doctor faced away from her and asked her questions but there was no physical examination. At a meeting with SM on 1<sup>st</sup> November 2007 she made a complaint in relation to the non-examination by the company doctor and she was told there may be a possibility to attend another company doctor. SM said he would contact the head of human resources in head office in this regard. SM asked the claimant if she would attend a second meeting with the same company doctor on 8<sup>th</sup> November and she expressed her concern that she would be treated in the same way as at the first appointment with him. SM assured her this would not happen. The claimant did attend as requested and the visit was exactly the same as the first appointment.

She could not say if she received the letter in relation to the meeting of 16<sup>th</sup> November but that meeting did not take place. The next letter dated 23<sup>rd</sup> November 2007 she only received on 3<sup>rd</sup> December as she was in hospital. This was a registered letter and when she received it she rang SM and arranged to meet on 6<sup>th</sup> December. At that meeting she told SM about her appointment for a test on 18<sup>th</sup> December and also stated that her GP in consultation with the company doctor said she was fit to return to work. The letter of 3<sup>rd</sup> December from SM she received on 10<sup>th</sup> December and the letter of 12<sup>th</sup> December she received on 18<sup>th</sup> December. These must have been registered letters.

She decided to write to SM on 13<sup>th</sup> December 2007 as she could not get in contact with him. In relation to letter dated 25<sup>th</sup> January asking her to attend meeting on 31<sup>st</sup> January she could not say if she received this letter. She received letter dated 31<sup>st</sup> January 2008 and this was the first she heard of the deadline for returning to work as being 25<sup>th</sup> February or her employment would be terminated. She wrote to SM on 7<sup>th</sup> February and this crossed with his letter of 12<sup>th</sup> February. She was unsure as to when she received this letter. She was certified fit to return to work by her GP on 25<sup>th</sup> February and she indicated to SM that she would return on that Monday at 9am.

On the morning of 25<sup>th</sup> February as she was getting ready for work she had bad palpitations, collapsed and injured her left eye when she struck a chest of drawers. Her mother-in-law took her to the Mercy Hospital and she asked her to ring SM while she was in the A & E and the claimant also rang him as soon as she was brought to the ward. She told SM that the cardiologist was keeping her in and was to have a test on Tuesday morning and she would ring him as soon as she knew the result. The response from SM was that a letter was going to her house. The claimant took from the tone of his voice that when she did not go to work on 25<sup>th</sup> that she was dismissed. The letter was sent out when she was in hospital. She got home on the Wednesday and received the registered letter a day or two after she got back home. She got a letter from the hospital when she was admitted and posted it to SM. She then got a repeat of the letter of dismissal of 26<sup>th</sup> February 2008. Tests were done over the following few months and she received a diagnosis in June 2008. She looked for employment straight away and outlined to the Tribunal her various job applications and the affect of her dismissal on her family. She was aware of disciplinary procedures through the company booklet when she started as a staff member but did not receive the newer version.

In cross-examination witness was referred to the respondent's handbook and to procedures in relation to long term absence. She was aware that she had to make contact with the store manager /hr manager. She got in contact with SM four times and another three times she tried contacting him. When she was unable to make contact with SM she rang back twice or three times and she left messages a couple of times. She tried contacting him prior to 8.30am on 30<sup>th</sup> July and she rang the security guard. She did not write a letter as the security guard was to pass on a message to SM. She did not take note of the dates she tried contacting SM.

In answer to questions from Tribunal members witness stated that it was when she received the letter dated 31<sup>st</sup> January that she felt her job was under pressure. At all times she tried to get back to work but she was physically not able. Prior to this she was out sick twice when she had to undergo two operations but she was not out for a substantial time.

The Tribunal heard evidence from the claimant's general practitioner (GP). He outlined the claimant's medical condition as on 18<sup>th</sup> June 2007. In July 2007 he referred her to a cardiologist and he stated her condition could be very debilitating. On presentation for examination, blood pressure and pulse examination would be routine and it would also be important to examine the heart rate in view of her condition. The claimant had all the symptoms that were common with the condition. He outlined the consultations he had with the claimant throughout 2007 and into 2008. The claimant was also attending a dermatologist. He had a phone consultation with the company doctor and he advised him of her on-going symptoms. He told him he would allow her back to work if the symptoms settled but they did not. The claimant told him her job was in jeopardy and he certified her fit to return to work on 25<sup>th</sup> February and would review how she got on. She was willing to try returning to work despite the symptoms persisting. She was unable to return as she collapsed and was under the care of the Mercy Hospital.

In cross-examination witness stated that the claimant spent three days in the Mercy Hospital and her condition on coming out of hospital was the same as before going in. She was and is available to return to work. In late 2008 and early 2009 her condition was the same and is not life threatening. She now feels more comfortable with her symptoms and can manage them better. This is an unpredictable condition. He had one conversation with the company doctor and he felt his report was inaccurate.

**Determination:**

The evidence before the Tribunal was that the claimant was absent on certified sick leave from June 2007 to the date of her dismissal by letter on 25<sup>th</sup> February 2008. The respondent's case was that they accepted that the claimant's illness was bona fide and they had no issue with that. The respondent complaint given in evidence was that the claimant did not render regular contact with the store manager as required in the respondent's regulations and that this lack of contact was a source of frustration to the respondent who were in limbo because of the claimant's failure to return to work.

The claimant's evidence was that there was a degree of contact between the parties, in terms of phone calls to the respondent, four direct meetings described by the respondent as not being disciplinary and written correspondence from the claimant, in addition to the claimant attending two appointments with a respondent nominated doctor.

At a final meeting between the parties on Saturday 23<sup>rd</sup> February the respondent made it clear that a failure to return to work on 25<sup>th</sup> February would result in the claimant's dismissal. The claimant secured a fitness to return to work certificate from her doctor on the basis that her job was in jeopardy. The claimant's doctor in evidence stated that this certificate was on the basis of seeing how things worked out. The doctor's evidence was that the claimant's medical condition was controlled but not cured.

Uncontested evidence before the Tribunal was that on the morning of 25<sup>th</sup> February while the claimant was preparing for a return to her employment she had a fall in her home, which required admittance to the Mercy Hospital. A relative phoned the store management that morning and explained what had occurred, the claimant also phoned when she was in a ward of the hospital and explained the reasons for not attending work. The respondent's response was to issue a letter of dismissal. In evidence the store manager stated that there was no appeal from that decision open to the claimant.

The claimant was at all times willing to return to work and while there may have been some cross over of correspondence between SM and the claimant, it was apparent to the Tribunal that the claimant at all times did her utmost to return to work.

The Tribunal is satisfied having heard the evidence that the claimant was unfairly dismissed and award her the sum of €46,667 under the Unfair Dismissals Acts 1977 to 2007. The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 was withdrawn.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

