

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYEE -*Appellant*

CASE NO.
UD1713/2010

against the recommendation of the Rights Commissioner 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 appeal at Kilkenny on 15th December 2011 and 1st March 2012

Representation:

Appellant: In Person

Respondent: Ms. Sheila Treacy, IBEC, Confederation House,
84-86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

This case came before the Tribunal by way of an employee (the appellant) appealing against the Rights Commissioner Recommendation reference: r-085835-ud-09/JT.

Dismissal as a fact was not in dispute in this case.

The respondent provides I.T. support services to a client in the banking sector. The appellant and a colleague were based at the client's premises in Kilkenny. The appellant was employed from the time of April 2008.

Giving evidence the Service Delivery Manager referred the Tribunal to the appellant's contract of employment as well as the company's terms and conditions, business practices, company policy on invention and confidential information, company software policy, internet and e-mail policy as well as an extract from the company's standards of business conduct policy detailing privacy and personal data protection. The company's grievance procedures and counselling and disciplinary procedures were also opened and referred to. The HR Business Partner gave evidence that the appellant was provided with the various policies and procedures at the

commencement of his employment. The appellant in his evidence noted that he had received a different grievance policy at the outset of his employment.

The appellant outlined in evidence that he had a difficult working relationship with his colleague on site. It was the appellant's case that his colleague's poor time-keeping and work performance impacted on him greatly and increased his workload which in turn put pressure on the appellant. The appellant outlined numerous incidents to the Tribunal and described how matters deteriorated upon his return from annual leave.

The appellant raised a grievance to the Service Delivery Manager in relation to two issues as he felt that he was being bullied and harassed. It was the appellant's evidence that he believed he would be victimised once he brought this complaint and he believed matters that arose in a subsequent disciplinary process were as a result of the grievance that he raised. A meeting was held with both the appellant and his colleague individually to discuss the grievance on 12 February 2009. The HR Business Partner was also present at this meeting. The minutes of this meeting were opened to the Tribunal.

The Service Deliver Manager subsequently issued letter dated 26 March 2009 to the appellant which addressed the issues raised by the appellant. In relation to the first issue which was the treatment of the appellant by members of the client's staff, the Service Delivery Manager wrote:

"Whilst there is anecdotal evidence to suggest that there were instances of such behaviour, statements made by you in relation to these matters over two separate meetings were inconsistent and at times contradictory. As previously advised in our meetings, these are non....employees and therefore we have no jurisdiction to raise such matters with them direct. We have however formally written to the ..Account Manager outlining the substance of your grievance and urging further action and investigation on your behalf. It is the prerogative of said Manager to engage with the customer, via official channels to bring this to bear."

In relation to the second issue of the appellant's treatment by a colleague, the Service Delivery Manager stated that it was clear that there had difficulties with the working relationship. He found it was important that the appellant and the colleague would "normalize working relations" for the benefit of the customer. The Service Delivery Manager stated that he was committed to engaging with them both in relation to this matter. The appellant was advised that he had the right to appeal against the outcome of the grievance. The appellant did not exercise his right of appeal.

In his evidence the Service Delivery manager stated that at that time he did not have any concerns regarding the appellant's health, as he was a model employee.

An overlap occurred between the grievance procedure and the subsequent disciplinary matter. A complaint was received from the customer regarding the appellant and a suspected breach of policy and inappropriate data usage by the appellant. The complaint was in relation to the accessing of data on 22 December 2008 and 2 March 2009. The customer sent an email of complaint on 9 March 2009. As the respondent company is the gatekeeper of the customer's data, the Service Delivery Manager stated that he was "mortified" when he saw the email of 22 December 2008.

Both he and the Team Lead met the appellant on 10 March 2009 in relation to this issue. A

letter from the HR Business Partner dated 11 March 2009 confirmed that the appellant was suspended on full pay pending a full investigation into two allegations which consisted of:

- *That you inappropriately accessed theSecurity Serveron two occasions with disregard for Data Protection and the company security policy, distributed secure and privileged content from that server, namely site access badge employee photographs to member of the ...staff.*
- *That you compiled a desktop screensaver composed of same secure content from the same server, and displayed in open plan office.*

Giving evidence the Operational Team Lead confirmed that he was charged with the investigation. Two investigatory meetings were held on 13 March and 26 March, respectively. Present at the meetings was the Team Lead, the appellant and the HR Business Partner. It was the Team Lead's evidence that at the first meeting the appellant denied the allegations but had admitted to part of the allegations in the second meeting. This was refuted by the appellant in his evidence to the Tribunal. Minutes of the meetings were opened to the Tribunal.

Following from these meetings the Team Lead issued an investigation report to the Service Delivery manager. The report concluded that due to the very serious nature of the first allegation and the confirmation from the appellant that the customer's internal data was used with the consent of the customer's staff, the Team Lead recommended that the matter be dealt with as a disciplinary matter. In his findings in relation to this matter the Team Lead wrote,

He did not directly obtain this picture from thesecurity server but agreed that he had attached it from his own....pc that temporarily held a backup of the data from the security server.

In relation to the second allegation the Team Lead made a finding that it could not be continued at that time due to a lack of evidence.

The appellant was invited to attend a disciplinary meeting by letter dated 30 March 2009 which stated that the purpose of the meeting was to discuss his conduct following from on two separate occasions 22 December and 2 March 2009, using secure customer information for a purpose other than that which it was intended, and in such a way that his conduct was in breach of Data Protection guidelines and the company's internet and email policy. The instances related specifically to the unauthorised distribution by email of employee photographs used on identity badges. The disciplinary hearing was held on 3 April 2009. The minutes of the hearing were opened to the Tribunal. The meeting was adjourned due to concerns regarding the appellant's health. It was the appellant's evidence that he was not in a fit condition to defend himself at that meeting. He had agreed to attend but only if he was allowed to make a statement and leave. It was the appellant's case that the Service Delivery Manager was aware from the time of 26 January 2009, that he was taking medication due to work-related stress.

Subsequently, a letter dated 6 April 2009 informed the appellant that the disciplinary hearing was postponed until further advice was received from the company's occupational health department. The referral stated that the company wished to be advised whether the appellant was fit to attend a disciplinary hearing meeting with his manager and human resources. Based

on an assessment of the appellant's medical report the occupational health assessor advised the company that in her opinion the appellant could now be considered fit to attend any meetings considered necessary. In reply to questions from the Tribunal, the HR Business Partner confirmed that the terms of reference of the assessment related solely to the disciplinary process. It did not occur to her at the time to get an opinion on the appellant's health for the preceding months, as there had not been any issues with his behaviour at work prior to the issues at hand.

Following the assessment the disciplinary hearing was resumed on 17 July 2009. The minutes of this meeting were opened to the Tribunal. The Service Delivery Manager stated that he went through the allegations with the appellant. The appellant did refer to his state of mind and it was the Service Delivery Manager's evidence that this was the first time he became aware that the appellant was taking medication and not January 2009 as stated by the appellant. The Service Delivery Manager reached a decision to dismiss the appellant as the appellant's position on any of the customer's other sites would be untenable from the customer's point of view. The meeting concluded when the appellant was informed that he was being summarily dismissed for gross misconduct. A letter of dismissal dated 21 July 2009 concluded that the appellant's actions:

... amount to a breach of trust on the part of the customer and employer alike, and a failing to carry out your duties to the required ethical and professional standards. Your position on thecontract has thus become untenable; we have also received a formal complaint from the bank in relation to your actions which adds further weight to our belief that this was the wrong thing to do.

The appellant did not exercise his right of appeal.

Determination:

The Tribunal has enormous sympathy for both the appellant and the respondent in this instance. The incorrect use of data by the employee left the employer in an embarrassing position with its customer.

The Tribunal is satisfied from the evidence that the customer believed that there had been unauthorised access to and use of, data from its secure server which was ultimately found not to have occurred.

The Tribunal is further satisfied that the customer had an expectation in this regard and had communicated a preference for dismissal to the employer at an early date. The Service Delivery Manager, witness for the respondent, spoke to the Tribunal of the customer being all over him "like a rash." He also spoke of the appellant's breach of trust and of this being "untenable in the customer's eyes"

Interestingly, no evidence was given to indicate if the customer was ever informed that a breach of the seriousness originally suspected had not occurred. That is not, of course, to minimise what did occur.

The Tribunal understands the position the employer was left in, however, it might well have alleviated some of the customer's concerns had it dealt with the matter differently. It is the Tribunal's belief that the employer allowed its concern to satisfy the customer to cloud its

judgement on this occasion.

The appellant brought a grievance shortly prior to the instance that led to dismissal arising out of a clearly communicated belief that he was being bullied, harassed and victimised. Having established nothing of substance in the appellant's grievance and having heard wide ranging complaints from him and having found an absence of "joined up thinking" on the part of the appellant it is questionable whether a reasonable employer would have considered and enquired into the appellant's psychological health at this point.

It is in the Tribunal's view that the need for such enquiry and further investigation prior to arriving at a decision in respect of the appellant's conduct was put beyond doubt at the initial disciplinary meeting on the 3rd April 2009 when the appellant's conduct and demeanour were suggestive of a significant psychological health issue. The Service Delivery Manager, witness for the respondent, advised the Tribunal that the appellant was "clearly not in the appropriate state of mind".

At this point under the terms of the appellant's contract of employment, the respondent could and should have sought to ascertain the nature of the appellant's illness, the likely duration over which he might have been suffering from the illness and the extent, if any, to which it might offer an explanation, partial or otherwise, for his conduct.

Instead, the respondent restricted the terms of reference to Occupational Health to establishing the appellant's ability to continue with the disciplinary process and was obliged to wait for over three months before scheduling the adjourned disciplinary hearing.

On a number of occasions at the adjourned disciplinary meeting, the appellant raised his state of mind by way of explanation for his actions and still the respondent failed to further investigate this issue.

The Tribunal is satisfied that the appellant was unfairly dismissed. The initial complaints against the appellant were not established. It was established, however, that information held for a particular purpose was used for an unauthorised purpose and would normally have entitled an employer to impose a sanction. On this occasion it is unnecessary for the Tribunal to consider if the sanction of dismissal was proportionate and appropriate, as the Tribunal is of the view that the investigation carried out by the respondent was insufficient and ignored an issue that any reasonable employer would have explored.

In the circumstances, the Tribunal awards the Appellant the sum of € 30,000 by way of compensation under the Unfair Dismissals Acts, 1977 to 2007, thus upsetting Rights Commissioner Recommendation reference: r-085835-ud-09/JT.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)