

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE
- *claimant*

CASE NO.
RP2092/2009
UD1864/2009
MN1765/2009
WT/778/2009

Against

EMPLOYER
– *respondent*

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms O. Madden B.L.

Members: Mr. L. Tobin
Mr N. Dowling

heard this claim at Dublin on 11th November 2010
and 16th March 2011

Representation:

Claimant(s): Mr. Kevin Callan BL instructed by Anthony Joyce & Co, Solicitors,
30-31 Francis Street, Dublin 8

Respondent(s): Mr. Peter Flood, IBEC, Confederation House, 84/86 Lower
Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

The Minimum Notice and Terms of Employment Acts, 1973 to 2005 was withdrawn prior to the hearing on 11th November 2010.

The representative for the respondent outlined to the Tribunal that the claimant was incompetent and the respondent terminated his employment. There was an appeal mechanism to the claimant and he could have appealed his letter of dismissal. The claimant made allegations against Ms. L but he never raised these with management previously. From July 08 onwards the claimant reported to a product support manager. She had conversations with the claimant regarding his lack

of attention to detail. The claimant asked far too many questions of his colleagues. The product support manager again met the claimant in September 2008 and the same issues were discussed. In December 2008 a meeting was again held and in attendance with the product support manager and the team leader. The claimant received a verbal warning in February 2009 and HR became involved. The same issues arose and disciplinary action was taken against him. He was given a written warning and there was no improvement in February/March 2009. A review took place and a number of serious matters arose.

Counsel for the claimant outlined to the Tribunal that the claimant undertook work on three projects. He then returned to the initial project, the project had moved on and he was given no briefs. A disciplinary process commenced on 3 March 2009. The appeal minutes were not put to the claimant. The claimant received his P45 on the day he was dismissed.

Respondent's Case

BU, production support manager explained to the Tribunal that the respondent customised software for clients. There was a nine-month period for the respondent to customise software before it was given to clients. A support team dealt with issues and changed requirements to meet new demands from clients. A Quality Assurance team reported to a team leader who in turn reported to the product manager. When the claimant started work on the DPS Project in May 2008 DPS was in the development phase. The claimant undertook work on templates and changes were made to the letter that DPS issued to policyholders. The claimant ensured letters to policyholders were the correct ones. A basic type of task was to ensure that the company template was what DPS clients required. QA testers had to ensure that they could recreate an issue. A QA tester applied fixes which had to be applied to a certain environment. Once a QA signed off on an issue it was fixed and requested to go to the client.

In June 2008 BU agreed a goal setting with the claimant, as she wanted to ensure that he knew what his targets were. The claimant could look after the help desk and ensure fixes that came in were monitored. A QA needed to test all fixes and had a certain amount of time to do that. She discovered that the claimant was not 100% up to speed with Excel. She met with the claimant on 19th September 2008. The claimant had a problem troubleshooting. In June 2008 a document was put in place for the claimant's team. The claimant used the document in June and July.

The claimant received training on Excel and he still had problems using this. The claimant kept asking the same questions. She told him to take notes and she hoped that he would minimise the number of questions he asked. The claimant told her that he would take this on board and take notes. The claimant told her that he was comfortable with Excel. The respondent did not have a QA test, HR received CVs from potential employees and candidates were interviewed. HR then put a QA test in place and gave it to potential candidates. The respondent did not know if the test was sufficient and if it would reflect the level of knowledge potential employees would have. This test was given to all of the claimant's team. The claimant was not happy that he had to undertake the test and he achieved a score of 32%. She would have expected a minimum result of 40% for a candidate with no experience. An employee in QA should score well above 40%.

After the July meeting it was decided to have another meeting in a few months. At this meeting they went through QA documents regarding fixes and testing. Trouble shooting ensured investigating issues whenever he had an issue and ensured that fixes had been planned in developing. She explained to him that he would not have to ask other employees had he followed the steps outlined and the problems would not arise. She told him to update test plans and also

raised the fact that he should not feel pressurised in signing issues. She spoke to HR about external training and this would commence in October/November. She met with the claimant and SL. The claimant was happy that he was able to back the DPS helpdesk and update Giras, SL's view was different and she felt that the claimant needed a lot of support and the claimant told her he did not need support.

In December she received a call from a Project Manager who was quite annoyed that a number of tests signed had been signed off as completed. These had to be sent back as issues arose regarding them. The respondent got paid for development and testing. The quality was so poor that it should not have been signed off. She met with the claimant and the claimant told her that he would ask the DPM to provide more information. The DPS needed to take responsibility for service issues regarding the report. After the meeting she told the claimant that he needed to give more details.

An e-mail issued to the claimant from SOD on 24th December 2008 regarding servicing test cases.

A further e-mail issued to the claimant on 19th January 2009 from SOD regarding issues the claimant had with servicing test cases. She spoke with the HRM and it was decided that a formal meeting would be held on Thursday 5th February 2009 with the claimant. Present at the meeting were the witness, HRM and the claimant. They went through a number of issues with the claimant and he was issued with a verbal warning. The next day SL spoke to the claimant SL sent the claimant details and a list of errors and the reason why they occurred. The claimant accepted that he had some issues and that he had not applied certain fixes. They were hopeful that the claimant would improve after the meeting. The witness asked SL to keep her updated from then on until the next meeting. A meeting took place on 19th March, present were the claimant, the witness and HRM. The claimant admitted he made mistakes. There was no improvement in the claimant's performance and he was given a written warning. SL sent the claimant an e-mail on 27th March 2009 regarding testing issues and as a result of an error the claimant made the release of a fix to production was delayed. The claimant received an e-mail on 31st March 2009 from SL, PSC in which she outlined that a release to a client had been delayed. A meeting was arranged for Friday 3rd April 2009 regarding the claimant's underperformance. Present were the claimant, HRM and the witness. It was decided to dismiss the claimant and the same issues were occurring since the meeting in July 2008. The claimant requested that he report to the witness directly but that was not an option.

In cross-examination she stated that the area the claimant worked in was quite a stand-alone area. The claimant raised the fact he had been asked to take responsibility for certain work but she told him that was not the case. She could not trust the claimant's work. The claimant was responsible for fixes in the development team. At the third meeting the claimant was asked to complete questions regarding the level of support he needed. Goals were established and a framework put in place. She met with the claimant in June to establish goals and she gave the claimant time to get up to speed. The job of a tester was quite a long process. She met with the claimant on several occasions and at meetings agreed that certain steps be taken. Spreadsheets were not needed for every issue. She knew from workloads that there was no immediate need for DPS external training.

KC knew claimant had to get training

Her job was to ensure that her team worked as a unit and worked to a certain standard. She would have occasion to talk to different team members. In relation to issues that were raised at meetings he was told what needed to be done.

In answer to questions from the Tribunal she stated that 50% was the average result of the aptitude test, which other employees undertook and all results were above 40%. She put the claimant on

the DPS programme as she wanted them to work together and she still felt that they could make progress. When asked in relation to the help desk she replied that she felt that the claimant was that person. The problems the respondent had with the claimant were so basic that if he followed the trouble shooting documents the problems could be resolved. She still felt that the claimant would improve. She did not work with the claimant on DPS.

SL told the Tribunal she was product support manager PSM and the claimant's team leader. She was responsible for five clients including DPS. She helped the QA members on the team. The claimant undertook an aptitude test; he achieved a grade of 32%, which was considered very low. He did not have experience on Eclipse and she would have expected a better result from him.

She met with the claimant on 18th December 2008 along with BU. She felt that the claimant was not applying fixes properly. The claimant felt he could manage the help desk on his own but he could not handle simple instructions. The witness looked after the help desk. She received an e-mail on 12th January 2009 from SOD regarding issues that she had with the claimant. The witness asked SOD to keep her updated, as she wanted to be aware of issues so that she could help the claimant with them.

She sent e-mail to the claimant on 27th March 2009 advising him that he should have the latest fixes installed on his machine. She received an e-mail from NS on 31st March 2009 regarding a QA and DPS release on Friday 28th March 2009. There was a delay of two hours on the release and when she asked the claimant about it he could not tell her when the script would be read to be passed to DPS. This was released to a client without QA clearance. She sent a further e mail to the claimant on 31st March 2009 in which she outlined to him that he did not have the correct fixes installed when testing issues and this again delayed the release.

She dealt with the claimant in a professional manner. She wanted to ensure that the claimant checked the fixes himself before asking a question of his team. At no point did she treat the claimant different from anyone else.

Under cross examination SL outlined that in September 2008 the claimant was instructed to go through the process first and after this if he needed help to ask his team or this witness. The claimant was wasting time, as he was not testing the basics. He was instructed by email on the 19th December 2008 that for the next five weeks to filter all his queries through the production support manager and this witness, this was to allow them to quantify and type the claimant's queries. These five weeks were sufficient to measure the claimant's tasks.

Next to give evidence was the HR manager. She confirmed that the respondent's handbook and written procedures were given to the claimant and were also available on their intranet. The claimant during his employment had never raised any grievance in relation to his team leader or discrimination.

At all times she had been kept in the loop in respect of the claimant. In January 2009 they had noted the lack of progress in the claimant's performance so she wrote to the claimant inviting him to a disciplinary meeting. This meeting took place on the 5th February 2009, present were witness, claimant and BU. The claimant did not want a colleague present. At this meeting they discussed the claimant's attention to detail, quality of his testing and other performance issues. The claimant only had to master one product, DPS and did not know how to run the help desk in relation to this solo. The claimant asked a lot of questions in relation to his work but the answers he

received were not put in to practise. During this meeting the claimant stated he had banned himself from asking questions because he had been told not to ask. She had found this comment odd as he had been told that they were here to help. This meeting broke at 12.30pm. During this break witness and BU decided to issue the claimant with a verbal warning as the claimant was continuing to make basic errors and the claimant had been vague when they questioned him about his performance. The claimant did not say much about the verbal warning but he understood he would get help from BU and SL. He did not appeal this verbal warning.

This witness wrote to the claimant on the 6th February 2009 confirming this verbal warning and notified him that a formal review meeting would take place on the 19th March 2009. This meeting was a disciplinary meeting were they were back to the same issues with the claimant's performance. There had been no improvement; the basic principles of QA were not being followed. As a result of this meeting a written warning by letter was issued to the claimant on 23rd March 2009 and he was also invited to a "formal meeting" on the 10th April 2009. This letter states that the purpose of this meeting is to review his performance. This written warning was not appealed.

This meeting was brought forward to the 3rd April 2009 as there was a release due on the 27th March 2009 and the same issues as previously with the claimant's work came up on this. This product release was due to go to their client at lunchtime but failed as the correct script and template was not applied. This is a very basic error for a QA. This witness wrote to the claimant on the 1st April 2009 inviting the claimant to this "disciplinary meeting" once again he was advised that he could bring a colleague with him.

At this meeting the claimant was informed of the purpose of the meeting. BU went through the performance issues with the claimant and raised the product release of the 27th March 2009. The claimant accepted he had made errors on this. This meeting adjourned at 11.50am and resumed at 12.30pm. During this break this witness and BU looked at all the factors of the claimant's performance and the amount of time spent coaching the claimant. They considered if they could move the claimant to another area in the respondents but as the product he was working on was not complex, they could not see him being capable of working on another product. When the meeting recommenced she informed the claimant that they had decided to terminate his employment. On the same day she provided the claimant with his letter of termination, which included his right to appeal this decision. The claimant did not appeal.

Under cross-examination she agreed that the claimant's contract did not refer to their grievance procedure. Their handbook was written in 2008 and launched in 2009. All employees signed a cover sheet stating that they had received the handbook and understood it. In 2008 there had been a number of meetings with the claimant. Any issues raised with the claimant at the meeting of the 5th February 2009 were with his performance hence they did not allow him to bring other colleagues work in to the discussion. At no time was the claimant banned from asking questions in the workplace. The claimant was told at the meeting of the 5th February 2009 that the meeting on the 19th March 2009 would be a disciplinary meeting. She accepted that she had described this meeting as a formal review meeting in her letter of the 5th February 2009. However a letter was sent subsequently inviting the claimant to this "disciplinary" meeting but a copy was not available on the day of the hearing.

At the meeting of the 19th March 2009 the claimant had stated "I feel that if I make mistakes, I get a letter, if other people makes mistakes nothing is done". She believes that all staff are treated equally

and at this meeting had stated that she was satisfied that this was happening. She had made this comment to put the claimant at ease and explained that HR had an open door policy at all times. The letter of termination had issued on the same day along with all monies owed and the claimant's P 45, this did not have any impact on the claimant's ability to appeal the termination decision. The letter of termination was prepared during the adjournment of the meeting.

In reply to questions from the Tribunal she explained that while the claimant was informed that he could bring a colleague she had not informed him that he had a right of representation at these meetings. The entire formal disciplinary procedure lasted ten weeks and no formal written warning or suspension was enacted. She agreed the process seemed quick but they had to look at how long the claimant had under performed. The claimant's performance had deteriorated when he had moved to BU's area.

Claimant's Case

The claimant gave direct evidence. He commenced with the respondent in January 2007 and worked on the DPS project with another colleague for six months. He then worked on the ILI project for seven months where he was the only tester. He was moved back to the DPS live project. When he returned to this project he did not receive any training or up date on same. He had raised with SL that there were a lot of changes to the project but SL never gave him any time to study or learn the project. If he had any problems with DPS he spoke to his work colleague C. He maintained that SL did not know the DPS project. While DPS was his main primary project he also had other projects to work on. When issues were returned to him SL could be quite aggressive towards him. The developers who were working on DPS were new so in an attempt to fix an area they would damage another.

His mid and end of probation assessment were produced in to evidence, these show he was "achieving expectations" and in two categories "exceeding expectations". The claimant also received bonuses during the course of his employment.

He was referred to the email of the 19th September 2008 from BU in which BU explains "some trouble shooting" will need to be done before asking anyone in his the team". In this email BU outlines the steps he should take to trouble shoot. The claimant after this put down step-to-step of how he tested and produced screenshots. The developers confused him they would ask him to put in different projects to his system. If he had a question in relation to his work he would ask his colleague C, if C could not help him he would ask an experienced developer or PK. There was nobody else on his team to ask for help.

The claimant was not aware that the series of meetings held in 2008 were covered by the "Informal Action" under the respondent's Disciplinary procedures. He was not issued with the company handbook until 2009. When he was asked to attend the meeting on the 5th February 2009 he thought it was a review meetings just like the ones he had in 2008. He thought this meeting would help them work together, move forward and improve the department. He did not receive a letter beforehand stating it was a disciplinary meeting and was only aware of this after the fact. The claimant was referred to the notes of the disciplinary meeting of the 19th March 2009 where he was told his performance had not improved. BU had asked him some questions in relation to access rights and it is noted that BU could tell the claimant could not understand the issues. He had replied "he had never seen the scripts" and further explained at the hearing that SL would give him loads of tasks at once, this was among them so he had applied the fix. He never raised this at the meeting as he felt BU always took SL's side.

As per his termination letter he could not agree that the respondent had provided him with the necessary training to up skill him as a QA tester. When the problems had started BU always listened to SL and never gave him a chance to explain. He felt that the respondent had planned to let him go all along.

Under cross-examination he was referred to his T1A submitted to the Tribunal in which he stated that SL made his working life difficult and he had encountered discrimination. The claimant explained that he had complained about SL to BU, SL was trying to teach him excel and was teaching him like a baby he had told her that she had to give him the time to learn this himself so he told BU how SL was behaving towards him and that this was how she treated him all the time. He had not raised this at the meeting in July 2008 as he felt if he had raised an issue against SL it would not help him in his job. The claimant had said he always worked well with all his managers and was referred to an email from SOD a manager who he had worked with for three weeks. In this email SOD lists a number of issues with a PPB policy plan and it was put to him that he was not competent at his job. The claimant outlined that he was newly deployed to DPS at the time and was working within 2/3 projects. SL pushed him to help on other projects, which meant he was juggling between his work, and other projects. When he had worked with SOD he had no problems with her.

He accepted that it was no surprise to him he had received a verbal warning after the meeting of the 5th February as the memo notifying him of same states it is a disciplinary meeting. He had not appealed this warning as BU always supported SL. He had improved his performance after this but SL said he hadn't, and also he did not want to cause any trouble. However he had been put in to a position where all the developers were new. He was referred to an email which he sent stating that "DPS issue tested and release note sign off" which was forwarded by SL informing BU that the claimant had passed this but his colleague C failed it afterwards. He explained he had worked on a number of issues so had C, issues C had worked on had been returned by their client but C was never disciplined. He was referred to an other error he made in the notes of the meeting of the 19th March 2009 in respect of changes to templates which he signed off but when subsequently checked were wrong. He was referred to a series of emails commencing with him raising the issue that noscan signature was appearing as required, the last of these email is from SL explaining the reason this task had failed was because the claimant when running it had picked up an old template. The claimant explained he had generated the document and clicked to compare signatures, but it kept giving him an error message so he retested but kept getting the same message, it was a development problem, so he kept changing the database. He told SL and SL gave this piece of work to C. Later he asked C how this was solved and C informed he that he went back to an old database to test the issue. It was put to him that he was making common errors by not applying the correct fixes to the machine. The claimant said everyday he ensured that these were applied correctly.

He had not appealed the decision to terminate his employment, as he had no voice in the respondent company, he knew appealing would have changed nothing.

Under redirection he maintained that he was informed he was dismissed before the adjournment of the disciplinary meeting of 3rd April 2009.

He never believed that his under performance would lead to his dismissal; he thought that they

trying to help him.

Determination

The Tribunal carefully considered the evidence adduced at the hearing. The Tribunal are satisfied that the respondents did not adhere to their own fair procedures as set out in their own handbook. However it is noted that the claimant himself did not avail of the appeal, which was clearly set out and available to him as per same documentation.

While the Tribunal accept the evidence that the claimant was underperforming in his role with the respondent but it is nevertheless clear that the company failed to apply fair procedures and on that basis we find that the claimant was unfairly dismissed. Accordingly we award the claimant €18,000.00 under the Unfair Dismissals Acts 1977 to 2007.

There was no evidence adduced at the hearing in respect of the claim under the Organisation of Working Time Act 1997, therefore this claim is dismissed. The Tribunal having found that an unfair dismissal occurred dismisses the claim under the Redundancy Payments Acts, 1977 to 2007.

Sealed with the Seal of

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)