What happens when an employee is sick? *

There is an interesting decision of the Employment Appeals Tribunal, case no. UD86/2010 being a case of Loretta Kearney and Tesco Ireland Ltd. This is a decision where Ms. Kate O'Mahony chaired the Division along with Mr. Hegarty and Mr. Flavin. The case was heard on the 10th November 2010 and the 24th February 2011 in Cork.

In this case the employee went out sick. A health referral report stated that the company doctors states that she is under regular specialist care for her depression. Her specialist fears that she is currently unfit to return to work and the company doctor feels that there is no foreseeable return to work date available. However the employee had stated to the doctor that she was very keen to return to work and feels that she would be in a position to do so after Christmas. However the doctor notes that in February 2008 she was similarly optimistic. The report continued to suggest that she should be given a return date of 1st February and the further employment should be terminated. A discussion meeting took place on her return to work on a phased basis. The employee indicated she was attending the specialist clinic every three weeks and could not get from her psychiatrist a return to work date. She stated that she only wanted to work 25 hours and would only work mornings not be on 4 pm and only on the till. The store manager extended the return to work till the 16th February.

The employee was dismissed. The dismissal letter said that in the event at a later date that she managed to achieve full fitness and was in a position to carry out all functions that they would be happy to consider an application for reemployment. She was not given a right of appeal. The Employment Appeals Tribunal looked at the cases of Marchall -v- Harland and Woolff Ltd and the Secretary of State for Employment [1972] IRLI 90 and Egg Stores (Stanford Hill) Ltd and Lebovicki 1977 ICR Page 265 which was adopted by Sheldon J in the case of Norcutt -v- Universal Equipment Co (London) Ltd 1986 ICR 414. The Tribunal stated that they were not satisfied that the common law doctrine of frustration operated in this case to discharge the contract of employment. They were not satisfied that their future performance of the employees obligations in the future would either be impossible or would be radically different from those undertaken by her in the past. They took into account the fact that the employee wished to return to work. They could not accept that the prospects for the future were so poor that it was no longer practicable. The Tribunal

also laid particular emphasis on the fact that in various letter to the employee advising her to meetings to discuss a possible return to work there was no indication whatsoever to her in any of these letters that her dismissal was being contemplated in the event for her inability to return to work. They were not satisfied that the employee received fair notice or any notice of her dismissal for incapacity was being considered and found that the dismissal was unfair. In this case because of the particular circumstances reengagement rather than reinstatement was ordered.

This case is important for highlighting the importance for employers in dealing with employees who are absent due to illness. The Tribunal particularly looked at the case Bolger -v- Showering (Ireland) Ltd where Lardener J in the High Court set out the criteria about when a dismissal for incapacity is to be deemed fair and these include:

1. That the incapacity was the reason for the dismissal.
2. The reason was substantial.
3. The employee received fair notice that the issue of the dismissal for incapacity was being considered.
4. The employee was afforded the opportunity of being heard.

If an employer is considering dismissing an employee due to incapacity due to a physical or mental illness it is imperative that the four steps set out by the High Court are followed. It is absolutely imperative that the employee knows that dismissal is a potential option and that the employee has a right to be heard in respect of same. In addition the employer must be careful to get appropriate medical evidence that it is an incapacity that is going to last. It is important that any medical report is furnished to the employee which is obtained by the employer. The employee should have a right to challenge any medical report by getting their own medical report.

Where an individual is being dismissed by reason of incapacity the reality is that they are being dismissed but they have not done anything wrong. It might be an inconvenience to the employer that they have such employee. However fair procedures dictate that where dealing with dismissal on the grounds of incapacity that not only are fair procedures applied but they are seemed to apply.

***Before acting or refraining from acting on anything in this guide, legal advice should be sought from a solicitor.**
****In contentious cases, a solicitor may not charge fees or expenses as a portion or percentage of any award of settlement.**