

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

Employee - claimant

CASE NO.

UD956/2007

Against

Employer - respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P. Hurley

Members: Mr. J. Redmond
Dr. A. Clune

heard this claim at Ennis on 23rd September and 2nd December 2008

Representation:

Claimant : Ms. Sheila Lynch, Cashin & Associates, Solicitors, 3 Francis Street, Ennis, Co. Clare

Respondent : Mr Patrick Whyms B L instructed by
Hanrahan & Associates, First Floor, 61O'Connell Street, Ennis, Co. Clare

The determination of the Tribunal was as follows:

Claimant's Case

The claimant commenced employment with the respondent as an administrative assistant in early July 2005. Her contract of employment did not include a grievance procedure and she was not furnished with a list of her duties. In addition the claimant did not receive any guidelines or rules on personal Internet use. In common with her colleagues she used "but did not abuse" her access to that facility. While undertaking reception duties the claimant was the main operator of the single computer in the office. That computer was not protected by personal passwords and was available to all staff. Apart from the claimant there were two other employees including an office manager. She also referred to at least two "directors" of the respondent who took an active role in its daily affairs. She regarded herself as a perfectionist at work who always asked questions.

Up to January 2007 the claimant enjoyed a very good relationship with her employer. In wishing her happy new year the two directors thanked her for the "great contribution" she made to the business in 2006. In November of that year the claimant was approached by the respondent with a view to offering her additional and more responsible sales work. The claimant regarded this invitation as a promotion offer but on reflection and "after much deliberation" she opted not to

accept it.

That decision marked the beginning of deterioration in her relationship with the respondent. This first showed itself in the employer's refusal to allow the claimant time off to attend a concert in Dublin in January 2007. The claimant was presented with a memorandum dated 23 January 2007 from her employer and asked to attend a disciplinary meeting the next day. That meeting was to discuss her involvement in the "gross misuse and abuse of the company property and time; shortfalls in standards required as per job description; and website design course/mail shots." The claimant expressed both shock and dismay at the contents of that memo and the brevity of notice for that meeting. This was the first time she had been made aware of her alleged wrongdoing in the workplace.

Prior to attending that meeting the claimant responded with a detailed memo to the employer in which she questioned or denied the contents of the respondent's original memo. She felt the contents of that memo and the subsequent meeting were intimidating and belittling and wanted those contents removed and withdrawn. In early February the claimant, the office manager and the owner's wife had an informal meeting to discuss the planned changes to the claimant's role. She was given a written list of duties she was expected to perform.

The claimant described her former office manager as aggressive and condescending who was neither approachable nor a team player. The claimant felt the manager did not provide her with adequate training and resources to carry out her revised role. The manager sent a memo to the respondent and his wife about a performance review she had undergone with the claimant for the period February/March 2007. A copy was also forwarded to the claimant. Its summary and conclusions were critical of the claimant's performance. The respondent in turn revisited the disciplinary procedure in dealing with the claimant and in that context a meeting was held on 3 April 2007. The claimant again had a work colleague present as a witness at this meeting.

As a result of that meeting the claimant was issued with a final written warning and was informed that the respondent might exercise its right to terminate her employment on the grounds of incompetence. The respondent company stated it was acting in a fair and impartial manner. The claimant commented that she had never received a first warning. She was in "deep shock, bullied and beaten down" by that sanction and felt she could not remain on in the workplace. The claimant noted that there was no proof she abused the computer system and added that no other employee was reprimanded for this alleged offence. She made a conscious effort to improve her work but had no training to adequately perform her assigned tasks. In addition she was not responsible for the necessary back up on the computer. The respondent accepted the office manager's critical verdict on the claimant's work performance. That manager blamed the claimant for mistakes made with that computer

The claimant's sister subsequently handed in a medical certificate to the respondent which declared her unfit for work for a week. The claimant felt there was a vendetta against her and that small petty incidents regarding her work were "thrown out of all proportion".

A former colleague of the claimant who had worked alongside her at the office described the respondent as a good employer. The respondent and his wife, however, were "not in the office a lot". The only computer with access to the Internet was located at the claimant's desk. The witness stated that both she and others used that facility and were never reprimanded for that. Right up to early 2007 there was no Internet policy at work. The witness was aware that the claimant

as offered what “sounded like” a promotion in late 2006. She also attended disciplinary meetings in the capacity as a witness for the claimant.

Apart from minor errors, this colleague did not notice any particular difficulties with the claimant’s work. What she did notice from early 2007 was the “hullabaloo” created by the office manager regarding the claimant’s work. She felt that the claimant was being picked on as that manager behaved aggressively towards her. The witness who did not like the way the claimant was being treated spoke to the office manager about this issue.

Respondent’s Case

On the second day of the hearing the wife and business partner of the owner gave evidence on behalf of the respondent. The witness had previously worked with the claimant and the office manager in a bookshop. The claimant commenced employment with the respondent on the 4th July 2005 and was given a contract of employment along with a job description of her role. For the first twelve months the claimant settled in well and learnt the rudiments of the business.

This witness outlined the background and the issues highlighted in the memorandum to the claimant from the respondent of dated 23rd January 2007. In relation to the first point “Gross misuse and abuse of Company property and time”, this witness explained that in October/ November of 2006 she noticed that the claimant would minimise her computer screen when she (the witness) entered as if she was trying to hide its contents. The office manager in December was updating the computers when she noticed a large amount of internet history and informed the witness and her husband on their return from holidays on the 16th January 2007. They organised to record the internet usage of the claimant’s from the 17th to the 19th January inclusive. This was excessive, she gave an example of the 19th January and a word document showing this usage was made available to the Tribunal. There was no one else in the office that day apart from the claimant and one other employee.

In relation to the second point raised in this memorandum “Shortfall in standards required as per job description”, the witness stated issues started in August and she made notes. There were minor imputing errors, the debtors’ ledger had slipped, and on a day-to-day basis she was raising these issues with the claimant. In August they had asked the claimant to prepare a mail shot for Northern Ireland. On the 2nd of September 2006 she gave her the letter that would accompany the mail shot which was due to go out at the end of October. On the 11th September 2006 she had checked for progress with the claimant but nothing had been done. On the 26th October 2006 before the claimant went on holidays the following day, she worked late and left the mail shot on this witness’s desk, consequently the mail shot did not go out till January.

The third point of this memorandum was “Website Design Course/Mail-shots. In March 2006 the claimant expressed an interest in web design so they sent her on a course and organised additional one to one training with their web designer. The claimant played around with the local site but nothing was done till the issue of this memorandum.

The claimant responded in writing to this memorandum. A disciplinary meeting was held with the claimant on the 24th January 2007 and a follow up to this meeting occurred on the 29th January 2007. In relation to the internet usage they decided to terminate internet access for all staff, in respect of the shortfalls in the claimant’s work they gave the claimant a second chance, made changes to her job role and informed her they would review her progress in the 2nd April 2007. They tried to include within her role some aspects that the claimant was interested in but

her basic role was not changed. In January 2007 they also updated their Sage system, this witness and the office manager spent one afternoon going through this with the claimant, however after this meeting they felt let down, as the claimant had offered no input at all.

Previously in November of 2006 they had offered the claimant a new position within the company that had been created specifically for her as they felt that she was unhappy in her role. The new position proffered included visiting clients, and entailed an increase in her wages in the form of commission. The claimant informed them in December that she would decline this offer as she felt she was more suited to an office job.

In March of 2007 a data corruption problem arose with their Sage package. The claimant was responsible for the back up when the office manager was away: she was aware of that these backups were critical. One evening in the office there were errors in the date increments and the computer "hung". The next morning she and the office manager called in the claimant to ask her if any problems had occurred while doing the backups. The claimant confirmed that she had used her step-by-step notes and had seen the check data box. As a result of this error they had to re-enter four days inputting. The next day the claimant was to run the back up: she received a call from her informing her that the check data box did not appear under her user name. This witness maintained that if the claimant had been using her step by step notes while doing the back up she would have noticed a deviation from the instructions and this problem would not have arisen.

At the claimant's appraisal meeting of the 5th March 2007 she was asked as to how soon the changes to the website would be made, she said two weeks. However, by the end of March nothing had been done. In February 2007 she went through the monthly flyers with the claimant and asked her to draw up a list of suggested flyers for the year. On the 29th March the claimant rang her to tell her that she was thinking about the April mail shot: she then left a draft mail shot on her desk. However, the font and outlay did not comply with the company's standard and as a result of this there was no mail shot published in April. This witness felt that the claimant's performance had not improved since her first disciplinary meeting.

A disciplinary meeting was held with the claimant on the 3rd April 2007 where all the issues relating to the claimant's performance were raised. This was followed by a meeting the next day in which they presented their findings to the claimant. The claimant was issued with a final written warning. The witness explained that it was difficult to gauge how the claimant had felt after this meeting: however, they thought the claimant would make a more concerted effort to improve her performance.

The claimant submitted a medical certificate the following day. They expected her to return to work on the 12th April 2007 but she did not come back.

Under cross-examination she confirmed that the claimant had not received a copy of the company's disciplinary procedures on commencement or afterwards. There were only two computers in the office and another employee would seek permission to access the internet on the claimant's computer. There was a personality difference between the claimant and the office manager that she sought to resolve by speaking to both parties. She denied that she tried to get rid of the claimant and refuted that she invented the shortfalls in the claimant's performance.

Next to give evidence on behalf of the respondent was the office manager who had occupied that position since March 2004. She had previously worked with the claimant in a bookshop and when she heard that the claimant was looking for work with the respondent, she had told her employer

that they would work well together. A problem developed between her and the claimant in July 2006. Initially it was just a frosty atmosphere; then the claimant would become defensive and would deny she had made errors. This witness offered her resignation to the owner as a result of the claimant's behaviour. The respondent sat down with the claimant to find out what was wrong and the claimant had said she had no problems. From mid August she noticed inputting errors; work that she had to complete was not done on time because the preparation for this process was not done.

In December 2006 she had updates to do on the computer: while doing this she found volumes of pages in relation to internet access. She brought this to the attention of the respondent and set up an automated programme that recorded the usage of the internet between 18th February and 21st February. This programme showed that there were approximately 1700 clicks on sites within a two and half hour period. These sites included job searches, ebay, shopping etc. Approximately 80% of the internet usage was related to the claimant's interests. This witness revisited the back up process for the computers in relation to the problems that arose because the process was not carried out correctly. She was not directly involved in the disciplining of the claimant. The claimant would not complete simple tasks correctly, be it the allocation of the post, filing, updating the database; the claimant should have known these processes and tasks after two years. She explained that the claimant had an aptitude problem with sage but was a capable individual and it may have been down to carelessness or not paying attention that her performance suffered. In comparing the claimant's performance from January to April 2007, she felt that the claimant had improved in certain areas and had disimproved in some areas.

Under cross-examination she admitted that she used the internet at work for her own personal use, normally after work and occasionally during the week. The issues with the claimant's work began to develop in July/August 2006. All staff had access but the witness stated that nobody else but the claimant had demonstrated excessive use.

Determination

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

Where an employee terminates his contract of employment with his employer the provisions of Section 1 (b) of the 1977 Unfair Dismissals Act apply.

The definition of "dismissal", in relation to an employee, means (sub section b)"...the termination by the employee of his contract of employment with his employer, whether prior notice of the termination was or was not given to the employer, in circumstances in which, because of the conduct of the employer, the employee was or would have been entitled, or it was or would have been reasonable for the employee, to terminate the contract of employment without giving prior notice of the termination to the employer".

The claimant, even though issued with a final written warning, was not dismissed but had been subjected to differing disciplinary processes at which she availed of the opportunity to present her case and at which she availed of the right to have a witness present.

Having heard and reviewed all relevant evidence the Tribunal is of the unanimous view that the claimant has not met the burden of proof required to demonstrate that the termination of her employment was unfair.

Accordingly the claimant's case for unfair dismissal fails

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

