THE HIGH COURT

[2021] IEHC 543

RECORD NO. 2020 101 MCA

BETWEEN

AK

APPELLANT

AND

UNITED PARCEL SERVICE CSTC IRELAND LIMITED

RESPONDENT

JUDGMENT of Ms. Justice Niamh Hyland delivered on 5 July 2021

Introduction

1. This is a challenge to a decision of the Labour Court of 5 March 2020 upholding an appeal against a decision of the Workplace Relations Commission ("WRC"). The WRC had held the dismissal of the appellant for gross misconduct was unlawful. I have concluded that the Labour Court were correct in holding the dismissal was within the range of reasonable responses open to the employer and I therefore dismiss the appeal.

Procedural History

2. The Workplace Relations Complaint Form of 8 February 2018 outlines the appellant's complaints against her former employer, including the complaint of unfair dismissal. The WRC issued their decision on 26 April 2019 and found that the summary dismissal of the appellant was unfair. The matter then proceeded to the Labour Court where, in its decision dated 5 March 2020, the Court found the appellant had not been unfairly dismissed.

3. By way of notice of motion dated 16 April 2020 the appellant, who represented herself, decided to appeal against the decision of the Labour Court and swore an affidavit on the same date detailing the reasons for her appeal. The appellant argued that the reason given for her dismissal did not constitute bullying and harassment, the outcome of the sexual harassment complaint filed against her was wrong, the respondent's handling of the complaint led to her dismissal, and that she had been victimised by the respondent. The respondent delivered its statement of opposition on 19 June 2020 and on the same date Mr Sean Byrne, Human Resources Manager of the respondent swore an affidavit. On 6 July 2020 Mr Conor O'Gorman, Employment Relations Executive for IBEC swore an affidavit detailing the proceedings in the Labour Court.

Chronology of relevant events

- September 2015 – the appellant commenced her employment with the respondent.

- 26 September 2016 – Mr. A, co-worker makes a complaint of sexual harassment against the appellant. Mr A complained that on 29 June 2016 the appellant approached him and asked him out. The appellant reports she did not ask him out but told Mr. A he was driving her mad with his mixed messages and she wished he would make up his mind. Mr A replied that he already had a girlfriend to which the appellant said he did not. Mr A further complained of a situation on 23 September 2016 where the appellant approached him at his desk and asked could he not be nice to her for two minutes. Mr A replied by

saying he was busy with work and the appellant continued to stay at his desk staring at him for a few minutes and then left.

- 16 November 2016 –the respondent upheld two complaints but did not recommend disciplinary action. In respect of the first complaint, it was concluded the appellant approached Mr A at his place of work on two occasions, making Mr A feel as though she had invaded his personal space and making him feel uncomfortable and that this could have been interpreted by Mr. A as harassment. The second complaint upheld was in respect of photos from a Facebook page.

- 22 November 2016 – the appellant appealed the outcome of the investigation.

- 12 December 2016 – the appellant sent an email to the investigators and asked them to encourage Mr A to enter into mediation, or she would make her own complaint against him.

- 13 December 2016 – a decision on the outcome of the appellant's appeal was given, where the complaint regarding the appellant approaching Mr A and invading his personal space was upheld. The complaint regarding the Facebook pictures was overturned. The appellant and Mr A were advised to enter into mediation, however Mr A refused.

- 20 December 2016 – the appellant made a complaint of sexual harassment and bullying against Mr A, *inter alia* because he refused to enter into mediation with the appellant.

- 13 March 2017 – a decision on the appellant's complaint found there was no basis for same and that the appellant had made the complaint maliciously.

- 2 April 2017 – the appellant wrote an email to the respondent complaining about the process of investigation.

- 28 April 2017 – a disciplinary outcome concluded that the appellant's complaint was not made maliciously.

- 25 May 2017 – a HR manager of the respondent having examined the process of investigation concluded that the issues raised by the appellant did not amount to a legitimate grievance.

- 29 May 2017 – the appellant sent a detailed email to Mr. R, a colleague and friend of Mr A, in respect of the sexual harassment complaint and subsequent events.

- 12 June 2017 – the appellant sent a detailed email to Mr. A.

- 13 June 2017 – Mr A made a further complaint of harassment and bullying by the appellant following the receipt of the email of 12 June 2017.

- 13 June 2017 – the appellant was placed on paid suspension pending an investigation into the allegations.

- 14 June 2017 – an investigation process into the further complaint was conducted by HR managers Ms Carroll and Mr Dempsey.

- 30 June 2017 – a draft outcome letter was sent to the appellant by the HR managers to the effect that the emails to Mr R and Mr A were inappropriate.

- 4 July 2017 – the appellant provided a response in respect of the draft outcome letter.

- 18 July 2017 – the respondent upheld Mr A complaint on the basis of bullying and harassment and found that the action of sending both emails was inappropriate and unwelcomed by both parties and that the content of both emails was totally inappropriate and neither email should have been sent. It recommended the matter be sent to a disciplinary officer to consider whether the application of the respondent's disciplinary procedure was appropriate.

- 27 July 2017 – after a disciplinary meeting held on 24 July 2017 and reconvened on 25 July 2017 at which the appellant was present, a decision was made terminating the appellant's employment for bullying and harassment which was found to constitute gross misconduct.

- 31 July 2017 – the appellant appealed this decision to Mr Alan Gubbins, GBS Director of the respondent.

- 9 August 2017 – an appeal hearing took place before Mr. Gubbins and an employee engagement specialist.

- 24 August 2017 –the appellant's appeal was rejected, the decision noting that the appellant did not dispute she had breached confidentiality, had sent emails of a highly inappropriate nature, and that the appellant had given no indication that she would not continue with the behaviour were she to remain with the respondent. Accordingly, it was concluded there was no reason to overturn the original decision.

4. On 8 February 2018 the appellant appealed to the WRC. On 26 April 2019 the WRC upheld the appellant's complaint of unfair dismissal and awarded the appellant compensation in the sum of €37,500. The Adjudication Officer concluded that the respondent's actions in terminating the appellant's employment were not within the range of reasonable responses, although she did find that the emails sent to Mr A and Mr R were inappropriate and was not justified. However, the Adjudication Officer noted that there was no consideration of the context in which the appellant had sent the emails, and the overall effect that the investigations had had on her.

5. On 4 June 2019 the respondent appealed against that decision to the Labour Court. On 5 March 2020 the Labour Court upheld the appeal and overturned the WRC decision.

6. The affidavit of Mr Conor O'Gorman sworn on 6 July 2020 avers that prior to the hearing in the Labour Court on 20 February 2020, both parties submitted lengthy written submissions. The appellant's submissions totalled approximately 50 pages, and she also

provided additional submissions a week prior to the hearing. The appellant's arguments focused on whether her actions had constituted sexual harassment, and the respondent focused on whether the decision to dismiss was one of a range of reasonable responses open to it.

Contents of emails

7. It is important at this stage to identify some of the content of the emails that gave rise to the appellant's dismissal. I am conscious of the sensitivities in this case and so I have only referred to extracts from the emails. Further, I should preface my identification of same by saying that I do not believe the appellant intended to cause hurt or upset by these emails and she believed at the relevant time that she was justified in sending them in a misguided attempt to clear the air. However, a consideration of the content is necessary to give context to my decision to uphold the conclusion of the Labour Court.

8. In the email to Mr. R, Mr. A's friend, she stated that Mr A narrowly ruined her career, that he lies without conscience, that he has a habit of lying, that he lied deliberately and consciously to her, that he was trying to ruin her life, that he nearly bullied her to death, that he was a coward, that he made false accusations and that he was abusive.

9. In the email to Mr A, she said he had put her through an absolute nightmare, she was scared he would attack her, that he was shameless, arrogant and manipulative, that he was not a healthy individual, that sometimes she thought he was pure evil, that he lies without conscience and that if she wanted to take revenge on him for ruining her life she would have done that a long time ago.

Arguments of the parties

10. This is an appeal on a point of law and as such it means that the jurisdiction of this court is limited. I am confined to considering whether the Labour Court made an error of law having regard to the grounds raised in the appeal.

11. Those grounds are set out in the affidavit of the appellant of 16 April 2020. They are as follows:

    i. The behaviour of the appellant, which was the reason given for her dismissal, did not constitute bullying and harassment;

    ii. The outcome of the sexual harassment complaint filed against the appellant by Mr A was wrong and the respondent's handling of the situation directly led to her dismissal;

    iii. The appellant was victimised by reason of the various processes carried out by the respondent in the course of the various investigations into complaints made by Mr A and complaints made by the appellant.

12. The respondent argues that the appeal should be dismissed exclusively on procedural grounds in that the appeal was not lodged within time, no extension of time has been sought, the appellant has failed to identify the point of law on which her appeal is made,

the appellant has failed to exhibit and to identify the evidence before the Labour Court and the application is not within the provisions of Order 84C.

13. The respondent also argued that the decision of the Labour Court was substantively correct, that the behaviour of the appellant was such that it was within a range of reasonable responses to dismiss her and that there was no unfairness to the appellant.

Findings on procedural arguments

14. The appellant has not been legally represented at any stage of these long running proceedings. In relation to the argument of delay, the decision of the Labour Court was 5 March 2020. The appeal was lodged on 16 April 2020. I do not know when the appellant received the decision of the Labour Court as she does not identify that date. Assuming it was received within three days i.e. by 8 March 2020, the appeal is still clearly outside the 21-day period by roughly two weeks. It is also the case that exhibits were not properly attended to and nor was the identification of evidence.

15. Given that the appellant is not represented and more particularly, given the intensely personal nature of the matter the subject of this appeal and the distress suffered by the appellant in relation to same, I am prepared to overlook the procedural failures in relation to failing to exhibit the decision the subject of the appeal and failing to identify the evidence before the Labour Court. In fact, the appellant lodged a very extensive book of documents which included many exhibits and the respondent helpfully provided me with a book of core documents and I have more than sufficient information before me to decide this appeal.

16. In relation to time, again because of the appellant's personal situation, I will extend the time for the bringing of the appeal to 16 April 2020 and deal with the substantive issues raised by the appellant.

17. Finally, in relation to the identification of the point of law being appealed, I do not agree with the respondent that the appellant has failed to identify the point of law on which the appeal is made; those grounds are identified in the affidavit of 16 April 2020 and I deal with them in turn below.

Ground of appeal 1: sexual harassment complaint

18. This ground of appeal has two aspects – the first seeks to challenge the decision of the respondent made on 16 November 2016 upholding Mr A complaints of sexual harassment; and the second seeks to justify the email sent to Mr A, on the basis that the respondent had acted incorrectly in finding she had sexually abused him, and that decision necessitated the appellant sending the email because she had no other way of clearing her name.

19. I cannot entertain the challenge to the decision of November 2016 as that is not a decision under appeal and was not the subject of the Labour Court decision except as part of the context to the decision to dismiss. In relation to the justification for sending the email and its relevance to the appellant's dismissal, I will address that in the section below on the fairness of the dismissal.

Ground of appeal 2: victimisation

20. This ground of appeal cannot be introduced in this appeal. No claim of victimisation was ever made by the appellant in the course of the proceedings before the WRC and Labour Court. Insofar as it is in substance a challenge to the various procedural steps that were taken by the respondent, an allegation of breach of procedures was not put before either the WRC or the Labour Court and neither of them made any findings in respect of breach of procedures by the respondent. The appellant cannot introduce this issue at this very late stage of the proceedings, where the decision to dismiss her is now being reviewed for the third time by an independent body i.e. the High Court, having already been reviewed by the WRC and the Labour Court.

21. I note in this respect that there were also three different stages in the decision-making process to dismiss her –the final investigation outcome letter of 18 July 2017 (which had been provided to her in draft on 30 June 2017), a disciplinary outcome letter of 27 July 2017 and an appeal outcome letter of 24 August 2017. By the time this appeal is concluded, the appellant will have had six different occasions upon which to articulate and have considered her version of events, and six different groups of persons will have considered the issue of her dismissal. All of them, with the sole exception of the WRC, have come to the same conclusion – that the sending of the emails constituted gross misconduct which warranted dismissal.

Ground of appeal 3: bullying and harassment

22. The essence of the appellant's claim under this heading is that the Labour Court erred in failing to explain how her behaviour constituted bullying and harassment, and that her conduct did not in fact meet the test of bullying and harassment.

23. In particular she asserts as follows:

    i. Her comments were not devious, she was clear and identified herself as the author of those comments;

    ii. The email was not part of a pattern of repeated behaviour;

    iii. Her comments may have been offensive but did not undermine Mr A's right to dignity;

    iv. Her comments had to be looked at in context; and

    v. Her comments were not made with the intention of undermining or intimidating Mr A.

24. She also states that the Labour Court failed to look at the context in which she sent the email, and it made no reference to the code of practice detailing procedures for addressing the Industrial Relations Act 1990 (Code of Practice Detailing Procedures for Addressing Bullying in the Workplace) (Declaration) Order 2002 (SI no. 17/2002) in respect of the definition of bullying. Nor did it explain how her behaviour was in breach of that definition.

25. In response the respondent pleads as follows in its Statement of Opposition of 19 June 2020:

> *"The Labour Court correctly applied the law in its approach to the Appellant's claim for unfair dismissal by assessing, by reference to the available evidence, whether the decision to dismiss the Appellant from its employment was within the band of reasonableness having regard to the conduct complained of".*

26. In support of that assertion it relies upon the decision of Noonan J. in *Bank of Ireland v. Reilly* [2015] IEHC 241 where Noonan J. held:

> *"38. It is thus clear that the onus is on the employer to establish that there were substantial grounds justifying the dismissal and that it resulted wholly or mainly from one of the matters specified in s. 6(4), which includes the conduct of the employee or that there were other substantial grounds justifying the dismissal. Section 6(7) makes clear that the court may have regard to the reasonableness of the employer's conduct in relation to the dismissal. That is however not to say that the court or other relevant*
>
> *body may substitute its own judgment as to whether the dismissal was reasonable for that of the employer. The question rather is whether the decision to dismiss is within the range of reasonable responses of a reasonable employer to the conduct concerned – see Royal Bank of Scotland v. Lindsay UKEAT/0506/09/DM.*
>
> *39. I respectfully agree with the views expressed by Judge Linnane in Allied Irish Banks v. Purcell [2012] 23 ELR 189, where she commented (at p. 4):*
>
> > *"Reference is made to the decision of the Court of Appeal in British Leyland UK Ltd v. Swift [1981] IRLR 91 and the following statement of Lord Denning MR at page 93:*
> >
> > > *'The correct test is: was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view, another quite reasonably take a different view.'*
> >
> > *It is clear that it is not for the EAT or this court to ask whether it would dismiss in the circumstances or substitute its view for the employers view but to ask was it reasonably open to the respondent to make the decision it made rather than necessarily the one the EAT or the court would have taken.""*

27. Counsel for the respondent places particular emphasis upon the wording of s. 6 (1) and (4) of the Unfair Dismissals Act 1977 (as amended) which provides that:

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.

…

(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,

…

6(6) 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 of the matters specified in subsection (4) of this section or that there were other substantial grounds justifying the dismissal.

…

6(7)(a) Without prejudice to the generality of subsection (1) of this section, in determining if a dismissal is an unfair dismissal, regard may be had, if the adjudication officer or the Labour Court, as the case may be, considers it appropriate to do so —

(a) to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal,

…

28. The respondent also invoked the judgement of Humphreys J. in *Transdev v. Caplis* [2020] IEHC 403 where he says at paragraph 12 that his function is to address only the legality of the decision and not its correctness and at paragraph 16 that a losing party is entitled only to the gist of the reasons.

29. The respondent says that the Labour Court made the following significant findings of fact: the appellant sent lengthy emails which were deemed to be offensive, inappropriate, unacceptable and constituted bullying; the appellant had been told to have no further contact with Mr A, the respondent had shown great patience toward the appellant in these matters; the emails sent were highly objectionable and demonstrated contempt for the respondent's clear directions.

30. These findings were made following the detailed evidence submitted by the parties and considered the conduct of the appellant which gave rise to the respondent's decision to dismiss her. It found that there were substantial grounds justifying the dismissal of the appellant, that her termination was not unfair and that the decision of the Labour Court was fair and reasoned and took into account the context in which the emails were sent and there was no error of law.

Findings

31. My remit in these proceedings is clear from the statutory scheme, as interpreted by the jurisprudence in the area. I am not engaging in an exercise to decide whether the appellant was guilty of bullying and harassment. Rather, having regard to the express provisions of s. 6 of the Unfair Dismissals Act 1977 (as amended), I must consider whether the Labour Court erred in law in deciding that the conduct of the appellant was a ground for dismissal and that the dismissal was within a range of reasonable responses of a reasonable employer having regard to that conduct.

32. That legal test has not been identified by the appellant. Rather the appellant has assumed that if her conduct does not come within the definition of bullying and harassment, then the Labour Court erred in law in finding she was lawfully dismissed. That is an erroneous assumption on her part. In those circumstances, she has in fact not raised any question of law that goes to the legality of the decision of the Labour Court. Strictly speaking, that means that she has not made out any case and that her appeal must fail without any consideration of the substance of the decision of the Labour Court.

33. However, in view of the fact that the appellant is not represented, I will explain why I am of the opinion that (a) the respondent was correct in concluding that the behaviour was bullying and harassment and warranted dismissal (b) why the Labour Court were correct in concluding that the dismissal was reasonable having regard to the conduct of the appellant.

34. In relation to the question of bullying and harassment, the definition has been set out in the decision of the Supreme Court in *Ruffley v. the Board of Management of St. Anne's National School* [2017] IESC 33 where it is stated:

> *"At each point the statutory drafter has chosen a term at a markedly elevated point in the register: conduct must be repeated, not merely consist of a number of incidents ; it must be inappropriate, not merely wrong; and it is not enough that it be inappropriate and even offensive: it must be capable of being reasonably regarded as undermining the individual's right to dignity at work".*

35. In this case, the emails of May and June 2017 undoubtedly constituted deeply inappropriate behaviour. The first was indirect in the sense that the email was sent to a friend of Mr A; the second was direct in that the email was sent to Mr A himself.

36. There was a dispute between the parties as to whether the appellant had been told she was free to send an email to Mr A's friend or whether she had been told she should not do so. That was resolved by the Labour Court who found that at page 11 of its decision:

> *"Having regard to the information put before the Court regarding the numerous declarations by the employer that it considered matters closed and the clear directives to the Complainant to put matters behind her, the Court finds it highly improbable that the managers in question would have given the "explicit permission" alleged by the Complainant".*

37. I am bound by those findings of fact. But I might add that this dispute hardly seems dispositive of the issue. Even if the appellant had been told that she was free to send an email, the email that she actually sent was utterly inappropriate and harmful and therefore any agreement for her to contact Mr A's friend could not sanction the contents of that email.

38. I have set out above some of the contents of the emails but have refrained from setting out the entirety of same given their inappropriate nature. It is inconceivable that any employer could treat the sending of these emails as anything but conduct of a most serious kind. The appellant stressed on a number of occasions in the hearing before me and at other hearings and in other submissions that she did not intend to be malicious or harmful in the sending of these emails; that she was doing it because she felt she had no other option to clear her name; that they had been prompted in particular by the fact that at the relevant time they were sent, Mr A had started to say hello to her and acknowledge her again, having ignored her for some months, and she did not know what other way she had to deal with this but to send the emails; and that the necessity for the emails was caused by the failure of the company to reverse its decision that she had sexually harassed Mr A. I do not consider that any of those reasons in any way justify the sending of the emails. Irrespective of the justification for the sending of the emails – and I do accept that they were not sent with malicious intent but rather in a misguided attempt to resolve the situation and clear the air – I must look at them from the point of view of the recipient applying objective standards.

39. From that point of view, I have no doubt but that they could reasonably be regarded as undermining the recipient's right to dignity at work.

40. Moreover, the behaviour of the appellant was repeated since, although only two emails had been sent, they were part of a pattern of behaviour, starting with the behaviour that gave rise to the finding of sexual harassment, the making of the complaint of sexual harassment against Mr A, the decision to take that complaint because he would not engage in mediation, and the failure by the appellant to accept that she needed to move on from the events of 2016.

41. In relation to the issue that was in fact before the Labour Court i.e. whether the dismissal was reasonable having regard to the appellant's conduct (albeit not a ground of appeal by the appellant), I am satisfied that the Labour Court were entirely correct in their decision

and there is no reason to interfere with same. They made appropriate findings of fact including the following:

- That after the upholding of the single allegation of sexual abuse, the appellant was told not to have any further contact with Mr A;
- That after the respondent rejected the appellant's complaint against Mr A she was told to move past the issue;
- That on review of the two investigation processes, it was found there was no basis for a legitimate grievance and the appellant was told that matters were considered closed and she should move on from it;
- That despite this the appellant did not move on but rather sent the offending emails;
- That the offending emails were highly objectionable in content, were in stark contravention of the employer's clear directions to the appellant and demonstrated a contempt for the employer's efforts to deal with the difficulties which had endured over a significant period;
- That there was an understandable conclusion on the part of the employer that matters could not and would not be left alone by the appellant and that dismissal was a last straw and reluctant action having regard to the events.

42. Indeed, the appellant herself in the hearing before me submitted that she was obsessed by the events at the relevant time and by what she perceived to be the unfairness of those events.

43. In all the circumstances I can see no basis for any error of law in the Labour Court approach that the employer acted reasonably in dismissing the appellant on the basis of her conduct. The decision to dismiss the appellant was clearly well within the bounds of a reasonable response open to the respondent.

Conclusion

44. In the circumstances I reject the appeal and uphold the decision of the Labour Court.