

Complainant		Respondent
Parties	Nkemka Patrick Okachi	Sodexo Ireland Limited (amended on consent at the hearing)
Complainant		Respondent
Anonymised Parties	{text}	{text}
Representatives	Self-Represented	The HR Suite

Complaint:

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-00056017-001	11/04/2023

Date of Adjudication Hearing: 21/01/2025 Workplace Relations Commission Adjudication Officer: Úna Glazier-Farmer

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.

Background:

The Complainant gave his evidence on affirmation. The Complainant confirmed he received the Respondent’s submissions by email.

The Respondent had three witnesses present: Mr. Adrian Nix, Area Support Manager, Ms. Brenda Flaherty, Client Relationship Manager and Mr. Billy Perkins, Divisional Support Manager. All three gave evidence on affirmation. Submissions were received in advance of the hearing from the Respondent.

The addresses of both parties were updated as was the Respondent’s correct name.

In the interest of fairness and where there was no objection from the Complainant or Respondent, the Complainant, who was unrepresented, was asked to outline his case in the first instance where he did not provide any narrative as to the nature of his complaint on the Complaint Form or in a statement or submission in advance of the hearing. After he was finished with his evidence, the Respondent was given time to speak with its representative.

The parties were requested to open all evidence to the hearing that it was relying upon.

Summary of Complainant’s Case:

It was the Complainant’s evidence that he was unfairly dismissed by the Respondent after being falsely accused of sexual harassment.

He commenced work with the Respondent on 5 May 2014 and was dismissed on 17 February 2023 from his employment as a Cleaning Supervisor. It was his evidence that he worked 39 hours a week and earned a gross weekly wage of €489.45. He described himself as a great worker who was flexible in his hours and never had any issues in the workplace.

The Complainant outlined his interaction with a female colleague in the gym, whom he had not seen since before the Covid-19 pandemic. They had a conversation about their attendance at the gym. The Complainant described the conversation as jovial and upbeat. He denied there was anything of a sexual nature, describing himself as a married man. He said he complimented her, and she gave him a hug at the end of the conversation. It was his evidence that he

gave her a one-shoulder hug where he did not feel comfortable as she was wearing gym clothing.

Under cross-examination, the Complainant was asked if he put his hand on the woman's shoulder, to which he replied that he did, adding, "*You can check it on the camera.*"

When he attended work the next day, the Complainant was spoken to by his manager, Mr O'Neill, who explained there had been a complaint against him. When he requested the CCTV footage from his manager, he was told the evidence was "*not based on camera footage.*" The Complainant was suspended from work with immediate effect until 3 weeks later when he received an invitation to a meeting with the Respondent. It was his evidence that this was the first time he became aware of the allegation and asked why he was being disciplined straight away. He described feeling depressed at the allegation.

The Complainant accepted, when cross-examined, that it was not a 3-week period between the letter of suspension and the disciplinary invite letter and that there had been communication from his employer during this time.

Upon inquiry, the Complainant was asked if he had ever seen the CCTV footage of the interaction, to which he replied no, despite asking his manager. He added that he asked Mr Nix, who said the GSM, Cliff O'Neill, had reviewed the CCTV footage and provided a statement.

The Complainant outlined his meetings with the Respondent, describing the first meeting as being a "*good meeting.*" After the second meeting, he was sent a letter stating he had been dismissed and that he could not appeal.

Under cross-examination, the Complainant accepted he was provided with a copy of the disciplinary investigation report. He also accepted he was given an opportunity to appeal, and he took it.

The Complainant raised previous difficulties he had with the receptionist on-site in response to her witness statement relied upon during the investigation. Upon inquiry, the Complainant was asked if he raised any grievances with his employer regarding these previous incidents, to which he said he did not.

The Complainant accepted he had recently received training on the dignity at work policy and rules of conduct when asked by the Respondent. Upon inquiry, he was asked if the investigation was conducted under the Dignity at Work Procedure. It was the Complainant's evidence that he did not know.

Asked if he was given an opportunity to cross-examine the woman making the complaint against him, the Complainant said he was not, nor did he see her statement. His evidence was that she worked for the client company and stated, "*I worked for Sodexo.*"

Upon inquiry, he was asked about his financial loss. The Complainant gave evidence of obtaining employment on 4 June 2023 until 31 January 2024 at a higher salary than he earned with the Respondent. It was his evidence that he applied for "*a lot*" of jobs on Indeed, attended a few interviews, but got no response.

The Complainant confirmed he had no further evidence or submissions.

Summary of Respondent's Case:

Mr Nix's Evidence

Mr Nix gave evidence regarding the investigation he undertook on behalf of the Respondent. He outlined his experience of conducting workplace investigations with the Respondent. It was his evidence that the incident had been reported to the client company HR, and he was tasked to investigate it by the Respondent's HR.

Mr Nix outlined the steps he took as part of the investigation: sending 2 statements from the client company to the Complainant in the invite letter to the disciplinary investigation meeting, advising him of the seriousness of the allegation, noting the presence of an accompanying person with the Complainant, and agreeing on the minutes with the Complainant at the end of the meeting. Mr Nix described the meeting as a "*friendly exchange,*" adding that the

Complainant *“admitted he said what she said”* and *“we felt he had a case to answer,”* recommending that there had been a *“breach of the dignity at work policy.”* He expressed concern that the Complainant accepted he had put his hand on the woman’s shoulder and made comments to her.

Mr Nix noted that the Complainant had dignity at work training in October 2022.

The Complainant asked Mr Nix about the CCTV footage. It was Mr Nix’s evidence that he did not have access to the CCTV, saying it was the property of the client, and he only had the GSM’s statement of what he saw on the CCTV. It was put to Mr Nix that Mr O’Neill was not at the hearing, with the Complainant stating he asked him the *“very day”* he was told about the complaint.

It was put to Mr Nix that no one followed up with him about the incident. In reply, it was Mr Nix’s evidence that *“we followed the process as always,”* adding that there were HR Business Partners and the employee assistance programme available to the Complainant.

The Complainant asked the witness on why he did not get a chance to speak to the woman who made the complaint *“one-on-one.”* In reply, Mr Nix said she did not feel comfortable making a statement.

Upon inquiry, Mr Nix was asked to clarify which policy he conducted the investigation under, to which he replied that he *“liaised with HR at every step, and they dictate the policy.”* Asked about the statement in his report regarding impartiality, it was Mr Nix’s evidence that he was independent, as he did not know the parties but took his *“lead from the HR department.”*

Asked why he sent the Complainant the Disciplinary Procedure, he said that he later sent the Dignity at Work Policy but did not have a copy of the document in the submissions. It was his evidence that the statement of the receptionist was also included in the amended letter to the Complainant.

When asked about the woman’s statement, it was his evidence that an *“abridged version”* was received by the Respondent from their client, as *“she did not want to make a big deal.”* The email received from the client was *“written by HR.”* Mr Nix confirmed he had received dignity at work training.

Ms Flaherty’s Evidence

It was Ms Flaherty’s evidence that she had 23 years’ experience with the Respondent and was involved in several workplace investigations.

Upon receipt of the investigation report, she reviewed her evidence and noted that the Complainant accepted he put his arm around the woman’s shoulder and made inappropriate comments. It was her evidence that she was concerned the Complainant did not see any issue with placing his arm on the woman’s shoulder or what he said to her. On that basis, she was of the view that dismissal was the most appropriate sanction.

It was her evidence that after meeting with him, she called the Complainant to advise him of the outcome of the disciplinary investigation and followed up with a letter that included details of the appeal procedure.

Under cross-examination, Ms Flaherty was asked about the CCTV footage and why the Complainant did not get a copy. It was her evidence that her decision was based on the statement from the Complainant at the investigation meeting, and she *“did not consider the CCTV”* in her decision.

Upon inquiry, she confirmed she had dignity at work training and was asked if she considered this policy. It was her evidence that she had, and the Complainant had been provided with this policy and the rules of conduct, but she could not recall when he had received them.

Ms Flaherty was asked if the Complainant raised his previous issues with the receptionist with her; to which she replied, no.

It was Ms Flaherty's evidence that the reference to gross misconduct did not automatically result in dismissal, referring to the Complainant's 2015 contract of employment. She added that she was previously part of an investigation where a finding of gross misconduct did not lead to dismissal.

Mr Perkins' Evidence

It was Mr Perkins' evidence that the Respondent followed a "*robust process*" which was carried out independently. During the appeal stage, the Complainant raised his length of service and wanted the matter dealt with locally. It was Mr Perkins' evidence that he upheld the decision, saying, "*For me, it fell into the ground of sexual harassment,*" and "*from what I read, he didn't see anything wrong.*" Referring to the client, Mr Perkins described them as being "*extremely upset*" by the whole incident.

The Complainant put it to the witness that this matter was taken overly seriously by the Respondent, to which Mr Perkins disagreed.

He was asked by the Complainant why he was not allowed access to the CCTV to prove his point. Mr Perkins replied that he would have "*loved*" to have access to it, but the client was not providing it. Referring to Mr O'Neill's statement when he viewed the CCTV, Mr Perkins said it was very clear to him what Mr O'Neill saw, and he trusted what he said. It aligned with what the Complainant said in meetings.

Upon inquiry, Mr Perkins accepted he had undocumented conversations with Mr O'Neill and the client about the CCTV. It was his evidence that he did ask for the CCTV footage from the client, despite pushing the client to release it. Mr Perkins said that he focused on the grounds of appeal, the investigation notes, and the report.

Conclusion

It was submitted on behalf of the Respondent that the investigation process contained in the Dignity at Work Procedure did not apply where the complaint came from a third party, a client, rather than another employee of the Respondent.

The Respondent confirmed it had no further evidence or submissions.

Findings and Conclusions:

The Unfair Dismissal Act 1977 places a clear burden of proof on the employer to establish that the dismissal of an employee from their employment must be justified.

"6.—(1) Subject to the provisions of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, to be an unfair dismissal unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal."

Section 6 (4) provides: -

(4) Without prejudice to the generality of subsection (1) of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, not to be an unfair dismissal, if it results wholly or mainly from one or more of the following:

(b) the conduct of the employee," Section 5 of the Unfair Dismissals (Amendment) Act 1993 provides, inter alia, that: "*... in determining if a dismissal is an unfair dismissal, regard may be had ... to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal."*

McMahon J. in *Khan v Health Service Executive 2009 E.L.R. 178*, summarised the meaning and value of fair procedures as being:

"... at the very foundation of all legal systems and all decision makers must observe them whether we like it or not.

Fair procedures are necessary for the common good ... What does [sic] fair procedures mean? At the very minimum it

means that the person at whom a charge is levelled has proper notice of the charge; that he has proper opportunity to take legal advice and to prepare for hearing; that no one is to be a judge in their own cause; (nemo iudex in causa sua) that both parties are given a full opportunity to be heard (audi alteram partem) and that the judge is free from bias. Moreover, it is clichéd law that not only must these principles be adhered to, but they must be seen to be adhered to. Justice must be seen to be done. Perception is significant.”

An employee has the right to a fair and impartial determination of the issues being investigated as provided for in the Code of Practice on Disciplinary Procedures (S.I. No. 117 of 1996), the Respondent’s own procedures, as well as case law.

Having carefully considered the evidence, in this case, it is clear that the Respondent did not follow fair procedures or its own policies in investigation this serious allegation of sexual harassment. In arriving at this conclusion, the following has been considered:

The Complainant’s evidence was at times unclear regarding who he met and at what stage of the disciplinary process. Based on the documentary evidence opened by the Respondent, the time and steps in the disciplinary procedure are accepted. It is not accepted that the Complainant did not receive an appeal. This claim was challenged and ultimately accepted by the Complainant during cross-examination.

It is also accepted that the Complainant did not raise any issues with the receptionist’s statement during the various meetings with the Respondent with no evidence of it in the minutes of the meetings.

Mr O’Neill did not appear at the hearing to explain his decision to suspend the Complainant as a first step or the decision to invoke the Disciplinary Procedure instead of the Dignity at Work Policy. Given the nature of the Respondent’s business, which involves access to other work locations, the suspension appears to be a knee-jerk reaction and, therefore, unreasonable. Furthermore, there was no request by the woman making the complaint not to work with the Complainant.

This was compounded by the fact that Mr O’Neill’s written witness statement, dated 11 January 2023, was made before the client provided details of the original complaint. The decision to suspend which was solely permitted under the Respondent’s Disciplinary Procedure, appears to have been taken before the complaint was ever received. The Complainant only became aware of his suspension on 13 January 2023, through a letter detailing allegations of “*gross misconduct*” relating to “*sexual harassment*”.

The High Court in *Bank of Ireland v Reilly [2015] IEHC 241* noted that suspension is a serious step that can cause irreparable damage to an employee’s reputation. This view was reinforced by the Supreme Court in *O’Sullivan v HSE [2023] IESC 1*, albeit the judgment was delivered after the events in this case.

The Respondent bypassed its own Dignity at Work Policy, an extensive policy providing for informal and formal investigations into complaints of bullying and harassment before considering if disciplinary action was merited. The Respondent’s submission that the Dignity at Work Policy does not apply when the accusation originates from a client rather than an employee is not accepted.

The initial complaint came in the form of a list of points “*HR agreed*” with the original complainant. This list was then sent to the Respondent from a “*GBS Infrastructure Senior Manager*” via email. This email did not name the Complainant nor did not make any complaint of physical contact. It was described by Mr Nix as “*an abridged version*” of the complaint in evidence. It is extraordinary given how matters unfolded for the Complainant that Mr Nix was advised the original complainant “*did not want to make a big deal*” of the interaction.

Allegations of physical contact first appeared in Mr O’Neill’s statement, which noted that the Complainant put “*his*

arms around her.” The Complainant consistently denied this, maintaining that he placed a hand on her shoulder. Despite this, each stage of the disciplinary process relied on the inappropriateness of this conduct which ultimately led to the Complainant’s dismissal.

It is further noted that the receptionist’s email of 12 January 2023 also made no reference to physical contact between the parties.

The timing of the complaint from the client is noteworthy, where it is dated 08.23am on 13 January 2023, the morning of the day the Complainant was suspended, yet the Senior Manager noted she was aware the Complainant had been *“on leave pending the results of any investigation”*. The email ends with a request for the Respondent to *“let us know the outcome of that – or at least the outcome of the part that is relative to our site.”*

Throughout the disciplinary process, the Complainant consistently requested access to the CCTV footage, which was denied. While the Respondent claimed the footage was not relied upon, the evidence suggests otherwise. The only reference to physical contact came from Mr O’Neill’s account of the CCTV, which the investigators did not independently review. This further reliance on hearsay evidence is unacceptable.

Furthermore, the client’s refusal to provide the CCTV while simultaneously requesting updates on the outcome of the investigation is concerning. None of the individuals involved in the investigation identified the absence of the original complaint or lack of CCTV footage as a being wholly unfair to the Complainant, which raises serious questions about the objective fairness of the investigation.

The disciplinary process lacked objectivity and independence; Mr Nix stated that HR directed him on which policy to follow during the investigation despite his own training in dignity at work. The investigation report concluded that the evidence was *“not completely conclusive as to what happened and what was said”* yet recommended disciplinary action. The Personal Trainer who the receptionist claims witnessed the incident was not interviewed. Ms Flaherty’s outcome letter focused on the Complainant’s admission of placing his hand on the woman’s shoulder despite no direct complaint from her about this. Mr Perkins dismissed the Complainant’s good service record, repeated request to view the CCTV footage as not being relevant yet made informal inquiries with Mr O’Neill and the client about the CCTV without informing the Complainant or allowing him to respond to these private discussions.

Despite Mr Perkins’ evidence that Respondent would not allow cross examination of witnesses in response to the request from the Complainant to meet with the woman, the Respondent’s own Disciplinary Procedure provides; *“Employees may question witnesses (via the meeting/hearing manager where appropriate)”*.

The High Court in *Lyons v Longford Westmeath Education and Training Board [2017] IEHC 272* stated that: *“it is clear that as a matter of law and as a matter of fair procedures an individual whose job is at stake and against whom allegations are made would be entitled to challenge and cross-examine evidence.”*

The EAT in *Merrigan v Home Counties Cleaning Ireland Ltd UD 904/1984* held: *“The job of an employee cannot be at risk on the mere whim of a third party to the employment relationship.”*

This was reiterated by the EAT in *An Employee v An Employer UD205/2010* wherein it held: *“Every case must be considered in the light of its own particular facts. The dismissal of an employee brought about through pressure from third parties whether customers, clients, fellow employees or others may be justified provided the employer acts fairly and handles the procedure and investigation properly”*

In *Aoife O’Reilly v Laya Healthcare Limited, ADJ-00038772*, a similar arose where the Complainant was not provided with a copy of the original complaint from the client, yet the Respondent sought to press ahead with its own investigation from a third-party account of the complaint.

The Respondent's handling of this case fell significantly short of the principles of natural justice. While the standard for workplace investigation is not perfection, it does go beyond merely populating template documents without any objective independent thought and consideration for the Complainant's version of events. This is even more significant when it comes to complaints, if founded, can have a lasting impact on a party's reputation both in the workplace and beyond.

This investigation was neither fair nor independent, and the decision to dismiss the Complainant was based on flawed procedures and hearsay evidence. This failure has not only resulted in the loss of the Complainant's employment of 8 years but has also damaged his reputation.

Furthermore, I find the sanction of dismissal of applied was entirely disproportionate, given that lack of evidence against the Complainant. It is also noted there was no evidence of the Complainant having previous disciplinary sanctions applied.

I find the Complainant was unfairly dismissed by the Respondent.

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

I find the Complainant was unfairly dismissed by the Respondent.

Section 7 of the Unfair Dismissal Acts provides for redress where a Complainant has been found to be unfairly dismissed.

7.—(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 rights commissioner, the Tribunal or the Circuit Court, as the case may be, 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) payment by the employer to the employee of such compensation (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) in respect of any financial loss incurred by him and attributable to the dismissal 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 said financial loss was attributable to an action, 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, and

(d) the extent (if any) of the compliance or failure to comply by the employer or employee with any procedure of the

kind referred to in section 14 (3) of this Act or with the provisions of any code of practice relating to procedures regarding dismissal approved of by the Minister.

“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;”

The Complainant was not cross examined on the financial loss and therefore deemed to be accepted.

Having carefully reviewed the specific circumstances of this complaint, in which the Complainant was unfairly dismissed, subsequently secured short-term work from June 2023 until January 2024, and now finds himself unemployed again, together with the nature of the Complainant's business, where the complaint did not originate from a fellow employee of the Respondent or someone with whom he worked directly, and the potential for alternative work sites within his county, I conclude that the most appropriate redress is reinstatement by the Respondent on the same terms and conditions as those held prior to his unfair dismissal.

Dated: 27th of January 2025 Workplace Relations Commission Adjudication Officer: Úna Glazier-Farmer Key Words:

Unfair Dismissal – Client Complaint – Sexual Harassment- Lack of Fair Procedures - Reinstatement