EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.
Employee UD767/2008

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. Winston
Mr. P. Woods

heard this claim in Dublin on 21 November 2008 and 25 February 2009

Representation:

Claimant:
Mr. Conor Bowman BL instructed by
Fitzpatrick Gallagher McEvoy, Solicitors,
Orby Chambers, 7 Coke Lane, Smithfield, Dublin 7

Respondent:
Mr. Eamonn McCoy, IBEC, Confederation House,
84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

The claimant gave evidence that she started work for the respondent in 2003. She had a relationship with a supervisor (CP), and they had a child together. They broke up in August/September 2004. She said that she told no one at work about this but CP told other staff that she had slept with someone else. She told the respondent's manager (MM) that she could not work with CP any longer but she felt MM was trying to get rid of a problem rather than solve it. The respondent's grievance procedure was not outlined to her and the company was not supportive.

She said that she was not given details of statements made by other staff. She hoped the respondent would change her hours in relation to CP. She did not want to move. She had done nothing wrong. She met VA (a HR adviser with the respondent) and MM at a hotel in January 2008 and was asked to meet CP but was not prepared to do that. She felt that it was a case of three against one and that MM was on CP's side. She and CP were asked to write down solutions and not to discuss their

private life. She felt awkward doing this and did not know what to write. She agreed at the mediation meeting to go back to work but felt that there was no point in doing this and so she sent a letter of resignation on 22 February 2008. She said that she was not treated fairly and that she was not given a chance.

All she wanted was their shifts to be changed around but all she was offered was a transfer. She was now on a single parent's allowance, had looked for suitable work and had attended college studying child-care since September 2008. She accepted that the word "resign" was not in her letter of 22 February 2008 but she believed it to be a resignation letter. She agreed that VA had asked her to reconsider but she felt that nothing would change. She thought that MM was trying to put her off by offering her another job. She denied that the company conducted a fair process because they did not solve the problem at all. She accepted that VA had gone out of her way to help her. She accepted that it was not said by her or CP or anyone else at the mediation meeting that the problem would be resolved by changing her hours and/or CP's hours but she told MM at their first meeting that she could not work with CP and he just told her to take time off. The roster was changed after this meeting.

Giving sworn testimony, the respondent's area manager (hereafter referred to as PR) said that he looked after operations for all of the respondent's thirty-six stores in the Republic of Ireland and that he had not known the claimant personally. Around mid-October 2007 he received a complaint from the claimant who was out sick. PR asked her to speak to her store manager or to put her complaint in writing to PR.

PR told the Tribunal that, initially, if an employee has a complaint, he or she should complain to a line manager but, however, that the claimant had felt that she could not do so and that she wanted to speak to PR. PR left it with the claimant.

In October 2007 PR received a letter from a trade union divisional organiser (hereafter referred to as BF) who wanted a meeting to discuss the claimant's issues.

The Tribunal was referred to a letter dated 31 October 2007 from BF to PR in which BF: referred to enclosed correspondence from the claimant as self-explanatory; said that he trusted that an investigation would be initiated; and concluded by writing that he looked forward to hearing from PR in due course.

The Tribunal was also referred to a written statement in the claimant's name alleging that, after the break-up of her relationship with CP (a customer service supervisor with the respondent), CP had made derogatory comments to respondent employees about the claimant's personal life.

PR told the Tribunal that, following BF's letter dated 31 October 2007, PR sent a letter dated 9 November 2007 to BF regarding the formal grievance which the claimant had raised against CP. In his letter PR wrote that he would be investigating the claimant's grievance through the process detailed in the respondent's bullying and harassment policy. Having enclosed a copy of the said policy, PR stated that, in order for him to fully investigate the points that the claimant had raised, he would like to meet with the claimant and talk through the issues face to face.

In the above letter PR said that he wished to meet the claimant on Friday 16 November 2007 (at a hotel location) and that the claimant had the right to be accompanied at the grievance hearing by a work colleague or a trade union representative.

PR told the Tribunal that he had to understand the nature of the complaint, establish the facts, investigate to see what the issues were and give a balanced overview.

The Tribunal was referred to meeting notes from a 16 November 2007 meeting between the claimant, BF, PR and VA. Referring to the meeting, PR told the Tribunal that he had gone through the claimant's initial letter but that the claimant "now put more meat on the bone". Other incidents had allegedly happened externally to the workplace. PR and VA were made aware that the claimant had a resignation letter with her and that the claimant felt that the best option was to resign. By the end of the meeting the claimant was withdrawing this. The claimant's sick pay had run out. PR and VA agreed to pay the claimant throughout the process of completing the investigation. The claimant said that she had been offered another job but that for personal reasons she could not accept.

PR told the Tribunal that the claimant's "problem was with" CP who was named as the alleged aggressor. PR (or the respondent's management as far as CP was aware) had not been aware of the issues, for example, a BEBO site and the smashing of a car window.

Asked what had been the respondent's attitude, PR replied: "We put her back being paid. I spoke to the relevant manager. We arranged a meeting with each individual from the letter of complaint. In total, eleven were mentioned." Asked if the respondent had interviewed these eleven, PR replied that BF had known that it would take time but that the respondent had wanted to do it as soon as possible given the information in the letter of complaint and the information obtained from the claimant and BF. The respondent had wanted to get people's thoughts to see if CP had maligned the claimant. PR and VA attended on behalf of the respondent. Asked what information was elicited, PR said that it had been "quite varied across the eleven". He said that some were in the claimant's "camp" and some in that of CP but that the majority had felt that there was no actual evidence to substantiate the complaint.

The Tribunal was now referred to a 10 December 2007 letter from PR to the claimant stating that "at present the investigation currently remains underway" and that he would notify the claimant of his findings as soon as possible.

Asked at the Tribunal hearing what he had been supposed to do, the claimant replied that he had been supposed to establish the facts from interviewing everybody involved (from the point of view that everything done was confidential). Eleven to thirteen meetings were held about what had happened. That was the first stage in PR's opinion. He confirmed to the Tribunal that the issue had been whether or not CP had maligned the claimant at work.

Asked about the personal issues involved, the claimant said that he had expected to have a look at everything that was internal (regarding possible "malignment" and harassment) but that what happened outside (the workplace) was outside the scope of the respondent's bullying and harassment policy. Asked if key issues had been recapped or reconfirmed, PR referred to the breakup of a prior personal relationship and said that several members of staff had identified this as relevant. However, PR told the Tribunal that "all of the information put together did not give enough evidence" against CP. Asked about his reference to "camps", PR replied that a group of people had been the claimant's and that it had been difficult to decide who was on what side. However, he added that "the rest were not witness to any malignment that was alleged".

Asked what had been the next step, PR said that they had arranged to meet the claimant and discuss their findings. The Tribunal was now referred to a letter dated 20 December 2007 from PR to the

claimant confirming the findings regarding the hearing (on 21 November 2007) of the claimant's grievance against CP. The letter stated that there were elements of the claimant's grievance "which related to matters outside of work" but that the remit of this investigation was "purely surrounding internal matters".

The letter also referred to respondent employees (whom the claimant had named as witnesses relevant to her allegations) and said that they had failed to provide any evidence of CP having referred to the claimant in a derogatory manner. It was acknowledged that the investigation had "brought to light some learning points" in relation to the situation that developed and how it was "handled in store".

It was suggested by PR in the letter that the most appropriate course of action at that point was to facilitate a meeting between the claimant and CP to enable a working relationship to be established so that they could work effectively in the store together. However, PR also wrote that there were other options that could be explored with the claimant (and CP) including the option of a voluntary transfer. PR went on to write that, if the claimant was in agreement, MM (a manager with the respondent) would arrange to meet with CP and with the claimant (when she would have returned to work) to facilitate a meeting between the claimant and CP and to explore any other options available on an individual basis.

The letter concluded by stating that, if the claimant were not satisfied with its content, she could have recourse to the next stage of the respondent's grievance procedure. PR told the Tribunal that the respondent had wanted to facilitate the claimant in going back in to work with the respondent and that the claimant could go through mediation with MM but that the claimant could still avail of the opportunity to appeal by going to the next stage in the respondent's procedures.

PR stated to the Tribunal that he was not involved in any way in this matter after 20 December 2007.

Asked if the investigation had been a whitewash, PR denied it but he conceded that the evidence which corroborated the claimant's complaint had not been put to CP. However, he denied that it was a lie that he had written to the claimant that no evidence had been found to support her allegation. He also denied that the respondent had arrived at the conclusion that suited the respondent. When it was put to him that the claimant had been invited to go into mediation despite the fact that her allegation had been sustained he replied that the claimant could have appealed if she had not been happy.

Giving sworn testimony, VA (the abovementioned HR adviser with the respondent) said that in October 2006 the respondent had found that its bullying and harassment policy was more "geared" to Britain and that it had been made more compliant with requirements in Ireland. She cited the following sentence from the policy: "In order to protect the alleged harasser and any witnesses all interviews and discussions will be treated in the strictest confidence." VA then told the Tribunal that it was not required that witness statements be given to a complainant.

VA confirmed that the claimant had been told that she could appeal the outcome of the investigation. VA referred the Tribunal to her minutes (titled Outcome Meeting Summary) from 20 December 2007 regarding the claimant's grievance. She stated that, when PR had given the claimant the grievance investigation findings, the claimant had been happy to go back to work and that the respondent (i.e. PR and VA) had thought it would be a good idea for the claimant and CP to establish some kind of working relationship. The claimant agreed to return in late December 2007

but did not do so. The claimant's trade union told VA that the claimant wanted somebody other than MM (the abovementioned manager with the respondent) to facilitate the proposed meeting for her and CP.

VA stated to the Tribunal that JH (a trade union official) had asked her if she would meet the claimant and JH before the claimant's next meeting to allay concerns and that VA had agreed to that. The claimant did not object to this, did not find the process wanting and did not indicate that she wanted to appeal the result of the grievance investigation. VA added that the respondent would not implement mediation if there was to be an appeal meeting.

VA told the Tribunal that she had written to both the claimant and CP on 15 January 2008 confirming her understanding of the outcome of the mediation meeting held on 14 January 2008. She copied this letter to MM and JH (from the claimant's union). VA understood that the claimant would return to work on a date in late January 2008. VA felt that the objective had been achieved, thought that there had even been a shaking of hands and said to the Tribunal that the mediation was to be about how the claimant and CP would work together thereafter.

However, the claimant did not return to work and the respondent received a medical certificate which referred to stress. VA wrote to the claimant to see how she was and what was happening. The respondent wrote to the claimant seeking the claimant's consent for the respondent to contact the claimant's doctor. However, on 25 February 2008, MM received a letter from the claimant in which the claimant wrote that she had "come to the end of the road", that her doctor had told her that she "would be mad to go back" to the respondent after how she had been treated and that the claimant believed that "the investigation and mediation were a big letdown". The claimant added that she had honestly felt that she had "never had a leg to stand on" because MM and CP were both members of management.

VA subsequently wrote to the claimant asking her to reconsider her resignation but, ultimately, VA felt that, after the claimant did not reply to correspondence, she (VA) was left with no alternative but to think that the claimant had chosen to leave. VA felt that the respondent had been left with no option but to accept the claimant's resignation.

Asked if the claimant might have had a different view if VA had told her that her allegation had been corroborated and the respondent had done nothing, VA replied that she did not understand because the claimant was going to go to mediation.

Asked if the claimant would have been happy to go to mediation if VA had told her that staff members had corroborated her allegation, VA replied: "We reached an outcome that we were happy with." VA did not deny that she had been present when staff members had been interviewed but she did not accept that the finding (that the claimant's allegation had not been substantiated) was a lie. VA added that the claimant could have appealed.

When it was put to VA that the claimant had alleged that CP had been badmouthing her to such a degree that the claimant had felt unable to return to work VA replied: "I suppose so."

Giving sworn testimony, MM (the abovementioned store manager with the respondent) said that, after the claimant had come to him, they had discussed the claimant getting another job and that the claimant had said that she had an interview "lined up". MM then stated to the claimant her value to the respondent and the regard the respondent had for her but the claimant said that she would find it hard to work for the respondent in the future. MM did not tell her to seek another job but they did

speak about the effect on her of the breakdown of her relationship and the prospects of her working for the respondent again.

MM told the Tribunal that he had suggested to the claimant that she could use the grievance procedure. He told her that, if she made a complaint naming somebody, they would be questioned about their knowledge of the matter and that, if there were grounds to progress it, the respondent would address the matter with CP. The respondent had procedure for this.

It was put to MM that the claimant argued that he had said that all written statements would be made available. He replied that they would have to be made available if somebody requested them.

Asked if he had further involvement in the matters, MM told the Tribunal that he had suggested that communication was needed but that the possibility of CP answering the phone made the claimant uncomfortable.

MM stated to the Tribunal that both the claimant and CP had had responsibility to him and that he had felt that he was "the best option" as mediator but that he had not put himself forward as the first choice.

Asked if CP had read all the employee statements, MM replied that he did not know because he had not been doing the investigation but that he did not think so. The Tribunal was now referred to the respondent's bullying and harassment policy where it was stated that the alleged harasser would be met by the relevant manager who would outline the nature of the complaint and provide the alleged harasser with a written outline of it as well as setting a date for a formal meeting as soon as was practical following the complaint being received.

Determination:

The Tribunal majority finds that it was very unsatisfactory and irregular that the claimant was not told that staff members had corroborated her allegation and that the respondent ignored the said corroboration. An employee has to be entitled to make a complaint about someone in a higher position without the employer disregarding all evidence in support of the complaint and declining to inform the employee that there had been corroboration by other members of staff. There was no indication that the employee's union was let in on the respondent's well-kept secret. The Tribunal considers that the respondent in dealing with the complaint merely gave the appearance of complying with all procedures and best practice before informing the claimant of a particular result.

The Tribunal majority finds that the claimant was entitled to lose confidence in the respondent after the respondent's investigation which was so lacking in transparency and openness. The claim under the Unfair Dismissals Acts, 1977 to 2007, succeeds.

On the subject of redress, the Tribunal majority, in making an award of financial compensation against this employer, deems it just and equitable to award the claimant the sum of €6,000.00 (six thousand euro) under the said Unfair Dismissals Acts, 1977 to 2007. The Tribunal majority was not entirely satisfied that the claimant was unable to get any work at all after her employment with the respondent.

Dissenting Opinion of Mr. D. Winston

I dissent on the basis that during the whole process the claimant had professional advice, that she refused a job in another respondent outlet and that she did not avail of all the procedures that were available.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)