

## **THE DOS AND DO NOTS OF UNFAIR DISMISSAL**

### **Recent Trends in Labour Court Cases**

In 2007, the Unfair Dismissal Act will be in force for thirty years. Despite this, there is no let-up in the number of cases progressing to third-party bodies for alleged unfair dismissal. Upwards of 1000 cases are being taken on an annual basis and the Employee Appeals Tribunal, the Rights Commissioners and the Labour Court are as busy as ever dealing with a wide range of dismissal cases. This article takes the opportunity of the forthcoming anniversary to review recent judgments on the termination of the employment contract to highlight trends and gain an understanding of what the Labour Court considers fair and unfair dismissal.

### **BACKGROUND**

The Unfair Dismissals Act was originally introduced in 1977 as part of an overhaul of Irish Employment Legislation that had begun four years earlier with Ireland's succession to the then European Economic Community. It was a time of significant change and the beginning of a new professional era for Personnel Management. Several important pieces of legislation that date from this time include the Minimum Notice and Terms of Employment Act, 1973, the Anti-Discrimination (Pay) Act, 1974 and the Employment Equality Act, 1977. All pieces of legislation were intended to strengthen employee protection. Despite their enactment, this article shows that Irish employment has some way to go before employee rights can be taken for granted.

Amended and updated in 1993, the Unfair Dismissals Acts have been at the centre of the protection of worker rights in Ireland. The combined purposes of the Acts are to protect employees from being unfairly dismissed from their employment, to set out criteria by which a dismissal is deemed to be fair or unfair and to provide redress where such as dismissal is found to be unfair. To assist companies in developing their own procedures to the highest standards, the Code of Practice on Grievance and Disciplinary Procedures (S.I. 146 of 2000) was introduced. While not legally binding, the Code can be – and is – taken into account in any proceedings.

The Code contains general guidelines on the application of grievance and disciplinary procedures and outlines the principles of fair procedures for employers and employees generally. While covering all workplaces, the Code is considered to be of particular relevance to situations of individual representation. Equally, while not overriding any other agreement that may be in place, any such locally used guidelines should at the very least incorporate the principles and procedures of the Code.

By providing such a framework, the Code enables management to operate to minimum standards when dealing with issues relating to staff grievances and performance or behaviour issues. It also ensures that employees have access to procedures where alleged failures to comply with these standards may be fairly and sensitively addressed. In the modern context where many organisations prefer to deal directly with their staff, the Code requires that

organisation recognise the power imbalance in the relationship and provide a process accordingly.

## **THE PRINCIPLES OF NATURAL JUSTICE**

The Code requires that any procedure for dealing with such issues, while reflecting the varying circumstances of organisations, must comply with the general principles of natural justice and fair procedures:

- that employee grievances are fairly examined and processed;
- that details of any allegations or complaints are put to the employee concerned;
- that the employee concerned is given the opportunity to respond fully to any such allegations or complaints;
- that the employee concerned is given the opportunity to avail of the right to be represented during the procedure;
- that the employee concerned has the right to a fair and impartial determination of the issues concerned, taking into account any representations made by, or on behalf of, the employee and any other relevant or appropriate evidence, factors or circumstances.

These principles require that the allegations or complaints be set out in writing, that the source of the allegations or complaint be given and that the employee concerned be allowed to confront or question witnesses. This principle was highlighted by the Court in *Morrin Morrin & Malone (The Barge) and A Worker (CD/03/945)*. Here the Court stated that it “is satisfied that the claimant was not given a fair and reasonable opportunity to state his case at the meeting”. They also found that “the dismissal was an excessively harsh punishment for any misdemeanours he may have committed” and awarded the claimant €3,500 in compensation.

Similarly in *John Casey Limited And A Worker (CD/05/596)*, the claimant stated that she was called into the office and was summarily dismissed by the management. The management at this meeting made a number of allegations about her work performance, which she believed were merely created as a justification for dismissing her. Management for its part produced a list of errors, which they stated had been brought to her notice and that she had been warned on a number of occasions about her shortcomings in relation to her job. However, the Court found that “it is not acceptable for the Company to send for an individual without indicating the seriousness of the meeting, without offering any representation, and then to summarily dismiss the person’ and recommended that the employer pay the claimant €20,000 in compensation.

## **RIGHT OF REPRESENTATION**

One of the core principles of natural justice, along with the right of reply, is the right to representation. The Labour Court has noted time and again that such a right cannot be denied to the employee. This was noted in *Morin et al*, in *John Casey et al (CD/05/596)* and again in *Cellular World and a Worker (CD/01/718)*. In the Code of Practice, such a representative

includes a colleague of the employee's choice including a person from a registered Trade Union. This right should be included in the organisation's Grievance and Disciplinary procedures.

The Code excludes 'any person or body unconnected with the enterprise'. However, in *Burns and Hartigan V Governor of Castlereagh Prison ([2005] IEHC 76)*, the High Court found that due to the gravity of the sanction that faced the employees, a legal representative should be allowed at disciplinary hearings. In this instant, the employees were not faced with dismissal but demotion. This judgement appears to contradict previous case law and will have a dramatic impact in the development of future disciplinary procedures and the carrying out of a disciplinary meeting where dismissal is even a possibility.

## **A LAST RESORT**

As a general rule, the Code requires that, where any performance or behaviour deficiencies are identified, companies should not proceed straight to a disciplinary procedure but should attempt to resolve any issue first through a coaching and support process. This is a principle that is supported by the Labour Court. In *Dejay Royale and A Worker (CD/04/606)*, the company stated that monthly management meetings were held whereby it was clear that the targets were not being achieved. The under performance of the Operations Department became a serious problem and the worker was advised that his performance was not satisfactory. However, the Court found that the failure to follow procedures in line with the Code of Practice was not acceptable and was therefore 'of the view that the summary dismissal of the claimant was unacceptable'. An award of €20,000 was recommended.

In *Herbert Park Hotel and A Worker (CD/05/527)*, the claimant was dismissed during her probationary period. The Labour Court found that "she was entitled to expect that she would have had the benefit of that period to establish her suitability for continued employment". The company should have given the employee every chance to overcome any identified deficiency who was awarded compensation of €15,000.

However, the opposite also holds true. Where an employer has given the employee every chance to rectify any deficiency – and have followed best practice in operating the disciplinary procedure – any subsequent dismissal will be held to be fair. In *Ebookers and A Worker (CD/05/591)*, the company initiated the disciplinary process in June 2004 and dismissed the employee in December of that year. Having followed best practice and provided additional coaching to rectify issues in relation to the employee's performance, the Rights Commissioner had found that "that the decision to dismiss was not unfair and that the actions of the employer were not unreasonable". On appeal, the Labour Court found "no reason to alter the recommendation of the Rights Commissioner and accordingly upholds it".

## **THE SANCTION SHOULD BE APPROPRIATE**

Generally, the steps in any procedure will be progressive moving from an oral warning, to a written warning, a final written warning and, if necessary, onto a dismissal. However, there are

occasions where more serious action, including dismissal, is warranted at an earlier stage. Procedures should set out clearly the different levels at which the various stages of the procedures will be applied. Failure to apply the proper sanction will normally lead the Labour Court to find against the company.

In *Connex Transport Ireland Limited and A Worker (CD/05/808)*, the claimant, a Traffic Supervisor, forwarded, by e-mail, information to the Rail Procurement Agency regarding the effective operation of the LUAS. The company contended that the information was designed to discredit it and, following a full disciplinary process, the claimant was dismissed for alleged breach of trust amounting to gross misconduct. The Rights Commissioner stated that “there were not rival organizations in competition with each other but rather were two organizations who were trying to achieve the same common end” and “that dismissal was an excessively harsh penalty in the circumstances” and awarded €7,500 in compensation. An appeal to the Labour Court upheld the Rights Commissioner’s findings and increased the compensation to €14,000.

In *Wilo Pumps and SIPTU (CD/05/172)*, reinstatement was recommended by the Labour Court who found “that dismissal was too severe a sanction” and that the period in which the employees were not employed be considered suspension without pay. This case dealt with the dismissal of four individuals for clocking violations where the individuals were either absent from the company premises while clocked in, and then clocked out by other employees or were involved in the clocking out of their colleagues.

## **CONTRIBUTION TO DISMISSAL**

The Labour Court will take all circumstances of into account including the employee’s role in their dismissal. In *J.J. McCreery Limited and A Worker (CD/03/892)*, the employee was dismissed for alleged irregularities over petrol receipts. The Labour Court found that the employer failed to follow procedures prescribed by the Code of Practice and “on that basis the Court must conclude that the dismissal was technically unfair”. However, the employee only provided a reasonable explanation on appeal from the Rights commissioner. As such, the Labour court found that there were “some features of this case which indicate that the employee contributed significantly to the dismissal”. Despite finding that the dismissal was unfair, no compensation was awarded.

## **SERVICE IS NO BAR TO LACK OF FAIR PROCESS**

In *Herbert Hotel et al* above, the Labour Court found that fair process must be followed even within the probationary period. This principle was followed in *Viking Direct (Ireland) Limited and A Worker (CD/01/642)*. Taken under Section 20(1) of the Industrial Relations Act, 1969, this allowed the worker to have a case heard even where there is less than twelve months service. While only the employee was bound by the outcome, a Labour Court recommendation does hold a strong moral force.

In this case, the employee had been headhunted by the company who stated that, during her probationary period, the employee was made aware that management was unhappy with her performance. Despite this, her performance deteriorated and the company terminated her employment. The employee, for her part, argued that she was not aware that a review of her performance was being carried out after thirteen weeks of employment.

Where an employee is considered unsuitable for permanent employment, the Labour Court accepted that “an employer has the right, during a probationary period, to decide not to retain that employee in employment”. However, they stated that “that this can only be carried out where the employer adheres strictly to fair procedures”. Again, the Labour Court found that the employee was not afforded fair procedures in accordance with the Code of Practice and recommended that she should be compensated by the additional payment of €15,000

This does not prevent an employer from using their probationary process to determine an employee’s suitability for the role. In *Merloni Limited and A Worker (CD/05/1035)*, the Labour Court found that “the Employer had concerns in relation to the Claimant’s work performance and those concerns were communicated to the Claimant. In these circumstances the Employer did not act unreasonably nor contrary to good practice in deciding to terminate the Claimant’s employment within the probationary period when her performance did not sufficiently improve”. As such, the dismissal was found to be fair.

## **CONSTRUCTIVE DISMISSALS**

Constructive dismissal results from an employee resigning and subsequently claiming that they had no other option given the circumstances of their employment. However, it is difficult to prove that the employee had no alternative available other than resignation. In *RTE (DTTN) and A Worker (CD/03/643)*, the employee’s job changed without consultation or agreement. As a result her duties and responsibilities were significantly reduced forcing her to resign. This was rejected by the company who stated that the changes were made in the best interests of the business and that a large portion of the claimant’s duties remained with her.

The Labour Court found that “the claimant had no alternative but to transfer ... to a position where the work involved was of less value than that held previously”. They also found that the “transfer was imposed upon her without consultation and was complied with under protest .... (and) this action culminated in a situation where she had no alternative but to resign”. Compensation of €10,000 was recommended.

## **FAIR USE OF DISCIPLINARY PROCEDURES**

The Labour Court takes a view that disciplinary procedures should be used with care and only for the specific circumstances for which they were created. Other use by an employer will not be tolerated. In *Irish Blood Transfusion Service and A Worker (CD/03/580)*, the employee was dismissed on disciplinary grounds some time after an internal tribunal had investigated and rejected a claim of bullying and harassment made by the employee. The Labour Court found that the “the dismissal was inextricably linked to the complaint of bullying which she made and

this amounted to victimization”. Reinstatement was recommended by the Labour Court who also found it regrettable that the IBTS “did not attend and avail of the opportunity to explain more fully the basis” its decision to dismiss the employee.

## **CONCLUSIONS**

The Labour Court has taken a very strong line in recent years against employers who fail to follow good practice in the termination of an employment. They require at the very least that the organisation implement procedures that comply with the Code of Practice which has been in place since 2000. Failure to take this very basic step will result in, at the very least, the employer being found to have terminated the employment unfairly.

However, an employer that implements the Code of Practice - and follows it in making a decision to dismiss - will find the Labour Court sympathetic and will normally find the dismissal to be fair. After thirty years, the Labour Court does not allow any leeway to companies who fail to follow good practice. The Code of Practice provides an ideal framework for organisations and companies who have yet to integrate it into their procedures should do so at the earliest possibility or face an unwanted finding from the Labour Court.

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