

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE - *claimant*

UD441/2011
MN451/2011

against

EMPLOYER - *respondent*

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr D. Hegarty
Mr D. McEvoy

heard this claim at Cork on the 26 July, 16 October and 17 October 2012

Representation:

Claimant: Stokes & Co, Solicitors, 20 Grand Parade, Cork

Respondent: O' Dea & Co., Solicitors, Hardiman House, Eyre Square, Galway.

The appeal under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 was withdrawn at the outset of this hearing.

The determination of the Tribunal was as follows:

Summary of Evidence

The respondent is an organisation which was established to support and give assistance, including assistance in accessing redress, to survivors of the former industrial schools in Ireland. The organisation consists of six regions, five of which are in Ireland (with its head office in Cork) and one in the U.K. The respondent has a charitable status and receives its funding by way of donations and from official bodies, the HSE being its main funder.

The claimant was a member of the organisation since 1999 and was very passionate about it. He became an employee of the organisation in 2004 when he was appointed acting administrator.

In November 2009 following a breakdown in relations between those running the organisation and some members in Cork a new executive committee was elected, with the claimant as its chairman, at a meeting attended by over three hundred members. This was perceived as an attempted take-over of the organisation. By letter of 26 November 2009 the claimant was suspended on pay pending an investigation. The letter of suspension crossed with his claimant's informing the respondent that he was certified unfit for work. The claimant's suspension was lifted but there was a dispute as to whether it was lifted by letter of 12 January or 12 April 2010.

There were now two executive committees and the legitimacy of the whole organisation was being called into question. The main funding authority began to take a more front line approach to the running of the organisation. A number of meetings were held in early 2010 and ultimately an agreement to put a new structure in place was reached in April 2010. The claimant signed the agreement. The new structure had a lead-in process of regional meetings at which three delegates were to be elected who in turn would elect five members/survivors to the new Board of Directors at a general meeting. At a meeting held on 18 May 2010 a small steering group of three members (SG) chaired by SGC, was established to facilitate the implementation of the agreement. The respondent's position was that at the meeting it was agreed that both the claimant and the chairman of the other executive committee would both stand aside from the process. The claimant's position was that he never agreed to stand aside from the process. By letter of 25 May SGC advised the members that it would be holding meetings in the six regions within five weeks to elect the delegates and requested any member wishing to be considered for election as a delegate to notify head office at least two days prior to the convened regional meeting in their area.

The claimant was away on holidays at the time of the Kerry meeting and was elected a delegate by proxy. SGC explained to the meeting that as the claimant was an employee there may be a conflict of interest if he was also in the dual role of employee and delegate. The claimant's election as a delegate became a contentious issue between SG and the claimant. SG indicated to the relevant persons in Kerry and the HSE that it was inappropriate that an employee should also be a delegate as having a dual role as employee and delegate "gives rise to a potential conflict of interest vis-a-vis the independence of the process". The claimant replied in strong terms rejecting SGC's position. All the other delegates were volunteers.

By letter of 9 July the delegates were invited to an extraordinary general meeting on 30 July 2010 in Cork to elect five survivors/members to the Board of Directors. The meeting was chaired by SGC, who asked those members who were not delegates to leave. The claimant's position was that he attended the meeting as an elected delegate and not as an employee of the organisation. He and two other delegates and his partner arrived at the meeting on the 30 July 2010 and was met by angry members who were leaving saying they were refused access.

A member gave evidence that the atmosphere at the meeting was cordial at first but this changed on the arrival of the claimant and his supporters. According to the respondent's current chairman the behaviour of the claimant and his supporters was abusive, intimidating and threatening. The claimant 'barged into the meeting', claimed the meeting was "illegal" and made allegations of criminal conduct against those running the organisation. The Gardai were called. The evidence of one survivor present was that he was heckled and hassled when leaving and the experience was one he will never forget. SGC had no difficulty with the claimant attending, however accusations were

made and he was challenged as the chairman. The meeting was adjourned and later that evening reconvened at another location where a new board of directors was elected.

The claimant understood that only elected delegates could vote in a new board of directors but members should have been allowed attend. He denied barging into the meeting. He gave evidence of being subjected to intimidating, abusive and threatening behaviour and of being instructed to leave the meeting. Witnesses on behalf of the claimant corroborated the claimant's evidence. He spoke briefly with SGC who was due to chair the meeting and was informed that the meeting was for delegates only and members could not attend. The Gardaí were called. There was a dispute as to whether they asked him to leave. The claimant denied that the Gardaí asked him to leave. Another witness alleged he was assaulted outside the hotel and the hotel management called the Gardaí. A former supervisor of a half-way house run by the organisation gave evidence of receiving complaints from residents about other residents smoking hash; she had raised concerns about the use of drugs there with the then respondent.

By letter dated 1 August 2010 a director, on behalf of the then Board of Directors, informed the claimant that he was being dismissed for gross misconduct.

“As an employee of the company you are expected at all times to conduct yourself in a proper manner, which includes showing respect for the members of the organisation. You further agreed that as a prerequisite to any agreement was that mutual trust and respect was afforded to all involved in the process and in the organisation.

You have on any number of occasions since the signing of the agreement and or your contract of employment breached these obligations. Your actions since the signing of the agreement and your failure to attend at work for the last number of weeks without an explanation have not facilitated the easy implementation of the agreement that was initially anticipated.

Your comments at the meeting of the 30th July 2010 ... ‘that the organisation was now being run by criminals and drug dealers’ amounts to an act of gross misconduct. In which circumstances the company hereby notifies you of the termination of your employment with the company with immediate effect.

SGC drafted the letter of dismissal, at the request of a director of the then Board but he had no involvement in the making of the decision to dismiss the claimant; he believes that it was a culmination of events which led the Board to dismiss him.

Determination

The respondent took the view that the claimant's comments on 30 July constituted gross misconduct warranting summary dismissal. None of the directors of the former Board of Directors, who took the decision to dismiss the claimant attended at the hearing before the Tribunal to justify its decision.

The claimant was not given an opportunity to respond to the allegation of gross misconduct made against him. The dismissal was effected without fair or any procedures. Fair procedures, at minimum, require that the claimant knows the charge against him and that he be given an opportunity to answer that charge and put forward any defence he may have. Some may argue that in certain circumstances a hearing or a right of reply would make no difference to the final decision.

This proposition was emphatically rejected in *Glover v BLN Ltd.* [1973] IR 388 by Walsh J, where he stated:

The obligation to give a fair hearing to the guilty is just as great as the obligation to give a fair hearing to the innocent.

The Tribunal is further of the opinion that the decision to dismiss may well have been made in haste.

In all the circumstances the Tribunal finds that the dismissal was unfair and the claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds. While the claimant had been passionately committed to the organisation the Tribunal nonetheless finds that in making the comment: '*the organisation was now being run by criminals and drug dealers*' at the meeting on 30 July the claimant contributed to his dismissal. Having taken that contribution into account the Tribunal awards the claimant compensation in the sum of €10, 000.00

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)