

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:  
EMPLOYEE - *claimant*

CASE NO.  
UD644/2011

Against

EMPLOYER - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. K.T O'Mahony B.L.  
Members: Mr D. Hegarty  
Ms H. Kelleher

heard this claim at Cork on 1 August 2012

Representation:

Claimant: Ms. Fiona Foley, Fiona Foley & Company Solicitors, Joyce House,  
Barracks Square, Ballincollig, Co Cork

Respondent(s) : In person

**Summary of Evidence**

The claimant commenced employment as an interior plant rentals technician on a part-time basis with the respondent in November 2007. Her role involved watering and maintaining plants at clients' premises and she received training on commencing employment. There was a dispute as to whether this training was for two or six weeks. A cordial working relationship existed between the respondent's managing director (MD) and the claimant.

In the period March to May 2010 MD was concerned about the condition of plants in one client's premises and replaced them; he did not discuss the problem with the claimant butswitched her to a different contract because he could not afford to lose the contract. It takes twoto three months for plants to deteriorate. In and around mid-2010 MD had concerns regardingthe maintenance of plants at two clients' premises and spoke to the claimant at that stage. In lateAugust 2010 MD received a letter of complaint from the respondent's biggest client and following a meeting with the client he inspected the plants and found they had not been maintained to a sufficiently high standard. He was annoyed.

When the claimant arrived for work as normal on 2 September 2010 MD called her to a meeting, where he outlined to her his dissatisfaction with her work. MD considered that the claimant's errors, misjudgements and general incompetence in and about her work amounted to

gross misconduct. He decided to dismiss her. The claimant's position was that MD dismissed her at that meeting and that she told him he could not dismiss her, that she was entitled to verbal and written warnings. At the end of the meeting MD indicated to the claimant that he would contact her the next day regarding a follow-up disciplinary meeting. No evidence of the complaints from customers was provided to her before the meeting.

At the follow-up meeting on 7 September 2010 the issues were again discussed and at the meeting MD handed the claimant a letter identifying six premises where plants had in recent times been found to be in a poor condition and continued, stating:

*“[The respondent] invests in high quality plants and containers, all the plants that go into a client on the first day of a contract are in perfect condition. Your role as Interior Plant Rentals Technician is to simply maintain that perfect condition. The fact that so many plants ended up in such poor condition is a very serious breach of the [respondent's] rules and procedures and I consider it to be gross misconduct. I take the view that this is not only Gross Misconduct, (vis) but a breach of my trust and confidence, also. This has resulted in [the respondent] having to replace entire displays at immense expense. In the letter MD confirmed the claimant's dismissal with immediate effect for “a catalogue of consistent errors, misjudgements and general incompetence at a time when maintenance contracts have been renegotiated and when our reputation is more important than ever”. This dismissal letter was prepared prior to the meeting of 7 September.*

In this letter of dismissal dated 7 September 2010 MD also informed the claimant that he would pay her one week's notice under the Minimum Notice and Terms of Employment Act 1973 but that she was not required to work that week and all payments, including the notice payment, would be made to her when she returned company property that had been issued to her and she was requested to remove all personal items from the premises and company vehicle immediately and to exit the premises. The claimant was shocked.

The claimant appealed her dismissal and on request submitted her grounds of appeal in writing. An appeal meeting was held on 1 October 2010. MD, his wife/partner, the claimant and a friend (as witness) were present. The respondent's complaints were discussed in detail at the appeal meeting. MD maintained that the plants in all the premises identified in his letter of dismissal had deteriorated due to the claimant's failure to follow the company rules and procedures in the maintenance of plants and that in some cases he had to replace the plants. The claimant accepted at all times that she was responsible for problems with the maintenance of plants at one site which was discussed with the respondent earlier in 2010 but had no knowledge of problems with her work at any other site until 2 September 2010. As regards the complaint from the respondent's largest customers she explained how she regularly had difficulty gaining access to the Director's office in order to ensure plants were being maintained properly had often called to the site outside her normal working hours in an attempt to do her work. At another site she was told that some plants were owned by the customer and these were not her responsibility. Plants in at least one case were over-watered by someone working on the particular premises. The claimant did not accept MD's position that all the plants in some premises had to be replaced.

Having considered the both sides' positions, following the appeal hearing, MD by letter dated 4 October offered 'to re-instate' the claimant on a six-month trial basis with further training, inspections, a monthly review process and to reduce the sanction to a written warning. The

claimant felt such a position would be untenable for her. Because of the hasty manner in which the issues had been dealt with, without any investigation or opportunity to put her case, she lost trust in MD, felt that his offer of 're-instatement' was not genuine and turned down the offer.

### **Determination**

The Tribunal finds that a number of procedural deficiencies in the disciplinary process rendered the dismissal unfair. In the absence of any evidence that the alleged failures by the claimant in the performance of her duties were wilful and deliberate, the alleged failures, if established, would constitute incompetence and not gross misconduct. Where incompetence is attributed to an employee's performance of her duties, the employee must be issued with a series of warnings as well being afforded an opportunity to improve her performance. The employee must be made aware that continuing failure to reach an adequate standard of performance could result in dismissal. There was no evidence that any such warnings were issued to the claimant and she had not been afforded an opportunity to improve.

The Tribunal is satisfied that the decision to dismiss the claimant was taken and communicated to the claimant at the meeting of 2 September. In failing to give the claimant prior notification of the meeting of 2 September or of its purpose and in failing to afford her the opportunity to have representation at the meeting the respondent failed to comply with fair procedures. At the meeting of 7 September the claimant was presented with a letter of dismissal prepared prior to the meeting. Fair procedures were adopted at the appeal stage. However, a fair appeal does not remedy an earlier defect in the disciplinary process.

Having considered the evidence the Tribunal also finds that the dismissal was substantively unfair.

The claimant's reasons for appealing her dismissal were because the accusations against her were wrong and she was not guilty of gross misconduct. In light of the fact that the nature of the process engaged in damaged the trust reposed by the claimant in the respondent and because of the nature of MD's conditional offer to her, it was not unreasonable for the claimant to decline the offer.

For all the above reasons the dismissal was unfair and the Tribunal awards the claimant compensation in the sum of €8,926 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)