

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

EMPLOYEE –**appellant**

UD1924/2009

against the recommendation of the Rights Commissioner
R-073722-UD-09/POB in the case of:

EMPLOYER–**respondent**

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. N. Russell

Members: Mr. J. Hennessy
Mr. F. Dorgan

heard this claim at Clonmel on 9 November 2010,
26 January 2011, 22 March 2011 and 17 May 2011

Representation:

Appellant: In person

Respondent: Mr. John Farrell, IBEC, Confederation House,
Waterford Business Park, Cork Road, Waterford

This appeal arose as a result of an employee (the appellant) appealing against a recommendation of a Rights Commissioner **R-073722-UD-09/POB** in the case of an employer (the respondent)

The determination of the Tribunal was as follows:

The Employer in this case is a manufacturer of Medical devices. An existing Company in which the Claimant was an Employee was taken over by the respondent in late 2006. The Claimant's Employment transferred. He had first been Employed as a Test Technician on the 28th May 2001 and had been promoted to an Electrical Engineer Grade 1 on the 22nd of December 2003 and to an Electrical Engineer Grade II on the 4th January 2005. His first review under the current Employer occurred in March 2007 some 3-4 months after the previous Company had been taken over.

In late 2006 the Claimant believed that he was on the track to promotion to the next level and received a "Valued" assessment from his Employer in March 2007 though the latter did identify certain shortcomings on the part of the Claimant, particularly in the area of 'Ownership' of projects and commitment to same. As a result, the Employer suggested that the Claimant, might focus on technical aspects of his job and on ownership issues which the Claimant felt was different to the career path he had been on where the emphasis had been on a Supervisory role. From the March 2007 Review the Claimant felt that he was getting mixed messages and found matters quite confusing. What became clear to the Tribunal during the course of this case is that there was never a complete meeting of minds between the Claimant and his Employer in the person of O.L. in particular.

The last review the Claimant had under the previous Company was in October 2006 which appeared to give him a "mid assessment" which was a downgrade on his previous positioning. He unsuccessfully appealed this. Notwithstanding this review, the Claimant was still asking his Employer about promotion in January 2007. Weekly meeting with O.L were organised in order to coach and assist the Claimant to meet his objective for promotion. When the Claimant asked if he was up for promotion in March 2007 he was advised that there would be no promotions at that time and that his performance did not warrant promotion in any event.

On the 25th January 2007 the Claimant was given a verbal warning for absenteeism from O.L. which he took badly and became somewhat withdrawn. Thereafter, on the 8th Feb 2007, on his return from an absence, the Claimant refused to fill out a Work Sheet. The Claimant did provide reasons to the Tribunal for his refusal and O.L accepted, in evidence, that the Claimant may have taken offence in having been asked to fill out this form. On the 9th February O.L issued a Verbal Warning to the Claimant for absenteeism which was disputed by him. An emotional exchange took place between the Claimant and O.L on this date and it was as noted in the latter's handwritten notes of the meeting that the Claimant had levelled certain allegations at O.L. as follows:-

"You think if you sling enough mud at me it will stick
" you put a noose around my neck"
"Don't make out to be the hero here O....."

It was clear at the Tribunal that from this point onwards, a tension entered into the relationship between the Claimant and O.L and this was confirmed by J.W in her evidence.

On the 22nd of February 2007 the Claimant appealed this verbal warning to O.L. The latter upheld the warning but upon appeal to the next level of Management it was reversed and lifted. Weekly meetings continued as before.

Of the March 2007 Review, O.L advised the Tribunal that the principal issue was ownership" by the Claimant of his projects. He found him not to be at the standard necessary for promotion but was at the standard expected of his grade. He was assessed accordingly. The Claimant was not presenting to him as a strong promotional candidate. He advised the Tribunal, that at the Claimant's request, there was H.R involved in the process as the Claimant had expressed a "distrust" of same. This was long before the

commencement of the Disciplinary Process.

Matters deteriorated from March 2007 and the Claimant was dismissed on the 2nd of July 2008 for poor performance in failing to achieve acceptable performance levels.

During the course of the hearing of the claim over a number of days the Tribunal heard extensive evidence and viewed all relevant documentation to include the Employers Disciplinary Code, its Performance Improvement Plan (PIP) and its Performance Management Reviewed tool, PADR.

The Employer's Disciplinary Code provides that any decision up to and excluding termination can be appealed twice internally with any appeal against the Department Manager to be heard by the Human Resources' Manager. The Code provides for a verbal warning after counselling and coaching which warning is to be administered by an immediate Supervisor. The Code states that it is not necessary for Human Resources (H.R) to be involved in the process at this point. The Supervisor also has authority to issue a written warning which remains on the Employee's record for a year and, also, to reduce sick pay entitlement by 50%. A written warning is followed by Disciplinary Probation. The Code requires the Supervisor to liaise with both H R and the Company's Legal Advisers before placing an employee on Disciplinary Probation. The ultimate sanction is termination which requires the involvement of a H.R Representative, Senior Management and the Vice President of the Company.

It is well established that a Disciplinary Procedure needs not only to be fair but, in its Application, needs to allow for different sets of circumstances.

The PIP is a performance management tool. It is a structured process which enables an Employee who is falling below the appropriate standard for his position and grade to improve. It does not, however, act to suspend any Disciplinary process. In this particular case the PIP was initiated due to a alleged significant drop in the mid-cycle performance of the Claimant. Indeed, the Company was consistent in its position that it was a substantial drop in performance in the month prior to the initiation of the PIP that led to same. The PIP consists of four six week blocs which are progressive in nature and involve coaching, the setting of targets and the monitoring of performance and achievement.

During the course of the hearing before the Tribunal the Claimant remained of the view that he should not have been in the PIP process and was clearly not happy to be involved in same. Ms JW in her evidence advised the Tribunal that the process could be seen as having a "stigma". The Claimant seemed to be under the impression that he was put on the PIP process because of earlier difficulties with absenteeism. However, the terms and circumstances in which the process was initiated were clearly stated by the Employer.

As to issues pertaining to absenteeism and lateness, O.L confirmed to the Tribunal that these can become a non-issue by initiation of both the PIP and Disciplinary processes.

After the March 2007 Review, no plan was put in place to address what the Employer saw as the Employee's shortcomings. The Claimant was told to "work on it". When O.L felt that there was no improvement the PIP was commenced on the 15th of November 2007 based on an alleged drop in commitment and ownership on the part of the Claimant over the

previous month. Six objectives were set for the process to cover areas such as training, attendance, representation of his Group by the Claimant, the processing of Change Orders, the completion of accurate test data, the driving of yield improvements and the Supervising of others.

The Tribunal was faced with a complete conflict as to the conduct and effectiveness of the PIP and it was quite clear to the Tribunal that the parties had totally different perspectives on same. There was very little meeting of minds between J.M. and O.L. and it seemed to the Tribunal that there was a difficult dynamic between them.

By the 20th September 2007 the Claimant appears to have become quite frustrated and raised the issue of Redundancy. He suggested to O.L that if he was not on track for promotion he would like to take Redundancy. Preliminary notice of a Redundancy Scheme had been given to Employee s though it was not a voluntary scheme. The Company claimed before the Tribunal, that the scheme was not open to the Claimant's group. However, the latter believed at the time that it was.

On the 4th October 2007 the Claimant accused O.L. of "railroading him" and on the 8th of October 2007 advised O.L that he could see no future for himself in reporting to him.

In and around this time there were difficulties in a relation to an incident in the plant which saw production suspended in one area. This occurred while the Claimant was on his way to Mayo for the weekend. There was a complete dispute in relation to the facts of this incident. Contemporaneous notes from by O.L indicated that the Claimant took some sick leave around this period claiming that he was depressed from what was happening at work.

On the 23rd October 2007 a meeting was called in relation to the alleged absenteeism of the Claimant and a verbal warning was issued which was not appealed. During the course of that meeting O.L also brought up the matter of the Claimant's performance advising him that, in the Company's opinion, there had been a significant decline over the previous month. This was disputed by the Claimant. The Claimant was put into the PIP process.

At this point there was clearly a divergence in perspectives on the part of the Claimant and O.L going forward. O.L believed that what he perceived to be a significant drop in performance on the part of the Claimant was because he was neither promoted nor given Redundancy. The Claimant believed that O.L.'s attitude towards him had changed when he indicated that he would like to take Redundancy, the Claimant believing that O.L considered this to be an indication that the Claimant was not committed to the Company or to his job.

The Tribunal heard that evidence of e-mails by the Claimant between the 24th October to the 26th October which were described as "hostile" towards O.L. The Claimant refused to attend the PIP any further without G.H and L.R being present. A Meeting was held on the 26th October 2007 the purpose of which was stated to be "Management of communications between J.M. and O.L."

On the 15th November 2007 the PIP objectives were set out for the Claimant. The Claimant was not happy as he did not feel that there were any significant performance

issues and that the first occasion when any emphasis appeared to be put on performance was in October at the Disciplinary Meeting for Absenteeism.

On the 24th January 2008 a Written Warning was issued to the Claimant at the end of Bloc 1 of the PIP for failing to achieve objectives. From the evidence heard by the Tribunal it appeared that the Claimant generally achieved objectives but may have needed prompting or assistance and that the principal issues for the Company appeared to relate to the Claimant's ownership of projects and his ability and willingness to take responsibility .

On the 24th January 2008 the Claimant was given a Written Warning for lack of improvement in the PIP Process. This was hugely contentious between the parties. It was quite clear to the Tribunal that Bloc 1 of the PIP had not proceeded satisfactorily and that the Claimant was dissatisfied that O.L made the decision to issue a Written Warning on his return from the U.S.A when the Bloc had not been probably completed. The principal fault for this breakdown rested with the Company which did not put proper arrangements in place for O.L.'s absence. An appeal of this warning to G. H was unsuccessful. The Claimant was very unhappy with the manner in which the appeal was handled and, indeed, J.W. (HR) was of the opinion that it could have been handled better. It would appear that the Claimant, at this point, lost confidence in the internal Appeal process.

The Tribunal was told that the Claimant initially improved under the PIP but subsequently disimproved. This was disputed by the Claimant

The Claimant felt that the Written Warning at the end of Bloc 1 from O.L was unfair and could not have been based on a proper and fair assessment of the process, O.L. having been absent for weeks 3,4, and 5 of the Bloc. It was clear to the Tribunal that the PIP Process did not operate effectively if at all, in O.L.'s absence.

On the 7th April 2008 the Claimant received his feed back on Bloc 3 of the PIP. He was placed on Disciplinary Probation for 90 days and his sick pay entitlements were reduced by 50%. The principal complaint by the Company at the time appeared to be in relation to the ownership of projects and the Claimant's acceptance of responsibility for same.. The Claimant was not happy with these findings. He refused to sign the minutes of the meeting as he disagreed with the contents. Indeed, O.L noted on the document that the Claimant felt that O.L was showing a "bias".

On the 16th May 2008 J. W. at the request of O.L convened a meeting with G. H and P O'C, to discuss the options as regards the Claimant.

At a meeting held with the Claimant on the 27th May 2008 O.L reviewed and discussed with him his full summary of the PIP process. On the 30th May 2008 the Claimant e-mailed O.L and J.W with a list of people he wished to have interviewed in support of his contention that he was not under performing; none of these was spoken to. Instead, O.L spoke to seven members of Senior Management all of whom were aware that the disciplinary process was already in being.

On the 4th June 2008 a Disciplinary Meeting was held at which the Claimant was dismissed effective from the 2nd July 2008.

The Claimant appealed on the 10th June 2008. An Appeal Panel was organised and the Appeal process ran from the 24th June to the 30th June.

On the 3rd July 2008 the Appeal Panel reported back to T.N and by letter dated the 4th July 2008, the latter informed the Claimant that his Appeal was unsuccessful.

On the 21st May 2008 The Claimant was given his feedback on bloc 4 of the PIP and on the overall process. The Claimant then submitted his own comprehensive written response to same.

On the 30th May 2008 the Claimant was asked to attend a Disciplinary Meeting.

On the 3rd June 2008 O.L gave a full reply to the Claimant's letter. This reply again referred to communication issues between O.L and the Claimant in the following terms:-

“At your own request all Meetings were held in the presence of our assigned H.R Representative to ensure that every effort was made to clarify communications going both ways”

This letter from O.L seemed to the Tribunal to entertain the possibility that the Claimant was still not correctly interpreting what was expected of him.

On the 5th June 2008 the Claimant was dismissed for failure to improve under the PIP Process.

On the 10th June 2008 the Claimant lodged an Appeal with the H.R Manager and an Appeal Panel was formed. The Appeals process was carried out comprehensively. O.L. stood over his findings and opinions and the Claimant disputed these. He felt that the entire process was unfair and that none of the names he had given as references had been interviewed. He was dissatisfied that the opinions solicited from Senior Management in relation to his performance were not obtained by an independent party. He objected to O.L. having dealt with this aspect.

During the course of the Appeal Process, J. W. (H.R) was interviewed. She informed the Appeal Panel that the Claimant did not agree with the PIP Process; he didn't believe that there were performance issues of significance and believed that he was being placed on the PIP simply because he had raised the issue of Redundancy. She found him to be very frustrated by the process and, in particular by the fact there were no one-to-one meetings outside of the PIP. She advised the Appeal Panel, that in her opinion, both O.L. and J. M. “stored things up” for the weekly PIP Meetings. She appeared to agree that some of O.L's approach might be seen as nit-picking. She advised that weekly tasks set for the Claimant did seem to get finished in the main but often with a push and some prompting. She advised that the principal issue remaining was his “drive”. In her opinion, by Bloc 3, the Claimant “had disengaged” from the process and no longer “even argued with O.L”. She described the PIP as “emotive”. On the issue as to why the Claimant's Supervisory role had been removed, she advised the Appeal Panel that J.M. was of the impression that it was to enable him to concentrate on technical aspects of his job while O.L. advised her that it was because J.M. was “ a bad influence ” on Reports (i.e. those reporting to him). It

appears that the Appeal Panel had access to O.L.'s handwritten notes but these were not actually put to the Claimant nor did he have copies of same. During the course of the hearing before the Tribunal he disputed a number of the notations.

The Tribunal was somewhat unclear as to J.W.'s role in the process. The Claimant seemed to be under the impression that she was possibly representing his interests whereas she saw herself as an independent party. She used the phrase "facilitator" to describe her role. This did not entirely tally with her evidence before the Tribunal that, when O.L. made the decision to dismiss the Claimant, "we supported him unanimously." The Tribunal feels that J. W.'s role should have been made absolutely clear to the Claimant.

J. W. described "a very tense negative atmosphere" at PIP Meetings between O. L. and J.M.. She felt called upon occasionally to interject and to explain points that O.L was making to J.M..

The Tribunal also heard the evidence of A.L. on the Appeal Process. On cross-examination she confirmed that she had not spoken to any of the 25 names submitted by the Claimant in support of his contention that his performance was not sub-standard. She advised the Tribunal that none of those persons could give feedback on the issue of ownership. It was put to her by the Claimant that under the PADR process there was a provision for feedback from fellow workers.

In his evidence the Claimant disputed the suggestion that, when neither promotion nor Redundancy were on the cards for him, his performance declined.

The Claimant accepted that he did not fully exhaust all internal appeals available as he had lost faith in the Appeal Process

The Claimant disputed the allegations of substandard performance and O.L.'s perspective on many significant issues. There was a lot of disagreement in the PIP Process.

Determination:

The Tribunal is concerned that O.L. sought to coach and counsel the Claimant, investigate his performance, conduct the Disciplinary Procedure and ultimately dismiss the Claimant against a backdrop where there were clear communication difficulties between him and the Claimant and patent trust issues. The Claimant had clearly expressed his feelings on a number of occasions during the Process.

The evidence of J.W. and her statements to the Appeals Panel are significant and she confirmed to the Tribunal that it was O.L. who decided to dismiss.

The Tribunal feels that it was wholly inappropriate for O.L. to conduct the Disciplinary Procedure and to decide the sanction in all of the circumstances. His objectivity, in light of the Claimant's attitude towards him, is questionable.

Other than setting tasks for the Claimant which he achieved in the main, on occasion with

some prompting, O.L. and the Claimant's Employer did not in the Tribunal's opinion, take any substantial action to help the Claimant remedy his performance shortcomings. The shortcomings identified in March 2007 at a time when the Claimant was still assessed as a "Valued" member of staff, were not dissimilar from those identified as fundamental to his dismissal, and yet the Tribunal did not hear clear evidence as to why the Claimant had been reclassified from "Valued" to being a candidate for dismissal. No evidence was forthcoming to show that training was made available to the Claimant to address his shortcomings which related to such imponderables as "ownership".

It is accepted by the Tribunal that, to some extent, the Claimant "disengaged" from the process. This was, however, a clear indication of difficulties in his relationship with O.L. and would have suggested to any reasonable Employer that there was a fundamental issue with O.L. remaining the person within the Company to continue with the process.

The Claimant, during the course of the Disciplinary Procedure, proffered a list of 25 names in support of his contention that he was not underperforming. None of these individuals was interviewed. The Claimant wished for them to be independently interviewed and not by O.L.. The Tribunal sees no merit in the position adopted by O.L. that none of the latter could add to the Process or assist the Company in assessing the Claimant's performance.

The Claimant did not fully exhaust all internal Appeal Procedures; however, he was clearly disenchanted with the manner in which the Appeal against the Written Warning of the 24th January 2008 was handled by G. H. who had already had some involvement in the earlier stages of the process. During the course of the Appeal against dismissal, J.W. indicated to the Appeal Panel that the Appeal could have been handled better as regards: timeliness; the request of Human Resources to have a Representative present not being acceded to; the failure to take and retain notes of the Appeal Process; and the manner in which the Appeal decision was communicated to the Claimant by way of a one-line e-mail. The Appeal Panel concluded that best practice had not been followed in this regard.

Considering all matters, the Tribunal believes that the Claimant was unfairly dismissed within the meaning of the Unfair Dismissals Acts, 1977 to 2007, and, in all the circumstances of the case, deems it just and equitable to award the Claimant compensation in the sum of €80,000.00 (eighty thousand euro) under the said legislation.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)