

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

EMPLOYEE

UD1032/2008

- *claimant*

against

EMPLOYER

- *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr D. Hayes BL

Members: Mr. J. Reid
Mr J. Maher

heard this claim at Dublin on 19th January 2009
and 20th April 2009
and 21st April 2009
and 8th July 2009

Representation:

Claimant: Mr Oisin Quinn SC instructed by Mr Ciaran O'Mara, O'Mara Geraghty McCourt,
Solicitors, 51 Northumberland Road, Dublin 4

Respondent: Ms Kiwana Ennis BL instructed by Mr Alan Barry, Ir/Hr Executive, IBEC
Confederation House, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

The respondent is a membership organisation that provides advice on health and safety matters. It has a number of voluntary regional committees, each of which nominates a member to the executive committee. From these is selected a president, vice-president, honorary secretary and honorary treasurer. There is also a chief executive, who is a salaried employee. The claimant commenced her employment in April 2006 as a "training and development executive". She gave

notice of her resignation in July 2008. Her resignation took effect in September 2008. She was on sick leave in the interim. She claims to have been constructively dismissed.

The respondent appears to have been an organisation with internal rivalries and difficulties. PM was appointed CEO in June 2006. He had a brief to drive through change that had been recommended in an external consultant's report. His predecessor as CEO, TOK, remained in the respondent's employment.

On 22nd April 2008 TOK sent an email to several members of the executive committee and a number of past-presidents. It was also sent to two individuals whose identities were not known to any witness before the Tribunal. In the course of a wide-ranging email, TOK made an allegation that the claimant had, for a period of months, bullied a, by then, former employee. This allegation was not brought to the claimant's attention.

On 11th May 2008 an article, bearing the headline "Bullying claims made against anti-bullying advice body" was published in the Sunday Tribune. The claimant was not named in the article. However, she felt that the reference to "a senior executive" was to her. On 12th May she met PM and at this stage she was shown a copy of the earlier email. The claimant expressed her concerns to PM and subsequently put them in writing, by letter dated 14th May. In this letter she wrote of her shock and distress and asked that the matter be fully investigated. On 15th May PM replied and said that he appreciated her distress and promised to bring the matter to the attention of the executive committee and that he would get back to her soon.

On 16th May PM, the president, vice-president and honorary secretary resigned with immediate effect. New officers and an acting CEO were appointed on 21st May. During the interregnum the claimant had given a copy of her letter of complaint to JS, the honorary treasurer for circulation to the new officers.

The employees were informed of the new appointments on 22nd May. That day the claimant was asked to telephone PC, the new president. She spoke to him at about 6pm. The call was about mundane matters. She then raised the issue of her complaint and TOK's email. She then met PC, along with HG, the new secretary, and AT, the acting CEO, on 27th May. She assumed that her letter of complaint had been circulated. It had not. She was told that her complaint would be investigated. However, she felt that it was not clear how this was to be done. She was told that they would check whether it was being dealt with as part of an on-going Labour Relations Commission (LRC) investigation. If it was not, it would be separately investigated.

HG sent an email on 30th May in which he repeated that they were:

"looking into all matters which have caused the recent difficulties within the organisation. These issues arose under a previous CEO and Officer Board. We are attempting to establish what actions/investigations if any were conducted by them while in office and what if any outcomes/recommendations were made. We confirmed that certain matters were before the Labour Relations Commission and the Rights Commissioner and we could not interfere with this progress. We did give you an undertaking and I confirm that undertaking that if your complaint has not been addressed already or is not being addressed in the above investigation we will instigate a separate investigation into your complaint."

As will be seen, these promises were not made good.

Previously, on 28th April, TOK had been suspended, apparently for breaches of confidentiality. These matters were, it seems, unconnected with his email. However, the suspension gave some measure of comfort to the claimant when she became aware of his allegations. On 10th June the employees were notified that this suspension was to be lifted. The executive committee had decided that the matters for which he had been suspended did not merit such a sanction. The claimant was shocked by this development. She had, by this time, begun to seek medical attention for stress.

On 11th June PC and AT met TOK. He was reprimanded for circulating the email but not for its contents. Given the reprimand that was given, this was perhaps a Jesuitical distinction. They said that he could not be reprimanded for its content because this was being dealt with elsewhere. The respondent's note of the reprimand is as follows:

“After approximately six weeks suspension TOK was formally reinstated to his position with the (*respondent*) with immediate effect.

TOK was then informed that the Management Committee was not in any way supportive of the email that he had sent to the Executive Committee members and to six former Presidents of the organisation on 22 April 2008.

The email provided information of various events and actions that had been taking place within the (*respondent*) over the past two years approximately, which TOK felt should be brought to the attention of the people to which the email was addressed.

PC stressed that he did not condone the action of TOK and that any such action in the future could result in serious consequences for him (TOK) and his future with (*respondent*).

TOK acknowledged that he may have made a mistake in addressing the email to persons outside the Executive Committee and he gave an undertaking that such a situation would not be repeated.”

If the respondent's interpretation is correct then TOK was being warned that if he again circulated an email, irrespective of its contents, that there could be serious consequences for him and his future with the respondent. The Tribunal does not accept this interpretation. It is clear that TOK was also being warned about the content of the email. This was not known to the claimant at the time.

As a result of TOK's reinstatement and so as not to have to work in the same building as her accuser, the claimant began to work from premises in Marino. This was not with the respondent's approval, who had suggested that she take “stress leave”. She rejected this approach. On 12th June her solicitor wrote to AT and called on the respondent to appoint an independent investigator.

Before going on annual leave the claimant sought to confirm whether the LRC investigator's (CD) brief had been extended to include her complaint. She commenced her annual leave on 17th June and returned on 30th June. By email dated 30th June HG told her that he had previously confirmed

that CD would request a meeting with her and that CD had confirmed “that the disputed email which you have complained about was an integral part of the matters under investigation and that he would hear you in this regard.” It was also confirmed that CD’s brief had not been extended. On foot of this email the claimant wrote to AT and sought an apology and a guarantee that her complaint would be treated seriously. Otherwise, she said, she would be forced to resign. She sought a reply by close of business on 2nd July. On 1st July she received an email from HG saying that the directors were arranging to discuss the recent correspondence culminating in her threat of resignation. He hoped, he said, to have a response by the end of the week. By email dated 2nd July the claimant said that she would extend her deadline to Friday 4th July. On Monday 7th July, having had no reply, the claimant tendered her resignation giving two months’ notice. This notice was entirely served on stress-related sick leave.

Subsequently, in August, the respondent did agree to appoint an independent investigator, JD, to inquire into the claimant’s complaint. He felt constrained in such an investigation by the reprimand given to TOK on 11th June by PC. He felt that the matter had been dealt with. It was by no means clear from its wording that this reprimand dealt only with the circulation of the email and not the email itself. The first that the claimant knew of this reprimand was when she met JD on 27th August.

Determination

The reality of the situation is that a serious allegation was made about the claimant on 22nd April. She was not informed until she queried a newspaper report on 12th May. She wrote a letter of complaint on 14th May. A new board was appointed on 21st May. She was told that CD would investigate her complaint but in reality CD viewed her as a witness rather than a complainant. She was given an undertaking that a separate investigation would be undertaken if CD was not investigating her complaint or if the previous board had not instigated another investigation. This undertaking was given on 30th May. The respondent then appeared to do nothing. It was neither clarified whether CD was investigating the complaint nor whether some alternative investigation had been conducted by the previous board. In essence, the respondent was content to allow CD’s investigation to take its course and to wait to see what came of it. Indeed, it was suggested that the claimant had never clarified her complaint. If this was the case it was certainly the case that no officer of the respondent made any serious attempt to clarify the matter. Six weeks after making her complaint there was no discernible progress. The claimant was strongly of the belief that the respondent was intent on not conducting an investigation. This belief was shown to have some substance when the claimant met JD and it transpired that the respondent had effectively dealt with the subject matter of her complaint on 11th June without ever having told her. It is also noteworthy that the respondent moved with some alacrity in early July 2008 to commence an investigation into an allegation of bullying made against the claimant.

It is not open to an employee to demand that a grievance be investigated in any particular way. An employer is entitled to some latitude in how he goes about such an investigation. However, one thing is clear; he must conduct an investigation that is fair and thorough. In most cases a prudent employer will follow the steps laid down in a grievance procedure. Where both parties acquiesce in a departure from such a procedure, as happened in this case, there cannot be complaint that the procedure was not followed, so long as any alternative is fair and thorough. In this case the respondent gave an undertaking that the matter would be investigated and then conducted no investigation at all. This is not a case where the complaint is that the investigation was not carried out to the claimant’s specifications. It is one where the complaint was not investigated, not it should be said through any ill will. This is simply a case where a complaint was poorly handled.

This was, perhaps, a time of turmoil within the respondent organisation. That does not, however, absolve an employer from responsibilities towards employees.

In the circumstances the Tribunal is satisfied that the claimant's resignation was in circumstances as to amount to a dismissal. No evidence was adduced to rebut the presumption that the dismissal was unfair. The Tribunal is satisfied that the appropriate remedy is compensation and awards the sum of €45,000.00 as being just and equitable in the circumstances.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)