

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:
EMPLOYER

CASE NO.
UD898/2011

-appellant

against the recommendation of the Rights Commissioner in the case of:

EMPLOYEE

-respondent

-v-

EMPLOYER
under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms J. McGovern B.L.

Members: Mr A. O'Mara

Mr G. Whyte

heard this appeal at Dublin on 2nd October 2012 and 10th January 2013

Representation:

Appellant:

Respondent: In person

Background:

This case came before the Tribunal by way of an employer appealing the recommendation of a Rights Commissioner, ref: r-087635-ud-09/RG that the respondent employee be paid the sum of €18,000.00 in compensation under the Unfair Dismissals Acts, 1977 to 2007. The employer is the appellant and the employee the respondent.

Respondent Employee's case:

The respondent YR gave evidence that she worked for the appellant as a project co-ordinator from August 2008 until her departure due to what she considered as bullying and harassment by a fellow employee H in November 2009. The person in question would make things difficult for her during the course of her work.. She often ended up in tears. She recalled instances where he shouted at her and on one occasion LM came out of her office and asked what was making him angry. The respondent explained to LM that H's behaviour was a continuous problem and both were brought into the office. H apologised but his behaviour towards her continued. She met with LM again and said his behaviour towards her had to stop . Nothing was done. It is the respondent's evidence that she felt intimidated by H and following a series of events felt that she had no choice but to leave her job.

At a company event on 13th November H approached YR wherein he informed her he was a good friend of HD the HR manager YR assumed he was letting her know that nothing was ever going to

be done about his behaviour and she felt intimidated by his approach in this manner. YR felt that H was implying that if she complained to the HR department nothing would be done about any issues she had. The respondent rang HD and told her what had happened and that she had had enough. HD asked her not to leave and promised to start a formal investigation. LM again proposed a meeting with YR and H to “clear the air”. YR initially acceded to the meeting but subsequently e-mailed LM and HD advising them that she was not happy with this as she did not want to be in a meeting with H

On 18th November 2009 the respondent felt that she escalated her complaint by emailing the chief operations officer DM to ask for a meeting or a chat. She received no reply. On 24th November she gave a written statement to HD, LM and DM advising that she could no longer work for the appellant and her only option was to terminate her employment. YR advised the appellant that she would work her notice from home because she felt she could not be in the office. She was told that would be necessary. She asked if her position could be made redundant because she had no other means of support when she left but this was refused.

The respondent told the Tribunal that she had worked from the age of 14. She was a very confident person but at the end of this process her self-esteem was completely gone. YR felt that nobody should have to work under the conditions she was subject to and management would let it happen again. She had hoped H would have been in attendance to let him know how she felt but he was not.

Under cross examination YR said that she had made three or four complaints but she didn't keep a written note of her complaints. The conversations were only verbal conversations with LM and no records seem to have been kept. It is the respondent's evidence that she requested a formal investigation with HD on the day she telephoned her. It was a day that HD was off but she still contacted her and remembered the conversation. The respondent felt that this should have been enough to start a process of investigation.

Appellant Employer's case:

The Tribunal heard evidence from LM who was the respondent's line manager. She explained that the appellant company is a computer software company that has grown significantly in the last number of years. The office is an open plan office at the time had four people at each desk unit. Her and her office had a glass wall with YR's desk outside the office. The culture in the office was that of a “start-up company” with a casual, relaxed and professional atmosphere

The respondent commenced work with the appellant in late summer 2008 and worked on the beta project. In time she was appointed co-ordinator and in turn YR requested more work. She was a good worker and the company were happy with her. She was surprised at YR's resignation in November 2009.

The witness explained that the first issue she was aware of between YR and H was in September 2008. On hearing raised voices between them she asked both of them into her office. H apologised to YR for raising his voice and said that it would not happen again. As far as LM was concerned the matter was dealt with and there was no other issues raised.

The respondent did not raise any further concerns with her or say that she was unhappy in any way. An e-mail of 22nd September 2009 was opened to the Tribunal. The witness explained that YR told her that she was upset with two of her colleagues. YR said that they were not listening to her

and that they were preventing her from doing her job. She discussed this with YR and they agreed to come up with a plan to tackle any issues YR had. Again, as far as LM knew YR was happy with the result and YR did not raise any formal grievance.

Two more incidents occurred with YR, one in early October 2009 with S and a second with H in mid November 2009. The respondent had sent LM an e-mail stating that she felt that S was trying to undermine her. LM suggested that they arrange a meeting. LM advised YR to speak to the HR manager, HD, and it was at this juncture the latter became involved. LM held the meeting with YR and S and subsequently reported back to HD with the result of same. As far as LM understood the meeting went well, S apologised and the group formulated a plan on how to work better together going forward.

Another incident occurred between YR and H. LM sent an e-mail to the respondent and H dated 19th November 2009. She suggested a 'clear the air meeting' between the three of them with HD to attend. Initially YR was on board with this but she subsequently did not want to attend with H there. LM indicated that she felt that they would make no progress without H present but in the end the meeting did not proceed.

The Tribunal heard evidence from HD who was the appellant's human resource manageress. Regarding the respondent's assertion that it was a nightmare for her to go into work or she dreaded going into work the witness felt that there was no evidence of that nor was there evidence of her being unhappy. HD gave evidence that she first became aware of YR's position in early October 2009. While she knew there were one or two issues prior to this she was not involved in them as they were settled with LM as far as she knew. On 8th October 2009 HD received an email from LM seeking guidance on how to handle a situation between YR and S and in turn, HD gave LM some pointers. As far as HD understood the meeting went well and matters were sorted out.

HD was also involved with the second issue that arose between YR and H and supported LM in the proposal that they all have a 'clear the air meeting'. Initially YR agreed but HD then received an e-mail dated 20th November 2009 which was opened to the Tribunal.

"Hi LM and HD

I am not comfortable having this meeting with H present, I would prefer to meet with yourself and HD privately."

The witness explained that they wanted to progress the matter but did not want YR to be uncomfortable with H present.

When questioned by the Tribunal HD was unclear as to whether any sort of formal procedure was instigated at this stage. She did not consider any of the above enough to warrant the application of the company's 'bullying and harassment' policy prior to 19th November 2009. When further queried on YR's perception that an investigation had in fact commenced, HD replied that if an investigation was in train she would have said so in her emails or would have specifically referred to an investigation. She does not recall indicating to YR that she would conduct an investigation into the complaints and she does not recall YR requesting an investigation. When questioned as to whether or not the 'bullying & harassment' procedures that were opened to the Tribunal were followed the HR manageress felt that prior to the 24th November 2009 matters had not escalated to that level but if she had been given the opportunity to act following the emails of the 23rd November it would have been a case where she would have invoked the policy.

On receipt of the letter of 23rd November 2009 from YR tendering her resignation HD felt that YR did not want to stay in the company. HD asked YR to reconsider but this is disputed by YR. Once the resignation was accepted HD provided a reference for YR.

The Tribunal heard evidence from DM the respondent's Chief Operations Officer and a director. He told the Tribunal that YR was an eager employee and the company was happy with her

The witness conducted a meeting with YR following her letter of resignation on 24th November 2009. It was DM's evidence that he went through the letter with YR and asked her whether she would consider another options within the company but this is disputed by YR. He also felt that YR had her mind made up and wanted to leave. He recalls YR asking to be made redundant but he explained that this was not an option. When asked about the email sent by YR on the 18th November 2009 to him seeking a meeting he indicated that he does not recall seeing the email and would not have ignored it intentionally.

Determination:

This case came before the Tribunal by way of an employer appealing the recommendation of a Rights Commissioner, ref: r-087635-ud-09/RG. The employer is the appellant and the employee is the respondent. The respondent has a constructive dismissal case before the Tribunal and therefore the burden of proof lies with the respondent.

The Tribunal carefully considered the evidence presented by both parties.

It is the appellant's case that they were not entirely aware of how unhappy YR was during the course of her employment and if she felt that she was being bullied and harassed by any of her colleagues those fears were not communicated to either HD or LM. HD gave evidence that she did not think YR's complaints warranted her invoking the 'bullying and harassment' policy as she thought the problems were dealt with as they arose.

The Tribunal's note of YR's evidence was that she felt intimidated and threatened and certain emails opened to the Tribunal from YR reflected that terminology. In looking at the bullying and harassment policy it is clear that similarly terminology is used in describing what could or would amount to bullying and harassment. In all of the circumstances it is not clear to the Tribunal why YR's complaints were not treated on this level and in accordance with this policy from the start. In fact it seems to the Tribunal that YR's complaints were dealt with in a rather informal and ineffective manner.

However, the burden of proof rests on the respondent to show that she had no choice but to leave her position in the appellant company. The respondent must show the Tribunal that her resignation was not voluntary and that the conduct of her employers was so unreasonable that she had no choice but to resign. Furthermore, it is incumbent on any employee to utilise all internal remedies made available to her unless she can show that the said remedies are unfair. Unfortunately, the Tribunal feels that the respondent did not discharge the burden of proof in this case.

While the respondent expressed that she had difficulties with certain employees in the appellant company her communication of those issues to either HR or her superiors was not entirely clear or consistent. Some basic efforts were made by the appellant initially and both LM

and HD considered that any issue raised by YR had been dealt with. No formal grievance was ever raised by YR nor did she attempt to invoke any of the procedures in place. The clearest expression of YR's dissatisfaction lay in her letter dated 23rd November 2009 however that was also the same date of her letter of resignation. In all of the circumstances the Tribunal feels that the respondent did not give the appellant an adequate opportunity to deal with the matters raised in the letters of 23rd and 24th November 2009.

For the above reasons the claim for constructive dismissal fails. The Tribunal determines that the recommendation of the Rights Commissioner, ref: r-087635-ud-09/RG is upset and the claim under the Unfair Dismissals Acts, 1977 To 2007, fails.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)