

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.
UD1960/2010

EMPLOYEE *-claimant*

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: Dr. A. Courell B.L.

Members: Mr D. Morrison
Ms R. Kerrigan

heard this appeal at Donegal on 16th March 2012
and 25th October 2012

Representation:

Appellant: Mr Vernon Hegarty, S.I.P.T.U. 5th Floor, Liberty Hall, Dublin 1
Ms Fidelma Carron, S.I.P T.U. Port Road, Letterkenny, Co Donegal

Respondent: Mr Marcus Dowling B.L. instructed by, McMullin, Solicitors, Donegal Street,
Ballybofey, Co. Donegal

This case came before the Tribunal by way of an employee appealing the recommendation of a Rights Commissioner ref :r-066105-ud-08.

Preliminary Issue

The respondent stated that the appellant was employed on a series of fixed term contracts where she worked for the summer season from 2001 until her employment ended in 2008. An incident occurred during 2007 which lead to an investigation and a disciplinary process. The respondent stated that P45's issued at the end of each season and the appellant did not have the necessary oneyear of service to bring a claim under the Unfair Dismissals Acts, 1997 to 2007.

The appellant's representative stated that the appellant began her 2007 contract on 7th April 2007 which was due to end on 27th September 2007. She received a letter from the respondent in June 2007 outlining a set of issues regarding her conduct and a further letter in July 2007 suspending her from her duties. The letter advised that the manager would carry out a full investigation. She was issued with a P45 in September 2007 but continued with the investigative procedure and received a letter of dismissal from the respondent stating that she was dismissed as and from 26th May 2008. A payment was made to the appellant to cover the period of the investigation.

Preliminary Decision

After having considered the evidence adduced on behalf of the parties and the submissions made by the parties' representatives, the Tribunal finds in favour of the appellant in respect of the preliminary issue. The Tribunal finds that the appellant had the requisite one year's service and, accordingly, is entitled to bring a claim under the Unfair Dismissals Act, 1997 to 2007.

It was established by the respondent that the appellant's contract of employment, dated April, 2007, was due to come to end in September, 2007 and, in addition, that a P45 had issued to the appellant in September, 2007. However, the Tribunal did not accept that the P45 was conclusive evidence of the termination of the appellant's employment. In the particular circumstances of this case, even after the appellant's employment was supposed to have been terminated, the respondent had engaged with the appellant in a disciplinary procedure which suggested that she continued in the status of an employee. Furthermore, she received a payment to cover the period of the disciplinary procedure. The Tribunal was also mindful of the fact that a letter from the respondent to the appellant dated the 26th May, 2008, refers to her employment as having been terminated on that date. Applying the relevant standard of proof which is that of the balance of probabilities, the Tribunal finds that the appellant had the necessary one year's service which entitles her to bring a claim under the Unfair Dismissals Act, 1997 to 2007.

Respondent's Case

The Manager (SS) of the respondent, a Town Council gave evidence. SS made the decision to dismiss the claimant. The claimant's line manager (the Town Clerk) conducted the investigation with the assistance of the County Councils' HR Manager. The claimant was offered the opportunity to respond to the allegations in writing and then attend a formal meeting; she did not respond to the allegations or attend the investigation meeting.

As a result of the investigation the Town Clerk recommended that the claimant be dismissed. SS then made the decision to dismiss the claimant; it is referred to as an appeal as it is an appeal of the Town Clerk's recommendation but no decision had actually been taken at the conclusion of the investigation process. The letter of the 4th of July 2007 informs the claimant that she is being suspended on full pay, outlines the results of the investigation and states that,

'If dismissal is being recommended, the employee has a right to a full hearing by the Town Manager before a decision is taken. An appeal against a recommendation for dismissal should be made...within 10 working days of the date of decision to recommend dismissal.'

The decision was not appealed by the claimant. The claimant engaged a representative and as a result the respondent gave her a second opportunity to respond to the allegations, this included an interview with her line manager who was the Town Clerk. The claimant's representative responded

to the allegations by letter of the 25th of September 2007. By letter of the 2nd of October 2007 the claimant's line manager informed her that,

'I find that your response is unacceptable and not credible. As a consequence it is considered that your actions constitute gross misconduct.'

The Town Clerk issued a second recommendation to dismiss the claimant.

The claimant appealed this decision by letter of the 10th of October 2007. The appeal hearing took place on the 4th of December 2012. The allegations were discussed in detail at the meeting and adjourned for further documentation. The appeal meeting continued on the 3rd of March 2008. The witness gave detailed evidence on each allegation and his reasons for upholding or withdrawing the allegation. The following allegations were upheld;

1. That the claimant followed and filmed the local fire brigade resulting in a letter of complaint; the claimant said she was responding to a call reporting an abandoned car but the area was outside of her jurisdiction so she should not have responded.
2. Being absent from work on the 1st of June 2007 without prior authorisation; although the claimant maintained she had spoken to the acting manager about taking the annual leave she did not have the appropriate authorisation.
3. Canvassing Councillors attending a council meeting on the 12th of June while on duty and the appropriateness of same; the claimant maintains she was acting as a private individual as the council was voting to extinguish a right of way.
4. That the claimant 'harassed' a local business owner resulting in a letter of complaint; the claimant admitted to being in the vicinity of the local business in uniform on the 13th of June and assisted her brother in taking measurements of the site. She admitted to taking photographs, videoing and calling the business owner a liar but 'on her own time.'
5. That the claimant while on duty gave an interview to a local radio station as an 'activist'; the claimant admitted that she was on duty while giving the interview, on previous occasions when she gave interviews she was not on duty.
6. That the claimant accused certain officials and members of the Town Council of corruption; the claimant admits the comments and said they were 'throw-away' and should not have been taken seriously. The claimant continued to make the allegations of corruption in the local media and in writing but maintained that as she was a seasonal employee she was within her rights to make the allegations while not employed.
7. Cause for concern over the volumes and pattern of tickets issued; the activity levels gave serious concern to the respondent.
8. That while on suspension the claimant harassed another traffic/litter warden; the claimant admits she was taking photographs of various developments around the town and that the other traffic/litter warden may have been in the vicinity at the time.

On the 26th of May 2008 a detailed written decision to dismiss the claimant was issued. SS does not recall the claimant stating that she didn't attend the investigation meeting on the 4th of July 2007 as she didn't receive the letter of the 21st of June 2007. The claimant's absence from that meeting did not influence the decision to dismiss her as she was given the opportunity to go through the process a second time. The issues with the claimant starting on the 8th of May to the 21st of June turned into a cumulative problem; they were not cumulated to orchestrate the claimant's dismissal.

Claimant's Case

The claimant did not receive the letter of the 21st of June outlining the allegations against her until the 6th of July 2007. At the meeting of the 4th of December with SS the claimant responded to all the allegations made against her.

1. That the claimant followed and filmed the local fire brigade resulting in a letter of complaint; the claimant was responding to a call reporting an abandoned car.
2. Being absent from work on the 1st of June 2007 without prior authorisation; the claimant sought permission from her line manager but as he was unavailable she left a message with another staff member (acting manager) who said she would pass the message to him on his return; the following week the acting manager said she forgot to pass the message on.
3. Canvassing Councillors attending a council meeting on the 12th of June while on duty and the appropriateness of same; the claimant had attended a council meeting in 2005 and it was never mentioned by the respondent but she now accepts it was not appropriate.
4. That the claimant 'harassed' a local business owner resulting in a letter of complaint; the area had a massive litter problem and that is why the claimant was there so often.
5. That the claimant while on duty gave an interview to a local radio station as an 'activist'; the claimant asked permission on commencement of her employment to go on discussion shows and was informed that it was ok as long as she did not talk about her job.
6. That the claimant accused certain officials and members of the Town Council of corruption; the Town Clerk was being very evasive when the claimant requested information so she made a throw-away comment asking 'do brown envelopes come into this office', the claimant did not think that he would take the comments the way he did.
7. Cause for concern over the volumes and pattern of tickets issued; the claimant's machine for issuing parking tickets didn't always work so she concentrated on litter which was much more time consuming.

None of the issues would have been a problem for the claimant if she had been instructed at any stage not to do them anymore. The claimant maintains that the respondent could have approached her immediately after any of the incidents instead of 'saving them up' in order to dismiss her.

The claimant admits she was on duty while giving the radio interview. The claimant admits to publicly accusing the respondent of corruption and to having a van with signage saying 'the respondent is corrupt' written on it. The claimant is aware that a few people have complained about her taking pictures and videos of them and posting them on the internet.

The claimant gave evidence of her loss and her attempts to mitigate her loss.

Determination

The Tribunal find by majority, with Ms Rosabel Kerrigan dissenting, that the claimant's dismissal was fair and reasonable in all the circumstances. The Tribunal is satisfied that when the respondent became aware that the claimant was not conscious of the on-going investigation and disciplinary process they started the procedure again to ensure the claimant had the opportunity to participate fully with the aid of a representative. The Tribunal find that it was fair for the respondent to view the claimant's actions as gross misconduct.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)