

Complainant		Respondent
Parties	Kate Brennan	Dublin University, Trinity College Trinity College Dublin
Complainant		Respondent
Anonymised Parties	{text}	{text}
Representatives	John Cleary SIPTU	Mary Leahy, Head of Employee Relations

Complaint(s):

Act	Complaint/Dispute Reference No.	Date of Receipt
Complaint seeking adjudication by the Workplace Relations Commission under Section 8 of the Unfair Dismissals Act, 1977	CA-00060672-001	21/12/2023

Date of Adjudication Hearing: 13/11/2024 Workplace Relations Commission Adjudication Officer: Breiffni O'Neill

Procedure:

In accordance with Section 8 of the Unfair Dismissals Acts, 1977 - 2015, following the referral of the complaint to me by the Director General, I inquired into the complaint and gave the parties an opportunity to be heard by me and to present to me any evidence relevant to the complaint.

The Complainant as well as her former line manager gave evidence on oath/affirmation and the opportunity for cross-examination was afforded to the parties.

Background:

The Complainant commenced her employment with the Respondent on 5 September 2022 as an Executive Officer. She stated that there were no substantive reasons provided for her dismissal when she was given notice of the termination of her employment on 30 August 2023.

Summary of Complainant’s Case:

The Complainant commenced her employment with the Respondent on 5 September 2022 as an Executive Officer. She stated that there were no substantive reasons provided for her dismissal when she was given notice of the termination of her employment on 30 August 2023. She worked for the duration of her notice period and the last day on which she worked was 29 September 2023.

Summary of Respondent’s Case:

The Respondent stated that I had no jurisdiction to hear this complaint because the Complainant did not have the requisite service under the Act.

In support of this argument, it was asserted that as the probation period was less than one year and, by virtue of section 3, the Act does not apply. Specifically, the decision to fail the Complainant’s probation was made and communicated to her within the probationary period, which was within 12 months of her start date, namely on 30 August 2023.

The Respondent highlighted that the reason the probation ran until the end of August 2023 was to allow the Complainant every opportunity to demonstrate fully her competence across the range of expected role competencies.

The Respondent conceded that the dismissal would be unfair, if it was found that the Complainant was found to be under the scope of the Act, because a second Performance Improvement Plan had not been implemented.

Findings and Conclusions:

The Law: Section 2(l) (a) of the 1977 Act provides:

"This Act shall not apply in relation to any of the following persons: (a) an employee (other than a person referred to in section 4 of this Act) who is dismissed, who at the date of his dismissal, had less than one year's continuous service with the employer who dismissed him."

The "date of dismissal" is defined in Section 1 of the 1977 Act as meaning:-

'(a) where prior notice of the termination of the contract of employment is given and it complies with the provisions of that contract and of the Minimum Notice and Terms of Employment Act, 1973, the date on which that notice expires.(b) Where either prior notice of such termination is not given or the notice given does not comply with the provisions of the contract of employment or the Minimum Notice and Terms of Employment Act, 1973, the date on which such a notice would have expired, if it had been given on the date of such termination and had been expressed to expire on the later of the following dates— (i) the earliest date that would be in compliance with the provisions of the contract of employment, (ii) the earliest date that would be in compliance with the provisions of the Minimum Notice and Terms of Employment Act, 1973.

Findings:

I note firstly that the Complainant was contractually entitled to one month's notice of dismissal, whether she was dismissed within or outside of the probationary period. I further note that this notice of termination was given by the Respondent to the Complainant by letter on 30 August 2023, wherein it was stated: *"As a result of the above decision, your employment with Trinity for this position is being terminated, effective from 29th September 2023 for reason of your failing probation. I would like to ask that you work your notice period. I will allow you reasonable time off to facilitate you in securing alternative work if you require. You will be paid for any outstanding annual leave you may be entitled to and any outstanding entitlements."*

The question of the notice period being waived, or payment in lieu of notice being given, does not arise because the Respondent explicitly requested that the Complainant work her notice period, and she did in fact do so. As the date on which the notice expired, 29 September 2023, was the date of dismissal, in accordance with the Act as set out above, I find that I have jurisdiction to hear this complaint because the Complainant had over 1 years' service with the Respondent.

As the Respondent conceded that the dismissal would be unfair, if it was found that she fell under the scope of the Act, because a second Performance Improvement Plan had not been implemented when her line manager returned from protected leave, I find that the Complainant was unfairly dismissed.

Decision:

Section 8 of the Unfair Dismissals Acts, 1977 – 2015 requires that I make a decision in relation to the unfair dismissal claim consisting of a grant of redress in accordance with section 7 of the 1977 Act.

The Law: Section 7 of the Unfair Dismissals Act, in relevant part, states that:

(1) Where an employee is dismissed and the dismissal is an unfair dismissal, the employee shall be entitled to redress consisting of whichever of the following the adjudication officer, considers appropriate having regard to all the circumstances:

(a) re-instatement by the employer of the employee in the position which he held immediately before his dismissal on the terms and conditions on which he was employed immediately before his dismissal together with a term that the

re-instatement shall be deemed to have commenced on the day of the dismissal, or

(b) re-engagement by the employer of the employee either in the position which he held immediately before his dismissal or in a different position which would be reasonably suitable for him on such terms and conditions as are reasonable having regard to all the circumstances, or

(c) (i) if the employee incurred any financial loss attributable to the dismissal, payment to him by the employer of such compensation in respect of the loss (not exceeding in amount 104 weeks remuneration in respect of the employment from which he was dismissed calculated in accordance with regulations under section 17 of this Act) as is just and equitable having regard to all the circumstances,

(2) Without prejudice to the generality of subsection (1) of this section, in determining the amount of compensation payable under that subsection regard shall be had to—

(a) the extent (if any) to which the financial loss referred to in that subsection was attributable to an act, omission or conduct by or on behalf of the employer,

(b) the extent (if any) to which the financial loss referred to in that subsection was attributable to an act, omission or conduct by or on behalf of the employee,

(c) the measures (if any) adopted by the employee or, as the case may be, his failure to adopt measures, to mitigate the loss aforesaid,

(d) the extent (if any) of the compliance or failure to comply by the employer, in relation to the employee, with the procedure referred to in subsection (1) of section 14 of this Act or with the provisions of any code of practice relating to procedures regarding dismissal approved of by the Minister,

(e) the extent (if any) of the compliance or failure to comply by the employer, in relation to the employee, with the said section 14,

(f) the extent (if any) to which the conduct of the employee (whether by act or omission) contributed to the dismissal.

3) In this section—

“financial loss”, in relation to the dismissal of an employee, includes any actual loss and any estimated prospective loss of income attributable to the dismissal and the value of any loss or diminution, attributable to the dismissal, of the rights of the employee under the Redundancy Payments Acts, 1967 to 1973, or in relation to superannuation;

“remuneration” includes allowances in the nature of pay and benefits in lieu of or in addition to pay. Findings:

As the Complainant has found alternative employment elsewhere and the employment relationship has irretrievably broken down, I find that that compensation is the appropriate remedy in this case.

I note that the Complainant was out of work from 29 September 2023 until 29 April 2024, when she secured a job with a salary that was approximately 25% lower than what she earned with the Respondent. As she turned down a much better paid role with another perspective employer, because she would not learn how to drive, and presented no evidence of attempts to secure work after she started in her current role, I make no award in respect of her prospective financial loss.

While the Complainant presented some evidence of her efforts to find work over the period which she was unemployed, she stated that she restricted her job search to roles that were advertised directly by companies instead of also applying for jobs that were posted by agencies. I find therefore that her efforts to source alternative work during her period of unemployment were inadequate.

Having heard her evidence, the Respondent highlighted both that the Complainant failed to sufficiently mitigate her

loss and that any award should reflect this. In considering this assertion, I note that there is conflicting case law around the calculation of an award of compensation with many decisions focusing solely on the efforts of a Complainant to mitigate their loss and appearing to disregard the conduct of the employer in relation to the dismissal. This is, in my view, at odds with the legislative provisions set out above and, in calculating the compensation to award in the instant case, I have regard to the decision of the Adjudication Officer in ADJ 32667, where she stated, inter alia, that:

"in considering compensation, regard must be had to all of the subsection of Section 7-and the tests are not confined to the efforts of the former employee-or the Complainant in this case. In circumstances where the Respondent is found not to have met the tests set out in subsections (c) and (d) and the Complainant made no contribution to the decision to dismiss her under (a) (b) or (f) It would be wholly unjustified to penalise the Complainant solely for a conclusion that she did not make a sufficient effort of mitigate her losses where the balance of unfairness and failure to comply with the terms of Section 7 as a whole lie squarely with the Respondent."

In the context of this case, I have regard to the fact that the Respondent did not afford the Complainant any fair procedures as set out in 7 (c) and (d) and that the Complainant made no contribution to her dismissal as set out in (a) (b) or (f) given that it was not attributable to an *"act, omission or conduct"*.

I also have regard to the Labour Court decision in the case of *Obasanjo Olajubu v Wasdell Europe* UDD 2449 where it was highlighted that:

"An award of compensation must be in an amount that is 'just and equitable in all the circumstances". These words provide the Court with some latitude in considering both mitigating and aggravating factors in the circumstances surrounding the dismissal".

Considering all of the foregoing points, I make an award of €15,000 in respect of the unfair dismissal.

Dated: 21.03.25 Workplace Relations Commission Adjudication Officer: Breiffni O'Neill Key Words: