

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
Employee

CASE NO.
UD597/2007

Against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey BL

Members: Mr D. Moore
Mr B. Byrne

heard this claim at Dublin on 31st October 2007 and 16th and 17th January 2008

Representation:

Claimant: Mr Colm Casey B L instructed by
Wales & Co., Solicitors, Clifton House, Lower Fitzwilliam Street, Dublin 2

Respondent : Mr Pat McCann B L instructed by
Arthur Cox, Solicitors, Earlsfort Centre, Earlsfort Terrace, Dublin 2

The determination of the Tribunal was as follows:

Respondent's Case

The director of human resources stated she was familiar both with the respondent's human resources' policy and practice and the claimant's situation and work performance with regard to those policies and practices. The witness had many years relevant experience before joining this information technology solution company in April 2006. One of her functions was to update and produce a company handbook detailing with, among other things, terms and conditions of employment for this growing company. The witness issued revised grievance, disciplinary, and harassment policies to all staff in September 2006. The claimant's employment with the company commenced in the autumn of 2003. He had been issued with a different version of such procedures at that time. The company had four grades of consultant at that time and the claimant started at the level of principal consultant level 2 which was the next to highest of the consultancy grades.

With the aid of a book of documents the witness set out to explain and justify the respondent's decision to dismiss the claimant in early 2007. She highlighted the disciplinary rules and procedures in the claimant's contract of employment. The claimant was also subject to regular reviews of his work. The witness did not explicitly see those reviews as part of the disciplinary

process. A verbal warning never issued to the claimant as part of those reviews but she was in “no doubt” that the claimant understood the meaning of his reviews.

In May 2005 following a performance appraisal the claimant’s role in the company was relegated to that of a consultant. This was the lowest grade on that scale. However he did not suffer a drop in basic salary due to that demotion. According to the witness the claimant was expected to perform extremely well in that position. In a letter formally notifying him of that move the respondent also issued the claimant with a first written warning relating to his poor performance. That letter also detailed some aspects of his work that supported the company’s decision. In addition that letter included the following: “We expect a significant improvement in your performance.....”

The witness referred to the claimant’s quarterly performance review he had with his manager in May 2006. She commented that the claimant was not properly servicing his and the respondent’s clients, and since it was critical to “get things right” the claimant needed to give more attention to the details of his tasks. The claimant agreed to eight written objectives that were set out at that meeting and to be achieved by November 2006. The witness then became a party to subsequent emails between the claimant and his manager and all three gathered on 20 June at a performance management meeting. The claimant was aware of the nature of that meeting prior to its commencement and during the course of that meeting certain shortcomings in his work were again brought to his attention. The witness felt it was not feasible for the company to “hand hold” the claimant as he performed his duties. He had over ten years experience in the information technology sector prior to joining the respondent. The claimant questioned some of the company’s misgivings about his work particularly the timing of those complaints. The witness did not accept that the only time he heard of his shortcomings was at his quarterly reviews.

As a result of that meeting the respondent issued a written warning to the claimant on 21 June 2006. The company also informed the claimant that he faced further disciplinary action up to and including dismissal should he not meet the agreed objectives. The witness also offered him support and assistance in achieving those objectives. The claimant appealed that warning the following day to a director of the company. After considering that appeal that person in turn informed the human resources director on 26 July of his decision to uphold the decision to issue the claimant with such a warning. Following a further meeting on 29 August the witness issued a final written warning to the claimant as regards his work performance. Again she advised him that should he desire it he could get support and assistance from his manager. Furthermore the witness alerted him to the consequences of consistent under performance. Such behaviour would result in dismissal. The claimant again appealed that decision to another director-chief executive officer. That appeal submitted on 7 September was based more on disciplinary procedures than on work performance.

It was around that time that the witness realised that the claimant had not been informed of the outcome of his appeal against his first written warning. She had assumed that the result of that appeal had been communicated to the claimant at the time she received that result. The witness described that scenario as an oversight on the respondent’s part. The respondent however, “did not take a step backwards” following that oversight. In an undated correspondence to the claimant and the witness the chief executive officer rejected the claimant’s appeal. The witness did not consider senior management as inappropriate or as not being neutral in hearing the claimant’s appeals.

By autumn 2006 the claimant was assigned mainly internal tasks. It had reached the stage where project managers did not want the claimant on their teams for external work. However, by early January 2007 he was again invited to a disciplinary hearing as his work performance was the source of a further complaint. That hearing took place on 4 January and was attended by the claimant, his

representative, the witness, and the applications manager. At the conclusion of that meeting the latter and the witness agreed that due to the claimant's consistent underperformance and his denial of responsibility for its quality was sufficient to merit his dismissal. His recent warnings were also taken into account. A notice of dismissal was issued to the claimant that day and included a note on an appeal process against that decision. Such an appeal was made and the respondent's decision was again upheld. That notice of dismissal included, in part, "This dismissal is a result of your continued failure to meet the performance standards acceptable of your role in XXXX and your continued failure to accept any responsibility for the performance shortfalls."

The next witness became the head of a unit called Applications Development in August 2005. He had over twenty years experience in the information technology sector that included the position of project manager with the respondent prior to that appointment. He was part of the senior management of the company and as manager of the claimant was broadly familiar with his work. Following a request from the claimant the witness formally reviewed his work in May 2006. He described the claimant's work as examined in that review as mixed. That review did not form part of a disciplinary process. Prior to a meeting with the claimant on 20 June 2006 the witness outlined the major issues that were causing concern. The claimant was also made aware that he could face disciplinary action as a result of that meeting. At that meeting the witness "went through" those issues with the claimant. The reaction of the claimant was a source of "great concern" as he was in denial of his shortcomings on his work. A first written warning was issued to him due to his inability to accept responsibility for his work and for its poor quality. In acknowledging the omission of a verbal warning the witness defended starting at the written stage so as "to impress upon the claimant the seriousness of the situation".

Following further adverse comments on the claimant's work in August 2006 the witness met with and discussed the claimant work. Again he denied responsibility for its poor quality and the witness and the human resource director had "no option" but to issue him with a final written warning. The witness maintained that the claimant was also aware of issues about his work from discussions and comments outside of the formal reviews and meetings. However, the witness did not directly examine the claimant's work at that time. Instead he relied on and accepted details he received from those who knew his work. He was unaware and was surprised to learn that at the time of the final written warning the claimant's appeal against his first warning had not been communicated to him.

At the disciplinary hearing on 4 January 2007, which the witness took responsibility for instigating, the claimant was given the opportunity "to air his views". At the conclusion of that meeting the witness and the human resource director agreed that by then they had gone through all the procedures with the claimant and found they had no alternative other than dismissal. The witness commented that the claimant continuously rejected all help and assistance from the respondent.

The head of resources gave evidence. There were significant bugs in a program the claimant had worked on and he was uncooperative in solving the problems. The witness was at the claimant's response. The problems were security issues and the consequences of client information leaking would be serious. Project managers no longer wanted to work with the claimant.

A project manager with whom the claimant worked gave evidence. On a project to design a system she was dissatisfied with the first draft document. There was a meeting to discuss what should be done. The claimant had 5 days to produce a revised draft. When the revised draft was completed most of the errors had not been addressed satisfactorily. The revised draft was also poorly written and did not follow the template.

A second project manager gave evidence. The claimant worked on the design phase of a project for him. The claimant ran workshops with the client. The document he produced was of poor quality, it did not include enough detail. The witness got another person to finish the project.

A director of the respondent gave evidence. He dealt with the appeal against the written warning. He could have substituted a verbal warning but choose not to as he felt that the written warning was warranted.

A second director, with the same seniority as the first director gave evidence. He heard the appeal against dismissal. He followed procedures outlined by the HR department. The claimant received his P.45 before the appeal meeting. He examined the reasonableness and the fairness of the process.

One of the co-founders and the managing director of the company said that his working relationship with the claimant was initially very good. He felt that the claimant had high potential in the business but within a short time he began to lose confidence in the claimant's ability to deliver results and performances. The witness was involved in the demotion of the claimant in May 2005.

This enterprise had a wide range of clients half of whom were public sector bodies and enjoys a growth rate of approximately thirty percent a year. It was established in 1996 with two staff and now employs upwards of one hundred and fifty people. Among its growing workforce was a human resource officer who joined the company in April 2006. She began to bring the company's disciplinary, grievance, and harassment policies "up to scratch" soon after her commencement with the company. Such revised policies were "properly published" on the company's Intranet to all staff on 1 September 2006. The witness accepted that the respondent's use of those policies in disciplining the claimant prior to that date was "not technically correct". However he justified their use in this case saying that the claimant's behaviour merited the omission of a verbal warning. Besides continuous feedback given to the claimant on his work also allowed the skipping of a verbal warning.

This director was involved in the claimant's appeal against a final warning in September 2006. He described his relationship with the claimant at that time as reasonable and regarded himself neutral as he was "coming new to this case". He had formed the opinion at that stage that the oversight in the company's handling of the claimant's first appeal made no difference in his attitude towards the appeal he was addressing. The witness upheld the claimant's final warning outlining his reasons in an undated email to him.

The claimant was assigned to an internal project at the end of October 2006. Such a project was not expected to exceed five working days. The witness was pleased with the claimant's first draft presented within two days of the commencement of that project. However by December the quality of the claimant's work was "very poor". He told the claimant more work was needed on that project. The witness expressed his concern about that quality to the claimant's mentor on 2 January 2007. That mentor and the human resource person met the claimant two days later and dismissed him. In denying that there was a concentrated effort by the company "to get rid" of the claimant the witness was very satisfied with the way the respondent treated the claimant from May 2006 the termination of his employment. The company was "very fair" to him but had also learned lessons from this case.

Claimant's Case

After several years experience in the information technology business the claimant commenced employment at the respondent's in September 2003 at a high level. By the end of May 2005 he was demoted to the level of consultant that was the lowest grade in the company's hierarchy of consultants. That downward move was formally communicated to the claimant by the respondent's managing director with whom he "had personal issues" with at the time. It was the witness's belief that from time onwards the company no longer wanted him to remain on as an employee. Due to his own personal circumstances at the time and other factors the claimant did not resist his downgrading by the respondent. The claimant requested and was granted a quarterly performance review by his manager in May 2006. His manager indicated that his work was good and the claimant's performance on the reviewed projects he was involved in was mixed. The witness agreed that the eight objectives agreed to at that performance meeting for the next six months were reasonable.

On 19 June 2006 the claimant and his manager exchanged a number of emails in relation to his work performance prior to a meeting with that manager and the human resource officer the next day. The witness was told that a disciplinary warning could issue from this meeting and was referred to the company disciplinary procedure. Apart from one particular case this was the first the claimant heard of complaints about his work since his quarterly review meeting. The claimant had been working on four to five projects between that review meeting and 19 June 2006. As a result of the meeting with this manager and the human resource officer on 20 June the latter issued him with a formal written warning the next day. At that time the claimant felt under pressure from the respondent and felt "hounded" by the company. However, he accepted that he was under

The claimant wrote a detailed letter to a director of the company on 22 June by way of an appeal to that warning. While accepting his work performance was not perfect the writer stated that his performance was affected by the stress caused by the company due to its emphasis on his work with the various projects he was engaged in. The claimant was "in fear of losing his livelihood". He also questioned the respondent's modus operandi in the way the company treated his every "hiccup" as a shortcoming in his work. He argued that the nature of his work lent itself to a process of trial and error before the final product is successfully concluded. That mentor replied to that appeal by email to the human resource officer on 26 June. The warning was upheld. The claimant was not informed of that outcome prior to a final written warning that issued to him on 29 August 2006.

That final written warning was appealed to the chief executive officer on 31 August 2006. The claimant mainly based that appeal on procedural grounds. He emphasised among other issues that the company had skipped the issuing of a verbal warning to which he felt entitled to in a disciplinary process. The witness added his right to natural justice was denied in the manner the respondent treated him as part of this process. The claimant regarded his working environment as unproductive if he was disciplined for every mistake. In a lengthy undated email to the claimant the chief executive officer rejected his appeal. Earlier the claimant had asked that his appeal would not go before that person as he felt that its outcome would be a foregone conclusion if that were the case.

When the claimant was placed on an internal project later in 2006 under the supervision of that chief executive officer late in 2006 he felt he was on "a very sticky wicket". By that time the project managers considered him "toxic" due to his disciplinary record and did not engage him on their work. He met that officer on 21 December 2006 where he was told to finish that internal project by 4 January 2007.

On 2 January 2007 the claimant was sent an email from the application manager notifying him of a disciplinary hearing on the 4 January at 11.30 am. An earlier email sent from the chief executive officer to that mentor was also forwarded to the claimant. In that email the chief executive officer was critical of the claimant's work and wrote that he was seeing the claimant at 2.00pm on the 4 January to discuss his work. That email also requested the mentor to withdraw the claimant from that internal project and assign him elsewhere in the event his work had not significantly improved by the time they met. The claimant who described the chief executive officer as a difficult man to please responded to his email in the form of a three-page letter dated also 2 January.

A disciplinary hearing took place on Thursday morning 4 January attended by the claimant and his new line manager as a witness for him, together with the human resource officer and the claimant's mentor. That meeting concluded in the dismissal of the claimant. His subsequent appeal to a different director was also dismissed.

Determination

The Tribunal is of the view that the respondent honestly believed on reasonable grounds that the claimant was not competent. It was common case that the earlier demotion of the claimant was as a result of certain difficulties including personal difficulties that the claimant had, although no substantial evidence was given regarding this matter.

However, it appeared to the Tribunal that there were errors in the manner in which the matter was dealt with. The Tribunal heard evidence of previous issues between the managing director and the claimant, although no detailed evidence was given in that regard. The Tribunal is of the view that the appeal procedure should not have been carried out by him.

Furthermore, regarding the last project where the claimant was given a time limit into early January 07 to sort out difficulties with the project but was informed by phone on 2nd January 07 that complaints by the co-founder regarding that project gave rise to a disciplinary process. While it is accepted that there were competence issues with the claimant and that greater attention could have been paid by him to the projects in question, the manner in which in particular with that project the disciplinary procedure was invoked prior to the review date was unfair.

On balance, bearing in mind the question of the claimant's competencies and the inadequacies in the manner in which the disciplinary procedures were used by the respondent, and taking into account that the actual loss to the claimant was in the region of €19,000.00 the Tribunal finds that the claimant was unfairly dismissed and awards him €10,000.00 under the Unfair Dismissals Acts, 1977 to 2001.

Sealed with the Seal of the Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

