

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE - **claimant**

UD2385/2009
MN2207/2009

WT1010/2009

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 C. Egan BL

Members: Mr T. Gill
Ms H. Murphy

heard this claim at Galway on 22 June
and 14, 15 & 16 November 2011

Representation:

Claimant:

Ms Audrey Cohen BL instructed by Enda P Moran, Solicitors,
Main Street, Celbridge, Co Kildare

Respondent:

Ms Gerry Silke BL instructed by Mr. Benen Fahy,
Benen Fahy Associates, Solicitors, 2 Bridge Street, Galway
on the first day of hearing and by Mr Fahy, on the subsequent days

Respondent's Case

The claimant was employed as a project co-ordinator for the respondent's community development programme (CDP) from 2003. The respondent operates a building for disadvantaged people (the centre); the centre is available for use by community based organisations. The respondent received funding from the Department of Community, Rural and Gaeltacht Affairs (the Department) and from the City Council (the Council). The claimant was a board member (one of seven) and company secretary of the respondent until December 2007.

For some time there had been a proposal that the CDP be split from the respondent to form a separate entity in much the same way as had occurred some years earlier when the crèche, which had originally been part of the respondent, became independent and moved to different premises. The CDP was controlled by a voluntary management committee (the committee) of the respondent; the committee had nine members, two of whom were on the board of the respondent.

During the summer of 2007 the then CDP administrator was threatening to resign citing, at least in part, the claimant's behaviour as the reason for wanting to resign. This issue was never formally put to the claimant who, in August 2007, complained to her union representative (UR) about matters including the absence of effective supervision, support or appraisal leading to the undermining of her ability to carry out her job. The claimant then had issues with a community support worker (CS) from a training and development organisation, who was to become a director of the respondent in September 2008, in relation to his suggestion that the separation be put on hold. The claimant put her feelings on this matter in separate documents to both the then chair (TC) of the board and UR.

The respondent appointed a buildings' manager (BM) in October 2007, and in February 2008 BM took on the role of company secretary. Areas of contention arose between BM and the claimant, and it is not disputed that the claimant made complaints about BM to the acting chairperson (AC) of the board in the early autumn of 2008. By this time, there were four remaining board members, with the newest member (CS) being appointed in September 2008.

BM and the claimant were tasked with moving ahead with the plan to separate the CDP from the centre. When this led to tensions between the claimant and BM, an independent third party was brought in to help find the way forward for the separation project. This proved unsuccessful and it was left to the board to decide on the way forward.

At a meeting, held to discuss the allocation of rooms for the CDP to operate in the centre, on 29 October 2008, AC told both BM and the claimant that they had to follow the board's instructions. The claimant was unhappy and got up to leave the meeting, whereupon AC instructed her to remain. AC felt that his instruction to the claimant was going to be characterised as intimidation. On 30 October 2008 AC sent an email to the claimant in which he repeated his comments about the need for board decisions to be followed. He further warned the claimant of the need for all staff to behave civilly towards each other, and that inappropriate behaviour could lead to disciplinary sanction up to and including dismissal. Around this time, complaints about the claimant's conduct were received from both BM and the caretaker of the centre.

Relations between the CDP and the centre continued to deteriorate. In November 2008, following a decision by the committee, the claimant and the administrator moved out of the centre to alternative premises. This move was effected without the approval of the board and caused particular difficulties in that the administrator also acted as receptionist for the centre in the afternoons, a function she was unable to perform after the move. AC was away for some time following an accident but during his recovery period he met the administrator and became concerned at the

manner in which the administrator was being treated after the move. As a result of this, the administrator submitted a complaint about the claimant's conduct on 17 December 2008. The claimant was then suspended with pay pending an investigation into the complaints of the three staff members against her.

An independent Human Resource Consultant (MH) was engaged by the respondent to carry out an investigation into a range of complaints made by employees of the respondent organisation. The complaints were made against fellow employees within the organisation and contained an allegation of bullying made by the claimant against CS. The majority of the complaints were made by employees against the claimant. The witness was provided with terms of reference for her investigation and commenced her investigation in early January 2009. The terms of reference of her investigation were sent to all participants prior to the commencement of the investigation. The witness conducted her investigation in accordance with best practice procedures as outlined in the Health and Safety Authority code of practice on the prevention and resolution of bullying at work. She interviewed all of the complainants, the alleged perpetrators and the named witnesses to the alleged behaviours separately in January 2009, with the exception of the claimant. She met with the claimant briefly on 23 January 2009 and was informed by her that, while she wanted to co-operate with the investigation, she did not wish to be interviewed on that day without the presence of her solicitor. The claimant may also have mentioned that she was awaiting documentation to be provided to her by the respondent. The witness understood the claimant's position, and was also of the view that it was important that the claimant be provided with all documentation prior to the interview taking place. The witness understood that the respondent subsequently made repeated attempts to arrange a further meeting between herself and the claimant, but ultimately no such meeting ever took place. The witness told the Tribunal that it was regrettable that she did not have an opportunity to interview the claimant as part of her investigation. She confirmed that she was not provided with the claimant's job description or contract of employment at any stage during the investigation. She was not given a copy of the respondent's procedures on bullying as part of her investigation.

(MH) concluded her report on 20 March 2009, and reported her findings and recommendation to the respondent organisation. She concluded that two of the complaints made against the claimant be upheld. She did not uphold any of the other complaints, and did not uphold the claimant's allegation of bullying against the chairman of the board. Following the completion of her report (MH) strongly recommended that the claimant and her representative be furnished with a copy of the report and offered an opportunity to comment on the report. The claimant responded to the report, and the witness was provided with a copy of that response. (MH) then commented on that response by way of an e-mail to (PK) on 15 April 2009 and that concluded her involvement in the matter.

Witnesses for the respondent (PK) (EO) gave evidence that a restructuring of the respondent organisation into two separate legal entities was undertaken. This process was ongoing for a period of time, and the practical element of the restructuring caused huge difficulties within the organisation. The organisation, which receives funding from Department of Community, Rural and Gaeltacht Affairs, sought outside professional help and engaged the previous witness in that regard. The claimant was suspended on 19 December 2008 on full pay until the conclusion of the investigation. She was the only employee suspended. She was invited to participate in the investigation and was also informed that she could be represented by her solicitor. She was also supplied with copies of the allegations made against her. A meeting/interview was arranged between the claimant and the independent investigator for 23 January 2009 but that

meeting/interview did not proceed at the request of the claimant. The witness wrote to the claimant's solicitor on 17 February 2009 stating that the investigator had interviewed everyone she wished to talk to with the exception of the claimant. He also stated that the interview process must be completed by 27 February and invited the claimant to suggest dates within that timescale for a meeting with the investigator. The claimant did not respond with any suggested dates and no such meeting occurred.

The respondent received the independent investigator's report and forwarded a copy to the claimant and her solicitor prior to it being reviewed by any of the other parties. The claimant's comments on the report were sought by the respondent and were received on 14 and 21 April 2009. Following the receipt of this correspondence, a disciplinary meeting was scheduled for 30 April 2009 where a final decision would be made on the issue. The claimant's solicitor contacted the respondent on the afternoon of 29 April 2009 seeking an adjournment to the proposed hearing and seeking further documentation. The disciplinary panel met on 29 April 2009 and decided to postpone the meeting until 12 May 2009, following the request by the claimant's solicitor for the adjournment. This decision was conveyed to the claimant's solicitor by way of letter dated 30 April 2009. In relation to the request that further documentation be made available, the panel decided that all relevant documentation had already been furnished and this decision was also conveyed in the said letter of 30 April 2009. The panel was also willing to consider any witnesses that the claimant wished to bring to give evidence at the scheduled meeting of 12 May 2009.

The disciplinary panel met with the claimant and her solicitor on 12 May 2009 and listened to the evidence and submissions advanced on behalf of the claimant. The claimant did not request that any other witnesses be heard at the meeting. The meeting was then adjourned for approximately one hour and the panel considered the matter. They felt that a pattern of bullying had been established as outlined in the investigator's report, and were not convinced by what the claimant said. A determination was made that both allegations of bullying be upheld. The pattern of bullying was an affront to the dignity of the other two employees and they imposed the ultimate sanction of dismissal. The minutes of both meetings on 30 April 2009 and 12 May 2009 were opened to the Tribunal but the respondent was not in a position to inform the Tribunal as to who had recorded the minutes. The claimant appealed the decision to dismiss her, but the respondent did not conduct an appeal hearing as it is a small organisation and "the same people involved in the decision to dismiss would have been the people hearing the appeal." Accordingly, there would have been no point in an appeal hearing. It was accepted by the respondent that their grievance procedures allow for an appeals panel to hear all appeals. The respondent did not refer to the claimant's contract of employment throughout the process.

Witness (JC) gave evidence that he was employed at the same level as the claimant with the respondent organisation. He outlined to the Tribunal the nature of the difficult working relationship that existed between himself and the claimant. He stated that she regularly withheld information from him. The claimant requested that any communication between them be done in writing, even though they only worked a few feet apart from one another. He found the claimant's behaviour to be bizarre and eventually made a complaint about her behaviour.

Witness (SA) gave evidence that she worked as a project administrator and reported to the claimant. Initially she enjoyed working with the claimant but things changed and she found herself under pressure and suffering from stress. The situation was becoming unbearable and she expressed her unhappiness to the claimant on many occasions. She also described to the Tribunal an incident where she found the gate of the workplace locked as she was leaving on a winter's evening. She contacted the claimant, who had left the building, by mobile phone on more than two occasions, but

remained locked in the car park for 90 minutes. She was not accusing the claimant of locking her in the car park but described it as a bitter experience as she was the only person in the building on a dark winter's evening. She eventually made a complaint regarding the claimant.

Claimant's Case

The claimant gave direct evidence that she worked for the respondent as a project co-ordinator since 2003. She worked in a full-time position and had a broad range of responsibilities. Initially, she enjoyed a good working relationship but as the organisation became bigger she began to experience work problems. In 2006, she started to encounter difficulties with a number of her work colleagues. As the organisation was dividing into two separate entities, she was given no clear instructions or guidelines. She made a number of complaints to her employer in 2007 but her complaints were not addressed. As her difficulties were not being addressed, she was becoming very distressed. (AC), chairman of the development project made efforts to mediate between the parties but these efforts proved unsuccessful. It got to the stage where it was becoming impossible to get any work done. By October 2008, her working relationship "was disastrous". Her phone conversations were being monitored and (GMcM) yelled at her that he was the boss and she should do as she was told. She then made formal complaints against the resource manager (JC), the acting chair of the board of directors (GMcM), and a general complaint against the Board of Directors. She contacted (JS), who was a member of the staff liaison group and who advised her to take two days off work on 31 October and 1 November 2009. She did so, and returned to work, where a move to another second premises was underway. The claimant had been involved in the proposal to move to that location and received instructions to complete that move. This move was being carried out as part of the division of the organisation into two separate entities. The respondent was also retaining its original premises. On the evening of 11 November 2009, the claimant left her new location and returned to the respondent's original premises. When she arrived there she received a phone call from (SA) informing her that she was locked in the car park. Together with another colleague, she arranged with the security company, who had responsibility for the premises, to unlock the gate and allow (SA) to leave. (SA) was due to attend the meeting in the original premises and the witness informed her that there was no necessity for her to attend the meeting considering that she had been locked in the car park. The claimant felt she was being helpful to (SA) in that regard.

On 19 December 2008, the claimant was absent from work on annual leave. She received a letter posted to her home informing her that (MH) had been appointed to carry out an investigation of all outstanding grievances and complaints involving staff, board and committee members. The letter also stated that the operations and work of the respondent return to its original premises immediately and that she was suspended on full pay with immediate effect (subject to Department funding) until such time as the investigation was completed. This letter was copied to a Department official, the chairperson of the project, (AC) and her union representative. It did not contain any other enclosures. The claimant was shocked to receive this letter a few days before Christmas. She contacted her union representative who informed her that he was absent on annual leave for one month. She felt completely isolated. The following day she received a further letter outlining matters agreed by the board of directors. It again stated that she was suspended on full pay until such time as the investigation was completed. The letter was from (GMcM) and was copied to eight others. As far as she was concerned, everybody in the community project knew that she had been suspended and this caused her great distress. She was not given any reason for her suspension and was not informed of the nature of the complaints made against her.

The claimant received further correspondence on 9 January and 16 January 2009 informing her that

the investigation was underway, and (MH) would be available to meet her on or before 23 January 2009. There were some enclosures with the letters concerning the complaints but the complaints were not in relation to her. The claimant contacted her solicitor and her solicitor made a data access request seeking all information held by the respondent in relation to her. The claimant met with (MH) for approximately 30 minutes on 23 January 2009. She informed (MH) that she did not agree with the terms of reference of the investigation and referred to the fact that she had a contract of employment with the respondent. She also informed (MH) that she had not received all the documentation that she had sought. On 17 February 2009, the claimant received further correspondence stating that the interviews by the investigator must be completed by 27 February. She was still awaiting further documentation from the respondent at this point, and could not attend the investigation because of this. The claimant was not made aware of the possible sanctions that may be imposed by the respondent. She did not meet with the investigator again, and in or around 23 March 2009, she was furnished with a copy of the investigator's report. The claimant submitted a detailed written response to the investigator's report. She pointed out that she never received copies of the complaints. She refuted the allegations and requested that the matters be re-investigated. She expected that the respondent would re-open their investigations and the charges against her would be dropped.

The claimant received a letter from the respondent on 25 April 2009 inviting her to attend a disciplinary hearing on 30 April 2009, where a final decision would be made on the issue. This letter also contained two further allegations, which were not part of the investigator's terms of reference. The claimant sought a postponement of this proposed meeting, as her solicitor was not available to attend. The respondent acceded to this request, and a further meeting was scheduled for 12 May 2009. The claimant attended the meeting with the disciplinary panel together with her solicitor on 12 May 2009 at 2pm. She stated that she had five witnesses, but the witnesses were not allowed in the meeting room. The meeting was chaotic with no agenda and no procedures. There was no official note-taker. The claimant asked the panel if they had considered her written response to the investigator's report, and (PK) replied that they had. They then proceeded to go through her submission and she was told by the respondent's solicitor that she was not allowed to ask questions of the panel. He then started to question her about other matters. At no stage during the process was dismissal mentioned as a sanction. The meeting continued beyond 4.30 pm and was then adjourned for approximately 20 minutes. The claimant then returned to the room together with her solicitor, and was informed that she was dismissed with immediate effect. The claimant was shocked. She received her letter of dismissal two days later and was not afforded the opportunity to appeal the decision. Her contract of employment provided that such an appeal process be conducted, but the respondent refused to hear her appeal.

Since her dismissal, the claimant completed a course of study in her attempts to up-skill. That course cost her €2,200.00. She has registered with FAS. She was on a placement course from January 2011 until July 2011 and secured paid employment from July 2011 onwards. She earns €150.00 per week.

Witness (AC) gave evidence that he witnessed the chairman of the respondent organisation (GMcM) "flare up" at the claimant. He stated that he "was in her face" and his behaviour was inappropriate. (AC) was horrified when he was told by the claimant that she was suspended. He felt that (GMcM) should have apologized for his behaviour towards the claimant, and that he told him that he should apologize. He told the Tribunal that the moving of location was not done on the claimant's own volition and the move was agreed by the management committee.

Determination

The Tribunal, having considered all the evidence adduced over the four day hearing, finds that the respondent was in breach of its disciplinary procedures. The dismissal process was flawed in that the appeals panel comprised the same personnel as the disciplinary hearing panel. However, it is the unanimous decision of the Tribunal that the claimant contributed substantially to her own dismissal. The Tribunal, therefore, awards her the sum of €8,000.00 under the Unfair Dismissals Acts 1977 to 2007.

The claims under the Minimum Notice and Terms of Employment Acts 1973 to 2005 and the Organisation of Working Time Act 1997 both fail and are hereby dismissed.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)