

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE *-claimant*

CASE NO.
UD1491/2009

against

EMPLOYER *-respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Taaffe

Members: Mr. M. Carr
Mr. S. O'Donnell

heard this appeal at Navan on the 30th March 2010
and 7th & 8th July 2010
and 21st December 2010

Representation:

Appellant: Mr. Andrew Nugent B.L. instructed by McAlinden & Gallagher Solicitors, Main Street, Ashbourne, Co. Meath

Respondent: Mr. Brendan Archibold, 12 Alden Drive, Sutton, Dublin 13

The determination of the Tribunal was as follows:-

Background

The respondent is a Community Development Programme funded by Fás and the Department of Community, Rural and Gaeltacht Affairs. A voluntary Board of Management manages the respondent. The Chairman of the respondent outlined the nature of the respondent; working with disadvantaged people in classified disadvantaged areas and working with minorities within the community. There are two programmes within the respondent, Career Start and the Community Development Project. There are 11 Board members and 6 employees. A sub-group was set up to oversee the management off the Career Start programme. The respondent dismissed the claimant on the 26th of January 2009.

Respondent's Case

The Chairman of the respondent (MJJ) took up the position in 2008. MJJ gave evidence that the claimant was out on sick leave from February 2008 until August 2008.

The claimant was the co-ordinator for the community development project but refused to take part in any community work, which she had been doing before she went on sick leave. The claimant temporarily oversaw the career start programme when the co-ordinator for that programme was out on sick leave in 2007. The respondent made it clear to the claimant that she was not the co-ordinator for the career start programme.

The claimant returned to work in August 2008. There was a training day with a facilitator to try and move the project forward in order to retain their funding. The respondent had introduced new work practices to come into effect in August 2008. The claimant informed the respondent she had over 160 hours to take as time in lieu for working at home. The new work practices set out that any time in lieu had to be agreed by the Board, 7 hours was the limit to be taken with permission from the Board and going forward work should not be taken home. It was also decided that individual members of the Board should not be contacted by phone that there would be a specified person as the contact for the Board either the Chairman or Vice-Chairman. On the 18th of August the respondent asked the claimant to a 'return to work' meeting, this was to update her on any changes; she did not need any representation and was so advised, it was not a formal meeting.

The respondent issued a letter to the claimant on the 26th of August 2008 documenting a verbal warning that had been issued to her for using a recording device to record a conversation with a colleague. The claimant did not provide the assurance required that she would no longer use the recording device.

The respondent could not deal with the claimant's grievances until she returned to work from sick leave. On the claimant's return they asked the claimant for her grievances in writing and informed her on receipt of her grievances they would appoint an investigator. The claimant still refused to help the respondent present the new work practices. The respondent wrote to the claimant on the 7th of September 2008 acknowledging receipt of her grievances and requesting individual complaints to be outlined. The respondent wrote to the claimant again on the 26th of September 2008 informing her that an investigator had been appointed.

The respondent met with the Department of Community, Rural and Gaeltacht Affairs on the 9th of September who informed them they had to 'get their act together' in order to keep their funding. On the 15th of September the respondent reported on the meeting with the Department and introduced the new work practices. The claimant refused to co-operate and would not change her work practices, as her grievances had not been dealt with, this also applies to the changes proposed to her contract of employment and her terms of employment.

The investigator was appointed and interviewed all the respondent staff. The investigation concluded that no bullying and harassment took place. This investigation concluded post the claimant's dismissal.

In September 2008 the claimant brought an allegation of a misappropriation of funds by one of her colleagues. A sub-committee was set up to investigate this allegation and found that the allegation was unfounded. This finding was communicated at a meeting on the 20th of October. The respondent issued a letter to the claimant on the 21st of October outlining that her behaviour at the meeting had been 'quite aggressive and disrespectful' and that this was unacceptable. The claimant was instructed not to take the allegations further. The claimant contacted Fás and was issued a letter requesting her 'not to spend any more time on the matter' and that failure to follow instruction 'will invoke disciplinary action against you.'

The respondent wrote to the claimant on the 3rd of November refuting the allegations made against the

Board of Management. These were new allegations against the Board, subsequent to the allegations made to invoke the grievance procedure. The letter states that,

'If you do continue with this type of behaviour and continue to resist our right as your employer to give you direction and instruction then we will be left with no alternative but to take disciplinary action against you up to and including dismissal.'

The respondent received numerous complaints in writing concerning the claimant's behaviour and attitude to her colleagues. One request was for a transfer, as the complainant could no longer work with the claimant. The authors of the complaints gave evidence as to their authenticity. The respondent wrote to the claimant on the 6th of November outlining that the Board apologised on her behalf to one of the complainants who did not work for the respondent.

On Tuesday the 18th of November a meeting was organised by the respondent to try and 'alleviate' the tension in the atmosphere between the staff.

On the 27th of November the respondent wrote to the claimant requesting a meeting for the following Tuesday the 2nd of December, the respondent offered the claimant the choice to bring a representative of her choice. This meeting was intended to be an investigation meeting into the complaints against the claimant. The claimant was made aware verbally of the complaints made against her. The claimant declined to attend this meeting and her representative was unavailable to attend a further meeting on the 12th of January 2009. The claimant was due to meet the investigator appointed to investigate her grievance on the 8th of January 2009.

The claimant was issued with a report from the Board of Management on the 14th of January; 2 days prior to the investigation meeting. This report outlines the sequence of events from the claimant's return to work after her sick leave and includes all the letters of complaint against her. The report concludes with the outcome, *'The Board feels that (the claimant's) behaviour amounts to gross misconduct and that we are left with no alternative but to dismiss her.'*

The investigation meeting was set up for the 16th of January with the claimant, her representative, her brother and three members of the Board (a sub-group set up to investigate the complaints against the claimant) were in attendance at the meeting. This meeting was organised to 'hear the claimant's side of things.' The decision to dismiss the claimant was made at a Board meeting the week after this meeting. The chairman was given a verbal recommendation to dismiss the claimant. The claimant was informed by letter of the 26th of January of her dismissal and her right to appeal this decision. The appeal was conducted by way of written submissions; the appeal was upheld and the claimant was notified of this on the 2nd of April 2009.

The respondent's disciplinary procedures state that *'before a decision (to dismiss) is reached the employee will be interviewed by the staff liaison sub-group and given the opportunity to state his/hers case.'* The procedure also highlights the employee's right to appeal.

A member of the Board of Management (JR) who was appointed to the sub-group to investigate the complaints against the claimant gave evidence. The witness was aware that the claimant had been issued the Board of Management's report (including the conclusion to dismiss the claimant) two days prior to the investigation meeting of the 16th of January. The conclusion to dismiss the claimant was included in the report in order to highlight the seriousness of the situation. The claimant did not respond to the allegations made against her but instead re-iterated her grievances against the respondent. The authors of the complaints were not present at the meeting. The incidents in the

complaints against the claimant were not investigated.

The role of the sub-committee was to ascertain the claimant's response to the Board's allegations that her behaviour amounted to Gross Misconduct. The letter of the 5th of January requesting the claimant attend a meeting was as a result of the report although the letter does not make reference to the report. The report was not compiled by the sub-committee but by a third party; the witness stands over the content. The Board of Management approved the report and gave it to the sub-committee at an earlier Board meeting. On the 26th of January the sub-committee met prior to the Board meeting and endorsed the report's conclusion and recommended the claimant's dismissal to the Board. The Board of Management endorsed the claimant's dismissal.

Claimant's Case

The claimant commenced employment in February 2005. The claimant was instrumental in getting the respondent up and running and heavily involved in community activities of behalf of the respondent. The claimant had a wide variety of duties as part of her role as co-ordinator and also was responsible for the Career Start programme while the co-ordinator was on sick leave. The claimant was under severe pressure and asked on numerous occasions for support from the Board of Management. This support was not forthcoming and as a result of this pressure the claimant ended up in hospital.

The claimant made an accusation against the co-ordinator of the career start programme and in the resulting investigation the co-ordinator made accusations against the claimant. The claimant was not kept informed or made aware of the details of the accusations or ensuing investigation despite numerous requests.

The claimant initiated the grievance procedure on the 17th of April as a result of these events and her lack of support from members of the Board of Management. As a result of her treatment on various occasions from the Board of Management the claimant invoked the grievance procedure stating that, *'This harassment, bullying and disrespectful behaviour will not be tolerated.'* The claimant remained on sick leave until August 2008. The claimant was informed by letter of the 26th of September that an independent investigator had been appointed. The investigation into the claimant's grievances was ongoing.

The claimant was requested to attend a meeting on the 2nd of December 2008. The meeting was re-scheduled for the 16th of January 2009. The claimant had received a letter dated the 6th of November in relation to a complaint made against her stating that the Board wrote a letter of apology on the claimant's behalf; a copy of the complaint was not given to the claimant.

The claimant received a report from the Board of Management on the 14th of January 2009. The claimant felt that the decision to dismiss her had been made prior to the meeting as the report included the conclusion that, *'The Board feels that (the claimant's) behaviour amounts to gross misconduct and that we are left with no alternative but to dismiss her.'* The claimant's representative wrote to the respondent raising the issue that it appeared they had made the decision to dismiss the claimant already. The meeting was very intimidating as they were instructed by (JR) at the outset that no questions would be answered and that the meeting would be closed if the claimant's brother spoke. The claimant refuted all the allegations made against her. A pre-prepared statement was read out at the conclusion of the meeting and the claimant was taken to her office to clean out her desk. The claimant's representative questioned whether it was necessary for the claimant to clean out her desk when a decision had not been made yet.

The appeal against the decision was by way of written submissions and was upheld by the respondent

Chairman.

Determination

The Tribunal carefully considered all of the evidence adduced and is satisfied therefrom that (a) a consistent and persistent conflict presented itself in the relationship between the parties and (b) that this was contributed to by both parties.

In addressing the claimant's dismissal the Tribunal examined the behaviour of the respondent towards the claimant prior to her dismissal and is satisfied for the reason set out hereunder that they behaved unfairly and unreasonably towards her in that they (a) prior to a disciplinary meeting with the claimant, at a management meeting in the absence of the claimant, pre-determined to dismiss her on the grounds of Gross Misconduct and (b) despite their attention being brought to this pre-determination by the claimant's representative at this disciplinary meeting, proceeded to implement their decision to dismiss her.

Section 6(3) of the Unfair Dismissals Act, 1977 as amended by section 5(b) (a) of the 1993 Act states that,

“in determining whether, in those circumstances, the dismissal is an unfair dismissal, the Rights Commissioner, the Tribunal or the Circuit Court, as the case may be, shall have regard, for that purpose only, to—

- (i) the reasonableness or otherwise of the conduct (whether by act or omission) of the employer or employee in relation to the dismissal.”

The Tribunal therefore determines that the claimant was unfairly dismissed and is entitled to compensation in respect of this dismissal, having withdrawn her claim for re-instatement. In determining this amount the Tribunal considers whether the claimant, as a result of her behaviour in the course of her employment contributed to her dismissal and is satisfied that she did.

The Tribunal find that the claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds and awards the claimant compensation in the amount of €20,000.00, being fair and reasonable in the circumstances.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)