EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:	CASE NO.
EMPLOYEE - claimant	UD1268/2008
	MN1170/2008
	WT518/2008

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: Ms. K.T. O'Mahony BL

Members: Mr. D. Hegarty
Mr. D. McEvoy

heard these claims in Cork on 24 June 2009 and 27 October 2009

Representation:

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Claimant:
In person

Respondent:
Mr. Paul Gough, Eugene F. Collins, Solicitors,
Temple Chambers,
3 Burlington Road,
Dublin 4

The determination of the Tribunal was as follows:

Summary of the Evidence

On 7 February 2007 the respondent's HR manager (HRM) received a formal complaint from an

employee (VH) alleging harassment by the claimant. The allegation referred in particular to the contents of an email dated 7 February 2007 wherein he stated inter alia

"You are incompetent, lazy, completely undisciplined and dangerous. At one time I believed thatyou would make a valuable contribution to the company, now I see someone who cannot admit error and makes more work, often for other people to clean up after you."

The respondent's HR Manager HRM advised the claimant of the complaint of harassment in relation to the said email and called him to an investigation meeting on 14 February to establish whether the contents of the email of 7 February constituted an isolated incident or whether there had been others such incidents and whether they constituted harassment. A senior IT manager (SM), who gave evidence to the Tribunal, and HRM constituted the investigation panel (the panel). The claimant, VH and their manager were interviewed separately as part of the investigation.

At the investigation meeting VH informed the panel that the claimant was consistently criticising, insulting and harassing him and that the email left him feeling sensitive and a bit depressed. VH provided some further examples from earlier emails from the claimant and SM made a summary of these comments: *"Out of the mouth of babe", "Your approach is like that of an officer of the Titanic". "It seems that you have an unfortunate attitude to producing quality work." I suggest that in future you stick to procedures.", "Do not reply to this email. I have nothing to add." "This is formal notification that I do not find the closure of this task as this time acceptable." "Failure to complete adequately will be referred to your superiors."* Further, VH felt the claimant acted as his manager, always telling him what he could and could not do.

At his investigation interview, when informed that VH found him to be insulting, criticising and harassing, the claimant informed the panel that he felt his comments of 7 February were justified because VH had contravened company policy by installing an unapproved change in the system on 27 January, which is a dismissible offence. The claimant did not report the matter to management; he had not been asked to give feedback on VH. The claimant was aware that VH felt that he was always getting at him. There was a dispute between the parties as to whether SM had read the entire summary of the comments (above) allegedly made by the claimant to VH in other emails.

Their manager confirmed to the panel that a management relationship did not exist between the claimant and VH but explained that the claimant, having more experience, had been asked to mentor the VH. The manager was not aware of any performance issues about VH's work. In theclaimant's last performance review, areas around his communication and interpersonal skills wereidentified as areas for development. The panel assured the claimant that the focus of the investigation was the language he had used in his communication with VH and not the technicalaspects of their work.

The panel concluded that there had been harassment. By letter of 22 February 2007 HRM informed the claimant that the panel concluded that the allegation should be upheld, that the claimant hadused wholly unsuitable language to the VH in a repeated and condescending manner, that it constituted harassment within the meaning of the respondent's harassment policy and that the respondent would be invoking its disciplinary policy.

The claimant made a number of complaints about the investigation process: it was slanted against the employee as it did not provide for an appeal; he had been told it was an information gathering process but the panel had reached a conclusion; new accusations were presented to him verbally at the investigation meeting, VH's allegations were not presented to him in writing (letters of 13 & 27

February, 2007 refer). HRM wrote a detailed response to the claimant disputing his complaints and setting forth the respondent's position (letter of 7 March 2007 refers).

The claimant was invited to a disciplinary meeting on 9 March 2007 and informed that he would have the opportunity to respond to the conclusions of the investigation and the disciplinary panel would decide whether disciplinary action was appropriate. He was reminded that HV's original complaint was that he had subjected him to constant criticism, and that he had insulted and threatened him. A copy of the investigation report was enclosed with the letter of invitation of 7 March 2007.

At the disciplinary hearing on 9 March the claimant was again informed that this was his opportunity to challenge the conclusions of the investigation panel. When the claimant raised issues about the investigation process he was given the option to abandon the meeting but he chose to stay and participate. The respondent understood that the claimant's issues about the process had been abandoned. The claimant accepted that the language he used in his email of 7 February was inappropriate. The claimant explained that he likes to follow standards and procedures in his work and that this can cause friction. VH had never complained to him about the manner in which he communicated with him. He assured the respondent that he would participate in a process to ensure that there would not be a recurrence and to improve his communication and interpersonal skills. The respondent found the claimant to be co-operative and understanding.

However, in a letter of 12 March 2007, the claimant withdrew his "qualified acceptance" of the investigation report, refuted its validity and disagreed with its contents because the respondent was in breach of the provisions of clause 1.9 of his Employment Agreement with the respondent, which provides: In all disciplinary matters, the employee will be presented in writing with the totality of the allegations outstanding against him, will be given the right to respond…" In a further letter of 16 March the claimant indicated that his rejection of the report in no way changed the undertakings she had made during the hearing nor his wish to move forward as expressed during the hearing.

Because the claimant had withdrawn his acceptance of the finding of harassment the respondent held a fresh disciplinary hearing on 2 April where the contents of the investigation report could be put in detail to the claimant. The same members of management, Director S and Senior Manager CA formed the disciplinary panel. While the claimant had been notified of the disciplinary hearing by letter of 26 March 2007 he failed to attend the hearing and it was rearranged for 4 April 2007. At that disciplinary hearing the claimant agreed that he had used inappropriate language to the claimant, would refrain from so doing in future and indicated his willingness to do remedial training in communication skills. The claimant informed the meeting that he had the best interests of the company at heart. The disciplinary panel upheld the allegation of harassment, the claimant was issued with a written warning, which would be active for no less than 12 months, and in order to enhance his communication and interpersonal skills he was to participate in appropriate training which was to be structured through the use of performance improvement review plan (PIR) and which was to run for six months; the claimant was to participate with HR and his manager in selecting the appropriate courses/materials. The claimant was further put on notice that non-compliance with the standards set out in PIR or a repeat of any behaviour deemed to be a form of harassment could result in termination of his employment. The claimant was informed of his right to appeal the decision within five days. In the claimant's response of

18 April he again referred to his request for the allegations in writing and since the outcome of the disciplinary hearing was based in part on the investigation report he found it "unacceptably flawed".

When the time frame for lodging an appeal had expired the claimant entered into correspondence with the person identified as appeals officer. In this correspondence the claimant complained that the investigation had not been thorough, that he had not received a written statement of the totality of the allegations and that there were errors and omissions in the investigation report. Further, the claimant clarified that he did not want to appeal the disciplinary decision because the process had been flawed and that accordingly the decision emanating from the disciplinary meeting was invalid and there was nothing to appeal. Furthermore, he objected to the person appointed to carry out the desktop review. The respondent was unsure as to whether the claimant wished to appeal and asked him to clarify this by a "yes" or "no" answer. In early July 2007 a desktop review was carried out by Senior Manager M and he concluded that the disciplinary process had been properly adhered to and upheld the sanctions (written warning and the PIR training) imposed. The conclusions of the appeal officer were presented to the claimant by the HR generalist (HRG) at a meeting on 15 July 2007

The claimant was asked to attend a PIR meeting on 3 August 2007 to discuss with his manager alternative plans and set out development goals for the six months of the PIR. The claimant was notified in advance both by email and telephone and again by email at the time of the meeting but he failed to attend.

The claimant was then asked to attend a disciplinary hearing on 10 August 2007, to be chaired by Senior Manager M, in respect of his failure to follow management's instructions to attend both the PIR meetings on 3 August and the earlier disciplinary meeting on 2 April and his failure to inform relevant persons in advance. The claimant's position was that his failure to attend on 2 April was because he was involved in a severity 1 problem at the time and the meeting slipped his mind; he had explained this to chairman of the disciplinary hearing when the latter called him and he did not think that any further action was required. While he had received the email in relation to the PIR meeting on 3 August he had not opened it. He alleged that he had not received the letter inviting him to the instant disciplinary meeting and had only become aware of it when it had been mentioned to him on 9 August. Arising from this disciplinary hearing, in a letter dated 14 August 2007 the claimant was issued with a final written warning. In the letter he was reminded about the general requirements for selecting and participating in the PIR and informed that non-compliance with the standards set out in the PIR plan or a repeat of any behaviour deemed to fall below the respondent's expected standard could result in dismissal. Senior Manager M and HRG discussed the contents of the letter with the claimant at a meeting on the day (14 August). At this meeting the claimant indicated that he had never received outlook training. HRG was amazed that anyone in the industry would not have had outlook training.

On 17 August 2007, the claimant's manager and HRG presented the PIR plan to the claimant and went through it step by step. They were to meet in three months to discuss the claimant's progress. The claimant signed the PIR plan on 23 August 2007. The PIR involved online training where the employee can log on and do the course at his own pace. The claimant's manager was to monitor the claimant's progress.

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In a letter of 20 August 2007 to HRM, the claimant raised a number of issues with the respondent in relation to the 14 August disciplinary hearing, including short notification and scheduling of meetings, the role of HR in the disciplinary, which he contended should have been impartial as well

as repeating some of his earlier issues and seeking records of the disciplinary meeting of 10 August. On 22 August HRM sought clarification from the claimant as to whether his letter of 20 August was an appeal of the disciplinary decision of 14 August and informed him that Senior Manager CA would conduct the appeal. In subsequent correspondence the claimant pointed out that Senior Manager CA had been involved in the disciplinary hearings in early April.

By letter of 17 September HRM replied to the issues raised by the claimant in his letter of 20 August, stating inter alia that HR personnel were present at the meetings as facilitators. The correspondence continued apace after this date with the claimant requesting different documents, repeating his usual complaints about the process and requesting copies of VH's original signed accusations. The respondent felt it had responded sufficiently and the claimant continued to be dissatisfied with the respondent's responses.

In early November HRG indicated that a meeting would be held in the following weeks to see how the PIR plan was progressing. In an email dated 8 November 2007 the claimant stated that the respondent had failed to comply with its obligations and in particular it had failed to provide VH'soriginal signed accusations and that this along with its continuing failure to comply with its policyrendered the PIR unsupportable. The respondent was alarmed by this response. The claimant alsocorresponded with the respondent's ethics office but it felt that the process had taken place in a fairmanner and did not warrant further action.

By letter dated 20 November 2007 HRG invited the claimant to a disciplinary meeting on grounds that :

> "To date you have failed to comply with the reasonable requests made by Management that you attend a PIR course. Your failure to move forward in the process and follow reasonable management instruction has led us to hold a disciplinary hearing on Friday 23/11/2007. This is on the grounds that you have persistently failed to accept and act on reasonable instruction from your manager. Please be aware that further sanctions may be imposed by the company that may ultimately lead to the termination of your employment contract with [the respondent]"

The claimant wrote querying whether it was an appeal or a disciplinary meeting.

The claimant's manager chaired the meeting and Senior HR as well as HRG also participated. As with previous meetings the claimant was told he could bring a friend or colleague to the meeting on 23 November but he declined. The claimant indicated that he had not refused to take the courses and there were no deadlines in the plan. The claimant reiterated that he had not received the original complaints in writing. He also mentioned that there were outstanding appeals. The respondent's position was that they had not seen any activity towards his PIR and he had been informed that there would be a three-month review. The claimant's position was that he had not commenced the PIR training because of his workload, alleging that he was working 25% over his contractual obligation, that he was intending to take some of the courses when there was a work "freeze" and that no time frames had been set for completion of any of the elements of the course within the six month period. A meeting was reconvened on 28 November 2007 to seek clarification from the claimant on a number of issues, in particular whether he intended fulfilling the PIR. At that meeting the claimant reiterated that he was willing to take the training but maintained that the issue was that he had not received the allegations in writing as was his entitlement. The respondent was fully satisfied that the relevant documentation had been provided to him.

The respondent found the claimant's responses to the question as to whether he intended to engage with the PIR plan to be vague and contradictory. The disciplinary panel felt that the claimant had frustrated attempts to get him to engage with the PIR course. The respondent had lost trust and confidence in the claimant. His persistent failure to act on reasonable instruction from his manager constituted gross misconduct. A letter of dismissal in these terms was sent to the claimant on 12 December 2007. The employment was terminated with immediate effect and the claimant was paid one month's salary in lieu of notice. He was given the right of appeal and while he did appeal he stated that he had not accepted the process. Attempts were made to set up the appeal hearing with the claimant. He could not attend on the first occasion as he was could not come to Ireland on the appointed date. On the second occasion, 25 January 2008, the appeal hearing was to be held by teleconference to facilitate the claimant. The claimant did not attend as requested and when the respondent contacted him to find out why he was not in attendance he indicated he would be in contact. The claimant next made contact by email on 6 June 2008 when he stated he was lodging a claim for unfair dismissal. From the date of the disciplinary hearing on 28 December 2007 the claimant was absent from the office with out the authorisation of his manager and had taken to working from his home in the UK, which is contrary company policy. Several attempts were made to contact him but they failed. This also contributed to the decision to terminate his employment.

Determination

The claimant was dismissed for his persistent failure to engage with the PIR training and to follow his manager's reasonable instructions. While the claimant indicated that he was willing to engage in the training he repeatedly contended that the PIR training was unsupportable because the respondent had not complied with its own procedure in its dealings on the harassment issue. The claimant further maintained that there were no time frames or deadlines prescribed within the six-month period of the plan and that he was willing to engage with the plan when work permitted.

The harassment policy produced in evidence by the respondent does not require that a complaint, whether informal or formal be in writing. Whilst the investigation was an information gathering process the respondent's harassment policy specifically provides for the drawing of a conclusion as to whether harassment has occurred: *If following an investigation, the Company concludes that harassment has taken place, the harasser will be dealt with in accordance with the company's Disciplinary Procedure.*

Following its investigation the investigation panel concluded that the claimant had a case to answer in relation to harassment and that it should proceed to a formal disciplinary hearing. It is at this stage of the process that the requirement to have "the totality of the allegations" in writing arises. Clause 1.9 of the claimant's contract of employment provides: *In all disciplinary matters, the employee will be presented in writing with the totality of the allegations outstanding against him, will be given the right to respond…".* The Tribunal is satisfied that in sending the claimant the investigation report on 7 March the claimant had been provided in writing with "the totality of the allegations" against him before the disciplinary hearing. Whilst there was a dispute between the parties as to whether the entire summary of the offending extracts from his other emails were put to the claimant at the investigation interview, he was provided with the written summary of these in the investigation report before the disciplinary hearing. Furthermore, the offending extracts were taken from emails sent by the claimant and accordingly within his knowledge. Finally, harassment policies do not in general provide for an appeal at the

investigation stage. Accordingly, the Tribunalfinds that the respondent was not in breach of its own procedures and the PIR was not unsupportable as contended by the claimant. .

The claimant's position was that he was willing to undertake the PIR training when his burden of work reduced and that there were no time frames or deadlines prescribed within the six-month period of the plan. The respondent's position was that the claimant had not engaged with the PIR plan and the claimant had been informed that there would be a three-month review. The Tribunal finds that in providing for a three-month review it was implicit that some progress should have been made by that time. Having considered the evidence on the on the meetings of 23 & 28 November 2007 the Tribunal is satisfied that it was reasonable for the respondent to conclude that the claimant was guilty of gross misconduct in failing to follow lawful instructions to engage in the PIR.

Whilst the claimant complained that some members of management participated more than once in the disciplinary process the Tribunal is satisfied that any repeat participation was on different disciplinary issues and it does not contaminate the fairness of the process.

For the above reasons the Tribunal finds that the dismissal was not unfair and the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

The claimant acknowledged that he received his entitlement under the Minimum Notice and Terms of Employment Acts, 1973 to 2005. Accordingly, the claim under those Acts is dismissed.

As no evidence was adduced by the claimant regarding the claim under the Organisation of Working Time Act, 1997 the claim under that Act fails for want of prosecution.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)