

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

Employee

UD783/2005

against

MN561/2005

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr L. Ó Catháin

Members: Ms M. Sweeney

Dr. A. Clune

heard this claim at Limerick on 20th July 2006
and 18th January 2007

Representation:

Claimant: Mr. Des Long BL instructed by Mr. Michael F. Nolan, Solicitor, Toler Street,
Kilrush, Co. Clare

Respondent Mr. H. Pat Barriscale, Holmes O'Malley Sexton, Solicitors,
Bishopsgate, Henry Street, P.O. Box 146, Limerick

The determination of the Tribunal was as follows:

Respondent's case:

The Tribunal heard evidence from a Mr. B. I who was a partner in the Respondent company since 1995. The company was previously known as XXXX and the Respondent company took over XXXX. The witness accepted that the Respondent and the previous entity XXXX employed the Claimant. When they took over XXXX the Claimant continued in his employment with the same terms as he had previously. The Claimant had annual reviews and this was done on a confidential basis.

On 7th April 2005 the receptionist in the Respondent received a phone call from XXXX bank asking to speak to the person who dealt with a case of a Mr. Mc M. The receptionist referred the query to a colleague of the witness a Mr. L H. Mr. LH told the bank that he had no knowledge of a client of theirs called Mr. Mc M. Mr. L H told the witness of the query. Mr. L H spoke to the Claimant and told the witness of the conversation. The Claimant had told Mr. L H that the query was in relation to a friend of his and that he would deal with the query. The witness later became aware that the bank wanted to substantiate a loan application for Mr. Mc M.

The witness discussed the matter with Mr. L H and he asked Mr. L H to contact the bank to ask for copies of documents submitted. He did this and the bank faxed copies of the documents. It transpired that the bank had received three sets of accounts for the years 2002, 2003 and 2004, relating to a Mr. Mc M who was a sole trader. There was also a letter for the taxation affairs of Mr. Mc M, which indicated that the Respondent company represented Mr. Mc M stating that his tax affairs were in order.

The witness checked their company records and there was no record of a file for Mr. Mc M nor was there a record of a Mr. Mc M as a new client. He asked everyone in the office and no one had knowledge of Mr. Mc M. He was concerned about the matter. A reference number that the bank gave them referred to a client of theirs and the Claimant frequently dealt with the client.. The partners in the firm called the Claimant to a meeting to advise him of the situation regarding the bank and told him that they were suspending him with pay and an investigation would follow. He himself carried out the investigation.

There was no record of a file for Mr. Mc M; there was no record of a new customer client. He asked Mr. COH if he knew of a client by the name of Mr. Mc M and he asked everyone in the office also. Nobody had knowledge of Mr. Mc M, and this caused him concern. The witness explained that they had a checklist for new clients and it was standard procedure to have a file for new business or a new client. They did not have one for Mr. Mc M. The claimant was the person who dealt most with a client (KH) that they had and there was no mention of Mr. Mc M on this file or of Mr. Mc M being a subcontractor.

The partners of the firm decided to call the claimant to a meeting. They told him that they were suspending him with pay and a full investigation would follow. This was in line with the claimant's contract and the witness himself would investigate the matter.

His investigation was to establish if the respondent had a business relationship with Mr. Mc M and if he had submitted the information to the bank. He spoke to employees in the tax department in their company and enquired if there was a tax clearance certificate. He phoned the Revenue Commissioners who told him that they were not listed as an agent for Mr. Mc M. He spoke to the claimant and he compiled a report. He had initially written to the claimant to tell him that he was suspended and to inform him that he would be afforded an opportunity to supply any documentation should he want to. He wrote to the claimant to inform him that he would have to attend an investigation meeting. The claimant wanted to be informed of the specifics of the meeting/investigation.

They met the claimant and Mr. LH took notes at the meeting. Mr. LH told the witness that he was not to adjudicate on the matter as he had investigated the matter. He asked the claimant if he had prepared the account for Mr. Mc M and the claimant told him that he had. He asked the claimant about the report date and the claimant disagreed with the account date. He sought the working papers for the account and he did not get them nor did he see them. If the working papers had been provided he would have been able to verify the account. The claimant told them that it had been his intention to introduce Mr. Mc M to the office as a client and that Mr. Mc M probably did his own tax accounts for the previous years. The claimant told him that he did not know about the previous two years of accounts for Mr. Mc M but that he was sure the third years accounts were correct.

The witness explained that the final approval for account has to be passed by a partner. The bank balance verification, and the working papers have to be on file and signed by a partner. The file has

to be in the office for inspection. He was not aware that any of the partners were involved in the file and he had asked them if they were. He checked if there was a mention of Mr. Mc M and if there was an account charge and there was not which was unusual. There was no record of correspondence with Mr. Mc M. There was no mention of correspondence with the bank.

At the end of the investigation the partners considered the matter. The witness wrote to the claimant to attend a disciplinary meeting. They had decided to dismiss the claimant. The meeting was adjourned on a few occasions. The meeting took place and the claimant did not attend. They decided to dismiss the claimant because of gross misconduct and an absolute breach of trust. The claimant had a right to appeal the dismissal and he did not appeal. The witness explained that he was satisfied that the claimant was given numerous opportunities to provide documentation and evidence and he did not do so.

In cross-examination the witness agreed that they had erred in that they did not follow the appeals procedure in accordance with the claimant's contract. He explained that the managing partner had excluded himself as he had worked closely with the claimant. He agreed that they made the decision without the claimant being present. The witness clarified that they decided to dismiss the claimant at the final meeting.

He had previously discussed with the claimant and other employees about working on a contract basis. The witness denied mentioning a sum of money of €30,000. to the claimant.

Claimant's case:

The claimant told the Tribunal that the respondent employed him as an accountant for almost thirty-three years. He was dismissed in 2005 and his weekly pay was approximately €712.00 per week and the respondent paid for his VHI. The claimant relayed an incident, which resulted in his dismissal. A friend of the claimant's Mr. McM returned from the United States in 2004 and he asked the claimant what he was doing. McM was considering buying property as rental income. and the claimant and Mr. McM had a meeting in January 2005. Mr. McM called to the claimant's home and he had completed research to enable him to obtain a loan from IIB Bank. Mr. McM needed three years accounts and his wife filed the accounts for 2002 and 2003. Accounts for 2004 were not completed. There was nothing unusual in dealing with a client in this manner. The claimant had to undertake work at home due to pressure from Mr. P W a major client. He first had a meeting with Mr. McM after Christmas in 2004. Mr. McM called to see the claimant on the 17 and 18 January. Mr. McM brought bank statements, which the claimant went through. Mr. McM's wife prepared expenditure for 2002 and 2003. Accounts for 2002 and 2003 were filed with Revenue. The claimant had no dealings with revenue for those years. Accounts for 2004 were not filed until October 2005. From the draft accounts in 2004 the claimant was aware that Mr. McM had €52,000 or €53,000. The banks issued a standard letter. On a letter dated the 16 February 2005 addressed to a bank the template reference was incorrect and it was based on a letter issued by the Institute of Chartered Accountants. The reference was automatically inserted on the letter. The claimant was in a hurry as he was going to travel to Poland the following day and he did not know how long he was going to be out of the country. The claimant left with the letter in his hand and he did not submit accounts for three years to anyone. As far as he was aware the letter dated 16 February 2005 did not enclose accounts. He reiterated that he had not submitted accounts for three years. He gave Mr. McM the letter and told him to photocopy it. He had a note in his diary to set up a client. This entry was documented in his diary on 14 February to remind him to set up an account for Mr. McM.

The claimant was in Poland from 15 February until 3 March. Mr. P W had a key to the respondent's office. The reason that he did not set up Mr. McM as a client was that it was not a priority. There was a problem with Mr. P W's Polish account and he endeavoured to establish what the problems were at this time. He would have set up Mr. McM as a client on the day he had met him had he not met Mr. P W. On his return from Poland he did not go through his diary and he had no further dealings with Mr. McM. In the first week of April during lunch Mr. L H told him that the banks had contacted him regarding Mr. McM. The claimant met Mr. B. I the next day who told the claimant he was suspended. The claimant was informed that he collected a fee and used office paper. The claimant told Mr. B. I about the problem with Mr. PW's account and Mr. B.I told the claimant that there was sufficient staff in his office to deal with this account. The claimant returned his computer and he was escorted off the premises. Mr. LH was in the office and the claimant told him that he was suspended.

The claimant attended an investigative meeting sometime in May. When the claimant was asked to leave the respondent it had a very serious effect on him. It was very stressful and he was pressurised by Mr. P W who blamed the respondent for the problems with his account. The claimant had to attend the doctor who prescribed medication for him. In Christmas 2002 Mr. B I asked the claimant to Mr. P B's office and asked him if he would he consider taking a package. The claimant was offered €30,000 and the respondent would contract work to him. The claimant declined this offer and he felt the respondent would not offer him contract work. Mr. B. I did not discuss this further with the claimant and he did not give a reason for the offer. The claimant did not mention this to his colleagues. The claimant who was an employee since 1972 had an unblemished record with the respondent. No one made complaints about the claimant and he did not receive warnings about his behaviour. He was not offered a transfer to any other type of work. The claimant was suspended. He was dismissed due to the fact that he forgot to set up an account for Mr. McM. The claimant attended an enquiry accompanied by his solicitor and the claimant considered this meeting menacing. The claimant felt that the respondent used this excuse to get rid of him. The claimant had a right of appeal but he was aware that Mr. C OH a colleague would not deal with the appeal.

On 10 June 2005 the claimant was given a letter of dismissal. The claimant did not submit accounts to revenue. Mr. PB was a partner and Mr. COH was managing partner. The claimant did not appeal the decision to dismiss him. The claimant was never informed of what type of infringement resulted in a warning/suspension. The claimant was never given a warning and he was not aware of what type of act amounted to gross misconduct. The claimant stated that an employee assaulted him and the sanction that was imposed on her at the time was that she was not to repeat it again. She was not suspended or dismissed at that time.

The claimant stated that another employee who was not a partner signed letters. An employee in the tax office also signed letters and no disciplinary action was taken against her. As well as Mr. McM the claimant brought other clients to the company. The process was different at that time in the respondent. The claimant felt that the company wanted to get rid of him. The claimant was asked to sign off on accounts on behalf of the company. He was not aware if other staff did this.

The claimant documented his hours of work on a time sheet. He may have received a reminder to do so after three weeks. No member of staff was suspended for failing to undertake this. The claimant also signed his name to a document on behalf of a company CW which he was asked to do for the company's office. Ninety five to one hundred per cent of his time was taken up with Ms. P. W's account. The company had four partners. He did not know if the firm decided to suspend him. Mr. B I made the decision to dismiss the claimant and the claimant stated that the respondent

achieved its goal. The claimant was out of work for eighteen months and he did undertake some work for which he earned €4000 to €5000. He was in receipt of unemployment benefit. He obtained alternative employment on 9 October 2006. He now earns €400 gross and €300 net.

In cross-examination when asked if he knew he had to prove his loss of earnings he responded no. When asked if he prided himself in detail and thoroughness as an accountant he responded that he was as good as the next accountant. He sent a letter to the bank dated 16 February to clarify income for three years, 2002, 2003 and 2004. A letter was sent to every bank that requested details of tax affairs. The respondent dealt with the tax office and a standard letter was in place on the recommendation of the Institute of Accountants to cover an error. The reference on the letter was a template on his computer. He typed the letter to Mr. McM while he was having a conversation with Mr. P. W. The letter should have been sent on 15 February but he was in Poland

When he returned from Poland he was in the office for seventeen days up to the date of his dismissal. He accepted that he did not log Mr. McM on the computer but he stated that procedures were always broken. He would not have written the letter on headed paper if he had no intention of setting up an account for Mr. McM. When asked why he put the entry in his diary he responded that it was a reminder.

When asked that the partners were the ones who were authorised to sign off on documents he said that he was aware of the procedures but all procedures were not adhered to. The claimant stated that he knew what the result of the investigative meeting was going to be. The claimant said he was not asked to substantiate tax returns. He reiterated that the purpose of the investigation was to get rid of him. The claimant did not attend an appeal meeting, as he was ill. He received a letter of dismissal on 10 June. As far as he was aware he or his solicitor did not indicate that they requested that the managing partner should be on the appeal board. The claimant did not accept that the reason Mr. COH was not on the board was that he was too close to the claimant. Mr. B. I was not entitled to make the decision to dismiss the claimant.

In answer to questions from the Tribunal the claimant stated that he had a gut feeling that Mr. B I was told to get rid of him. He rejected the earlier offer and he did not get back to Mr. B I on the matter. He could undertake the work for Mr. McM at home. New procedures were in place in the office and the company endeavoured to attain ISO 9000 but did not achieve it.

Determination

The Tribunal finds there was an unresolved conflict of evidence. However the evidence given led the Tribunal to conclude that the dismissal was unfair due to deficiencies in procedure on the part of the respondent. The Tribunal also finds that the claimant contributed substantially to the circumstances causing the dismissal. The Tribunal allows the claim for minimum notice and awards the claimant compensation of €5692.32, which is equivalent to eight weeks gross pay under the Minimum Notice and Terms of Employment Acts, 1973 to 2001. The Tribunal awards the claimant compensation of €12,500 under the Unfair Dismissals Acts, 1977 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)