EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
Employee

CASE NO.
UD347/2005

against
Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J Flanagan BL

Members: Mr J Browne
Ms R McArdle

heard this claim at Wicklow on 14th February 2006

Representation:

Claimant(s): Mary Joe Butler BL instructed by Ms Finola Freehill and Ms Sinead Kerin, Solicitors, Augustus Cullen & Son, Solicitors, 7 Wentworth Place, Wicklow

Respondent(s): Mr Frank Lanigan, Malcolmson Law, Solicitors, Court Place, Carlow

The determination of the Tribunal was as follows: -

Respondent's Case:

The respondent firm was in the business of quarrying. The first witness for the respondent was the manager of the quarry in which the claimant had been employed. He told the Tribunal that he had been with the company in different roles for forty-two years. The claimant was employed by the respondent when the respondent needed extra staff in the office to process dockets for the weighbridge. The claimant was employed to deal with telephone queries and to issue dockets to the drivers of lorries with the weight of their load attached. It was quite a complicated job and there was computer work involved. The first witness had encouraged the claimant to say if he had any problems learning the system. Some time after the claimant had commenced employment, the first witness received complaints from head office, which was where the dockets were processed. There were a number of mistakes on the dockets that had been issued by the claimant. The first witness approached the claimant on several occasions and queried him as to why so many mistakes were occurring and encouraged the claimant to approach the other office staff or the first witness himself if the claimant had any difficulties.

In November 2004, the claimant gave a customer a price, which was not part of his duties, and the price given was incorrect. At the claimant's six-month review, the claimant agreed that he had made mistakes frequently and agreed that a further three-month trial period would apply to him. The claimant never asked anyone for further training or guidance despite the fact that there was

another colleague in the office carrying out the same duties as the claimant. The first witness brought the claimant into the office after Christmas and put the claimant on two weeks' notice. The claimant said it "was (his) own fault". The claimant finished working that day.

Under cross-examination, the first witness told the Tribunal that the claimant had never been interviewed for his position or issued with a contract in writing. No formal training had been given to the claimant but there were two other people in the office to help him learn as he went along. There were different prices for loads depending on tenders and different contracts but the claimant was not expected to know the details as the head office staff dealt with all of the pricing matters. The claimant had been brought into the office three times regarding his mistakes before any action was taken. The managing director of the company had given the first witness the instruction to dismiss the claimant and the witness agreed with that instruction as being the correct course to take.

The second witness for the respondent was the office manager of the office in which the claimant had been employed. The second witness had been employed with the company for twenty-five years in total. The claimant's job had involved issuing a docket to the driver in respect of each transaction, getting the docket signed and sending the docket on to head office for billing. Sometimes, cash or a credit card would be tendered and then a receipt would be issued but most of the transactions were on account. The only way to learn the job was to "get in and do it". When the claimant commenced employment, the second witness trained him on the computer system. The claimant was familiar with computers but not with the particular system utilised by the respondent. After six months, the second witness put the claimant on a further three months trial but the situation had continued to disimprove. The claimant billed the wrong accounts on the computer and incorrectly inputted data on a regular basis. The second witness received complaints about these matters from head office on a regular basis.

The second witness spent time with the claimant training him on the system and things did not improve. In August 2004, the second witness had a meeting with the claimant and gave the claimant another chance. There was an improvement for a few days but then the claimant reverted to his previous behaviour. The situation got worse to the point where the staff in head office approached the general manager and made a complaint. The situation was made known to the claimant and the second witness was present when the decision was made to terminate his employment.

Under cross-examination, the second witness told the Tribunal that he did train the claimant once it became obvious that the claimant was making mistakes. Nine months after the claimant had commenced employment, he was still making the same mistakes. The witness provided a reference for the claimant subsequent to his dismissal. Most of the errors made by the claimant were based on charging the incorrect accounts on the computer system.

Claimant's Case:

The sole witness for the claimant was the claimant himself. The claimant told the Tribunal that he had received one half hours training on the day that he had commenced employment with the respondent. The claimant received a further week of training that had involved only a few hours actual training, as the office had been extremely busy. After six months, the claimant approached the manager and asked for an assessment. The manager told the claimant that he had no time to assess the claimant on performance. The claimant was never told that his job was in danger until November 2004 when the office manager berated him about a mistake he made with an important account. When the claimant was dismissed, he shook hands and had no ill-feeling. The claimant

told the Tribunal that the computer system was very complicated. There were multiple accounts on the system per customer and it was not always clear on the dockets in respect of which account to charge the customer.

Under cross-examination, the claimant told the Tribunal that he met both the quarry manager and the office manager on the day he commenced employment with the respondent. After six months, the claimant requested a meeting and the quarry manager said that he had no time. Nothing further happened. The claimant was unaware if he was going to be retained in employment. There was no mention of errors/mistakes. The office manager had mentioned to him on occasion about different errors he had made and the claimant tried harder. He was never told how many errors he had made but did not believe it was as bad as the respondent had made out.

The claimant admitted that he had stated a price to a customer, but said that he was not told until afterwards that it did not form part of what he was allowed to do and that he had made a serious error in doing so. He felt that it was this error that had lead to his dismissal.

Determination:

It is a fact accepted by both the claimant and the respondent that the respondent dismissed the claimant. It therefore falls to the respondent to satisfy the Tribunal that the dismissal was fair.

The Tribunal has heard evidence on behalf of the respondent from only two witnesses, the manager of the quarry and the manager of the office for which the claimant worked. It is the uncontroverted evidence of the respondent that it was neither of these two individuals who made the decision to dismiss the claimant but rather the managing director of the respondent company himself. The managing director of the respondent company did appear and give evidence himself as to his reasons for the dismissal. The Tribunal has instead heard evidence given by two individuals as to the managing director's reasons for dismissing the claimant. Where an employer chooses not to present evidence by the individual or individuals who made the decision to dismiss an employee, but instead relies on the evidence of others in attempting to justify a dismissal, the evidence given may be regarded by the Tribunal as hearsay and speculation as to the true reasons for the decision to dismiss. The Tribunal, in the exercise of its discretion as a less formal body, may admit such testimony into evidence and deal with on its weight, rather than by the application of an exclusionary rule. The Tribunal may consider the law of evidence, insofar as it is relevant to the evidence before it, as a guide to the weight that is fair and reasonable to attach such evidence, in reaching its decision. In the absence of evidence by the decision-maker, an employer may seek to prove by inference from the evidence of others the reasons of the decision-maker for the dismissal. However, the Tribunal must be careful to assess the fairness of the dismissal on the basis of the reasons actually relied upon by the decision-maker, and not on the basis of reasons which could have been relied upon by the decision-maker, but may not have been the operative reasons. It will be a more difficult task for an employer to prove that the dismissal was for one or more of the proper reasons available to it, and not for a further, improper reason, in the absence of evidence by the person who made the decision as to his actual reasons.

The Tribunal notes that the claimant was not provided with a contract in writing nor with any written warnings nor with a letter of dismissal setting forth the reasons for the dismissal. The respondent's case is remarkably unsupported by documentation.

On the facts of this case, the Tribunal is satisfied that the only reasons for the dismissal relate to the performance of the claimant. The Tribunal notes that the respondent contends a significantly higher

rate of error by the claimant in inputting data than the claimant considers truly representative of his own performance. Furthermore, the claimant believes that the true motivation for the dismissal arises from one particular incident, in which he quoted a price of approximately €5 to €6 per tonneless than the correct price, rather than any inputting errors, such errors being internal to th erespondent and not directly communicated to a customer. Irrespective of whether the Tribunal wereto prefer the evidence of the claimant or respondent on this particular controversy, either versiondiscloses a rationale for the dismissal that relates exclusively to the quality of the work performedby the claimant and no reason for the dismissal other than quality of the work carried out by theclaimant was canvassed by either party as being the an operative reason for the dismissal, and sothe Tribunal concludes that the dismissal involved no other considerations.

It is the respondent's evidence that the claimant was told that he was dismissed in circumstances, which make it clear that the decision to dismiss had already been made, and this was the first notice to the claimant that any dismissal had been even contemplated. The Tribunal accepts this evidence of the respondent.

It is the uncontroverted evidence of the respondent that it was the managing director of the respondent company who made the decision to dismiss the claimant, that the decision to dismiss was made in the absence of the claimant before Christmas, that this decision was communicated to the claimant after Christmas and that decision was communicated as a *fait accompli*. At no stage prior to the dismissal was the claimant advised that a disciplinary hearing was about to take place, in relation to the quality of his work, or that could result in his dismissal, or at all. Insofar as a disciplinary hearing could be said to have taken place, it was one to which the claimant was not invited. Alternatively, it can be said that in the absence the claimant and without any opportunity for the claimant to attend, no proper disciplinary hearing occurred. The failure of the employer to afford the employee the opportunity to present any defence to the decision-maker prior to the decision being made to dismiss the employee constitutes a fundamental breach of the principle of procedural fairness referred to by the phrase *audi alteram partem*. The dismissal, being procedurally unfair is therefore an unfair dismissal.

The Tribunal finds the dismissal to be unfair on the grounds of unfair procedures. Therefore the Tribunal does not need to decide whether the dismissal was justified on the grounds of the performance of the claimant or decide what reasons were the operative considerations motivating the decision-maker.

The Tribunal finds as a matter of fact that the total gross remuneration of the claimant was €622.54 per week. The Tribunal also finds that the respondent employed the claimant for a period of continuous service commencing on the 16th November 2003. The respondent served two weeksnotice on 3rd January 2005. The claimant was not required to work out the notice but was insteadpaid in lieu.

The Tribunal considers an award of compensation, instead of reinstatement or reengagement, to be the most appropriate remedy because it is the remedy which will the give effect to the wishes of the parties, takes account of the dissatisfaction with the claimant's performance as expressed by the respondent, has regard to the unavailability for work of the claimant who suffered a disability as a result of depression and has regard to the passage of time and the smallness of the office to which the claimant would otherwise be returned and having regard to all other factors of which the Tribunal has notice.

The Tribunal notes that that the claimant was in receipt of Disability Benefit and therefore finds that the claimant was unavailable for work from 16th June 2005 onwards. Notwithstanding the fact that the claimant suffers from depressive illness from time to time and that the claimant secluded himself for some time after the date of his dismissal, the claimant applied for approximately twenty different jobs prior to 16th June 2006. The Tribunal is satisfied that the claimant was available for work prior to 16th June 2006. The Tribunal, in its calculation of loss, has taken account of the payment by the respondent in lieu of notice. Bearing in mind all relevant factors the Tribunal awards compensation in the sum of €7470.48 to the claimant.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)