

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE - **Claimant**

UD1328/2010

MN1281/2010

WT542/2010

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 K. T. O'Mahony BL

Members: Mr D. Hegarty
Ms S. Kelly

heard these claims at Ennis on 23 January
and 14 & 15 May 2012

Representation:

Claimant:

Mr Michael Landers, IMPACT,
Nerneys Court, Dublin 1

Respondents:

Mr Barry Walsh, A&L Goodbody Solicitors,
IFSC, North Wall Quay, Dublin 1

The determination of the Tribunal was as follows:

After a comprehensive selection process the claimant was one of some 36 successful candidates from approximately 1,400 applicants, chosen by the respondent (the Authority), to be taken on as a Student Air Traffic Controller in Student Controller Programme 7 (SCP7). The claimant signed acceptance of the offer of a place on SCP7 on 14 February 2008. This letter of appointment stated that the training assignment was temporary for a period of approximately two years. The course commenced on 3 March 2008.

Condition 2 of the letter of appointment states "Throughout the Programme your suitability for continuation in the training programme will be under review by the Head of Training (HT)".

Condition 3 states: "The assignment may be terminated

a) By either side, in accordance with the Minimum Notice and Terms of Employment Acts, 1973 – 2001[as amended by the Protection of Employees (Employers’ Insolvency) Act, 1984]

Or

b) By the Authority

- i) Where it has been decided that you are not suited to perform the duties of an ATCO (Operational) as a result of your failure to meet all of the technical/medical requirements
- ii) At any time, if in the opinion of the Director Human Resources you are unsuitable for continued employment as a Student Air Traffic Controller by reason of misconduct.”

The training course is modular in construction such that a student is required to successfully complete each module before progressing to the next module.

The Training course consists of four stages. The claimant successfully completed the first two stages, being the theory and skills modules. The third stage had 6 phases.

Until phase 6 of the third stage all sections of the course allow for a less than perfect record in terms of achieving the pass mark of 70% whether by being afforded the opportunity to resit a subject or being allowed to progress as in stage 3 by achieving a pass mark in two out of three assessed exercises.

Successful completion of stage three allows a student to proceed to stage four as an on the job training instructor (OJTI). Successful completion of OJTI allows a student to be licenced as a probationary operational air traffic controller.

For stage three of his training the claimant was assigned to Shannon Area Control Surveillance (ACS) Low Level (Radar) Course (the course). The claimant was one of three students on the course and as it is a requirement of the course that there be one instructor to every two students. The students on this course had the advantage of having two instructors between the three of them, the course leader (CL) and an instructor (T2). The course commenced on 27 July 2009 and on 31 July 2009 the claimant signed and returned to CL a document containing the conditions and requirements of the course.

In respect of phase 6 (the final phase) of the Simulation Assessment the conditions and requirements provide:

6.1 All exercises in phase 6 will be assessed exercises

6.2 The student’s performance in all exercises will be assessed in various categories. The student must reach the required standard in each category in order to achieve a pass mark in the exercise in question. The required standard is 70%

6.3 The student must reach the required standard in **ALL** of these exercises. A student who fails to reach the required standard in **ALL** these exercises will have his/her participation in Student Controller Programme terminated

The claimant did not retain a copy of the course conditions and requirements (the conditions).

The students were also provided with a simulation workbook (the workbook) in respect of phase 6, Emergencies and TRUCE (training in unusual circumstances and events), which states:

“The student is obliged to undertake five (5) assessed exercises. The student’s performance in these five (5) exercises will be assessed under various categories. Students must reach the required standard under each category in order to achieve a pass mark in the exercise in question. The required standard is 70%. Students must reach the required standard in three (3) of the five (5) exercises (emphasis added).

Failure to achieve this standard (70%) will result in the student being terminated from the course.”

The copy of the workbook used by the claimant is dated 12 August 2009. There was no requirement to sign this document.

During the simulation phase of the course, starting with phase 3, the claimant encountered difficulty in particular with situational awareness, conflict detection and conflict resolution. During phase four, dual operations, on 1 September 2009 the claimant had a mistaken identity problem when acting as tactical controller resulting in the planning controller having to take over as the claimant was not in control of the situation. At this time CL made HT aware of the instructors’ concerns about the claimant. The instructors again had concerns about the lack of consistency in his performance and his overall competence levels during phase five.

The claimant completed 116 exercises on the simulators and the debriefing notes countersigned by the claimant of all these exercises were opened to the Tribunal. The students are also briefed before each exercise.

The claimant progressed to phase six and while the conditions state that all exercises in this phase were to be assessed the respondent never the less provided a number of unassessed run-in exercises to help the students. The claimant successfully completed the first four assessed exercises. On Friday 18 September 2009 the students were briefed on the fifth and last exercise which involved the failure of Dublin radar. The fifth exercise was run on Monday 21 September 2009 on which day the claimant had arranged to arrive late for work at around 11.00 am as he had a medical appointment.

The fifth exercise was a dual operation involving both a planning controller and a tactical controller. The claimant was allowed to act as planning controller unassessed on an exercise to assess a colleague as tactical controller in the exercise. At the conclusion of this exercise the claimant was debriefed by T2 and a notional mark of 80% given to him. The claimant then undertook the fifth assessed exercise as the tactical controller and, whilst successfully accomplishing the emergency part of the exercise, he had difficulty with a three-way cross of aircraft at the end of the exercise in regard to separation and conflict detection. During the debriefing the claimant described himself as having been “muddled and confused” during the incident. CL who assessed the exercise gave the claimant a mark of 60%, below the required pass mark. CL informed the claimant that he was being terminated from the course. The claimant deferred a meeting with HT from the afternoon of 21 September 2009 until the following morning when the claimant was accompanied by his union representative and HT was accompanied by CL. At this meeting the claimant raised, for the first time, the issue of the discrepancy between the conditions and the workbook in regard to whether it was necessary to pass all five assessed

exercises in phase six as stated in the conditions or three out of five as stated in the workbook.

The claimant had a right of appeal to both HT and, when that appeal was rejected, to the Director of Technology and Training (DT). In his appeals the claimant, in addition to the discrepancy, raised what he described to the Tribunal as 'the abnormality' of the briefing for the fifth assessed exercise being given on a Friday with the weekend intervening before the exercise on the Monday. His appeal to HT was lodged on 25 September 2009 and he was advised of the failure of that appeal in a letter from HT on 2 October 2009.

The claimant submitted his appeal to DT on 7 October 2009 and this appeal was heard on 2 November 2009. The claimant was accompanied by a different union representative and DT's secretary acted as note taker. The claimant was advised of the rejection of this final appeal by letter of 11 November 2009 and his employment terminated in a letter from the Director of Human Resources dated 13 November 2009 and received three days later.

Determination:

At the outset of the hearing the respondent agreed, without arguing the point, to the claim being dealt with under the Unfair Dismissals Acts.

It was very clear to the Tribunal that good relations existed and continue to exist between the parties to this case. The respondent acknowledged that the claimant was a diligent student. The points at issue between the parties, while they have had a major effect on the claimant, are in fact relatively few.

The Tribunal accepts that the respondent is a safety critical organisation with the safety of air travel being its *raison d'être*. For an organisation which sets such store by safety, as it quite correctly must do, it is all the more surprising that the discrepancy between the conditions and the workbook arose. The respondent suggested that it was the responsibility of the claimant to have retained a copy of the conditions. The Tribunal is satisfied that a reasonable employer would have ensured that the claimant was provided with a copy of that document after it had been signed by him.

Nevertheless, the Tribunal is satisfied, on the balance of probabilities, that on 21 September 2009 the claimant was aware that his failure to achieve a pass mark on the assessed exercise as tactical operator was likely to lead to his termination from the programme. The conditions make it abundantly clear that it is necessary to pass all of the assessed exercises in phase six and the claimant accepts that he was aware of that. The procedure whereby CL reports to HT on the claimant's failure and HT rubber stamps this and the claimant then has an appeal to HT is not in conformity with fair procedures. However, whatever the failings of this arrangement the Tribunal is satisfied that the claimant was able to avail of an appeal to DT. The claimant's representative contended that this appeal was contaminated by DT's having had contact with HT. This is not a case of a conduct based dismissal, it is a competence issue. The respondent has set in place procedures, as set out in both the letter of appointment and the conditions of the course, which provide an objective means of determining the competence of the students. The Tribunal accepts that in conducting the appeal DT was satisfying himself that the claimant had got the benefit of adherence to procedures, objectivity of assessment and a requisite level of preparation. It was not DT's function to second guess the assessment of HT, CL & T2. Once DT had satisfied himself of the respondent's adherence to all of these requirements he was in a position to uphold the dismissal. For all these reasons the Tribunal is satisfied that the dismissal was not unfair. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

The Tribunal notes the respondent's undertaking to pay the claimant his entitlement to three days' payment in lieu of notice under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and making an order to that effect, it awards the claimant €218.12. As no evidence was adduced in respect of the claim under the Organisation of Working Time Act, 1997, that claim is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)