

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE - claimant

UD970/2009

MN987/2009

WT426/2009

against

EMPLOYER - respondent

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005 ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr D Hayes BL

Members: Mr R Murphy  
Mr M O'Reilly

heard this claim at Dublin on 25th March 2010 and 1st June 2010

Representation:

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Claimant : Mr James Phillips BL, instructed by:  
Mr Paddy Morrissey  
Patrick J Morrissey & Company Solicitors  
Crofton Road, Dun Laoghaire, Co Dublin

Respondent : Mr Stephen O'Sullivan, BL, instructed by:  
Ms Ellie Dunne  
A & L Goodbody Solicitors q  
I.F.S.C., North Wall Quay, Dublin 1

The determination of the Tribunal was as follows:

#### **Respondent's case:**

The Tribunal heard evidence from the Chief Technology Officer (CTO). The respondent company is a provider of on-line poker software technology with 635 employees. The claimant was initially a Network Engineer and he then moved to application support. The claimant was responsible for installing and managing and had four on his team. He was on a salary of €60K per annum

plus 0-20% bonus. His hours were 9am – 5.30pm but he could be required to work extra hours. The company provide the service 24/7, 365 days a year. They operate an informal environment in relation to hours. They ideally work on core hours but offer flexibility to get the work done.

The witness, who is responsible for I.T, reports to the CEO. They have a large database and software system. The claimant's contract of employment was opened to the Tribunal. I.T. in Ireland is very competitive and the respondent targeted the top end of the talent in Ireland. The salary paid to these employees was 10-20% over and above in recognition of this talent.

The witness joined the respondent company in May 2006. The claimant reported to the Director of Information Systems (DIS). In December 2008 the CEO came to the witness and reported that he felt that production was down. In January 2009 when he was doing a review of the I.T. he went to DIS and asked him for a breakdown of work. DIS got each team member to submit the work they were doing on a daily basis. A chart was prepared. In relation to the claimant significant concerns were raised. A certain level of throughput was expected and it seemed from the chart that there was a significant repetition of tasks. In relation to project/job "L" which should take a number of hours whereas three days was listed on the chart. In relation to project/job "Q" which showed three days in addition to three days consulting and this had been ongoing since April 2008. The same work was being reported on a daily basis. It seemed that the claimant was not getting through the tasks assigned to him. The respondent operates a ticket system where work is submitted for completion and the maximum time would be four hours. The claimant was working on the RT tickets and the time would range from ten minutes to a maximum of four hours. The claimant was there the longest and his throughput should be higher, but he was doing less work.

On 23<sup>rd</sup> February 2009 the claimant was informed by email that he was to attend a meeting the next day. The minutes of this meeting were opened to the Tribunal. Based on the work sheets the claimant was taking on significantly less work, which affected the team and the timely delivery of tasks. The claimant's peers worked 12/14 hours per day to catch up on tasks that were not done by the claimant. The feedback from the claimant's team leader reported that the claimant was not taking on tasks close to finishing time. There were also questions to be asked in relation to absences and his working from home without authorisation. Staff need to show up for work and there were times when at 1pm the claimant would notify people that he was not at work and did not get a particular job done. In April 2008 an issue was raised with the claimant in relation to log archiving, which was ongoing at end July 2008. If the log file gets too big this would result in the entire system being brought down. While the claimant started working on the archiving in April 2008 he was still dealing with it in January 2009. On 18<sup>th</sup> February 2009 the claimant's team leader sent an email to witness giving a list of issues in relation to the claimant and his work.

Demands are made on staff but the respondent is lenient on attendance once the work was done. Employees work from home but in consultation with ones manager. The HR department observed employees in relation to time keeping. The claimant's time keeping was reasonable. Certain performance reviews were taken into account when dismissing the claimant. In October 2008 the claimant submitted a self-appraisal, which would not be standard procedure. The procedure was that the direct line manager would submit to HR prior to communication with the employee. In this case a series of emails were opened to the Tribunal one of which related to a pay increase of 6%, which had not been approved by the head of HR. The claimant was relying on some of the new members of staff and it was understood that the claimant was a Windows Engineer. This would not be expected from someone with the claimant's length of service. The

claimant's employment was terminated based on a review of his performance when he was called to a meeting on 24<sup>th</sup> February 2009. This was confirmed by letter mistakenly dated 25<sup>th</sup> January 2009. The witness made the decision to dismiss the claimant. The claimant was paid one-month's pay in lieu of notice. The claimant has since been replaced.

Reference was made to the fact that the claimant was still out of work. 20% of the jobs he applied for were based in Argentina while 32% were in Ireland. The claimant would not have the skills for a lot of the jobs he applied for. The I.T. sector has been unaffected by the recession and there was not evidence of the claimant making job applications to certain well known companies in Ireland.

In cross-examination the witness disagreed that the manner of the claimant's dismissal was at variance with that of his contract of employment. The claimant received the complaints in writing at the meeting of 24<sup>th</sup> January 2009. There were no verbal warning or written warnings recorded on the claimant's file. When making the decision to dismiss the claimant the witness looked at the daily task sheets alone. He agreed that the task sheets did not itemise the RT tickets, but regardless of that he contended that the claimant did less work than other employees.

The head of HR gave evidence that the HR department discovered that the claimant had filled in his own annual review form and had given himself an excellent review. The maximum annual salary increase of 6% was recommended. Managers are supposed to meet with HR to discuss the employee's performance and appropriate salary increase before speaking to the employee. But in this case the manager emailed the document to the employee and signed off on it before discussing it with the HR department. The salary increase was not sanctioned as HR intended to revise the review. The claimant should have been aware that his salary increase had not been sanctioned.

During cross-examination the witness stated that she knew prior to August 2008 that the CTO had concerns about the claimant's performance. She was unaware why the claimant was not on a performance improvement plan.

### **Claimant's Case:**

The claimant gave evidence that he commenced his employment with the respondent company in October 2006 as a Microsoft Engineer. He had his first annual review in October 2007 and was awarded the maximum salary increase of 6%. He received an annual bonus of 11% initially, but he appealed it and was awarded a further 2½%. The next year he received a better review and was again put forward for the maximum salary increase. He contended that he discussed his reviews with his supervisor. When the claimant tried to follow up on his increase the HR department told him that nothing was concrete.

The claimant contended that the CTO did not take the RT tickets, which he performed into account and he contended that RT tickets were not just short-term tasks. One project he was doing was moving servers from Canada to Guernsey, which took a number of months and was not reflected accurately in the CTO's document.

The claimant contended that no one discussed his hours with him. There was flexibility in regard to working at home as long as the work was done. He contended that he always made up his hours if he was late.

The disciplinary meeting was held on the day he returned from annual leave on February 24<sup>th</sup> 2009. He had no advance warning of what the meeting was about. He raised the point that he had had an excellent review in October, but the CTO said that it wasn't approved, which the claimant was unaware of. He had received an email from HR stating that it was on hold but he didn't know why. He was shocked at the spreadsheet produced by the CTO. He felt that it did not reflect accurately how much work he did. He protested but he was ignored and felt that the decision had already been made to dismiss him.

The claimant gave evidence of his loss and his attempts at seeking employment elsewhere.

During cross-examination the claimant agreed that attendance was identified as an improvement area in his 2007 salary review. He contended that he discussed his review with his supervisor. He was very surprised at being dismissed.

The claimant's representative withdrew the claim under the Organisation of Working Time Act during the hearing.

### **Determination:**

The claimant commenced employment in October 2006. He was dismissed for perceived performance-related issues in February 2009.

The respondent has a comprehensive disciplinary procedure. It can be summarised in the following way:

#### Informal Pre-Disciplinary Discussion

If an employee's standard of work falls below an acceptable level, Management will informally make him aware that this is unacceptable and point out how it must be improved. This shall be seen as a counselling session.

#### Stage 1 – Verbal Warning

If the standard of work continues to deteriorate the formal disciplinary procedure will commence. A meeting will be held and the employee may be given a formal verbal warning. A corrective action plan and a date for reappraisal may be set.

#### Stage 2 – First Written Warning

If performance continues to fail to meet an acceptable standard a further meeting will be held. A first written warning may be given and an improvement action plan and further date for reappraisal will be set.

#### Stage 3 - Final Written Warning

In the event of a further breach a final written warning will be given. At that stage the employee will be warned that, unless improvement occurs, he faces dismissal. If there is still no improvement there will be a progression to stage 4 or 5.

#### Stage 4 - Suspension

Should an employee's performance warrant the sanction, he will be placed on

suspension.

#### Stage 5 – Dismissal

Before a decision is taken to dismiss an employee, there will be a full investigation into the matter and the employee will be invited to attend a disciplinary hearing.

In late 2008 the respondent's managing director had expressed a concern about productivity levels in the IT section. Consequently a review began in January 2009. DB, the Chief Technology Officer, asked GB, head of IT operations, to collate information on the work being done by each employee. To this end each employee was asked to submit details of the work being done by them.

A report was then prepared for DB. On foot of this exercise it was determined that the claimant was doing significantly less work than his peers. As a result the claimant was summonsed to a disciplinary meeting.

At 5.20pm on 23<sup>rd</sup> February 2009 an email was sent from HR to the claimant requesting him to attend a formal meeting under the company's disciplinary procedure at 10am on 24<sup>th</sup> February. He was informed that he was entitled to be accompanied by a colleague and that he was liable to be dismissed. However, the email did not give even the slightest indication of the nature of the disciplinary breaches alleged. The Tribunal was told that this is the standard email notifying employees of disciplinary hearings. This is a seriously flawed notification. One would hope that the same form is no longer in use.

On 18<sup>th</sup> February GB had sent an email to DB outlining thirteen issues with the claimant's performance. The claimant was not given notice of these issues. Nor was there evidence of any steps being taken to remedy these issues.

In the course of the meeting on 24<sup>th</sup> February the claimant raised the issue that not all of his completed tasks were included in the analysis being used by DB. No reply to this is noted in the respondent's minutes of the meeting. The claimant gave evidence that his protestations were completely ignored. This appears to have been the case. The claimant told the Tribunal that the full details were included in the information that he had given to GB. At the conclusion of the meeting, which lasted for about half-an-hour, the claimant was dismissed.

It was accepted on the respondent's behalf that no effort had been made to counsel an improvement in the claimant's performance. None of the steps outlined in the disciplinary procedure was followed. At no stage was the claimant alerted to, what was perceived to be, his below par performance and at no stage was an improvement action plan put in place.

A disciplinary procedure has to be more than a paper document. It is more than window-dressing. No matter how well written it might be, it is of no use if it is not implemented.

In February 2009, it was recommended that at least two other employees be placed on performance improvement plans. No explanation was forthcoming as to why this option was not considered for the claimant.

The Tribunal is satisfied that the claimant was summarily dismissed for perceived performance-related issues. No effort was made to make the claimant aware of any perceived short-comings and he was afforded no opportunity to make improvements.

DB, in cross-examination, conceded that the procedures used to dismiss the claimant were slightly

at variance with the procedures stipulated in the respondent's disciplinary procedure. To say that they were slightly at variance is an understatement. The procedures adopted bore no resemblance to the stipulated procedures or to any accepted standards of fairness.

The Tribunal is satisfied that the claimant was unfairly dismissed and in respect of his claim under the Unfair Dismissals Acts, 1977 to 2007, awards him compensation in the amount of €70,000.00 as being just and equitable in all the circumstances.

In respect of his claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, the Tribunal is satisfied the Claimant is entitled to compensation in the amount of €2,797.38.

The claim under the Organisation of Working Time Act, 1997 was withdrawn in the course of the hearing.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)