

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

Employee

UD351/2008

MN784/2009

against

Employer

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001 UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. McGrath BL

Members: Mr. A. O'Mara
Mr C. Ryan

heard this claim at Dublin on 31st October 2008
and 28th May 2009

Representation:

Claimant(s) : Mr David Miskell, Mandate Trade Union, O'Lehane House, 9
Cavendish Row, Dublin 1

Respondent(s): Mr. Duncan Inverarity, BCM Hanby Wallace, Solicitors, 88 Harcourt Street,
Dublin 2

The determination of the Tribunal was as follows:-

Respondent's Case

The HR manager told the Tribunal that she was HR manager in the Northside Shopping Centre. The claimant has been absent from work since 12 March 2007 and since then has been absent on sick leave. The policy in the respondent regarding sick leave was to write to the individual after six weeks of continuous absence and follow up with a letter every six weeks. This year the respondent has had seven long-term absentees and all employees have now returned to work. A letter issued to the claimant on 10 July 2007 inviting her to a meeting on 18 July 2007 but the claimant did not attend. On 20 July 2007 the respondent received a telephone call from the claimant to say that she had not received the letter. She was invited to attend a meeting on 25 July 2007 but she did not attend. Medical reports were sporadic and referred to nervous disability. On 26 August 2007 the claimant was called to a meeting on 6 September 2007 but she informed a colleague she could not attend. The claimant came in to work on 17 September 2007 and informed

the respondent she would return to work in two weeks but she did not return. The claimant's employment was terminated in November 2007 and she received her P45. A meeting took place on 6 December 2007 with the claimant, the witness and MK. The claimant stated that she did not receive the letters, which were sent to her in October 2007. The claimant was told the situation would be reviewed and the respondent would contact her in January 2008. A further meeting was arranged on 18 March 2008 and the claimant was told that an appointment would be made for her to see the company doctor. The respondent informed the claimant. Three medical appointments were arranged for the claimant, one for the Southside, which was too far for the claimant to travel and two for the north side and she refused to attend unless she had a statement of employment

In cross examination she stated that the store policy regarding long term absentees was that each case was different and it depended on the person whether they were on medication and attending a consultant. If an employee cannot give a return to work date the policy is that management is entitled to make the decision to dismiss. Medical certificates do not have to be delivered personally. The store manager made the decision to dismiss the claimant. She continued the option of having her medically examined after her dismissal without giving her the assurance of re-instatement to her employment. It was never suggested that she should bring someone along.

The store manager since October 2007 MK told the Tribunal that he was employed with the respondent since 1984 and held the position of store manager since July 2007. He had an involvement in the matter from October 2007. The claimant did not receive two letters, which were sent to her in October 2007. A dismissal letter dated 8 November 2007 was sent to the claimant and a P45 issued on 13 November 2007. The claimant was dismissed for non-receipt of medical certificates and her lack of interest in her position. On 6 December 2007 a meeting was held to assess the situation as the respondent had made a mistake. He had a telephone conversation with the claimant on 28 February 2008 and she was requested to attend the company doctor. On 18 March 2008 the respondent arranged for the claimant to attend the company doctor and there was no mention of her employment status. The claimant would not attend a medical appointment with the company doctor on the Southside and an appointment was arranged with a north side doctor on 17 April 2008. The claimant's future depended on medical assessment.

In cross-examination he stated that the claimant was dismissed for lack of interest in her position. The claimant did not furnish a return to work date and she failed to attend meetings. He accepted that the claimant contacted the respondent post dismissal. A meeting took place on 6 December 2007. He was not given a reason why the letters of July and August 2007 were not responded to.

Claimant's Case

The claimant told the Tribunal that she commenced employment with the respondent in April 2000 as a sales assistant. She was also a shop steward. She became ill in March 2007. She lost her family home and had a nervous breakdown and had psychiatric problems. She was in receipt of social welfare but had no income from the respondent. She kept the respondent aware of her circumstances and informed them of what was happening. She received a call from her sister that she had a letter from the respondent for her and it contained her P45. The claimant telephoned the store manager MK and he told her that he had sent her letters, which she did not respond to. She never received the letters. She requested a meeting but he told her that she was dismissed. He told her that he would get back to her and he did not. She continued to telephone the respondent. She was informed that she needed to go to a company doctor. The sick leave policy in the respondent was she had to furnish medical certificates, which she did. She is currently fit to return to work. Her GP was unavailable to give evidence or provide a report to the Tribunal.

In cross-examination she stated that she did not receive the letters of 11 October and 31 October. She received the letter of 28 August 2007 and was aware that her job was in jeopardy. Prior to going to the store on 17 September 2007 she had telephoned to ask if she could come in. The respondent asked if she could return in two weeks and she did not know when she could return to work. She attended a number of meetings during her absences. She has been fit to return to work since January 2009. She wanted to return to work. She did not make any efforts to secure alternative employment since January 2009.

Determination

The Tribunal members have carefully considered the evidence adduced over the two days for the hearing of this case. The claimant's position is that she was unfairly dismissed in circumstances where she received notice of her P45 being forwarded to her at a time when it was accepted by both parties that the claimant was absent from work arising out of a long term illness. The respondent concedes that two letters dated October 2007 were meant to precede the letter of termination and these letters pointed out that the claimant's position was in jeopardy.

There can be no doubt therefore that the purported dismissal cannot be anything other than unfair.

The Tribunal accepts that the respondent attempted to remedy the situation in the aftermath. There then followed a period of impasse wherein the claimant refused to submit to a medical examination in the absence of a confirmation of her employment status. The respondent for its part refused to confirm employment status in the absence of a medical examination. Neither party was prepared to compromise.

The Tribunal notes that the claimant is anxious to be reinstated in her workplace and has presented oral evidence to the effect that she is fit and well to do the job. The respondent has indicated an unwillingness to reinstate the claimant in any capacity. The Tribunal will not force the reinstatement remedy in circumstances where it seems likely that the option is simply unworkable.

In these circumstances the Tribunal is opting to providing compensation by way of remedy and in assessing the losses the Tribunal takes into account the seven to eight years of service given by the claimant and the unlikelihood of her obtaining a job in the immediate future.

The Tribunal awards the claimant compensation of €13,000 under the Unfair Dismissals Acts, 1977 to 2007. The claimant is entitled to four weeks gross pay in lieu of notice in the amount of €961.12 (240.28) per week under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)