

Employment case review: Irish WRC awards largest sum to date in unfair dismissal claim

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Summary

A sales executive (the “Complainant”) has been awarded the largest sum to date by the Workplace Relations Commission (the “WRC”) in a claim for unfair dismissal, when his employment was terminated over allegations of bullying.[1]

Anonymity

Given that the initial hearing of this matter took place prior to the judgment of the Supreme Court in the *Zalewski case*, both parties had an expectation that their names would not be publicised. Therefore, the adjudication officer (the “AO”) agreed to anonymise their identities.

The Complainant’s arguments

The Complainant commenced employment with his employer (the “Respondent”) in December 2016 as an Account Executive. The Complainant was later promoted to Enterprise Account Executive in April 2019. The Complainant asserted that his annual remuneration was €306,492, which the Respondent disputed.

It was the Complainant’s position that the dismissal was unfair for a number of reasons, some of which are noted below:

The investigation was unfair because there was not a proper division between the investigation process and the disciplinary process;

Robust and course language was part of the Respondent’s workplace culture and was not considered unusual;

The two witnesses, Mr P and Mr Q, were not made available on the day of the hearing and

could therefore not be subject to cross examination by the Complainant.

The Complainant was not afforded the right to legal representation;

There was no finding of gross misconduct and the disciplinary process and outcome was not incremental or proportionate;

There was no formal warning issued to the Complainant prior to the dismissal, contrary to the Respondent's employee handbook;

The precise grounds for the dismissal was not made clear;

The decision to dismiss was made by an employee who was not impartial given his prior involvement in the process;

The Complainant was denied his right to fair procedures because he was not made aware of all the allegations made against him at the outset of the process; and

It was evident from a message sent by the Complainant's line manager that the decision to dismiss was predetermined in advance of any disciplinary hearing taking place.

The Respondent's arguments

The Respondent's position was that the Complainant's employment was terminated following a full and fair investigation, disciplinary process and subsequent appeal process. The Respondent stated that the Complainant's interactions and communications with his colleagues via Slack, a channel-based messaging platform, were frequently problematic and required intervention by management on various occasions.

The Respondent alleged that the Complainant was given an informal warning at the outset via an email dated 8 May 2019. The Respondent stated that it sought to deal with the issues at that stage on an informal basis, as appropriate for a first offence and with a view to giving the Complainant a chance to improve his tone, reactions and behaviour. The Complainant responded via email on 15 May 2019 and apologised for his language, which he acknowledged was "*too direct and probably rude.*" This situation then culminated into two formal complaints being submitted against the Complainant on 23 May and 3 June 2019 respectively which, in turn, led to an investigation and subsequent disciplinary process.

Suspension with pay pending investigation

Given the serious concerns that the Complainant would potentially continue his behaviour, he was placed on suspension with pay in June 2019 pending further investigation in relation to the complaints. The Complainant was informed of the suspension in writing.

The Respondent stated that it conducted a scrupulously fair investigation process and that the Complainant was provided with all relevant information throughout. The Investigator's report was

finalised and issued on 30 July 2019, following which a disciplinary meeting was convened for 6 September 2019.

The disciplinary process

The disciplinary process was chaired by the VP of Sales (the “Chair”) who concluded that the Complainant’s behaviour constituted bullying and was a very serious breach of the Respondent’s Harassment, Sexual Harassment and Bullying Policy. The Respondent also asserted that the Chair considered the viability of alternative sanctions such as demotion or redeployment as an alternative to dismissal but concluded that neither option was appropriate in this instance. As such the Complainant was dismissed.

The Complainant unsuccessfully appealed the Chair’s decision to terminate his employment.

The decision of the WRC

The AO reiterated that his function was not to determine whether the Complainant was guilty of the alleged act, but rather to determine what a reasonable employer might have done in this instance and whether this standard was met by the Respondent. In reaching his decision, the AO considered the following points:

Failure to explicitly state that the Complainant’s job was at risk

Having read the email of 8 May which the Respondent claims amounted to an informal warning, the AO did not agree with the Respondent’s view in this regard. The AO stated that the email did not explicitly illustrate that the Complainant’s job would be in jeopardy if his conduct did not improve, which he asserts ought to have been done.

Failure to reference any alleged breach and lack of training

The Respondent failed to make reference to any alleged breach of its Bullying and Harassment Policy, nor was any training provided to the Complainant on this policy throughout his employment.

Whilst the AO was satisfied that the Complainant did engage in some inappropriate behaviour, such behaviour “*fell a long way short of warranting his dismissal in the circumstances.*” The AO also noted that crucially, he did not see any difference between the nature of the Complainant’s comments to Mr P prior to the 7 May meeting, which resulted in the alleged “informal warning” and the comments made between 7 May and 6 June which resulted in his suspension. Notably, this occurred during Ramadan, which the Complainant as a practicing Muslim was observing, but the Respondent made no allowances for.

In essence, the AO could not warrant justification for the Complainant’s dismissal where the comments made by him prior to 7 May in the eyes of the Respondent only warranted an “informal

warning” and the comments between 7 May and 6 June which were not substantially different to those one month prior, justified dismissal. The AO found that the failure to issue a formal verbal, written or final warning to the Complainant at any stage prior to his termination is incomprehensible.

Furthermore, the termination letter only contained one example of alleged bullying behaviour, which was not entirely specific in itself.

Having considered all the facts presented, the AO found that the Complainant’s dismissal was substantively unfair and wholly disproportionate.

Compensation and bonus payments

In his complaint form, the Complainant sought to be reinstated in his role, however, given his conduct during his employment, the AO found that the relationship between the parties had irretrievably broken down and that re-instatement would not be appropriate. Accordingly, the AO decided that compensation should be awarded instead.

The Complainant stated that his annual remuneration was €306,492 however, the Respondent asserted that it should in fact be €219,466. The difference of the two figures boiled down to the timing of significant bonus payments which the Complainant received. The AO considered the regulations made under section 17 of the Unfair Dismissals Act, 1977 (the “Act”) which differentiates employees whose remuneration does not vary by reference to the amount of work done by him, and an employee whose remuneration does so vary. The Complainant fell within the scope of the latter.

The parties contended the dates to ascertain the correct “Lookback period” which the AO determined should be 13 weeks from 6 December 2018, given that the Complainant was suspended between 7 and 17 June, during which he did not carry out any work.

The Complainant did not take up new employment until 22 months after his termination. The AO awarded a sum of €329,199,000 as:

- The Complainant received a substantial remuneration package prior to his termination;
- The Complainant works in a niche sector in a small city where both employers and recruiters are easily known to one another; and
- The Complainant’s job search was inevitably going to present hurdles given the nature of his dismissal in a small and interconnected city.

Key takeaways for employers

This case highlights the importance of having adequate policies and procedures in place.

Employers are urged to review their bullying and harassment policies in light of the [2020 code of](#)

practice and provide adequate training to all staff on not only providing and maintaining a safe workplace, but also in preventing incidents of bullying and harassment occurring. It is also imperative that informal discussions with employees around their behaviour/performance etc. must be properly documented and if it is an informal warning, then this must be clearly stated.

For further information on any of the above points, or assistance in drafting or updating policies and procedures, please contact Marianne Norton by emailing marianne.norton@ogier.com

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