

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

Employee

CASE NO.

UD390/2008

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. Hurley

Members: Mr. G. Phelan
Dr. A. Clune

heard this claim at Ennis on 15th October 2008

Representation:

Claimant(s): Holmes O'Malley Sexton, Solicitors, Bishopsgate, Henry Street, Limerick

Respondent(s): Mr. Michael O'Sullivan, HR Advisor, Arra Hrd, Castlelost West, Rochfortbridge,
Co. Westmeath

The determination of the Tribunal was as follows:-

Respondent's case:

The Financial Director of the company gave evidence on behalf of the Respondent. He explained he had been involved with the recruitment of the claimant along with the Repair and Maintenance Manager; they had conducted two interviews with the claimant. At these interviews he outlined to the claimant that there was a backlog of work and that she would need to bring it back under control. The claimant commenced employment with the company on the 24th July 2006 as the credit controller for their repairs and maintenance.

The previous incumbent in the claimants role had decided on a career change hence when working out her extended notice she appeared to have lost interest. When the claimant commenced this person continued to attend the office in the evenings to provide the claimant with on the job training.

In July 2007 he expressed his concern to the repair and maintenance manager, as he could see no improvement in the figures of debt, he was consistently looking at debt over three months old. The repair and maintenance manager was willing to work with the claimant to try and improve the situation. In January 2008 a directors meeting took place at which he attended, at this meeting it was decided to replace the claimant as it was getting more difficult to collect outstanding monies

owed to the company.

He found a replacement in February 2008, the claimant was dismissed on the Friday 8th February and her replacement commenced the following week.

He explained that the company had disciplinary procedures in place, however he felt that issuing written warnings destroys working relationships hence they had an appraisal system in place.

The claimant had never any problems with attendance, time keeping, and had a good relationship with colleagues, however she was not suited to working in Construction and Property Management and was not adapting to working in the industry. The claimant had previous experience in clean industries where she had handled 1000 accounts, they had 500 accounts some of which were problematic, it was more difficult to collect money in their environment than that of clean industries.

Under cross examination the respondent's disciplinary policy and procedure document was referred to, he was asked if ever the claimant had received warnings in relation to her competency as referred to in this document, he confirmed that no warnings written or verbal were issued to the claimant.

In July 2007 he believed that the claimant was not going to improve her performance in her role. In relation to the on going appraisals of the claimant while in employment, he had seen them after the claimant was dismissed. The collection of debts had not got worse after the claimant had commenced but they did not improve as he had requested at the interviews. Three or four managers came on board in September/October and had weekly meetings trying to improve the situation, they had taken the most difficult accounts to try and resolve, as they had not been chased. The claimant did not rise to the acceptable level of competency within the company. All employees who used Protean had received training. He reiterated the decision to dismiss the claimant was made by the board of directors in January, the claimant was not told of this beforehand.

The claimant's last appraisal that took place on 10th December 2007 was referred to in which it states that her position would be reviewed in three months.

Next to give evidence was the Repair and Maintenance Manager. The credit controller in this position had been reporting to her for four years, there was one person previously in this role, before the claimant took over this position. She had attended the interviews that resulted in the claimant being recruited. When the claimant commenced she had received support from herself, the previous incumbent in this role, and other staff. From September 2006 the role was the responsibility of the claimant.

She explained the process of the performance appraisal, this takes place twice a year, once in October/November and in April/May, forms are given to the employee being appraised and are then gone through with their immediate line manager.

The Protean system used by the respondent generates invoices; credit notes and new accounts are put on to this system. She and others showed the claimant how to use this system. If you don't know how to operate Protean you cannot do the role of Credit Controller.

The claimant's review of the 25th May 2007, which covered the period of January to May 2007 on which her overall rating was "meets expectations", was referred to. She explained she worked a lot

with the claimant and supported her along the way, the claimant was not reaching the level required but she believed the claimant had potential to be brought forward. She understood that there was a huge learning curve involved, it was a difficult credit control role, but the claimant had come to them with good references. She had a good working relationship with the claimant.

In July 2007 when the financial controller had spoken to her about the claimant's performance she felt it was a reflection on her, as the claimant directly reported to her. She felt she needed to step up her game to get the claimant to a satisfactory standard. She sat down with the claimant and constructed a daily schedule for her and allowed time for the claimant to make phone calls to clients to collect money. She sat down with the claimant at least once a week between July and December 2007.

In September/October herself, the managing director, finance director, technical director and the customer service manager decided to divide out the accounts over sixty or ninety days old between themselves to try and collect the debts owed. The claimant did the preparatory work for this through the weekly download, which would tell you the state of play in relation to debts. The claimant would have been aware of the debt on weekly basis through these downloads.

The claimant's review of the 10th December 2007 was referred to; both the repair and maintenance manager and the claimant completed this appraisal together. A number of issues were raised in this, in respect of quality of work it was noted that the claimant must make more calls, she explained that this was very important in respect of the claimant's role, she did not believe that the claimant was making enough phone calls to their customers with the result they were not collecting monies owed. In relation to the claimant's attainment of financial targets, the claimant was not reaching collections targets weekly, this was very important as it affected the cash flow of the company. The financial targets were the number one priority of the claimant in her role as credit controller. Noted on this appraisal is "no bonus paid due to non performance" every other member of her staff received a bonus but the claimant did not as she did not reach expectations. She understood at the time that the claimant knew that the situation was not good, and had told her that they would review her position in three months time.

She was not party to the decision to dismiss the claimant, she was told early February of this decision.

Under cross-examination she explained that the claimant had been asking for more Protean training but she was not sent on any formal training. She had disagreed with the finance director when he had voiced concerns about the claimant, he interacted with the claimant once a weekly while she worked daily with the claimant.

She agreed that in normal circumstances that the company's disciplinary procedures should have been followed. In relation to the claimant's review of the 10th December 2007, she felt that this review reflected the seriousness of the claimant's situation; financial targets are everything in relation to credit control. At no stage had she raised the issue with the claimant that her job was on the line. She was not surprised when the claimant was dismissed but was surprised how she was dismissed.

Claimant's Case:

She attended two interviews with the respondent; at these she was advised it was a busy environment. When she commenced the lady whom she was replacing remained there for two

weeks, she also would come in at 17.45 and leave at 19.00, but spent time chatting to other colleagues, and never took her through her role from A to B.

The environment she worked in was very fast but her colleagues were very pleasant. Her first appraisal went well, and the repair and maintenance manager had a general chat about her job. She requested more training on the Protean system, she had received on the job training but felt formal training would be of benefit to her as to understand the system.

She was shocked when she was dismissed. She explained that on the day of her dismissal, she had a heavy workload lined up for the day. She needed to deal with a credit control query and the repair and maintenance manager had come in to her and she had asked her advice. Within minutes of this she was called to the finance directors office, where the repair and maintenance manager was also present. The finance director told her that it had been decided that she was not up to the performance that the company needed, he handed her a letter of dismissal. She went back and told her colleagues she had been fired

She returned to the finance directors office and asked him what it was all about, he told her then that her appraisal was her disciplinary. She also insisted that he issued her with a reference. She left on that day and heard that there was somebody at her desk on the following Monday.

Under cross-examination she accepted that figures and collections are everything in the role of credit control. She did not believe that there had been no improvement in debt collection in the course of her employment, that over the eighteen months of employment the company had installed about 250 new lifts which would be new accounts, that the debt been carried was three to five years old.

She was not aware that her position in jeopardy in relation to the bonus she did not receive, she understood that no staff in the repair and maintenance dept were receiving bonuses that year, but afterwards other colleagues had advised her differently. She had never seen the statement “no bonus paid due to non performance” on her last appraisal.

Determination:

The Unfair Dismissals Acts impose a burden on the respondent to show that dismissal was not unfair.

Fair procedures include but are not limited to the right to representation, an investigation and appeal process, and notification as to the nature of a disciplinary meeting.

The Division would refer to a previous Determination in the leading case of *Gearon v DunnesStores Ltd* UD 367/88 where it was held that fair procedures in effecting a dismissal had not been followed. The Tribunal then held

“The right to defend herself and have her arguments listened to and evaluated by the respondent in relation to the threat to her employment is a right of the claimant and is not the gift of the respondent or this Tribunal... the right is a fundamental one under natural and constitutional justice, it is not open to the Tribunal to forgive its breach”.

Having considered all the evidence the Tribunal cannot accept the argument put forward by the company that circumstances allowed them to circumvent the disciplinary procedures including statutory procedures in place. At no stage was it indicated to the claimant that her job was at risk.

The Tribunal deems the dismissal unfair, and the claim succeeds under the Unfair Dismissals Acts, 1977 to 2001 and awards the claimant €17578.55.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

