

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
Employee

CASE NO.
UD94/2007

Against

Employer

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. E. Murray

Members: Ms. M. Sweeney
Mr. D. McEvoy

heard this claim at Cork on 7th November 2007, 5th and 6th February 2008

Representation:

Claimant: Mr Stephen O'Donoghue B.L. instructed by
Fitzgerald, Solicitors, 6 Lapps Quay, Cork

Respondent: Ms Karen O Driscoll B L instructed by
Ronan Daly Jermyn, Solicitors, 12 South Mall, Cork

The determination of the Tribunal was as follows:

Respondent's Case:

The managing director (MD) of the respondent company described the business to the Tribunal as an insurance brokerage. The claimant was employed in December 2001 as a motor clerk and was exclusively responsible for a large file for a significant line of business involving a large number of members of the Defence Forces. This had been an active file at the company for fifteen years and was important to the company. On the morning of the 16 August 2006, the claimant met the witness to discuss his annual salary review, and he informed the claimant of the amount by which he proposed to increase in his salary. After lunch, the claimant returned and told the witness that he was unhappy with this increase. The witness advised that this amount was all the company could afford and was comparable to salaries in other firms in the same line of work.

Subsequently, the witness sent an email to the claimant requesting an update on payments relating to the large file. The claimant said he was too busy to do them at that time and the witness emailed him again to emphasise the urgency. The claimant then said that he could not locate the file and suggested it might be with a colleague. The witness checked with this colleague and she did not

have the file in her possession. The managing director previously instructed the claimant to keep the figures on the computer and keep a hard copy in the file on his desk. When the claimant said the whole file was missing, the witness went to his desk straight away to help him look for it. The claimant said he did not know where the file was and when he opened the computer files, they were deleted. There were no records on the computer relating to that file. These data related to insurance and pension matters. The witness telephoned the i.t consultant that dealt with computer matters for the company to ascertain if there was a way of recovering the data. The latter returned his call and explained that he had received a phone call from the claimant requesting the same information. The claimant had told him that he had deleted some files by mistake. The consultant suggested that they shut down the computer immediately. The witness went to the claimant and told him to close the computer and sent him home for the day.

A letter was sent to the claimant dated the 18 August 2006 advising him that he was suspended because of the loss of the computer data and the hard copy of the file, and the witness asked him to make himself available for an investigation. The claimant submitted a medical certificate on the same day. The MD arranged to have an independent person carry out an investigation into how the data was lost. He appointed an experienced human resources consultant. The witness telephoned that person and gave him an outline of the circumstances. On the 22 August 2006, the managing director sent a letter to the claimant inviting him to a meeting with the consultant for the 25 August. The claimant responded by email advising that the date did not suit and the witness rescheduled the meeting for the 12 September. He confirmed this by letter on the 23 August inviting the claimant to bring a colleague along to the meeting with him. The witness received a reply from the claimant's solicitor on the 11 September, advising him that the claimant had been on holidays and would be unable to attend the meeting on the 12 September. The witness also requested that the claimant attend the company doctor for medical assessment on the 1 September by further letter on the 25 August. The claimant's mother informed the witness by phone that the claimant would not be attending the appointment with the doctor. The witness rescheduled the appointment for the 4 September by letter to the claimant on the 31 August. A further letter issued to the claimant on the 6 September confirming a meeting with the human resource consultant on the 12 September. In that letter the witness also requested that the claimant inform him of his availability regarding attending the company doctor. No reply was received.

The witness sent a request by letter for the claimant to confirm his attendance at the meeting on the 12 September. This letter issued on the 11 September and crossed with the reply from the claimant's solicitor. The witness's solicitor replied on the 11 September stating that the claimant was obliged to attend the meeting on the 12 September and that the investigation would proceed on that date whether the claimant attended or not. The claimant did not attend.

The M.D. wrote to the claimant on the 18 September enclosing a copy of the report from the consultant. He informed the claimant that the investigation had concluded and he was now proceeding to disciplinary procedure. A disciplinary meeting was scheduled for the 25 September for all matters to be discussed. On the 25 September the witness, and a note-taker attended for the meeting. The claimant attended and opened the meeting by requesting a copy of his terms and conditions of employment. The witness told him that he did not have a copy with him and the claimant said the meeting was adjourned. The claimant then left. Later that day the witness couriered a copy to the claimant. He also faxed a letter through his solicitor stating that the claimant was deliberately trying to frustrate his efforts to conclude the disciplinary meeting and rescheduled the meeting for the 27 September. He informed the claimant that failure to attend this meeting would be considered a disciplinary offence.

The meeting on the 27 September opened with the claimant producing a recording device requesting to record the meeting. The witness told him that a note-taker was present and the notes would be presented to him by the end of the day. At the meeting, the managing director asked the claimant to confirm that he had received a copy of his terms and conditions of employment and he put the report from human resource consultant to him. He asked the claimant to comment on the conversation between the claimant and the I.T. consultant. Apart from acknowledging the receipt of the terms and conditions of employment, the claimant had no further comment nor did he give any further information. Following the disciplinary meeting, the witness felt there was a total breakdown of trust between him and the claimant. He felt that he had no alternative but to dismiss the claimant. The witness contacted the claimant to arrange to reconvene a meeting to let him know the outcome and the claimant refused to attend any more meetings. The managing director issued a letter to the claimant with his decision. The witness said that his decision was based solely on the fact that the files were missing inexplicably and these were the responsibility of the claimant. The computer files were intentionally deleted as the system was set up to avoid accidental deletions. The claimant was offered the right to appeal the decision.

Under cross-examination, The M.D said that the file went missing the day the claimant declared that he was unhappy with his salary increase. When the i.t consultant phoned the witness returning his call, he told him that he had received a phone call from the claimant about deleted files. The i.t consultant added that the claimant had told him that files had been deleted from his computer and he was enquiring whether they could be recovered. The claimant was the only employee with direct access to the particular file that was deleted from the computer. The claimant did not ask to see the i.t consultant in person to question him during the disciplinary meeting. The letter issued to the claimant dismissed him summarily for gross misconduct. The witness denied deleting the file himself, for the purpose of setting up the claimant. The claimant appealed the decision to dismiss and this appeal was heard by the MD's wife who was another director at the company. She upheld the decision to dismiss based on the file and paperwork presented. The witness denied bullying the claimant over the fact that he was a personal friend of a previous employee that had difficulties during his employment. The file that was lost contributed fifteen percent to the overall business of the company. It never turned up. There were approximately seven hundred policyholders associated with the file. The claimant never admitted deleting the file but he understood that the claimant had admitted it to the i.t consultant.

A h.r consultant gave evidence that he was engaged by the company to conduct an investigation into the matter. He went to the respondent company and got a broad understanding of the business.

The nature of the problem was described to him and he met with the other employees in the company. The first issue for him was to decide whether the file could have been deleted accidentally. He established that there were a number of steps to go through on the computer system before a file could be successfully deleted. The second issue was to establish if other staff members could have deleted the data. The claimant's computer was a "stand alone" and was not linked electronically to the others in the office. The particular files on his computer could not be deleted/remotely from another computer in the office. The consultant spoke to the i.t consultant and satisfied himself that this was the case. The third issue was to meet with the claimant and get his explanation for the sequence of events. The claimant did not attend the scheduled meeting. This left the consultant in a situation where he had to draw his own conclusions. The conclusion that the consultant reached was that the claimant had purposely deleted the computer files or knew something about where the files were. He regretted that he did not have the benefit of the claimant's contribution.

Under cross-examination, the witness said that he met the i.t consultant on the company premises

and that person demonstrated the different equipment and files to him. The witness verified with the MD that the claimant had telephoned the i.t consultant and said files had been deleted. That conversation occurred before the M.D requested the file update from the claimant.

The i.t consultant, retained by the respondent to look after its computers, gave evidence of phone conversations he had with the claimant and the M.D in mid August 2006. The witness felt uneasy with the claimant's tone and line of questioning. He regarded the subject matter as inappropriate, and his tone somewhat urgent. The claimant did not tell the witness that he had deleted files but did query whether deleted files from his computer could be retrieved.

As a result of this telephone conversation, and his subsequent conversation with the M.D, the witness took away the claimant's computer for examination. By that time he had informed the M.D of his earlier conversation with the claimant. The witness was able to retrieve some of the deleted files but certain details were still missing. He had retained some data from an earlier overhaul of that particular computer. The witness could not say who deleted the files in question. However, he commented that only a person with enough competence in computers could have done this and he did not believe that the M.D had that competence.

A co-director and wife of the M.D heard and considered the claimant's appeal against the decision to dismiss. While the claimant was aware of her standing and position within the company he never made an objection to her conducting his appeal. As part of the appeal process the witness consulted her husband over a particular aspect of this case. She did not interview anybody. The witness "worked through all the points" of the appeal that was submitted on 2 November 2006.

An appeal hearing took place on 8 November and was attended by the witness, the claimant, and another person who was linked with the company and who acted as note taker. The claimant "was fully engaged" in this appeal process, and he did not make any reference to the possibility that her husband had deleted the files. Two days later and following a review of the case the witness concluded that the decision to dismiss the claimant should be upheld.

Evidence was heard from a self-employed person who worked two days a week at the respondent's in the summer of 2006. In relation to a specific query from an insurance company the witness together with another colleague searched the claimant's desk on 24 July, while he was on holiday, and were unsuccessful in locating the Defence Force's file. The witness told the relevant company that the claimant was exclusively dealing with that file and was on holiday and would attend to it when he returned in August. She had no dealings or knowledge of the files herself and neither saw nor handled them. This witness took notes of the appeal hearing on 8 November 2006.

Claimant's Case

The claimant's returned from leave on 3 August 2006 and while aware that the hardcopy file was not on his desk, he did not look for it until around the 16 August. The M.D was on leave throughout the first half of that month. When he returned the claimant's salary and the missing file came to the fore. The witness was unhappy with the M.D.'s attitude towards his pay rise, and he felt badly treated. He felt that the M.D behaved in a bullying and intimidating manner towards him. Around the same time the issue of the missing file arose. There was a series of emails between these two men relating to that file on 16/17 August 2006. The witness suggested that a colleague might have the file, as it was not on his desk for some time.

The witness was unable to find the information on his computer either. He phoned the i.t consultant

with a view to retrieving the files. The claimant did not regard that call or its contents as inappropriate. He added that it was not correct that he told that person that he had deleted those files. The witness insisted to the Tribunal that he neither deleted those files nor caused them to be missing. He said he made that clear to all concerned. The claimant did however suggest that the managing director could be responsible for those files going missing as part of a plot to discredit and dismiss him. According to the witness it was possible for most staff in the office to access his computer and those files. The witness did not dispute that the files were deleted as a result of somebody's intentional act. He observed that the missing files and their contents could be retrieved and he did not think their loss was "a big issue".

On 17 August 2006 the M.D. suspended the claimant from duties. No reason was given for that development until he received a letter dated 18 August. That letter included the comment that the i.t consultant had stated that the claimant had admitted he deleted the files. An investigation was to proceed in which the claimant was invited to participate. However, the letter continued, that in the absence of such co-operation the investigation would happen and its findings might lead to disciplinary action. By that stage the claimant was also out of work due to a medical condition. The claimant did not rebut or challenge the contents of that letter. He justified his lack of response to continuing stress and that he was mentally unable to respond at that time. Events were now proceeding "fast and furious" as another series of communications developed between all the relevant parties.

An investigative meeting took place on 12 September 2006. The claimant did not attend that meeting as he had "just returned from two weeks vacation" and he needed time to take advice from his solicitor. As a result of that meeting and the investigator's report, which was furnished to the claimant, a disciplinary meeting was scheduled for 25 September. The claimant attended that meeting and there sought his written terms and conditions of employment. That application resulted in a delay of two days. The witness described the subsequent meeting as one-sided and "answered everything put to him". He declined an invitation to attend another meeting with the respondent on 9 October. However he received a letter dated the same day, from the M.D confirming "the company's decision to summarily terminate your employment for gross misconduct with effect from today's date".

The grounds for the claimant's appeal were submitted on 2 November 2006 and the claimant was made aware that a co-director of the respondent would hear his appeal. The claimant acknowledged he knew the close relationship that person had with the managing director but since he was not familiar with the ongoing proceeding he did not object to that person presiding over his appeal.

A doctor who treated the claimant on 17 August 2006 found him in an agitated and upset state. The claimant complained of being pressurised and bullied at work and felt he was being badly treated there. By the end of that month the claimant was still in "a fragile position" and took a holiday that would have been of benefit to him. The witness who saw the claimant again on 29 September reported that the claimant told him that he was much improved but still constantly preoccupied with work.

DETERMINATION

Having heard all of the evidence in this case and having carefully considered same this Division of the Tribunal makes the following findings:

Data was deliberately deleted in relation to the Defence Forces account from the personal computer of the Applicant. On the basis of the evidence presented to the Tribunal it is not possible for the Tribunal to determine who deleted the data but the Members of the Tribunal are satisfied that there is no evidence whatsoever to suggest that the managing director was responsible for the deletion of this data. Indeed, the Tribunal finds it highly unlikely that the managing director deleted the data for the purposes of entrapping the Applicant as has been suggested.

The Tribunal finds that the managing director had a reasonably held apprehension that the Applicant had in fact deleted the data himself and had removed the lever arch file containing the hard copy of the records. This apprehension was based on his exchanges with the Applicant and the phone call that he had with the IT Specialist, in which the latter expressed disquiet at the contents of a phone call that he had from the Applicant.

In the circumstances the Tribunal finds that the managing director acted reasonably in suspending Mr. Shiraz pending an investigation.

The procedures adopted thereafter by the Respondent were unimpeachable up to but not including the Appeal process. This was made an integral part of the disciplinary procedure by the Respondent himself. The Tribunal finds that an appeal to the wife of the principal decision maker in the disciplinary process infringes the rule of natural justice “Nemo Judex in Causa Sua” and also fails on grounds of perceived bias.

The Employer in this instance introduced SI 146 of 2000, which sets out a code of practice on grievance and disciplinary procedures. Paragraph 6 of that is relevant and I take the liberty of quoting it. *“The procedures for dealing with such issues reflecting the varying circumstances of enterprise and/or organisations must comply with the general principals of natural justice and fair procedures which include*

- *That the employee’s grievances are fairly examined and processed*
- *That details of any allegations or complaints are put to the employee concerned*
- *That the employee concerned is given the opportunity to respond fully to any such allegations or complaints*
- *That the employee concerned is given the opportunity to avail of the right to be represented during the procedure*
- *That the employee concerned has the right to a fair and impartial determination of the issues concerned taking into account any representations made by or on behalf of the employee and any other relevant or appropriate evidence, fact or circumstances.”*

It is uncertain whether or not the 5th point envisages an appeal procedure or whether it is an aspiration as to how disciplinary procedure should be operated but it must be somewhat doubtful that an appeal procedure in circumstances such as this is necessary at all. Having introduced one however the Respondent was bound by it and it should have been free of any defect.

These findings lead to the inevitable conclusion that the actual dismissal of the Applicant was

unfair. The Tribunal however has to consider whether or not the Applicant contributed by his conduct to his own dismissal.

In this regard the Tribunal finds that by not engaging with the initial investigation the Applicant contributed significantly to his own misfortune. The Applicant failed to make any serious denial of the allegations in the initial stages. The Consultant brought in to investigate the matter impressed the Tribunal as being a reasonable and experienced person and this Division of the Tribunal feels that a completely different outcome might have been achieved if the Applicant had engaged with him. The Applicant attributes his failure to engage with the investigator or to make any formal denial of the allegations to his emotional state at the time. The Doctor's evidence was of an emotionally distressed young man whose distress was understandable having regard to the predicament that he found himself in. There is however considerable evidence that the Applicant was able to deal with his affairs at that time and several e-mails sent by him have been opened to the Tribunal indicating that he was well in control of his affairs. Furthermore, he was able and well enough to go on holidays and also to register a new business name in or around this time. The Tribunal finds that there is no justification for the Applicant not engaging with investigative procedure.

In all the circumstances the Tribunal finds that the Applicant, because of the failure of the disciplinary process and for this reason alone, was unfairly dismissed. The Tribunal further finds however that the Applicant contributed very significantly to his own dismissal. In the circumstances this Division of the Tribunal feels that it is appropriate to make an award of damages in this case of €2000.00.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)