

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:  
Employee

CASE NO.  
UD1235/2006

against

Employer

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. E. Murray

Members: Ms. M. Sweeney  
Mr. K. O'Connor

heard this claim at Cork on 22nd October 2007

#### **Representation:**

Claimant: Mr. Paul O'Donoghue, Paul O'Donoghue & Co., Solicitors,  
Oldcourt, Riverstown, Glanmire, Co. Cork

Respondent:  
Mr. Frank Nyhan, Frank Nyhan & Associates, Solicitors, 11  
Market Square, (Opposite Courthouse), Mallow, Co. Cork

#### **The determination of the Tribunal was as follows:**

##### Respondent's Case:

The Managing Director (MD) told the Tribunal that the respondent is a wholesale veterinary company. The claimant's position was Sales Manager. The Animal Remedies Act 2005 sets down the rules governing the sale of restricted pharmaceutical products. The company makes an application to the Department of Agriculture for a license to sell these products. If a license is awarded it is for three years but must be renewed annually.

In November 2005 the respondent was audited by the Department of Agriculture. During the course of the audit the Inspectors from the Department asked for further details of an invoice relating to a quantity of antibiotics. The product had been invoiced to Customer A. Customer A denied receiving this order. When MD checked the order he discovered that the claimant had delivered it. The claimant recorded on his cash receipt summary that Customer A had paid cash. The claimant confirmed this to MD in a telephone conversation on the 6 December 2005.

On the 7 December 2005 MD spoke to the claimant again. Inspectors from the Department had in the interim interviewed the claimant. The claimant had told the Inspectors he could not remember which customer had received the product. The claimant again met with the Inspectors on the 9 December 2005 and told them he could not recollect which customer had received the antibiotics order. MD told the claimant the matter had very serious implications for the claimant and the company.

MD requested further details of the transactions from the bank and discovered that the lodgement relating to the invoice was a cheque from Customer B. MD met with the claimant on the 12 December 2005 and presented the facts to the claimant. The claimant admitted that Customer B had in fact received the order of antibiotics. The claimant apologised for his actions. The claimant's explanation was that he was trying to encourage more business from this individual. MD could not accept this explanation, as Customer B had not given the respondent any business that year. MD suggested the claimant meet with the Inspectors from the Department of Agriculture again which the claimant subsequently did.

MD further discovered that the claimant had provided antibiotics to Customer C. MD initially did not think this was a problem as the claimant had told MD that Customer C was a veterinary surgeon and therefore, entitled to purchase antibiotics. However, MD later discovered that the products were provided to Customer C's partner who was not a veterinary surgeon and that this person was exporting the products to Wales.

In or around December 2005 MD told the claimant that selling restricted products to unauthorised individuals may have an impact on his career and could put the company in jeopardy. On the 13 December 2005 MD became very concerned and told the claimant he was not to attend for work until the investigation had been carried out.

The claimant telephoned MD on the 4 January 2006 to say he was feeling unwell and would not be attending for work. At the time of the 5 January 2006 the Department Of Agriculture's investigation was still ongoing. The Inspectors requested details of lodgements pertaining to four of Customer C's invoices. MD received the following information from the bank about the breakdown of the lodgements. One of the lodgements consisted of cash. The second lodgement consisted of third party cheques that the claimant said he had received from Customer C's partner. The third lodgement consisted of third party cheques of which Customer C's partner was named as the payee on the cheques. The fourth lodgement consisted of a personal cheque from the claimant made out to cash.

The Inspectors asked MD specifically about the lodgement that consisted of the claimant's personal cheque. MD met with the claimant on the 6 February 2006 and asked the claimant about the lodgement. The claimant could not recall the details. On the telephone on the 8 February 2006 the claimant told MD that he had received a large amount of cash from Customer C's partner and the claimant had lodged it to his own bank account, as he did not want to be in possession of a large amount of cash over the weekend. MD did not believe this explanation as he believed the claimant could easily have lodged the money to any account but he had lodged it to his own account. MD held a number of meetings with the claimant in February and March 2006. MD asked the claimant for a copy of the lodgement slip pertaining to this lodgement. To date MD has not received it.

In May 2006 MD and the claimant had a telephone conversation. The claimant said he met the Inspectors from the Department of Agriculture and it transpired that Customer C was not a veterinary surgeon. MD did not know this until the claimant told him.

On the 1 June 2006 MD received a letter from the claimant's doctor. The letter stated that the claimant was fit to return to work. MD had not received any medical certificates from the claimant. Prior to June 2006 the claimant had asked MD if he could return to work but MD had told him he could not. MD also received a letter from the claimant in June 2006 telling MD he was returning to work.

MD decided to meet the claimant and a meeting was organised for the 8 June 2006. MD subsequently wrote a letter dated 12 June 2006 to the claimant. In this letter MD stated that he was re-iterating the facts that led up to the termination of the claimant's employment with the company. The letter states "*Because of the protracted deception and breaches of Management trust, breaches of company policy, terms of our Wholesale License and Animal Remedies Act 2005 thus exposing the company and its directors to possible prosecution by the Department of Agriculture I had no alternative but to terminate your employment...*"

MD also stated, "*There is one unresolved matter. Invoice No 29903, dated 28.11.05 for X..... This remains unpaid and there now appears to be some doubt that X ever received this order. Can you please clarify this matter as soon as possible.*"

MD did not receive an explanation from the claimant about this matter. In December 2006 MD received a cheque from the claimant. MD enquired from the claimant which customer the cheque referred to. On the 22 May 2007 MD received a bank draft from someone who is not a customer of the company. The two cheques approximately equal the amount owed by Customer X.

The outcome of the Department of Agriculture's investigation is not yet known. To date the claimant's position has not been replaced, as MD does not yet know the outcome of the investigation.

#### Claimant's Case:

The claimant started work for the respondent in 1988. The claimant was responsible for the two sales representatives at that time as he was the Sales Manager. In 2000 the claimant became the sole sales person for the company. The claimant was not told how to check whether or not a customer was a veterinary surgeon. Customer C had told the claimant that he was a vet. The claimant stated that although legislation is in place relating to the sale of antibiotics, it was common practice in the company to sell restricted products to unauthorised individuals.

The claimant was aware that restricted products were being sold to unauthorised individuals but it was common practice in the company to do this in order to get larger sales orders. As Sales Manager he was given "a gentle hint" to have better sales figures than the previous year. The company was aware that restricted products were sold to non-regulated individuals. The claimant confirmed he had not received any warning letters from the respondent. He believes all the payments owing to the company have been paid.

During cross-examination the claimant confirmed that he is currently unable to seek new employment. The claimant accepted he had sold restricted products to unauthorised people. The claimant stated that the company condoned this but he accepted that he had made a statement to the Department of Agriculture to the effect that MD did not know anything about the sale of restricted products to unauthorised individuals.

Answering questions from the Tribunal the claimant confirmed he was unfit to work from January 2006. His doctor's letter in June 2006 was sent to MD to test him to see if he would allow the claimant to return to work.

Determination:

Having listened to the evidence and considered same the Tribunal finds that whereas there may have been some looseness in relation to the supervision of the claimant in relation to the distribution of unauthorised products neither the Managing Director nor the company were aware of or compliant in the supply of restricted products to unauthorised persons. It is clear that the claimant engaged in a considerable degree of subterfuge in order to disguise what he was doing and it is the opinion of the Tribunal that this would not have been necessary if the respondent was aware of or compliant in his activities.

The claimant was aware that what he was doing was potentially fatal to his employment and potentially destructive for his employer. The consequences for the employer could have been prosecution or revocation of their license to sell restricted products. Consequently the Tribunal is of the opinion that the contribution made by the claimant to the state of affairs that now exists was very significant indeed.

The Tribunal however finds that the manner of the claimant's dismissal left a great deal to be desired. He was effectively placed on unpaid suspension in December 2005 and remained in that state for approximately six months. Although there were meetings between the parties during that period the Tribunal finds that the procedures adopted by the respondent in the dismissal of the claimant did not meet a reasonable standard of fairness and in the circumstances finds that the claimant meets the criteria for unfair dismissal.

The claimant has been unable to work since January 2006. The claimant admitted that the letter offered to the respondent in June 2006 was designed to test the respondent and was not a true reflection of his availability to work. Unfortunately the claimant continues to be unable to work.

The Tribunal finds that the claimant has not established any loss and the Tribunal is consequently restricted in the remedies it can give. The Tribunal finds that the remedies of reinstatement or re-engagement are not appropriate in this case having regard to the breakdown in trust that has now occurred between the claimant and the respondent and finds that compensation is the most appropriate remedy. In the absence of establishing loss the Tribunal awards the claimant the sum of €3,060.00 being four weeks pay by virtue of the provisions of the Unfair Dismissals Acts, 1977 to 2001, and particularly Section 6 of the 1993 Act.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)