EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE – claimant

CASE NO.
UD647/2009
MN660/2009
WT279/2009

against

EMPLOYER – respondent

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J Fahy BL

Members: Mr J Redmond
Ms H Henry

heard this claim at Loughrea on 16th October 2009, 14th January 2010 and 15th January 2010

Representation:

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Claimant(s): Mr Michael O'Connor BL, instructed by:
Mr James Seymour, Solicitor
Matthew Molloy & Company, Solicitors,
4 St Brendan's Road, Woodquay, Galway

Respondent(s): Mr. John Brennan
IBEC
West Regional Office, Ross House, Victoria Place, Galway

The determination of the Tribunal was as follows:

At the outset of the hearing the respondent accepted that although the claimant was employed through an agency he was an employee covered by the Unfair Dismissals Acts.

Claimant's Case:

The claimant's representative withdrew the claims under the Minimum Notice and Terms ofEmployment Acts, 1973 to 2005, and Organisation of Working Time Act, 1997.
The claimant gave evidence that his role mainly involved inspecting stents under a microscope. Every few seconds a new stent passed under the microscope, which the claimant checked for

defects.

Quite soon after commencing his employment, on July 2nd 2007, he found that his eyes became irritated. He told his training supervisor who said that it was normal and that he needed to get used to the microscope. Over the next few weeks he found that his eyes were getting worse. His symptoms were that his eyes were irritated, inflamed and produced a discharge. He had to make regular visits to the bathroom to wash out his eyes. He mentioned it to his supervisor a few times and then to his manufacturing supervisor, who said that he would make an appointment for the claimant to see the company doctor.

The claimant visited his own doctor a few days later, October 16th 2007. He asked his doctor to amend the certificate to read that he should not work on the microscope. He still needed to work and could not afford to take sick leave, as it was unpaid. She gave him a certificate stating that the he was unable to attend a workstation involving microscopy. The claimant believed it was the microscope that was causing him the problem.

The claimant gave the doctor's certificate to the manufacturing supervisor who put him back on the microscope while he found something else for him. The claimant was then put on the 'load vial function' for 40% of the time and the microscope for the rest of the time. The manufacturing supervisor told him that he had cancelled the claimant's appointment with the company doctor as he had been to his own GP.

On October 19th 2007 the claimant's GP provided him with a letter noting that he had attended her clinic complaining of eye irritation and that it seemed to be associated with working on a microscope. His GP made an appointment for him with a consultant. He attended the consultanton January 28th 2008. He had further review appointments with the consultant on May 19th 2008,June 5th 2008 and September 11th 2008. The claimant was given several prescriptions for eyeointments over the period of his employment.

The claimant opted to go on night shift in October 2007 as this meant he would have three or four days off per week, and he believed this would help his eyes. However, as the shifts were twelve hours long he found that it didn't help at all. He stopped doing the night shift in January or February 2008. He asked his new supervisor if he could be trained on something else and after a time he was trained on 'weigh function'. His eyes then improved and he felt good.

One day he was put back on the microscope. He thought it was temporary, but it turned out not to be. His eyes got worse. He told his supervisor and he attended his GP on September 3rd 2008, who told him to come off the microscope immediately. His GP gave him a certificate covering September 3rd to 17th. His GP gave him a letter dated September 4th 2008 stating that photosensitivity was possibly causing the problem and that his consultant had recommended a trial period working part-time on the microscope or a total redeployment. He attended his GP again on September 17th and was issued a further certificate to the 22nd September 2008.

The claimant left the certificates and letters, and a copy of the certificate from October 2007, in his supervisor's pigeon-hole on 4th September 2008. An occupational nurse made an appointment for the claimant to see the company doctor. The doctor said he could see something in the claimanteyes that he hadn't seen before, but said that the claimant would be fine. The claimant asked to seethe doctor again a week later and asked him to investigate more. The doctor offered to refer him toa consultant in Dublin, but the claimant would have to pay. The claimant refused this offer, as hedidn't believe it was fair.

A HR representative asked the claimant when he was going to return. He told her that he still had problems with his eyes but she said that the doctor had certified him fit. The claimant spoke to his wife and decided to resign. On September 24th he resigned his position with the company. He felt he could no longer risk his health. He felt ignored by the company and believed that they should have investigated after the first certificate.

During cross-examination the claimant agreed that he had not taken any sick days prior to September 2008. He did not get paid for sick days. He signed a probation review sheet in January 2008 and stated that he had 'a very positive and happy attitude towards' the company and that he wished to stay for as long as possible. The claimant considered this as a performance review and he believed that his supervisor was aware of his eye condition.

The claimant disputed the contention that September 2008 was the first time the company was aware of his issue. He contended that he gave a certificate to the manufacturing supervisor in 2007 and not, as the company contended, for the first time in September 2008 with the rest of the certificates. He agreed that he did not give the company the letter dated 19th October 2007, as he understood he would be seeing the company doctor as the manufacturing supervisor said he would arrange an appointment. He believed that the HR department would have been aware of the situation because of the certificate. He agreed that no other certificates were given to the company until September 2008. He told the training supervisor at the start that he had problems with his eyes and he had repeatedly asked her during August and September 2007 if he could be trained on something else.

He did not notify the supervisor on the night shift. He was under the impression that his next supervisor was aware of his problem, but he did not say anything to him until near the end of his employment. His supervisor then arranged an appointment with the nurse.

He agreed that in a health-screening questionnaire he completed in April 2008 he indicated that he considered his health to be in excellent condition and stated that he had been to his own doctor once in the preceding year. He also had an eye test in which he had answered 'no' to the question 'do you have any difficulty with your eyes?' The claimant contended that he was on a different task at that time and his eyes had improved.

He would have stayed in the employment if the company had let him work on a different task while his condition was being investigated. He agreed that he had volunteered for overtime on the microscope, as he needed the money.

The claimant met with the HR representative on Monday 22nd September 2008. The claimant agreed that he had asked to move off the microscope and the HR representative had said that it was up to the company doctor to make that judgement and he had deemed the claimant fit. She said she had no prior knowledge of the claimant's condition. The doctor was onsite that day so the HR representative arranged another appointment. The doctor contended that the claimant was fit and then the claimant felt he had nowhere to turn so he resigned. He didn't want to raise a fuss by invoking the grievance procedure as he was on a week to week contract.

The claimant did not recall getting phone messages from the respondent company after he resigned. It was possible they had tried to contact him.
The claimant accepted that he had received a written contract of employment and a copy of the recruitment company handbook. During the induction course the grievance procedure was addressed. The claimant was aware that a grievance should be reported to the supervisor.

During re-examination the claimant stated that staff were expected to do overtime.

Respondent's Case:

The supervisor of the night shift gave evidence that she supervised the claimant from October 2007 until January 2008. The claimant worked on the microscope. The supervisor never noticed that the claimant's eyes were red and he never complained about them. He asked to be trained on something else as he said he didn't like the microscope, but at the time there weren't any other options. She didn't notice the claimant taking excessive breaks. They wore gowns and clear glasses while working. She had not been told anything about the claimant's eyes by the previous supervisor. His wife was pregnant and he said needed to be there for her so he finished doing the night shift. He had been a good worker.

During cross-examination the supervisor stated that she could recall the claimant asking to train on something else two or three times over three months. Other employees only had problems at the start adjusting to the microscope. The supervisor confirmed that she had never heard that he claimant had a problem with his eyes.

The manufacturing supervisor gave evidence that one evening in September or October 2007 the claimant said he had a sore eye. He suggested that the claimant attend his GP. When he returned he said that he'd gotten some ointment and that he was 'okay'. He did not recall the claimant giving him a doctor's certificate.

Normally, if he got a sick certificate he would send it to HR if it was after a period of sick leave. If the illness was work related he would send it to HR and alert the Health and Safety Unit. The claimant did not raise a grievance with him.

During cross-examination the supervisor remembered saying to the claimant that he would see if there was other work he could do as they had had a conversation about versatility and variety. He was aware that people needed to rest their eyes when working on a microscope. The claimant did not say his sore eye was as a result of working on the microscope. The witness could not find his diary for 2007, and so could not check if he had made a note of the occasion.

He disputed the claimant's contention that he said he would make an appointment for him with the company doctor. He noticed that the claimant's eyes were a bit red, but he wouldn't have referred it to anyone unless the claimant had said it was work related.

The claimant's last supervisor gave evidence that the claimant came to him, on September 2nd or 3rd 2008, in a distressed state. He said that his eyes were sore and that he couldn't work on the microscope. He sent the claimant home and sent an email to the company nurse. This was the firsttime the claimant had ever said that he had a problem with his eyes or the microscope. He did notinvoke the grievance procedure.

A couple of days later the witness found a bundle of sick certificates and letters in his pigeon-hole. He had never seen them before. He forwarded them to the HR department. The witness confirmed that the claimant had sought overtime on the microscope.
During cross-examination the witness confirmed that the claimant had sought training on other tasks, but this was not unusual, as most staff liked a change.

The company's occupational physician gave evidence that he saw the claimant on September 16th 2008. The claimant said that he had had a problem with his eyes for several months, but there was

no obvious issue that day except for a butterfly rash on his cheek. This could on rare occasions be the result of 'uveitis', but eye complaints from the use of microscopes are rare and using one when trained is no more than wearing a pair of glasses. He had not seen other employees complaining of eye problems as a result of working on the microscopes.

The witness did not believe that the claimant's condition was caused by an allergy. Many patients describe things as an allergy but it is often a reaction to something. The work environment at the company was a well monitored one. It would be difficult for anyone to carry out a days work when suffering from an eye allergy. He believed that the claimant was fit to resume work on the microscope and intended to see him again in a few weeks.

The witness saw the claimant again, but as it was an unscheduled visit he did not have his file with him and he did not have notes of the meeting. He was not aware that the claimant intended to leave the company. He had not seen a doctor's report from the Ophthalmology Department in University Hospital Galway, but contended that if he had, he would have disagreed with it.

He later noted that the claimant's eye medication, prescribed by his GP, was an anti-histamine ointment rather than a steroid, as originally noted, and it's side effects included ocular discharge, dry eyes and itchiness. It was not to be used for more than four months at a time. He informed thecompany's Health and Safety Department of this by letter dated 7th October 2009.

During cross-examination the witness confirmed that he had not contacted any of the other doctors that the claimant had attended. The claimant told him that he had seen a consultant. He advised the claimant that he could attend a specialist but that he would have to pay for it, as it was not work related. He considered it acceptable to return the claimant to work on the microscope, as there was no evidence of abnormality in his eyes.

The witness explained that the company performs pre-employment assessments, VDU assessments and eye tests during the employment. He not did believe it was worth trying the claimant on different work tasks. He recalled intending to see the claimant again after his second visit. He did not recall asking the claimant how long it had been since he had worked on the microscope, but he contended that two or three days wouldn't make much difference if he was suffering from an eye allergy.

A HR representative gave evidence that prior to September 2008 the claimant had not come to her attention, or to the attention of the HR department. The first time she or the HR department had seen any of the claimant's sick certificates was when he submitted them in early September 2008.

The company doctor had deemed the claimant fit to return when he met him on September 16th 2008, but when the HRR discovered that the claimant had not returned she phoned him. He said he would return on Monday 22nd September as he had a certificate until then. He did not want to discuss the issue on the phone and so she asked him to meet her on Monday.

They met and the HRR asked the claimant what he expected and he said that he wanted to be taken off the microscope. She told him that it wasn't her decision and that she would need medical evidence to back up why he needed to be moved. The doctor was on site that day so she managed to get the claimant an appointment. When he left she contacted the manufacturing supervisor about the certificate the claimant said he gave him in October 2007. He was adamant that the claimant had not given him a certificate.

The HRR received a voicemail from the claimant on September 24th 2008 in which he stated that he

was resigning and that he wanted his P45. The HRR left him a message asking him to call her. The claimant never returned her call. She had no further dealings with the claimant. She did not believe that the claimant had given the company sufficient time to deal with his issues prior to resigning.

During cross-examination the HRR stated that the claimant sent his letters of resignation to the employment agency. The HRR did not expect the manufacturing supervisor to write down that the claimant had gone home with a sore eye in October 2007.

The HRR's supervisor had arranged the claimant's first doctor's appointment and had spoken to the claimant's supervisors, she was on holidays when the HRR met the claimant. She spoke to her supervisor on the phone about the situation.

The company has 1,800 employees and if they allowed one employee to move off the microscope without medical evidence it would open the floodgates for others who wanted to move. People want variety in their work. If the manufacturing supervisor had lost the certificate the claimant had many more that he did not give to the company.

The HRR disputed the assertion that the second appointment with the company doctor was at the instigation of the claimant. He did not know that the doctor was onsite that day. The claimant did not wait after the second doctor's appointment to see what else could be done.

Determination:

The Tribunal heard a conflict of evidence as to whether or not the first sick certificate was submitted to the company in October 2007. However, the Tribunal is satisfied that the first occasion that the claimant made a real complaint was when he told his supervisor in early September 2008.

The Tribunal is satisfied that the company reacted in a reasonable manner. The claimant was referred to the company nurse and then to the occupational physician. The Tribunal is less than satisfied with how the occupational physician dealt with his problem, particularly by not referring the claimant to a specialist ophthalmologist and only advising him to see one at his own cost.

However, the claimant resigned his position on September 24th 2008 without having fully exhausted the grievance procedure in place in the company, and accordingly, his claim under the Unfair Dismissals Acts, 1977 to 2007, must fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)