

Complainant		Respondent
Parties	Roberta Girinelli	Genius Ltd
Complainant		Respondent
Anonymised Parties		
Representatives	Richard Cooke	Setanta Landers, Setanta Solicitors

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-00064658-001	09/07/2024

Date of Adjudication Hearing: 04/12/2024 Workplace Relations Commission Adjudication Officer: John Harraghy

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 parties were advised at the outset that following the delivery of a judgement of the Supreme Court in *Zalewski v Adjudication Officer* on 06/04/2021 that hearings before the Workplace Relations Commission are now held in public. That may result in decisions no longer being anonymised. Both parties were advised that an Adjudication Officer may take evidence on oath or affirmation.

The parties were also notified of these changes by the WRC in the letter confirming details of the hearing. The Complainant gave evidence on oath and she was represented by Mr Richard Cooke. The Respondent was represented by Mr Setanta Landers, Setanta Solicitors. Mr Farrel Kavanagh gave evidence on oath on behalf of the Respondent. While the parties are named in this document, from here on, I will refer to Mrs Roberta Girinelli as “*the Complainant*” and to Genius Limited as “*the Respondent*.”

The parties’ respective positions are summarised hereunder followed by my findings and conclusions and decision. I received and reviewed documentation prior to the hearing. All evidence and supporting documentation presented has been taken into consideration.

Background:

The Complainant had worked for the Respondent for various periods over a 15-year period. Her most recent period of employment commenced on 31/01/2022 when she was employed as an assistant manager. Her employment was terminated on 04/07/2024. The Complainant submits that she was unfairly dismissed. The fact of dismissal is not in dispute. The Respondent believes that the Complainant contributed to her own dismissal given the position of trust she held. She was paid €29,900 per annum and entitled to a bonus of €2,000 after year one and she also received an annual bus pass. She submitted her complaint to the WRC on 09/07/2024.

Summary of Respondent’s Case:

The Respondent accepts that the Complainant’s dismissal on 04/07/2024 was not in line with best practice. It is the Respondent’s position that the Complainant frustrated her contract of employment when she applied for a job and was called for an interview at short notice. She attended this interview during a lunch break and then she took annual

leave in order to attend a two-day trial with the prospective employer.

At a meeting with one of the Respondent's directors (TK) on 04/07/2024 the matter was discussed and due to the frustration experienced the Complainant was told that she was dismissed. While the Respondent acknowledges that this was not best practice it took place when the trust and confidence placed in the Complainant was seriously compromised. TK attended this meeting and dismissed the employee. TK did not attend the hearing and a medical certificate was provided to confirm her unavailability. The Respondent was happy to proceed without this witness. Mr Farrell Kavanagh gave evidence on oath on behalf of the Respondent. Mr Kavanagh confirmed that he is also a director of the business which is a family run retail business and has been operating for over 30 years. Mr Kavanagh gave evidence that this is a small run business which has a team of 5 staff and he described this as a closely knit team.

Mr Kavanagh confirmed that the Complainant was one of the longest serving staff and worked for them at various intervals over a 15-year period and was an assistant manager at the time of her dismissal. Mr Kavanagh stated that the Complainant returned to the role of assistant manager in January 2022 and they always had a good relationship. He described the role of assistant manager as a very important job as it is a keyholder position and responsible for managing the staff. In addition to this the role involves running the store on a daily basis and is responsible for all associated duties such as staff time sheets and dealing with any customer related issues. Mr Kavanagh confirmed that the position is one where trust and confidence is placed on the Complainant.

Mr Kavanagh confirmed that he did not attend the meeting at which the Complainant's employment was terminated. He confirmed that his direct knowledge was that the other director (TK) was on holidays and during that time the Complainant attended an interview. He understands that she was gone for more than 10 minutes and he was aware that she took a lunch break when she returned. The other director contacted the Complainant on a Sunday evening seeking the rota for the week. Mr Kavanagh gave evidence that he was aware that the Complainant had submitted a complaint to the WRC 5 days after the meeting on 04/07/2024. Mr Kavanagh stated that he did not have an opportunity to speak with the Complainant after that. Mr Kavanagh also stated that in his 30 years in business this was the first occasion he had a complaint in the WRC or any previous tribunal.

Mr Kavanagh was cross examined by Mr Cooke on behalf of the Complainant. It was put to Mr Kavanagh that as he was not present at the meeting his evidence in relation to the meeting was hearsay. Mr Kavanagh stated that he was only giving evidence in relation to his direct knowledge.

Mr Kavanagh was asked how he knew that the Complainant was offered the job she attended the interview for. He stated that TK told him. Mr Kavanagh was asked why he believed that the Complainant attended the interview at a time which was outside her lunch break. He stated that the Complainant took her lunch break later.

It was put to Mr Kavanagh that he stated in evidence that he would have preferred not to be in the WRC and he was asked why he failed to engage with the Complainant. He stated that he believed that having to respond to a complaint in the WRC was a serious matter and he did not believe that it was the right thing to do to engage with the Complainant after he had received a letter from the WRC. He confirmed that he was afraid that anything he said or anything he sent to the Complainant would be used against him later.

In response to a question from the Adjudication Officer Mr Kavanagh confirmed that he was familiar with the Respondent's disciplinary procedure as outlined in the Complainant's contract of employment. Mr Kavanagh stated that he believed the Complainant was guilty of gross misconduct by virtue of the fact that she accepted a job while employed by the Respondent.

In a closing submission on behalf of the Respondent Mr Landers stated that this was a complaint of unfair dismissal and the fact of dismissal was not in dispute. The Complainant was aware of the nature of the meeting on 04/07/2024 from the text messages she received in relation to the meeting. The meeting was fractious and the Respondent felt betrayed and as a result had lost trust and confidence in the Complainant. The Complainant chose to explore other options in relation to her work and had no discussion with the Respondent in relation to how this would align with her employment. The Complainant contributed to her own dismissal and the Complainant's contract of employment contained a "Loyalty" paragraph which prohibited her from taking up other duties while working for the Respondent or for engaging in any business or employment without prior consent of the Respondent. The Complainant's attempt to mitigate her loss also fell short of what would be required. Over the five month period she applied for 42 jobs and a large proportion of these were for managerial positions. No applications were submitted for a period of 1 ½ months. In addition to this her loss was not in the quantum she outlined as it was offset by the weekly payments she received of €524.00 and this would bring her actual loss to €3,019 from the date of dismissal to date of the hearing.

Mr Landers also referred to case law which was outlined in the Respondent's written submission.

The case of *Foley v Post Office* [2000] ICR 1283 which was referenced in the High Court by McGovern J in the case of *Doyle v Asilo Commercial Limited* [2008] IEHC 445 which noted *"that it is not the function of the Courts to substitute itself for the employer and to make its own decision on the merits of the employer's decision to dismiss. The employer, not the tribunal is the proper person to conduct the investigation into the alleged misconduct. The function of the tribunal is to decide whether the investigation is reasonable in the circumstances and whether the decision to dismiss, in the light of the results of that investigation, is a reasonable response"*.

It was also submitted on behalf of the Respondent that in a number of cases that the principle of *"Band of Reasonableness"* is a vital consideration.

The Complainant frustrated her full-time contract of employment and there is a clear breach of trust which goes to the heart of the contract of employment. It is acknowledged that the dismissal of the Complainant is less than ideal in the circumstances. However, the maximum loss is €3,019 and this should be measured in the context of the Complainant's contribution to her dismissal and it is the Respondent's position that this complaint should be dismissed.

Summary of Complainant's Case:

The Complainant gave evidence on oath. She outlined that she applied for a job in a medical practice on 05/05/2024. She received a telephone call on 27/06/2024 asking her to attend for an interview at 12.30 on 28/06/2024. The Complainant gave evidence that she attended the interview and this lasted approximately 10 minutes. After the interview the interviewer expressed an interest in recruiting her and asked her to attend two work trial days on 02/07/2024 and 03/07/2024. The Complainant stated that she confirmed that she would be able to attend on 03/07/2024 as she was on a rostered day off but she would have to check in relation to her ability to get time off on 02/07/2024. The director (TK) was on annual leave and she contacted her via text message on 30/06/2024 to request a picture of the work timetable for the following week. The Complainant explained that she did not have a copy of this but she would organise to obtain one from a colleague and send it to her. During that text message exchange the Complainant stated that she requested the 02/07/2024 off as an annual leave day and asked TK if they could have a telephone call to explain her request. TK telephoned the Complainant and she explained to TK about interview and the two days' work trial and TK did not have any problem with this.

The Complainant returned to work on 04/07/2024 and she attended a meeting with TK in the office. It is the Complainant's evidence that TK never asked her anything about the work trial but told the Complainant that she was in breach of her contract of employment. The Complainant felt that TK did not understand and insisted that she was in breach of her contract of employment. The Complainant stated in evidence that TK told her that she would dismiss her on the spot and asked her to return the keys of the shop and collect her belongings and leave. The Complainant stated that she was not given any notice and she believes that when the meeting was not going the way TK wanted she made the decision to dismiss her. The Complainant stated that she was trying to defend herself and that the points made by TK were very unreasonable.

It is the Complainant's evidence that no job offer was made to her by the medical centre and she opened a letter from the medical centre to confirm this. The Complainant stated that a reference was provided by the Respondent to the medical centre but no job offer was made.

The Complainant stated that she agrees with Mr Kavanagh that they always had a good personal and amicable relationship and she was shocked at what had happened. There was no contact from the Respondent.

The Complainant opened a number of documents which showed the applications she made for work from July 2024 to November 2024. The Complainant stated that there were no applications made in September as looking after her children at time was her priority.

The Complainant stated that she applied for the job in the medical centre as she wanted to explore other career paths. That job was for two days per week and she was hoping to see if the Respondent would reduce her working week to three days if her application was successful.

The Complainant stated that she is seeking compensation and her losses are calculated based on her not having any work for a period of 22 weeks. She is in receipt of a social welfare payment of €524.00 per week. The Complainant confirmed that she remains unemployed.

The Complainant was cross examined by Mr Landers on behalf of the Respondent. She confirmed that she had a copy of her contract of employment and that she had signed this. It was put to the Complainant that the section of the contract with the heading "Loyalty" was relevant and she was asked to outline her understanding of this clause. She stated that this meant that she had to fulfil her role and do what she was asked. The Complainant was asked what her interpretation of the phrase *"you must devote the whole of your time, ..."* meant and she stated that while in work she was expected to undertake her role.

The Complainant was asked if she accepted that she was in breach of this clause of her contract and she confirmed that she did not think that she was.

It was put to the Complainant confirmed that she received a telephone call to attend the interview and that she left work to do so. She stated that she did but the Respondent had a flexible approach and there was another senior staff member in the shop at that time. She confirmed that she left the store at 12.25 and the interview was at 12.30 and close to the shop.

The Complainant was asked when she would take lunch and she stated that there were occasions when they did not take breaks and their lunch breaks were for 30 minutes and staggered. She stated that the shop was usually busy in the afternoons. On the day of the interview there were four people working in the shop. She arrived back in the shop at 12.55.

The Complainant confirmed that the outcome of the interview was that she was offered two days' work trial on 02 and 03/07/2024. The Complainant stated that she did not ask anyone if she could leave to attend the interview as

there was no one there to ask. It was put to the Complainant that she stated that TK was confused and taken aback when she told her about the work trial. The Complainant stated that TK said that she was surprised. The Complainant was asked if she considered attending the work trial was a breach of her contract of employment and she stated that it was not.

The Complainant was asked to review her complaint form and she stated that she filled it in and submitted it. The Complainant was asked if she explored other options with the Respondent before applying for other jobs and she confirmed that she did not. The Complainant also confirmed that she had no discussions with the Respondent in relation to reducing her work hours or made any such request.

It was put to the Complainant that if an employer put a lot of trust in her then what happened would be a cause for concern for an employer. The Complainant stated that she could see from TK that it caused some concern. She noted that there was a high turnover of staff and given her relationship with the Respondent she would have expected that there would have been a discussion about these matters.

The Complainant was asked if she accepted that she did not handle the situation well and she confirmed that she did not accept. It was put to the Complainant that in her complaint form she used the phrase "my demands" and "my request" and that this would indicate that she was also not handling things well. She did not agree this was the case. The Complainant was asked if she could not have met with TK before going for the interview and she stated that TK was not there as she was on leave. The Complainant also stated that she did not have to ask the Respondent as this was a private matter. The Complainant was asked if she accepted that she had any obligations to her employer and she confirmed that she did but she did not have in relation to her private life.

The Complainant was asked to clarify what she meant when, in her complaint form, she stated that *"My manager brought up how the company paid my bus ticket and allowed me flexible time, again in a controlling way trying to make me feel sorry"*. The Complainant stated that TK made it feel she was doing her a favour by giving her the bus ticket when it was actually a contractual term of her employment. If the bus ticket was not part of her contract she would not have accepted the job.

The Complainant was asked why she considered the provision of a bus ticket so sacred and the loyalty provision of her contract was not. The Complainant stated that she was always loyal to the company and worked for them to the best of her ability.

The Complainant was asked to confirm if it was her evidence that TK stated she was in breach of her contract of employment and she confirmed that it was. The Complainant was asked if she accepted that this was the reason she was dismissed. The Complainant stated that she did not accept this and TK wanted to make her admit that she breached her contract of employment. When this did not happen TK got frustrated and made an immediate decision to dismiss her.

It was put to the Complainant that the Respondent wished to apologise for what had happened and she was asked if she held steadfast in her view that she did not in any way contribute to her dismissal. The Complainant confirmed that she did not feel she made any contribution to her dismissal.

The Complainant was asked if it was her evidence that she remained calm and composed at the meeting on 04/07/2024. The Complainant stated that she had very little time to speak and she struggled to understand why TK felt that she had breached her contract of employment. It was put to the Complainant that the Respondent's position is that she was a long-standing employee and one whom they had placed a lot of trust in. The Complainant stated that flexibility worked both ways.

The Complainant was asked if she had any dialogue with the Respondent since her dismissal and she confirmed had none. The Complainant was asked if over her 15 years employment with the Respondent she had other disputes and she confirmed that she did not. The Complainant was asked why she did not contact the Respondent and she stated that the relationship had broken down and due to the way she was treated she did not want to speak with them. The Complainant was asked if she believed her behaviour at the meeting contributed to dismissal and she stated that it did not. The Complainant stated that she assumed that TK felt betrayed and she clarified that she assumed this because TK made a fast decision to dismiss her.

Mr Cooke made a closing submission on behalf of the Complainant. He outlined that despite the best efforts of the Respondent the Complainant did not do anything wrong. The facts are that she attended an interview during her lunch break and was offered a job trial and she sought and was given consent to attend this.

The Complainant worked for the Respondent for 15 years and the company placed a lot of trust in her. They decided to dismiss her within a 10-minute period. The Complainant is not in breach of her contract of employment as she did not engage in any other work. She did not go to a competitor and she was not guilty of gross misconduct.

It was noted that the Respondent apologised and this happened belatedly. Mr Kavanagh in his evidence did not provide any evidence that the Complainant was guilty of gross misconduct. The store was managed while she attended the interview and she sought permission of her manager.

It was submitted on behalf of the Complainant that we do not know if TK felt betrayed. There was also an issue in relation to her payment and obtaining a reference from the Respondent and this should be taken into account by the Adjudication Officer. The Complainant has submitted details of 40-50 job applications and remains out of work.

The Complainant is seeking compensation for her unfair dismissal.

Findings and Conclusions:

CA-00064658-001: This is a complaint of unfair dismissal seeking adjudication by the WRC under Section 8 of the Unfair Dismissals Act, 1977. The fact of dismissal is not in dispute in this case.

The applicable law, Section 6 of the Unfair Dismissals Act 1977, as amended, (the Act) states as follows:

Section 6(1) of the Unfair Dismissals Act, 1977 provides that *“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) of the Unfair Dismissals Act, 1977 provides as follows:

- a) *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 capability, competence or qualification of the employee for performing work of the kind which he was employed by the employer to do,*
- c) *the conduct of the employee, d) the redundancy of the employee, and*
- e) *the employee being unable to work or continue to work in the position he held without contravention (by him or by his employer) of a duty or restriction imposed by or under any statute or instrument made under statute.*

Section 6(6) of the Act states as follows:

“In determining for the purposes of this Act whether the dismissal of an employee was an unfair dismissal or not, it shall be for the employer to show that the dismissal resulted wholly or mainly from one or more grounds specified in subsection (4) of this section or that there were other substantial grounds for justifying the dismissal.

The Acts deem a dismissal to be unfair until the Respondent can demonstrate that it was neither substantively nor procedurally unfair. The combined effect of these sections of the Act require me to consider whether or not the Respondent's decision to dismiss the Complainant, on the grounds stated, was reasonable in the circumstances. It is well established case law that it is the role of the Adjudicator in such cases, to consider the reasonableness of the Respondent's decision in the circumstances. As the Adjudication Officer in this case, it is not my responsibility to establish the guilt or innocence of the Complainant in relation to the events which occurred. The Employment Appeals Tribunal (EAT) in the case of *Looney and Co Ltd v Looney* UD 843/1984 provides a valuable summary in relation to the role:

"It is not for the EAT to seek to establish the guilt or innocence of the claimant nor is it for the EAT to indicate or consider whether we in the employer's position would have acted as it did in its investigation or concluded as it did in its investigation or concluded as it did or decided as it did, as to do so would be to substitute our own mind and decisions for that of the employer. Our responsibility is to consider against the facts what a reasonable employer in his position and circumstances at that time would have done and decided and to set this up as a standard against which the employer's actions and decisions are to be judged."

The function of the Adjudicator is to assess what a reasonable employer, in the Respondent's position and circumstances, might have done. This is the standard by which the Respondent's actions must be judged against. The Act places the burden of proof on the employer to demonstrate that the dismissal was fair. As part of exercising this burden of proof the Respondent needs to show that fair process and procedures were applied.

In cases where a dismissal involves gross misconduct the EAT set out the appropriate test to be applied in such circumstances. In *O'Riordan v. Great Southern Hotels* [UD1469-2003] the EAT stated as follows:

"In cases of gross misconduct, the function of the Tribunal is not to determine the innocence or guilt of the accused of wrongdoing. The test for the Tribunal in such cases is whether the Respondent had a genuine base to believe, on reasonable grounds, arising from a fair investigation that the employee was guilty of the alleged wrongdoing."

In the within case the Respondent acknowledges that *"certain aspects of the process followed in the termination of the Complainant's employment did not follow optimum best practice"*.

I have carefully considered the submissions received and evidence presented by both parties at the hearing.

There were no allegations against the Complainant other than that she was in breach of her contract of employment. This was seen as a breakdown of the trust that the Respondent had placed on her. Trust is an essential component of all employer/employee relationships. If the Respondent had an issue in relation to the Complainant they had a duty to deal with this in a manner which respected the rights of the Complainant. The decision to immediately dismiss the Complainant without any investigation or process is not what a reasonable employer would be expected to do. It is the Respondent's position that the Complainant was dismissed from her employment with immediate effect and for reasons amounting to gross misconduct. The gross misconduct that was alleged to have taken place was that the Complainant attended an interview during her lunch break. No rationale was provided for this and it is clear that alternatives were not considered. The Complainant was looking at other career opportunities and the prospective employer was in an entirely different business than the Respondent.

The Complainant did not appeal this decision although and she was not advised that she had a right to do so.

The Labour Court in *T.E. Laboratories Ltd v Jakub Mikolajczyk* [2019] 30 E.L.R. 198 stated that the guidelines in relation to disciplinary investigations in the Industrial Relations Act 1990 (Code of Practice on Grievance and Disciplinary Procedures)(Declaration) Order 200 (S.I. 146 of 2000) are *"not without reason"* and are so that *"facts*

can be separated from suspicion and rumour and explanations can be offered by anybody who could, potentially, be facing a disciplinary process”.

The outcome was dismissal with immediate effect. The Respondent failed to conduct a disciplinary hearing in line with the code or any policy.

A right to fair procedures and natural justice is implied into contracts of employment. These rights are particularly important in disciplinary matters where a dismissal may have a negative repercussion on the employee’s reputation and their prospects for any future employment. The subject of any disciplinary process should be provided with a full and fair opportunity to state his or her case as part of the investigation process. It is widely accepted that as part of fair procedures and natural justice that an employee has a right to challenge his or her accusers before any findings are made. While these rights may be less relevant at a preliminary investigatory stage, they are paramount to any disciplinary hearing which is the point at which a decision is made in such matters. Indeed, where the potential sanction could warrant dismissal such a right cannot be ignored by the employer. In *Borges v. The Fitness to Practice Committee* [2004] 1 IR 103 provides that where investigative processes can lead to dismissal, cross examination is a vital safeguard to ensure fair procedures. In that case, Keane CJ stated:

“It is beyond argument that, where a tribunal such as the first Respondent is inquiring into an allegation of conduct which reflects on a person’s good name or reputation, basic fairness of procedure requires that he or she should be allowed to cross-examine, by counsel, his accuser or accusers. [1971] IR 217.”

The Respondent has a duty to ensure that their procedures are fair and transparent. The Complainant is entitled to have time to prepare her case and to consult with a representative if she so chooses.

The Complainant did not appeal the decision to terminate her employment. It would have been useful if she had done so as this could, potentially, have provided an opportunity to look at some of the issues surrounding the disciplinary process. The fact that there was a long-standing personal relationship between the Complainant and the Respondent should have assisted.

In *an Employee V an Employer ADJ-0000381* on the subject of appeals the Adjudication Officer stated:

“An appeal is not just an afterthought or a procedure that must be completed as a matter of course. It is a very important part of the disciplinary process and the greater the sanction that has been imposed the greater its importance. An appeal allows a dismissed employee the last chance to make their case, highlight any mitigating factors and seek protection for faulty procedures or disproportionality of sanction.”

Overall, I find that there have been serious procedural flaws in the meeting which resulted in the dismissal of the Complainant. There was no process followed. It is difficult to understand why these deficiencies were not recognised at an earlier stage by the Respondent.

Where procedural deficiencies are identified these must be considered in line with section 6(1) of the Act which states that *“having regard to all the circumstances.”* In that context I note the case of *Elstone v CIE (High Court, 13 March 1989, unrep.)* it was held:

“that the mere fact of some failing in due or agreed procedures is not a final and decisive matter for the court on appeal is clear from the provision of s. (6)1), that regard must be had ‘to all the circumstances’ and not to one circumstance to the exclusion of the other.”

The case of *Shortt v Royal Liver Assurance Ltd* [2008] IEHC 332, Laffoy, J held that a central consideration to fair procedures is whether or not any purported breach of natural justice was *‘likely to imperil a fair hearing or fair result.’* Having regard to the foregoing points and the totality of the evidence as presented, I find that no reasonable

employer would have dismissed the Complainant in the circumstances. There was no investigation into the alleged breach of contract and there was no evidence to confirm that the Complainant had engaged in any other employment. I find that the dismissal of the Complainant was unfair for the purposes of the Acts and the Complainant's claim is well founded.

Regarding a remedy, objectively, this employment relationship is irretrievably broken, and, as was confirmed at the hearing, reinstatement and re-engagement are not viable options.

Redress: Section 7 of the Act, in its relevant parts, provides: *7. Redress for unfair dismissal*

(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 or the Labour Court, as the case may be, considers appropriate having regard to all the circumstances:

.... (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, or

(ii) if the employee incurred no such financial loss, payment to the employee by the employer of such compensation (if any, but not exceeding in amount 4 weeks remuneration in respect of the employment from which he was dismissed calculated as aforesaid) as is just and equitable having regard to all the circumstances, and the reference in the foregoing paragraphs to an employer shall be construed, in a case where the ownership of the business of the employer changes after the dismissal, as references to the person who, by virtue of the change, becomes entitled to such ownership.

(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,

(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, and

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

(2A) In calculating financial loss for the purposes of subsection (1), payments to the employee—

(a) under the Social Welfare (Consolidation) Act 2005 in respect of any period following the dismissal concerned, or

(b) under the Income Tax Acts arising by reason of the dismissal, shall be disregarded. (3) In this section—

"financial loss", in relation to the dismissal of an employee, includes any actual loss and 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 [2014], or in relation to superannuation;

“remuneration” includes allowances pay and benefits in lieu of or in addition to pay.

The Complainant submitted that she is seeking compensation for unfair dismissal. It is incumbent upon the Complainant to give plausible evidence on mitigation of her loss. The Complainant provided some evidence of her attempts to mitigate her loss. She obtained no work for a period of 22 weeks. While she made some efforts to mitigate her loss, I am not satisfied that she approached this with the resolve that is set out in the case of the **Employment Appeals Tribunal v Continental Administration Co Ltd (UD858/199)** where it stated: *“a claimant who finds himself out of work should employ a reasonable amount of time each weekday in seeking work. It is not enough to inform agencies that you are available for work nor merely to post an application to various companies seeking work. The time that a claimant finds on his hands is not his own, unless he chooses it to be, but rather to be profitably employed in seeking to mitigate his loss.”*

I accept that not having a reference from her previous employer creates difficulties in seeking employment, but I do not accept that this is a barrier to a Complainant seeking to mitigate her loss. I note that the Respondent submits that the Complainant’s efforts were insufficient. .

The Complainant’s obligation to mitigate her loss as set out in Section 7(2) (c) of the Unfair Dismissals Act and this is taken into consideration in any case when deciding on compensation.

For the sake of completeness, the obligation on the employee in Section 7(2)(c) is only one of six tests that are set out in that section and that Section 7(2) (c) does not have a greater primacy than any of the others. For convenience, the other five tests are again set out below:

“(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 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 provision of any code of practice relating to procedures regarding dismissal approved by the Minister”.

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

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

It follows from the foregoing extract from the Act that in considering compensation, regard must be had to all of subsection of Section 7 and these tests are not confined to the efforts of the Complainant to mitigate her loss. In this case I find that the Respondent did not meet the tests set out in subsections (a), (c) and (d). There was no right to fair procedures, and I find that the Complainant made no contribution to the decision to dismiss her.

The Complainant submitted that her gross pay from the Respondent was €29,900 or €670.80 per week. This is not disputed. Based on her weekly wage of €670.80 I estimate her loss for the period of time she was not working as

€14,757.80

Section 7(3) of the Act allows me to consider “...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 2014, or in relation to superannuation.” In the within case that the Complainant had 2.43 years unbroken service with the Respondent. I find that the Complainant will have a prospective loss of rights with regards to any future redundancy situation that may arise, and I would put a value on this prospective loss at €3,516.

Having regard to all the circumstances in this case, I find that the appropriate compensatory sum to be €13,500. This quantum reflects the Complainant’s failure to appeal the decision to terminate her employment and also takes cognisance of the limited efforts to mitigate her loss.

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 that the Complainant was unfairly dismissed, and I direct the Respondent to pay the Complainant compensation of €13,500.00 as a just and equitable amount having regard to all the circumstances of this case.

Dated: 19-12-24 Workplace Relations Commission Adjudication Officer: John Harraghy Key Words:

Unfair dismissal. Redress.