

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF: CASE NO.
EMPLOYEE UD2411/2009
claimant
Against
EMPLOYER
respondent
under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. McGrath BL

Members: Mr G. Mc Auliffe
Mr J. Flannery

heard this claim at Dublin on 9th February 2011

Representation:

Claimant(s): Mr John Kelleher, A H C P S, Deputy General Secretary,
Fleming's Hall, 12 Fleming's Place, Dublin 4

Respondent(s): XXXXXX

The determination of the Tribunal was as follows:-

Respondent's Case

Mr. O'T told the Tribunal he was the IT manager with the respondent and was responsible for all systems. He had been with the respondent since 1984. The claimant commenced employment in May 2000 and worked in letter post. As a result of a merger with letter post and SDS the claimant reported to him.

An incident occurred on 2nd February 2009, the claimant was working in CRM and there was a double disc failure. The disc on the PC crashed and when this fails it has the technical ability to rebuild the system. Due to a second disc failure it could no longer retrieve the information, as the components were not there. A new disc was added eight months earlier but was not added to the tape deck, which was the routine back up system.

When it was switched back on not everything was recovered in the way it should have, as one of

the recovery applications was not switched back on and there were no recovery methods in place. If the live system came back up they would have recovered the data. The actual problem on the 2nd February 2009 was that one of the discs crashed and broke. When that happens you try to recover data over a number of discs. Then there was a second disc failure and as a result the first step in recovery failed.

The claimant was CRM Technical manager and had responsibility for the system. He believed that the claimant was involved in the first problem because the back up system failed. As technical manager he would have done a second test. The impact of the failure was that customer service department could not access all the customer telephone queries. Over a three to four month period a number of employees had to spend time in recovering data and the CRM had to get its own staff to re key data personally which cost the respondent a substantial amount of money.

Bonuses for 2008 would usually be paid in January 2009. Mr. O'T made decisions regarding bonuses, he rated and assessed staff and made recommendations up the line. The claimant should be paid a bonus as objectives in 2008 had been met. The claimant's overall ratings as well as the mistake he made should be taken into account. He did not have a meeting with the director. The claimant contacted him on 1st April 2009 and advised him he had not received his bonus. Mr. O'T queried this with IT and he was informed the claimant was not being paid his bonus. He could not tell the claimant this information over the telephone, as the claimant had been absent on sick leave. He spoke to the claimant on 23rd April 2009 and told him that his bonus was being deferred due to the CRM problem. He also told him that potential disciplinary issues were being talked about and that this came from the senior director in HR. The claimant told him that other employees were involved in the CRM crash.

He felt that the claimant was responsible for the first two issues with the CRM and the claimant was of the view that the department was responsible for doing back up. The next day 24th April 2009 he received an e-mail from the claimant that he had accepted another job and was submitting his resignation. This was unusual as it was sent in the early hours of the morning. He usually received text messages from the claimant over the night regarding work. The claimant then sent him an e-mail at 10.45am informing him that his last day of service would be the 20th June 2009. The next day he spoke to the claimant about the e-mail and he asked the claimant if he really wanted him to send the e-mail to HR. The claimant told him that he wanted it sent to HR and suggested that he might take a constructive dismissal case. The claimant was aggrieved that his bonus was being withheld. The claimant said that he would withdraw the resignation if he received an apology and got his bonus. That same Friday the claimant was due to attend two meetings. Also the claimant's colleague had gone on maternity leave and the claimant had been late back from lunch. He asked the claimant questions about work he was undertaking that day, the claimant told him he had completed work but he subsequently found out this work had not been done.

He sent the claimant's e-mail regarding his resignation to Mr. B, HR on Monday. He spoke to Mr. B who gave him a form of resignation for the claimant to complete. By Monday normal relations returned and there was no conversation regarding his resignation. On Tuesday he met the claimant in the corridor and gave him the form of resignation and asked him to complete it. The claimant asked him what would happen if he withdrew his resignation and that he did not have another job. On Wednesday he received a text from the claimant that he needed to go to the doctor and that he would not be back in work for a while. He never again saw the claimant. On Thursday he received a text from the claimant that he would be absent from work for two months, and he subsequently received medical certificates. The claimant had mentioned that he withdrew his resignation by way of a letter but Mr. O'T did not receive this letter. The claimant only asked

him what would happen if he sent an e-mail to withdraw the resignation. The claimant communicated in short messages by e-mail. He said the claimant told him he posted a letter that day. On 23rd June 2009 Mr. B, HR sent the claimant a letter regarding his resignation and he indicated that he had not received any correspondence from the claimant withdrawing his resignation. It was very unusual that the claimant would send a letter from his home when they had met on two occasions in a week.

In cross-examination Mr. O'T agreed that two months after the CRM crash that the claimant was aware that he might face disciplinary action. The claimant had accepted the responsibility or ultimate responsibility. He did receive e-mails late at night but it was unusual to receive a resignation late at night. He received work related text messages that same night from the claimant. The claimant told him that he wanted the whole thing to go away. He felt that the claimant was not happy, as he did not have another job to go to. He was of the view that the claimant was going to go down the route of trying to withdraw his resignation from his communication and his refusal to sign the form. He received the relevant medical certificates from the claimant. He had recommended payment of the bonus to the claimant. It was an unfortunate series of events. The claimant was not replaced. The final decision was not made regarding the bonus and it was under review. If there had been a problem with the system it would not have come to light until such time as the final disaster.

The HR manager in HQ, Mr B told the Tribunal that he looked after staff in HQ and in the country. He received the e-mail regarding the claimant's resignation around 29th April 2009 and Mr. O'T would have discussed it. The claimant's resignation was taken at face value. He would have sent a standard form for record keeping purposes. Mr. O'T had indicated to him that the claimant was not signing the form of resignation and that he was absent on sick leave. He discussed the claimant's letter dated 18th June 2009 (whereby he outlined that he offered his resignation under a period of extreme work related stress) with Mr. O'T. He sent a letter to the claimant on 23rd June 2009 informing him that the respondent did not have confirmation that it had received a letter from the claimant withdrawing his resignation.

On 2nd July 2009 he wrote to the claimant and wished him all the best in the future. The claimant responded that he had already withdrawn the resignation. He received a letter dated 15th July 2009 and the claimant indicated that he wished to instigate an official grievance process. This was considered but the matter had progressed too far to consider.

In cross-examination he stated that it was not unusual for IT employees to send e-mails at 1.43.am. The claimant was serving a period of three months notice. He was not aware the claimant had health issues prior to him furnishing medical certificates. The majority of employees signed the standard resignation form.

Claimant's Case

The claimant told the Tribunal that he believed he joined the respondent in 2001. He did not receive additional training on CRM he just read up on it. The CRM crash which occurred on February 2nd 2009 was ultimately his responsibility. The IT department had the double disc disaster. When this occurred other difficulties came to light. After this he worked long hours and weekends to recover the data.

As a result of the CRM crash he was told that he would get 10% of a possible 15% of his bonus. An element of his bonus was being withheld due to the CRM crash. On 1st April 2009 other

employees received their bonuses and his bonus was not paid his bonus. He was informed on 23rd April 2009 that his bonus was being deferred. He was told that there was a prospect of a pending disciplinary action and that the director of services had not signed off of on the bonus. He worked late that evening, he felt he was a scapegoat and that he had been persecuted. He had seen his bonus deferred on 23rd April 2009 and other employees received their bonuses on 1st April 2009. He sent e-mail on 24th April 2009 at 1.43am submitting his resignation. He had second thoughts about this e-mail over the weekend. He sent a letter the next day, which he posted. Mr. O'T told him he never received the letter and he asked him to sign a resignation form. Mr O'T told him that he would have to check with HR.

After this he ceased to function and he found it difficult to cross the road. He went to the doctor and was diagnosed with work related stress until the end of August 2009. He had sent his medical certificates to Mr. O'T. On 3rd June 2009 he met with the occupational health nurse. He received a letter from the HR director Mr. B on 16th June 2009 confirming his last day of service and he was in total shock on receipt of this. Since July 2009 he was in receipt of job seekers benefit. He established his own company in March 2010 but this is making a loss.

In cross-examination he stated that he was tired of working long hours. He submitted his resignation in a highly upset state. He wrote the letter of withdrawal on the following Monday after his discussion with Mr. O'T. He would have posted the letter the next morning on his way to work. He was advised by colleagues to compile this letter in writing.

Determination

The Tribunal has carefully considered the evidence before it. It is common case that a series of mishaps in the IT Operations Department came to light when there was a double disc crash on the 2nd February 2009. The nett result was the loss of necessary data, which had to be laboriously retrieved across two departments in the following months.

The claimant concedes that to some greater or lesser extent he might be considered as having the ultimate responsibility for this time consuming set back. However, nothing in particular was said to the claimant until the 23rd of April 2009 at which point his direct line manager Mr. O'T told him that his 2008 bonus (due to be paid at the end of April 2009) was being withheld or deferred pending the outcome of a disciplinary process which was being mooted by the director of customer service whose department had been badly effected by the fall out of the events of February 2nd.

Naturally, the claimant was very upset that he was being singled out for discipline and was also upset that a bonus potentially worth €13,000.00 was being withheld. This was especially in circumstances where the claimant had worked long hours to ameliorate the situation after the double disc crash. Within one day of this conversation the claimant wrote an e-mail letter stating that he was resigning and e-mailed this intention to Mr. O'T. The claimant further confirmed by a second e-mail, the dates, which would be his last day of work in circumstances where his Contract of Employment demanded a three-month notice period. The second e-mail was sent at 10.45a.m. while the first e-mail had been sent at circa 2 in the morning.

Mr. O'T with whom the claimant concedes had a good working relationship and rapport discussed the proposed resignation during the course of the following day of 24th of April 2009 but he understood that the claimant was not for turning on this decision.

Mr. O'T did not forward the resignation e-mail on the Friday 24th April 2009 and in fact only forwarded the e-mail to the head HR director Mr. B at circa 5p.m. on Monday the 27th April. It is noted that no conversation or comment was made regarding the events of the previous week nor was any reference made regarding the resignation during the Monday and Mr O'T assumed the claimant's position remained the same as it had been on the Friday. It seems that the claimant was quite indignant at the way he was being singled out for disciplinary action and felt this was a case for constructive dismissal and the only circumstances where he would withdraw his resignation was in circumstances where an apology would be forthcoming together with an immediate payment of the bonus.

Then on Tuesday the 28th of April Mr. O'T had another conversation with the claimant. At this time the claimant appeared to be resigning from his position. He refused to take possession of the standard resignation form which Mr. O.T was giving him and which Mr.O'T himself had just received from HR.

It is common case that the claimant wanted to know how HR would react to a withdrawal of his resignation. Mr. O'T could not know the answer to this, as this was now a matter for HR. Mr. O'T did not advise the claimant either way but felt that the claimant might follow it up with HR.

The next communication Mr. O'T had with the claimant was a series of text messages on the Wednesday the 29th April 2009 where the claimant confirmed that he was going out on certified and stress related sick leave.

The claimant gave evidence that whilst at home on sick leave and certainly within the first day or two he wrote to Mr O'T confirming that he now wished to formally withdraw his notification of resignation. This was unusual and the claimant would never ordinarily post a letter to his employer (nor had he ever had a need to) and the more usual communication would be by way of e-mail or by text message for more run of the mill issues.

It is noted that the letter was sent to Mr. O'T and not to HR, which was the department, more appropriately dealing with the issue of the claimant's resignation.

The Tribunal accept that Mr. O'T never received the letter in question and as neither he nor the HR department were aware of the purported withdrawal of the original resignation as tendered it was assumed that the resignation stood.

The Tribunal cannot criticise the employer for not communicating with the claimant, as he was now out on stress related sick leave and any communication might in the circumstances be seen as oppressive or overbearing.

Therefore the onus rested with the claimant to inform the company of a change in his position and when there was no immediate response to his letter to Mr. O'T he should have followed it up.

Some months later on June 16th 2009 and during the ongoing period of notice HR wrote to the claimant to confirm the date of termination of 23rd July 2009 and advising as to the issue of the P45 etc.

It was at this point that the claimant wrote to HR indicating that he had withdrawn his resignation, which had been made known to Mr. O'T both orally and by letter.

(Informing the occupational Health Nurse can have no bearing on this case as the nurse is not a line manager nor a member of the HR department and cannot be expected to relay messages between the employee and the employer.)

The HR manager Mr. B having had no previous indication of a change of mind opted not to consider one now some eight weeks later. A series of letters were exchanged between the claimant and Mr. B and ultimately the claimant's resignation was allowed stand.

The Tribunal is critical of the HR manager's refusal to allow the claimant initiate a grievance process wherein the claimant believed that Mr. O'T knew or ought to have known that the claimant wished to reverse his position. This was certainly a complaint that merited further investigation. The argument that the claimant's employment was about to expire does not have merit where there still exists a contract of employment and a consequential duty of care.

The Tribunal finds that the combination of factors including a resignation sent in the early hours of the morning, a long period of stress related sick leave and the pressure of an unexpected and uninvited disciplinary process should and could have alerted the company as to the vulnerability of the claimant which fact was borne out by the claimant's subsequent attempt to try and reverse his decision to resign. The Tribunal notes that the claimant did try to reverse his decision in the course of his employment (i.e. continual period of notice) and the claimant was entitled to be given more of an opportunity to be heard under the grievance process.

In the circumstances the Tribunal finds that the termination was unfair but recognises that the claimant in tendering a formal notification of resignation was largely responsible for the said termination.

The Tribunal compensates the claimant in the amount of €16,500.00 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

