EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:	CASE NO.
Employee	UD349/2003 MN1040/2003
against	
Employer	
under	

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr. P. O'Leary
Mr J. Mc Donnell

heard this claim at Cork on 11th July
and 27to 28 October 2005
and 7th December 2006

Representation:

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Claimant
Mr. Gerard Kennedy, SIPTU, (No. 1 Branch),
Unit 4 Church Street, St. John's Square, Limerick

Respondent:
Mr. Tom Mallon B.L. instructed by Mr. John O'Dwyer,
Arthur Cox, Solicitors, Earlsfort Centre,
Earlsfort Terrace, Dublin 2

The determination of the Tribunal was as follows: -

Respondent's Case

The chief accountant (CA) of the respondent's Food and Dairy Division, told the Tribunal that the respondent was involved with A in a project whereby sludge from the respondent's effluent treatment plant was to be dried and ultimately converted into an up-market fertiliser. A and his company, OG, had already been involved in the fertiliser business for several years. The claimant, who had been employed with the respondent for several years as a financial/systems accountant, was the accountant for the project. A undertook to manufacture the fertiliser and sell it. The mixingplant for the project was installed on a part of A's premises in

Navan. The plant and manufacturingcosts for the project as well as any costs incurred by A in the venture were borne by the respondent.A new company, OGM, was responsible for the marketing and sale of the end product but the fullproceeds were ultimately to be transferred to the respondent and all sales information was to also bemade available to the respondent. Accordingly, there were payments to and from the respondent onthe project and it was the claimant's responsibility to ensure that all documents were presented, payments vouched and accounting records maintained. It was a research and development project.In the event, the project did not come to fruition for the respondent and it withdrew from it in lateAugust/early September 2002.

In early June 2002 CA had become concerned about the claimant's attendance at work and had a meeting with the claimant on 13 June 2002. Whilst CA had, on a number of occasions, spoken informally to the claimant about various issues prior to this, the meeting of 13 June 2003 was a formal one. The claimant's attendance, his failure to submit expenses and his mobile phone usage were discussed. CA instructed the claimant that he henceforth keep the respondent informed of his whereabouts at all times during his working hours. The claimant was reminded during this meeting that he was the project accountant and not the project manager of the sludge-drying project.

At around 11.10 on 18 June 2002 when CA telephoned the claimant's office he was transferred to the claimant's mobile telephone. The line stayed open for some forty-five minutes and it becameapparent that the claimant was discussing private business at a meeting in a financial institution. The conversation was mainly about property but A and his company (OG) were also mentioned. Itwas obvious to CA that the claimant was not in the respondent's Castlefarm site as he had earlierindicated, pursuant to the instruction issued to him at the meeting of 13 June. Furthermore, he wasconducting his own rather than company business. CA went to Castlefarm and as he was leaving ithe met the claimant who was returning there.

At a meeting at around 12.15 that day, with CA and the respondent's Administration Manager, the claimant failed, despite a number of opportunities afforded to him, to come clean about his movements earlier that morning but admitted to having an involvement in a company that had been mentioned at the meeting (in the financial institution). At a further meeting that afternoon CA informed the claimant that he had overheard the conversation and asked him to come clean but he again failed to make a full disclosure about his movements earlier that morning. CA told the claimant that his trust and confidence in him were shattered, that he would have to discuss the matter with Head Office and would be recommending that he be issued with a verbal warning. CA also asked the claimant for a written apology. CA had trusted the claimant and never had a problem in his taking time off for personal/family reasons but had asked on 13 June to be kept informed of his whereabouts. CA had begun to document things from this date and within a week the claimant had begun to tell lies. If he had wanted to go to the bank all he had to do was ask. CA felt betrayed.

The claimant tendered a written apology to CA on the morning of 19 June. CA gave him an hour to reconsider his version of the events of 18 June and informed him that there may be an internal audit into the sludge-drying project. At a second meeting, later that day, the claimant admitted for the first time that he had been at meeting in a financial institution the previous day. CA requested a written account from him of the events of 11, 12 and 18 June. The claimant submitted a letter of apology later that afternoon and the witness administered the verbal warning. On 20 June CA asked the internal auditor (IA) to do an audit of the project and all transactions with OG for which the claimant was the accountant. CA also informed CEO about the recent events.

IA, a former internal auditor with the respondent, told the Tribunal that she had a two-hour meeting with the claimant on Tuesday morning, 24 June 2002, in relation to her intended audit of the project. The claimant recounted the history of the project but refused to hand over the files on the

project because he maintained that they contained information which was specific to A's organisation and he had given an undertaking to A not to disclose the contents of the files. He told IA to ask A for his permission to hand over the files. It was IA's view that in his dealings with A, the claimant was at all times acting as a representative of the respondent and accordingly the files were the respondent's and there was no need to get permission of a third party to view them and she so informed the claimant. The claimant was concerned that the respondent would "shaft" A who was supplying the new/trial product to his own customers and, in the absence of a formal agreement between the two parties, the respondent might poach these.

IA reported the claimant's refusal to hand over the files to CA. At a meeting at around 14.10 that afternoon (24 June) the claimant put forward the excuse to CA that A was in a vulnerable position vis a vis the respondent as a reason for his refusal to hand over the files and, despite an instruction from CA, he still would not hand over the files to IA. The HR Manager (HRM) (at the relevant time) became involved in the matter at that stage. HRM was aware of the problems with the claimant earlier that month and of the verbal warning,

At a meeting with CA and HR at 15.00 that day, HRM informed the claimant that the audit was a routine procedure that required his co-operation but the claimant insisted that the documentation requested (in the files) was not the respondent's; that he had given A an undertaking that it would not be passed over; and that, as there was no formal agreement in place between A/his company and the respondent, the former was in an untenable position. The claimant asked them to contact A but they informed him that it was IA's prerogative to decide how to conduct the audit. The claimant advised them that the files were, at that time in transit to A but he refused to disclose who was delivering them. This had been the first time the claimant informed them that he had disposed of the files. HRM reminded the claimant that his contractual obligation was to the respondent and informed him that his non-cooperation in the audit was a serious disciplinary matter. HRM told the claimant to get advice and consider his position. There was a one-hour recess to allow the claimant to contact his trade union official.

After the recess the claimant informed CA and HRM that his trade union official could not be present and that he had advised him not to participate further in the meeting. HRM rehearsed the events of the morning and in particular the claimant's refusal to co-operate. The claimant reminded them that he had been instructed not to discuss the matter. HRM suspended the claimant with pay pending an investigation. He instructed the claimant to recover the files and to hand them over to IA and indicated to him that if he failed to do so that he (HRM) would recommend disciplinary action. The suspension was a holding operation and not disciplinary in nature. The respondent was concerned that other files might go missing. No contact had been made with A at this stage. The respondent had not considered adjourning the meeting until the claimant's trade union representative could be present. HRM was not aware of any reason for the claimant's failure to keep back-up documentation. Whilst the claimant is not a qualified accountant, he did have around twenty-five years experience in this area. By letter dated 25 June 2002 HRM confirmed the suspension to the claimant and repeated his instruction to recover and hand over the files. The files were never handed over to IA.

The respondent's CEO wanted to maintain the respondent's relationship with A and he along with IA met him (A) on 1 July 2002. A agreed that he had asked the claimant not to release information about the project generally but said that he had no intention of keeping the information from the respondent. A confirmed to them that: (i) there was nothing confidential to his business on the files; (ii) there was no reason why IA should not have access to them and (iii) that any information given to the claimant had been given to him in his capacity as a representative of the respondent. He also confirmed to them that any dealings he had with the claimant was in his capacity as an employee of

the respondent. A undertook to co-operate with IA to reconstruct the respondent's accounting records. It had been the decision of management and not IA's to meet A. IA had not told the claimant that she was contacting A but in the event the claimant had spoken to A prior to the meeting of 1 July. During the meeting A commented, "This guy (the claimant) appears to be falling on a sword for me and I don't understand why!"

IA met with A again later in July 2002. A's brother, who is an accountant, and a member of her staff were also present at that meeting. IA never got sight of the respondent's files in order to substantiate the transactions the respondent had entered into with A's companies. IA was forced to reconstruct the costs of the project from A's files. Third party original invoices for costs charged to the respondent were not available but copy invoices supporting a significant amount of the costs were made available to her by A; there was no supporting documentation to indicate certain costs charged to the respondent and there was no way to substantiate certain payments. The results of the internal audit investigation dated 22 July 2002 were opened to the Tribunal. IA did not come across anything sensitive in her audit. She had only wanted the invoices and back-up information from the respondent's files. She could not say whether A had provided her with copies of all the invoices. The Internal Audit Investigation - Sludge Drier Project dated 22 July 2002 was only a summary position due to the lack of supporting documentation. The audit has never been concluded in its entirety.

HRM wrote to the claimant on 5 July 2002 to inform him that the investigation was continuing and to again instruct him to return the files to the respondent. On 24 July 2002 HRM wrote to the claimant, setting out the complaints against him and requesting him to attend a disciplinary hearing on 2 August 2002, where he would be given an opportunity to respond to the complaints. The complaints against the claimant were: failure to co-operate with the internal audit; failure to produce the respondent's files and handing them over to A; failure to produce back-up documentation for transactions entered into with A's companies; failure, despite repeated instructions, to return the files and back-up documentation; failure to perform his duties as Systems/Financial Accountant; and, arising from his involvement in two other companies, acting in an apparent conflict of interest. The claimant was advised that he was entitled to have a representative with him at the meeting.

At the disciplinary meeting on 2 August the claimant read from a prepared script. He did not accept that he was failing to co-operate with the internal audit. He agreed that he worked on behalf of the respondent on the project and that the respondent was paying the costs of the project but reiterated throughout the meeting that due to an undertaking he had given to A, the documents, including the back-up information, had to be reviewed in A's presence. He further said that he could not give information to "shaft another company (OG)". He felt that IA had been looking for more information than she was entitled to receive and that the respondent itself had not got one customer for the new product. The claimant maintained that convincing A to join the project, without a formal agreement being in place between the respondent and A, was a major task but he had planned to draw up a formal agreement once the business was up and running; he had obtained preliminary documentation from the respondent's solicitor in this regard and he was in possession of those. During the meeting the claimant informed them that A had threatened him (the claimant) with legal action if he handed over documentation without his consent. The claimant insisted that the information on the files was belonging to OG and not the respondent and while the files contained back-up information for payments made to OG these could be reviewed in A's presence. He agreed that a large sum of money was paid over to A/his companies by the respondent even though OGX (A's company which was selling the trial product/fertiliser) owed a large sum of money (the proceeds of the sales) to the respondent but said that was a matter for A to answer; he maintained that those monies had been paid over on the basis of invoices and back-up

documentation. The claimant admitted that he had an interest in both companies mentioned during the conversation in the financial institution on 18 June; his co-director in one of these companies had done work for A but that was not, in any way, connected with the respondent and there had been no conflict of interest. HRM told the claimant that the respondent would review his position and that any other questions would be put to him in writing. He further informed the claimant that it was "a most serious matter" but that there would not be an instant decision. The claimant's suspension was continued. The minutes of the disciplinary meeting were read into evidence.

In his letter of 6 August 2002 to the claimant, HRM referred to the disciplinary hearing held on 2 August, informed him that disciplinary action up to and including dismissal could be taken against him, sought any further responses and representations the claimant might wish to make and asked for a copy of the typewritten responses which he had read at the disciplinary hearing. The claimant supplied the copy of the latter.

Having considered the claimant's responses, HRM could not accept that the claimant felt bound by a confidentiality obligation to a third party while being employed by the respondent as a system/financial accountant who was obliged to keep all files on the respondent's behalf. Nor couldhe understand the alleged threat of legal proceedings by A in light of statements made by A to IAand CEO at the meeting of 1 July (set out at pages 3&4 above). HRM communicated these facts tothe claimant in a further letter dated 15 August 2002 and gave the claimant a final opportunity tomake further responses or representations.

HRM concluded that the claimant had grossly mismanaged the function of Systems/Financial Accountant. His performance being such that trust and confidence in him had been completely undermined. In a letter dated 27 August 2002 HRM informed the claimant of these conclusions and that it was his view that he should be dismissed but that the dismissal would not be implemented until 5 September 2002 pending any appeal by the claimant to the CEO. In the event, there was an appeal and CEO upheld the decision to dismiss the claimant.

In cross-examination CA agreed whilst there were no written guidelines on the auditing of joint ventures there was a well-established custom and practice. He did not know if this was the first joint venture the claimant had been involved in. The claimant was the one putting the systems and procedures in place. CA had no doubt that the claimant had full knowledge of what information was to be kept. If CA thought the claimant did not have this knowledge he would not have made him the accountant for the project. There was no suggestion of missing funds, fraud or misappropriation; the problem was a lack of documentation. CA had a very good working relationship with the claimant over the years but he began to have some doubts about him over the preceding twelve months. Success in getting the job done depends on trusting people.

CEO's secretary, at the relevant time, told the Tribunal that her typed notes were an accurate account of her shorthand contemporaneous notes of the appeal hearing held on 11 September 2002 and that they were a fair and accurate representation of that hearing. The minutes of the appeal meeting were read into evidence.

At the appeal hearing the claimant's involvement in the project including the contents of the meeting of I July (pages 3&4 above) were discussed and the claimant was given a further opportunity to deal with the issues. The appeal was unsuccessful and the claimant's employment with the respondent was terminated with effect from 16 September 2002.

Claimant's Case

The claimant, Assistant Financial Accountant with the respondent, told the Tribunal that he had been involved in numerous projects, mostly to do with new processes, products and systems. He had been very successful in obtaining grant aid for most of the projects. He took the Tribunal through the history and background of the sludge-drying project in some detail. He had spoken to the environmental manager about the possibility of grant aid for the sludge drying process. This was following an approach from the respondent to A. A patent for the sludge drying process was registered in Ireland and several European countries. A of OG and F of the respondent were registered as the inventors. There was complementary expertise from both companies.

The claimant had a number of discussions with his manager but there were no formal procedures, documents or instructions on how the accounting for a joint venture was to be done; it was an evolving process and he had never been in this type of situation before. Since 1993 he had been involved in grant aided projects where he was project accountant, not project manager. He had dealt with government agencies on an ongoing basis on over fifty projects; many of them without back up documentation.

On numerous occasions A had requested that a formal arrangement be made in relation to the project. In this regard the claimant had asked the respondent's solicitors to draft a shareholders' agreement but he had not provided her with specific details of the agreement (May 2002) and later he asked that a heads of agreement document be produced (June 2002). In cross-examination the claimant accepted that these were only discussion documents but asserted that these were evidence that he had the respondent's interests in mind. These documents were produced to the Tribunal. The claimant, under instruction from the respondent and despite A's initial objection had talked A into assigning his share of the ownership of the patent to the respondent. A had signed the transfer of the patent on being given an undertaking that sensitive information being accumulated would only be disclosed to persons, outside those directly involved in the project, in the presence of representatives from both companies. A and his company, OG, had several years' involvement in organic based products and their knowledge and customer base was a fundamental to establishing interest in the new product. A was taking a risk as he stood to lose existing customers if the product caused problems during the trials; the respondent did not have any customers for the product. Furthermore, in the absence of any formal agreement between the parties to the project, the respondent could "by-pass" A in relation to the ownership of the process and selling the product.

The claimant had not been advised of the threat to his position at the meeting, with CA and the HRM on 24 June 2002. He did not have the files in his possession and he could not give them what he did not have. After the recess, during which he had contacted his union representative, he informed CA and HRM that he had been advised not to participate further in the meeting until his union representative was present. However, after recounted the allegation against him and he denied that he had refused to co-operate with IA. HRM suspended him with pay and, having escorted him to his desk to pick up his personal belongings, escorted him out of the office. In the absence of a formal arrangement or agreement between OG and the respondent he felt a moral responsibility to A as he felt that the project represented a commercial threat to him. He had dealt with A in good faith but was under threat of legal action from him if he disclosed details. He could not provide the documents in response to the respondent's request of 25 June and 5 July as there was only one set of documents and he did not have them. All invoices had been sent to A. In response to IA and during the disciplinary process he had requested on about five occasions that A be contacted to give his permission to approve examination of the documents. He felt that this was a reasonable request to make. He felt an obligation to A who had always acted honourably.

The claimant denied that he had not co-operated with IA; he explained to CA and HRM that he had felt obliged by his undertaking to A and had asked them several times to review the documents with A present. He was in a position not of his own making. He explained that talking A into agreeing to the project without a formal agreement had been a major task and left A in a vulnerable position. He could not hand over files because he had no files belonging to the respondent in his possession. The files were not the respondent's alone; there was no problem about making them available for the internal audit if A was present for the review. There was only one set of files. He had passed the files back to A as he wanted to honour the obligations he had given to him, in line with his undertaking to him at the time of the assignment of the patent. He informed them that A had told him if he returned the files to anyone other than himself that he would issue legal proceedings against him. He had not paid money to A without back-up information; he reviewed the costs and when satisfied that the documentation stood up he approved the payments. He had dispatched the files to A knowing that IA had requested them. He accepted that normally back-up information should be held and given to the internal auditor when requested. He did not accept that he was guilty of a conflict of interest: it was a fellow director in one of the companies, in which he was involved, who had done work for A and that work was not in any way related to A/OG's business with the respondent. He explained this to CA and HRM at the disciplinary hearing. He denied failing to discharge his duties to the respondent, stating that he did the job better than the vast majority of his counterparts. He had been very successful in obtaining grant aid for projects; in about 55 applications he had only two rejections while the average rate of rejection was between 30% and 40%.

The claimant was not told that his job was in jeopardy prior to or at the disciplinary hearing on 2 August 2002. He first became aware that his job was in jeopardy when he received the letter of 6 August 2002 from HRM. He appealed the dismissal to CEO but had not been informed that CEO had met A before his appeal hearing.

Under cross-examination the claimant agreed that the meeting of 18 June 2002 overheard by CA took place in a named financial institution, was pre-arranged and about his private business. The meeting was for the purpose of financing ongoing property development. The co-director of one of his companies (S) was to go to the meeting but at his request (that morning) the claimant agreed to go to the meeting in his place. He denied that it had been intended that he would attend the meeting at the financial institution. He accepted that on a number of occasions he had given false information about his movements on the morning of 18 June but denied setting out to mislead CA. He accepted that A was mentioned during the meeting in the financial institution. A co-director of one of his companies had done some work for A and was owed money and was under pressure.

It was reasonable for the respondent to undertake the audit on foot of having overheard the conversation in the financial institution. He had suggested to CA that he be replaced on the sludge-drying project. He accepted that his visit to the financial institution on 18 June 2002 was in breach of the undertaking he had given to CA on 13 June 2002, that he had received a verbal warning for this breach and that the warning was richly deserved.

The claimant accepted that it was entirely reasonable for the respondent to want to see back-up documentation to support the expenditure and that, as a minimum there should be photocopies of invoices available. He did not accept that he had to hand over the documents requested by the respondent.

The project manager and another person were present when A threatened legal action against both the respondent and the claimant. The claimant had not informed CA about this threat, nor had he documented it. He had the files in his possession at the time of his meeting with IA on 24 June but

dispatched them to A before he met CA that afternoon. The files were delivered to A by his son. All supporting documents were in A's possession. He would not say, at the 24 June meeting who was taking the files back to A, because he was being harassed. He took the course of action that he felt appropriate at the time.

Whilst the claimant accepted that the respondent had a vested interest in the files, so had A. He accepted that he chose to upset the respondent rather than A. He did not accept the first two points raised in the HR manager's letter of 15 August 2002: as far as A was concerned, there was nothing confidential to A or his business in the files or that there was no reason that he was aware of, why internal audit should have been prevented from seeing the files. He accepted that all information in relation to the project was given to him in his capacity as a representative of the respondent.

A told the Tribunal that he is in the business of the commercial development of compost and fertilizer. He had attended two meetings with the respondent at which CEO was present. IA was also present at the first meeting. He had impressed upon the claimant the confidential nature of the sludge drying project and the need to protect his products. After several questions on the issue the witness said that while he had not gone so far as to threaten the claimant with legal proceedings for a breach of confidentiality he could see how the claimant might have understood that to be the case. He was aware that the claimant was engaged with him, as an employee of the respondent, acting in the course of his employment and that if the claimant had breached confidentiality that it was the respondent who would be legally responsible.

He had issued invoices to the respondent and payment had been made on foot of them. He agreed that these invoices were then the property of the respondent. He agreed that the claimant had sent him files but could not remember if they contained any of his original invoices to the respondent. He could not remember telling CEO and IA at the meeting of 1 July that there was nothing in the files confidential to his business or that there was no reason why IA should not have access to them or that any information given to the claimant had been given to him in his capacity as a representative of the respondent. He could not remember anything else. He had never before received files which were the property of another company. He only looked at them as a record of OG's business. He agreed that the respondent ought to have its files to hand in case Revenue or external auditors requested them. He did not sue the claimant. All the transactions between the claimant and himself were above board.

Determination

The Tribunal is satisfied that the files in question did not contain any information confidential to A's other businesses and that there was no reason why the internal auditor (IA) should not have sight of them. It also finds that it was not reasonable for the claimant to believe that he was under a threat of legal proceedings if he handed over the files to the internal auditor.

In failing to hand over the files containing the invoices and back-up information relating to the joint-venture project to the internal auditor and in failing to do so despite several requests from his superiors and furthermore, in putting the files out of the reach of the respondent the claimant was guilty of gross misconduct. In the circumstances it was reasonable for the respondent to consider that the bonds of trust and confidence necessary to maintain the employment relationship had been sundered. Accordingly, the Tribunal unanimously finds that the respondent had substantial grounds to justify the dismissal.

The claimant was notified of the allegations against him prior to the disciplinary hearing on 2 August 2002. Whilst he was not informed prior to the hearing that it could lead to his dismissal, he

was notified of this in the letter of 6 August 2002, wherein he was given an opportunity to provide further responses and make further representations; this opportunity was repeated in the respondent's letter of 15 August 2002. Furthermore in this regard the Tribunal noted that the claimant had the benefit of representation. The Tribunal finds that the claimant was afforded fair procedures on this issue.

The majority finds that the Chief Executive's (CEO's) prior involvement in the case tainted the appeal hearing. Whilst that involvement was his participation in the investigation in that he attended the meeting of 1 July 2002, there is a risk, having regard to the facts established at that meeting, that he might not have approached the appeal hearing with an open mind. Accordingly, the majority finds that the dismissal was procedurally unfair and the claim under the Unfair Dismissals Acts 1977 to 2001 succeeds. However the majority finds that the claimant by his behaviour contributed 100% to his dismissal. Accordingly the majority is making no award under these Acts.

As the dismissal was unfair the claimant is entitled to compensation under the Minimum Notice and Terms of Employment Acts, 1973 to 2001. The majority awards the claimant €6,280.00 under these Acts.

The following is the dissenting opinion of Mr Paul O'Leary:

I disagree with the majority decision of the Tribunal that procedures used by the respondent were unfair.

Employers are obliged to conduct a full investigation into the background of any case involving a disciplinary procedure. In this case it was necessary as part of the investigation, for the Chief Executive of the respondent Co. to meet with the Chief Executive of the respondent Co. with which it had a joint venture agreement, in order to clarify an aspect of the matters under investigation. This meeting took place on 1 July 2002.

The disciplinary process did not commence until 2 August 2002. The meeting of 1 July 2002 was not part of the disciplinary procedure and as such did not in any way taint the appeal by the claimant to the Chief Executive against his dismissal for withholding and putting beyond reach documentation, including invoices and records of payments, which prevented the respondent Co. from conducting an internal audit of the project.

I find that the dismissal was fair.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____