

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

EMPLOYEE

claimant

UD361/2012

against

EMPLOYER

respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms N. O'Carroll-Kelly BL

Members: Mr E. Handley
Mr J. Maher

heard this claim at Dublin on 28th May 2013

Representation:

Claimant(s): Mr. Diarmuid Murphy, Maguire McClafferty, Solicitors, 8 Ontario Terrace,
Dublin 6

Respondent(s): Mr. Eamonn McCoy, IBEC, Confederation House, 84/86 Lower
Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

Claimant's Case

The claimant commenced work in December 2007 in the respondent's warehouse. He injured his finger in work on the 23rd April 2011. He returned to work in early June 2011 and was then certified unfit to work from the 22nd June 2011.

He attended a welfare meeting on the 9th November 2011 with NC and CG from HR. The purpose of the meeting was to discuss his return to work by the 15th November 2011. He had met the company doctor DG on the 28th October 2011. DG told him that he was fit to return to work by the 15th November 2011 and he did not accept what she told him. His own GP did not agree with his return to work date. He refused to sign the minutes of the meeting on the 9th November 2011 and he did not receive a copy. He was informed that the respondent needed to contact his GP. He attended his GP on the 9th November 2011 and his GP told him that he could return to work at the start of December and no later than Christmas 2011. He felt that his GP would have received something from the respondent.

After the 9th November 2011 he sent a medical certificate to the respondent. His GP showed him a letter dated the 10th November 2011 from the respondent's doctor DG wherein she outlined that it was a matter for the employer to manage the situation when two doctors have a difference of opinion. He had weekly meetings with his GP.

He contacted the respondent on the 11th November 2011 and left a message or he spoke with someone regarding the reason for his absence. The next appointment with his GP was on the 16th November 2011. On the 16th November 2011 he spoke to his line manager who told him that his medical certificates were no longer acceptable. On the 18th November 2011 he received a letter from the respondent which was dated the 16th November that his employment was terminated.

He has been unemployed since his dismissal. He registered with several employment agencies. He was in receipt of job seekers benefit after December 2011.

In cross examination he stated that after his dismissal he was in receipt of occupational injury benefit, then social welfare benefit and after December 2011 he was in receipt of job seekers benefit. He applied for various jobs in IT, foreign exchange and cleaning. He had previously worked for a foreign exchange company abroad. He had never seen a report dated 10th August 2011 from the Occupational Health Advisor CK. He agreed that he told CK he was unwilling to engage in a return to work programme. He was not asked at the meeting on 9th November 2011 to arrange for a report from his GP. He disagreed that he was asked to give an alternative view.

He sent a letter dated Friday 11th November 2011 to the respondent by normal post. No one from the respondent contacted him. He did not avail of the appeal process. He was not aware of what DG said to his GP. He was a member of a trade union initially but was not a member of a union at the time of his dismissal.

In answer to questions from the Tribunal he stated that he did not contact the respondent to seek re-employment and his solicitor did not mention anything to him about this.. He was told at the end of the meeting on the 9th November 2011 to sign the minutes but he refused to do so as the minutes differed from what was said at the meeting. GC and NM, HR attended the meeting with him on the 9th November 2011.

Respondents' Case

NC told the Tribunal that at the time of the claimant's dismissal she was employed on the HR team. She attended a welfare meeting on the 9th November 2011 with the claimant and CG from HR. The respondent received a report from the respondent's doctor DG that the claimant was fit for normal duty without restriction. She discussed with the claimant if he had an alternative medical view. DG gave her findings to the claimant and it was not new news to him. NC told the claimant that if he could not return to work that he would have to provide a report for the respondent.

On foot of the meeting on the 9th November 2011 she sent a letter to the claimant dated 9th November 2011 in which she requested that if he had an alternative medical view to inform the respondent in writing so that it may be considered in advance of his return to work. The letter stated that " In the event that you do not attend for work on Tuesday 15th November 2011 we

must then assume that you are deeming yourself unfit to return to work and on this basis, the respondent will have no option to terminate your contract of employment on the grounds of dismissal". She did not receive an alternative view from the claimant or a letter dated 11th November 2011 from the claimant to the respondent's personnel department.

In cross examination NC stated that the respondent endeavoured to support an employee in returning to work.

In answer to questions from the Tribunal she stated that minutes were taken of the meeting on the 9th November 2011. The minutes of this meeting were mislaid. She had no recollection that the claimant asked for a copy of the minutes.

BH the second witness for the respondent told the Tribunal that he was senior manager in the HR team. He reviewed all the information that was given to him. He spoke to NC on the 9th November 2011. He did not receive a message from the claimant. He tried to contact the claimant on three or four occasions and there was no facility on the claimant's telephone to leave a message. The respondent wanted the claimant to furnish a return to work date. He reviewed all cases that have long term absences and endeavoured to get employees back to work.

His primary concern was to get the claimant back to work and the respondent needed to know when the claimant was returning to work. He was concerned that the claimant was not prepared to consider a back to work programme. He had a report from the Occupational Health Advisor CK which he followed up with her. The claimant was absent from work since June 2011.

In cross examination he stated that he did not attend the meeting on the 9th November 2011. He did not contact the claimant's wife who worked with the respondent as the matter was confidential. The respondent did not have clarity from the claimant's GP. It was not company policy to have a representative attend welfare meetings and welcome back meetings as the nature of the meetings could be confidential.

Determination

The claimant was out of work consistently from June 2011. The claimant attended with the respondent's doctor on the 28th October 2011. The respondent's doctor stated in her report that the claimant "is fit for full normal duties without restriction". The claimant then attended a meeting with NC and CG. It was the respondent's evidence that it was explained to the claimant that if he felt he was not fit to return to work on the proposed date 15th November 2011 he must provide a medical report from his GP setting out why he held an alternative view. Following that meeting he received a letter dated the 9th November 2011 stating "If you have an alternative view to that outlined above, please present this to me in writing by Friday 11th November 2011 by 2p.m. so that it may be considered in advance of your return. The claimant did not provide a medical report, nor did he seek time to allow him produce one. The respondent's doctor also wrote to the claimant's doctor on the 10th November 2011 stating "you are welcome to contact me and discuss any concerns you may have or you may wish to provide a letter outlining your opinion and the reason behind it". The claimant's GP never made contact with the respondent's doctor.

The respondent wrote to the claimant on the 16th November 2011 stating "you failed to provide

a medical report with an opinion contrary to that of the company doctor or arrive for work on Tuesday 15th November 2011 as scheduled”. We are left with no option but to assume that you are deeming yourself unfit to return to work and on that basis your contract of employment will be terminated on the grounds of ill health”. “You have to the right to appeal”. The claimant did not appeal. The claimant did not request time to get advice legal or otherwise in relation to a potential appeal. It was open to the claimant to request time to get legal advice and/or to get a full medical report from his GP. He failed to do so.

The Tribunal note that the respondent failed to inform the claimant in its letter of the 7th November 2011 calling him to a meeting that he could bring a representative with him to that meeting. Furthermore following that meeting the claimant was not furnished with the minutes, nor were they produced at the hearing.

In all of the circumstances the claimant’s claim under the Unfair Dismissals Acts, 1977 to 2007 fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

