

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
Employee

CASE NO.
UD807/2006

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

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. E. Daly B.L.

Members: Mr G. McAuliffe
Mr F. Barry

heard this appeal at Dublin on 2nd July 2008
and 28th October 2008
and 29th October 2008

Representation:

Appellant(s) :

In Person

Respondent(s) :

Ms. Doreen Shivnen BL instructed by Deirdre Mulligan ,McCann Fitzgerald,
Solicitors, 2 Harbourmaster Place, I.F.S.C Dublin 1

Background

This case came before the Tribunal by way of an employee appealing against the Recommendation of the Rights Commissioner ref (r-038733-ud-05-D1)

The determination of the Tribunal was as follows:-

Respondents Case

The first witness gave evidence that she is employed as a senior pharmacist with the HSE since October 2000. She works in a drug addiction service clinic in the North Dublin Area. The clinic is very busy and deals with an average of 140 people on a daily basis dispensing a wide range of medication. There are no pre-arranged appointments made and the clinic is open to the public from

9am to 12noon, 2pm to 3.30pm and 5pm to 6.30pm. The clinic is staffed by two employees of the HSE and it is vital that the employees operate as a team and support each other. There is a premium on good communication with your work colleague. It is the responsibility of the senior pharmacist in the clinic to check that the correct medication is dispensed to the clinics users.

The witness went on to give evidence that she worked with the appellant on four or five occasions. He was employed as a pharmacist technician and she was his supervisor. She found him to be careless and uncooperative and unwilling to share daily tasks. The working day can be very pressurised and she was left to take all the pressure when working with the appellant. She felt his work practices were unsafe and recalled that she had to intervene on more than one occasion when she found him dispensing wrong medication. She confronted him about this and explained the way duties should be done. On one occasion she asked the appellant to prepare some medication and to be more co-operative towards her. He replied "when you reach my age you will be more relaxed" and went on to criticise the HSE as an organisation. The witness suggested to him that he should leave the organisation if he was not happy. At that point the appellant said "I don't like City Clinic" and left. This incident occurred at 10.30a.m approx and the witness was left on her own in the clinic. The witness did not make a written complaint to her line manager but she did explain the incident to her by means of a telephone call. She did not work with the appellant again after the incident.

Under cross-examination the witness confirmed that she had no personal difficulty with the appellant and she never had a problem with communication. She agreed that the occasions when she prevented wrong medication being dispensed were not recorded and these incidents were not reported to her line manager. She agreed that the appellant was always professional when dealing with the clinics users.

In reply to questions the witness confirmed that one of the duties of the appellant as a pharmacist technician is to prepare medication. He could also dispense medication under the supervision of the pharmacist. She found working with the claimant to be very stressful and would prefer not to have to work with him again.

The second witness for the respondent gave evidence that she is the chief liason pharmacist in the East coast area and her duties include recruiting and training pharmacy staff. She was also the appellant's line manager. In May 2004 the witness hired the appellant as a sessional pharmacist. Sessional pharmacists differ from full-time pharmacists insofar as they are free to work for other employers when they are not rostered to work for the HSE, are not paid an annual salary and are not contracted. The drug treatment centres operated by the HSE are clinics with a pharmacist facility. The core of the treatment is to treat people who have chaotic drug habits and it is essential that accurate records are maintained. It is also extremely important for the stability of any given clinic that clients are seen and assessed quickly, prescribed the appropriate medication and leave the premises.

It is the responsibility of the witness to organise the rosters for each clinic in the East coast area ensuring that each clinic is adequately staffed. The witness wrote to the appellant on the 7 May 2004 confirming his appointment, detailing his rate of pay, outlining his hours of work and places of employment and enclosed a roster completed until the end of June 2004. It was also made known to the appellant that he should give two weeks notice to his employer if he wanted to change his rostered hours. The appellant initially complied with the roster and then expressed a preference to change his hours and not to work at a particular location. Any reduction made to the appellant's hours was made at his request. She did not receive sufficient notice from the appellant when he

wished to change his working hours and she received reports from other pharmacists that the appellant was not recording details of dispensing sufficiently.

The witness gave further evidence that the appellant had sought a further reduction in his working hours and reduced his original commitment to one location. The witness also received further reports of inaccurate dispensing which could have had potentially serious effects. She met with the appellant on the 30 June 2004 and discussed future work in the clinics and the reported dispensing errors. The appellant did not deny that he had prepared wrong medication for dispensing. It was agreed at that meeting that pharmacists must work with someone else until they learn the system and the appellant agreed flexibility to rota changes. From July 2004 until December 2004 the appellant only worked on Sunday mornings. He left to return to Egypt after Christmas 2004 and informed the witness that he was not sure when he would be returning. The witness confirmed that all hours worked on Sundays were paid at a rate of double time.

In reply to questions the witness confirmed that complaints made about the appellant were not made in writing and were not recorded as there was no written protocol in place to do so. She agreed that she did not receive a letter of acceptance to her letter of the 7 May 2004 offering the appellant employment as a sessional pharmacist. She did however recall the appellant complimenting her on the fact that the offer had been made in writing.

The third witness for the respondent gave evidence that she is employed as a chief pharmacist with the HSE in the Dublin North East area. The appellant had previously been employed with the HSE in 1998 as a pharmacy technician and when he became a registered pharmacist in April 2003 he approached the witness seeking employment as a sessional pharmacist. The appellant worked with the HSE from April 2003 until January 2004 and during that time the witness received complaints from other employees about the appellants behaviour alleging that he was not carrying out his workload. She also received complaints that he was late for work on occasions and she was receiving phone calls at the last minute from the appellant declaring his unavailability for work.

The witness gave further evidence that in January 2004 she received a complaint from a nurse in the Darndale clinic about the appellant's behaviour. She requested that appellant discuss the matter with her or write a report of the incident. The appellant refused to carry out either request and informed the witness that he was leaving the HSE and did not seek to be rostered for work again until May 2004. From May 2004 until December 2004 the appellant worked intermittently and returned to Egypt after Christmas 2004.

In April 2005 the appellant contacted the witness again seeking employment. The witness had reservations about his reliability but agreed to employ him. She explained to him the importance of being a team player and stressed that his attendance at clinical meetings was vital. One such meeting was scheduled for August 2005 and the appellant's presence was required at the meeting. He refused to attend the meeting stating that 'it was a load of rubbish'. The witness then went on holidays for three weeks and on her return received a complaint from a senior pharmacist in a clinic in Amiens St about the appellant's behaviour. The senior pharmacist alleged that the appellant had left the clinic on two occasions on the 7th and 8th September 2005 leaving him on his own to dispense medication to clients. This pharmacist informed the witness that he did not want to work with the appellant anymore.

The witness went on to give evidence that she attempted to arrange a meeting on the 22 September 2005 with the senior pharmacist and the appellant but the appellant refused to speak with her. She found the appellant's attitude to be very poor and he refused to accept the complaints that

ere made about his behaviour. She received a text message from the appellant on the 24 September 2005 requesting his location of employment on the 27th and 28th September 2005. She responded to this message advising him of the locations. The appellant failed to report for work and did not contact the witness informing her that he would not be reporting for work. The witness did not roster him for work at any future stage and did not contact him again as he was totally unreliable and the appellant did not make any contact with her. She had given him many chances and was helpful to him on many occasions. She had re-arranged the rota many times to cater for him and would be placed in a very difficult position if she was forced to work with him in the future.

Under cross examination the witness agreed that no contract of employment was given to the appellant. She confirmed that it is good practice to have two pharmacists working together in clinics but it is sufficient for a pharmacist to work alone if the clinic is not busy. When the appellant sought his P45 from her she directed him to the administration department of the HSE as it was not her responsibility to issue a P45. She denied that she ever discriminated against employees because of their race.

In reply to questions the witness confirmed that she had the authority to hire employees. In 1998 the HSE experienced difficulties in hiring pharmacists and it was common practice to employ people by word of mouth. She confirmed that sessional pharmacists work hours that suit their needs and they request the working hours from the HSE.

Appellants Case

The appellant gave evidence that it is now over 3 years since he was dismissed from his employment. He has made many attempts to secure employment in the intervening period and has attended many interviews but has been unsuccessful to date. The dismissal has caused devastation to his career and has caused him great distress. He has not committed any crime and did not contribute to his dismissal. He was never late for work and was never rude or disrespectful to anybody during his employment. He is of the opinion that everything that is broken can be repaired and he respects his former colleagues. The HSE has many different clinics in operation and he is available to work in any clinic. He would be happy to work in any clinic and is not seeking to be re-instated only to clinics where he has previously worked. He believes that re-instatement is appropriate because working conditions between himself and other colleagues is not difficult. He enjoyed a very good relationship with the chief pharmacist who, like him is an Egyptian national and had left his car and personal belongings at her house on an occasion when he returned to Egypt on holidays. This relationship deteriorated over the course of his employment but he still has respect for her.

The witness gave further evidence that procedures operated in the clinics where he worked were not of a professional standard and he complained about these procedures. He was also treated differently to other employees which he considers to be because of his race.

In reply to questions the witness gave evidence that he has many years experience working in the pharmaceutical industry. He worked for 13 years as a hospital pharmacist in Kuwait and worked for a number of years in the U.K. in hospitals and residential homes.

Under cross examination he denied that he had worked with the first witness on many occasions. He could only recall working with her on one occasion and denied that he had worked with her on five occasions in July and August 2004 and September 2005. She could not accept his advice when

he pointed out that she was not preparing medication in the proper manner. She was unable to communicate with him properly and she told him that it was better for her to work alone. When she said this to him, he did what she suggested and he was forced to leave the clinic. It was her that created the difficult work situation, not him. He agreed that teamwork was very important.

He confirmed that he attended a meeting with the second witness, the chief liaison pharmacist on the 30 June 2004 but denied that she outlined any difficulties she had with his work. The only item that was discussed at that meeting was his availability for Sunday work. He denied that he ever received the letter dated 7 May 2004 from her offering him employment as a sessional pharmacist.

He confirmed that he had refused to speak with the third witness, the chief pharmacist on the 22 September 2005 concerning an incident that occurred in the Amiens St clinic as she had insulted him and he wanted to concentrate on his patients. He agreed that he had sent a text message to the chief pharmacist on the 24 September 2005 enquiring as to the location of his work but denied that he was told to report to a particular location to which he did not report. He felt that sometimes her communication is ineffective and that she loses her temper.

Determination

The Tribunal on a full consideration of all the evidence is satisfied that the respondent failed to justify the appellant's dismissal and failed to follow fair procedures in dismissing the appellant.

The Tribunal is also satisfied that the appellant contributed to his dismissal by his conduct but that the inadequacies of the Respondents procedures to formally deal with this conduct, reduces that contribution.

Accordingly the Tribunal determines that the appellant's dismissal constitutes an unfair dismissal under the provisions of the Unfair Dismissal Acts and in this regard it is necessary for the Tribunal to consider the appropriate remedy and to assess the extent of the loss presented to the appellant.

The Tribunal is of view that a remedy of re-instatement is confined to the rare, although not unknown, cases where there is a good functioning working relationship between both parties which is current at the time of the hearing. It is not an appropriate remedy where there is not a good functioning relationship between the parties even though there may exist a hope or desire of a good functioning relationship in the future by a party.

The issue of the unfairness of the dismissal and the suffering that the Appellant contends that he has undergone are not matters which determine the appropriateness of the re-instatement remedy. These are matters which determine whether the dismissal is fair or unfair, and in this case the Appellant has been successful in proving the unfairness of the dismissal.

The remedy of re-instatement will not be granted if, to do so, would either, compel a reluctant employer to continue a relationship of employer/employee, a relationship which must be founded on mutual trust and understanding, and/or, return an employee to an employment which would require an unacceptable level of supervision to ensure adequate performance of his duties.

Based on the evidence submitted, the Tribunal is of the view that the appellant and the respondent are unlikely to have a good working relationship should re-instatement be deemed an appropriate remedy. This is based on the fact that current relationship between the parties is one which has broken down.

The dismissal of an employee must be fairly made and fairly carried out. This is a right established under statute. The remedy of reinstatement is not a right in the same way. Rather, the appropriateness of the remedy is determined by taking into account the desires of both parties and in general, parties in current dispute – howsoever it arose – will not be forced by way of order of this Tribunal to work together in the future. A determination of the Employment Appeals Tribunal Case No: UD 858/1999 is relevant in this regard.

Having regard to all the circumstances in the case the Tribunal considers compensation as the appropriate remedy and upholds the decision of the Rights Commissioner.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

