

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

Employee

MN713/2006
UD1084/2006

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: Mr M. Gilvarry

Members: Mr. D. Morrison
Mr J. Le Cumbre

heard this claim at Carrick-On-Shannon on 8th January 2008
and 23rd April 2008

Representation:

Claimant(s): Mr. Andrew Cody, Reidy Stafford, Solicitor's, Newbridge,
Co. Kildare

Respondent(s): Ms. Maura McNally BL instructed by Mr. Padraig Kelly, Solicitor, Farnbeg,
Strokestown, Co Roscommon

The determination of the Tribunal was as follows:-

Respondent's Case

JB told the Tribunal that her parents established the company. She commenced employment with the respondent in June 2005 the same time as the claimant. In August 2006 the claimant was absent from work and she undertook work on the claimant's computer. She discovered e-mail in the claimant's folder addressed to a firm of underwriters, which was sent on 10 August at 11.21 in which the claimant requested information on who she needed to contact in relation to getting an underwriting agency. The claimant assumed that she would have to complete a form, which had to be authorised by the financial regulator. JB also discovered other e mails which the claimant sent to CMCC on 11 August 2006 in which she stated that the business that they could take from the respondent could amount to thousands and that the claimant and her co-worker were the only one who knew about those files. The respondent undertook business on behalf of different types of

businesses in the country. The respondent was a member of the IBA and as such it paid them levies.

The claimant had burned a CD, which contained files, and the information was then deleted and moved to a recycle bin. The files contained telephone numbers and contact numbers. The file could relate to the early 90s and it also contained details of the respondent's turnover and financial status. The general life insurance business was on a separate file in a dedicated program. It had a list of monthly renewals and it was not possible to copy the data which was backed up to a tape. The witness got married on 19 August 2006. She considered the staff in the office as friends and all company employees were invited to her wedding. There was never a need for strict rules. The respondent trusted staff with company information and client files and it was all about providing a service. Her father always encouraged staff to advance to the next level and staff got time off to sit examinations and to study. IBA held certified insurance examinations. She got JH the IT expert to come in and examine the claimant's computer, and he recovered emails. She was horrified to discover that the claimant had sent e-mails to a competitor.

She was made a director in 2006 and in 2007 she bought the business. In dismissing the claimant she provided information and sought the advice of a solicitor. On 17 August 2006 it was discussed what the respondent was going to do and she did not have an involvement in the decision to dismiss the claimant. The discussion that she had with her parents concerned the contents of a letter to the claimant on 17 August. Her parents made the decision to dismiss the claimant following a response to the letter of the 17 August. She was not involved in the decision to dismiss.

In cross-examination she stated that she thought it was common knowledge that she was a director. Asked if she undertook an investigation she replied that she was shown a folder of e-mails to assist her in her investigation. Asked if there were disciplinary procedures in place in the respondent she replied there was never any need for disciplinary procedures. She did not know if there was a disciplinary procedure in August 2006. Asked that she knew the claimant's password she replied she had her own workstation and she was able to log on to all documentation. The respondent kept a list of passwords and she expected that the claimant did not log off her computer. The claimant sent e-mails during work hours.

She did not ask the claimant why she accessed company information. A letter had to be sent to the claimant to establish what she was doing. She sought legal advice on how best to approach the situation and to establish how much customer information was taken out of the respondent. The claimant was going to set up a business. She was absolutely shocked, the claimant got on very well in the respondent and she had completed examinations. The claimant was given a written reference and she never received a call regarding a reference.

In answer to questions from the Tribunal asked that there was a grievance procedure at the time of dismissal she replied that she was an employee and she did not know if there were written procedures in place. Asked that she was involved in drafting the letter of 17 August she replied that she spoke to her parents. Asked if she considered asking the claimant to a formal meeting and questioning her she replied there was initial communication and she had to wait to hear by letter. The letter from the claimant appeared to be full of untruths and it was very likely a meeting would have taken place if these were not in the letter. The commission rates were changed at the beginning of the year and the idea behind this was if the respondent had a good month that staff would benefit. The method of calculation was changed, as the respondent was not doing very well.

JH IT Expert told the Tribunal that he had received a telephone call from the claimant and her

co-worker who considered establishing a business. He confirmed he was later called in by JB to examine the claimant's computer. He located emails on the computer, which had been sent and then deleted, and found records of the claimant's internet usage, including accessing websites. He could not say how long was spent on internet use. On a website there was a folder area, which downloaded files into a folder and they remained there until they were cleared out. The data could be modified and accessed and the file name remained the same. Cavan County Council website was downloaded and a web page containing twenty different companies was viewed.

The 3rd witness for the respondent KB told the Tribunal that she and her husband established the respondent business in 1970. The claimant commenced employment in 2005. Her daughter JB became director on 11 July 2006. KB and her husband have since retired. Prior to her daughter's wedding in August 2006 her daughter telephoned her and informed her that the claimant had sent e-mails seeking an agency with a company (W). She discovered that the claimant and a co-worker had sent e-mails to another company regarding setting up their own business. She contacted her solicitor and she engaged an IT expert to look at the computer. It was discovered that the claimant had downloaded data from the respondent's computer and sent it to her computer at home. The claimant and a co-worker were ready to set up a business and had decided on the location of the office. She decided to write to the claimant and her co-worker and suspend them for a week. The claimant's co-worker resigned. The information coming in kept getting worse and worse, the IT expert was finding more emails and KB felt under siege, she was terrified and as the business was confidential it was very worrying. The respondent did not have rules in place in relation to the use of e-mails in work, as they trusted employees. The respondent was a member of the Insurance Brokers Associations, it paid for membership and was given specific information. The claimant was not a member of the Irish Brokers Association and she could not allow the claimant back to the office after this. She along with her husband and daughter JB made the decision to dismiss the claimant. The respondent paid for study leave that the claimant took. The claimant was a good worker and she was given an eight per cent increase at Christmas.

In cross-examination KB stated that she contacted her solicitor to advise her what to do and she sent a letter to the claimant on 17 August 2006. She had not considered dismissing the claimant prior to receiving the letter of 21 August 2006. KB furnished the claimant with a letter of dismissal on 28 August 2006. Asked that if she along with her husband and daughter JB made the decision to dismiss the claimant she replied that was correct as far as she knew. Asked that her daughter in her evidence said that she had no part in dismissing the claimant she responded she did not remember what JB said. At the time of the claimant's dismissal she did not have disciplinary procedures in place. If a staff member had a problem they reported to KB or her husband. The respondent did not have written grievance procedures or policies in place regarding the use of the Internet or the computer.

A witness told the Tribunal that the claimant registered for unemployment benefit from 5 September 2006 until 31 January 2007 and from 28 February 2007 until 9 April 2007.

Claimant's Case

The claimant told the Tribunal that she commenced employment with the respondent on 9 June 2005. In July 2006 the respondent wanted to introduce a new commission structure. It was the second time that it had happened and she was upset and disappointed that she was being paid less. She had financial commitments. The respondent's sales had increased and she undertook the job to the best of her ability and was getting paid less. She contacted a company by e-mail to see if she

could get an agency for her and her co-worker. She did not contact other brokerages or insurance companies. She tried to see if she could locate premises in Ballyconnell. She believed that her co-worker did. She was getting nowhere with the plan. The only option open to her was to buy out a brokerage which was not practical. The plan was going nowhere and would not have gone ahead. She was ill subsequent to 11 August 2006. No one from the respondent made contact with her from the 17 August 2006 to the 28 August 2006 and she did not receive e-mails.

She worked in Donegal town for four weeks in February 2007. She was unemployed from 28 February 2007 until 9 April 2007. From 9 April 2007 until December 2007 she worked with a brokerage in Cavan. She now works in her parents' business. She had a good relationship with the respondent and the reference, which she received from the respondent, did not reflect this. The reference did not assist her in obtaining employment, it had the opposite effect. The respondent did not have a policy regarding e-mails or internet use and it did not have disciplinary or grievance procedures.

In cross-examination the claimant stated that setting up a business was not in conflict with the respondent. Asked how she was going to get five to ten per cent of customers she replied that once they had established a business she hoped that some of the clients might contact her. They would have advertised. She did not contact the respondent after she received the letter of 17 August and she was asked to respond in writing. Asked if her co-worker told her that she got a letter she replied her co-worker sent a letter of resignation. She did not ask her co-worker why she resigned, as she was frog marched out of the office. The claimant accepted that the sending of e-mails and accessing the website was not 100% above board, but the majority of employees would not inform their employers if they intended setting up a business. It wouldn't have happened if she was treated with respect. She contacted (W) and she was aware that her co-worker contacted other insurance companies. She did not pay fees to the Irish Brokerage Association. Asked would she be happy to employ someone that she could not trust she replied absolutely not, but she had done nothing to warrant her dismissal.

Determination

The evidence heard by the Tribunal showed that the underlying facts surrounding the dismissal were substantially accepted by both parties. The claimant has accepted that she in conjunction with a co-employee had researched and taken steps towards the establishment of a competing brokerage in an adjoining town. The claimant admitted under cross examination that calls had been made to various insurance companies by her co-worker enquiring about the availability of agencies, premises had been sought, accountants had been consulted and it was clear to the Tribunal that a large volume of the preparation had been carried out at work using the employers' computers and e mail facilities. The claimant admitted that she had not been acting in an above board manner and that she communicated about the business plans to her co-worker via e-mails at work to avoid anyone hearing of the plans.

The employers' conduct in suspending the claimant on discovery of the e-mails to (W) so as to seek an explanation from the claimant was acceptable practice. The answer received was not responsive to the queries actually raised as the employer enquired about e-mails and communication to her suppliers/contacts and the answer given related to suppliers/clients. In the meantime the Tribunal accepts that the employer had discovered additional e-mails including most importantly the e-mail of 11 August from the claimant to C McC.

The unresponsive nature of the reply from the claimant which continued to conceal the claimant's

efforts to set up a competing brokerage combined with the frankly quite worrying contents of the e mail to CMcC and other e mails and information found on the claimant's computer were given as the reason for the dismissal of the claimant. While fair procedures would have required that a disciplinary hearing at which the claimant could be represented should be held before any decision to dismiss should be taken, and fair procedures would furthermore dictate that JB should not have participated in the decision to dismiss having carried out the investigation, the decision to dismiss was understandable. In a professional undertaking such as the respondent's a large value is placed on confidential client information and the actions of the claimant in using the respondents time and equipment in a secretive fashion and deliberately and consciously concealing same from the respondent, combined with her less than helpful response to the initial letter from the employer badly damaged the necessary trust that must exist between an employer and employee in such an undertaking.

The conduct of the claimant went beyond mere planning to set up a business, which even while done on the employer's time would not justify summary dismissal, to such an extent as to create reasonable grounds for the employer to fear that the claimant would abuse confidential information in doing so. Therefore if fair procedures had been followed by the respondent it is possible that dismissal would not have been found to be unfair.

However, the employer did not do so. It is mandatory for the employer act reasonably and to follow fair procedures and it is difficult to envisage a case where dismissal will be deemed to be fair if such procedures are not followed, and therefore we find that the Respondents' failure to follow fair procedures renders the dismissal unfair. The claimant however contributed to a very large extent to her own dismissal.

In the circumstances the Tribunal find that compensation is the most appropriate remedy and taking into account the claimant's contribution measures the compensation at €1,000 under the Unfair Dismissals Acts, 1977 to 2001. Because she did not receive minimum notice the Tribunal awards the claimant one weeks' minimum notice in the amount of €500 under the Minimum Notice and Terms of Employment Acts, 1973 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)