

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

Employer
- Appellant (The Employer)

UD151/2008

against the recommendation of a Rights Commissioner R-055454-UD-07/SR
In the case of

Employee
- Respondent (The Employee)

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. M. Gilvarry

Members: Mr. P. Pierson
Mr. P. Clarke

heard this appeal at Longford on 11 November 2008
and 18 February 2009

Representation:

Appellant:

Mr. Eamonn McCoy, IBEC,
Confederation House, 84/86 Lower Baggot Street,
Dublin 2

Respondent:

Ms. Claire Duignan, Groarke & Partners, Solicitors,
32/33 Main Street, Longford

The determination of the Tribunal was as follows:

This appeal arose as a result of an employer (the appellant) appealing against a recommendation of a Rights Commissioner R-055454-UD-07/SR in the case of an employee (the respondent)

The employee worked for the employer in Scotland from July 1996. In January 2005 the employee was seconded to the respondent's Irish operation. His role was to assist in the opening of new stores and to this end he was involved in Dublin, Killarney and Longford. From October 2005 the employee sought to work on a permanent basis in this jurisdiction and to that end was appointed to the position of Trading Manager in the Longford branch, he was effectively the Deputy Store Manager, and the Store Manager (SM) was his direct superior.

Whilst the employer operates a separate payroll in its Irish operations from that in the UK, both payrolls are administered from an office in the UK. At the time of his appointment as Trading Manager in Longford the employee was still on the UK payroll. His salary, which is paid on a four-weekly basis, was paid direct to a joint bank account in Scotland, which the claimant held with his wife from whom he was by now estranged. In early January 2006 the employee, whilst in Scotland, took steps to end his involvement with the joint account held with his wife. From that point on the only interest the employee had in the joint account was when amounts were transferred to his Irish bank account from the joint account. These transfers took place on 2nd and 27th February 2006 and it is common case that they arise from his salary legitimately being paid into the joint account.

The employee set up an Irish bank account in August 2005. He was taken onto the employer's Irish payroll in March 2006 and received his first salary on the Irish payroll on 15 March 2006. Unfortunately, due to an administrative error in the employer's payroll office, when the employee was transferred to the Irish payroll he was not removed from the UK payroll. The UK payslips were sent by post from the UK to the employee at the Longford store. It is common case that SM was, on occasion, involved in the distribution of these payslips to the employee prior to March 2006. The Irish payslips, which are a different colour from the UK ones, are sent to the store in a courier bag and then distributed to the employees of the store. The employee's position is that on several occasions he brought to the attention of SM the fact that he was still receiving UK payslips and that SM on several occasions was the one who gave the UK payslip to him. The employee's position is further that he contacted the payroll manager (PM) in the UK about the continued arrival of UK payslips and that PM told him that she would look into it. He had followed up this phone call with an email to her. The employer's position is that SM denied any knowledge of UK payslips being received by the employee until late January 2007 when he found a UK payslip for the employee who was at this time out sick. This payment was credited to the joint account on 25 January 2007

SM reported this discovery to the Human Resource Manager (HR). HR contacted PM who was able to confirm, after checking, that the employee was indeed on both payrolls. HR then requested SM to meet the employee to discuss the situation. This meeting did not take place until 26 February 2007 owing to the employee being on sick leave and then being on paid suspension over an unrelated matter. The notes of this meeting state that it was a disciplinary meeting but the employer's position is that the meeting was an investigative meeting. The employee, SM and a junior manager acting as the note taker attended it. The employee confirmed that he had been receiving the UK payslips and that he had spoken to PM about them and that SM had described it as merely a paper exercise and that nothing was being transferred out. At the conclusion of this meeting the employee was warned that what had occurred was potentially gross misconduct and he was suspended with pay pending the outcome of the enquiry.

Another store manager was appointed as the investigation manager (IM) by HR and conducted an interview with the employee on 15 March 2007. A note taker accompanied IM and a fellow employee accompanied the employee. At this meeting the employee told IM that both SM and PM were aware that he had been receiving UK payslips. IM stated that the purpose of the investigation was around breach of trust but that the employer was not accusing the employee of misappropriation of any monies at that time. The claimant accepted that he should have followed up on the matter but told IM the reason that he had not was because SM had been aware of them as they came through his office and he had spoken with SM about them. IM undertook to arrange a search for the email that the employee said he had sent to PM in 2006 about the UK payslips. The employee undertook to obtain bank statements relating to both the Irish and the UK joint account. Later on 15 March 2007 IM interviewed SM and at this meeting SM accepted that he had been

involved in the distribution of the UK payslips to the employee prior to his going on to the Irish payroll. However he stated that he had not seen a UK payslip from that time until the one he saw in January 2007.

IM met the claimant again on 26 March 2007 to continue the investigation process with the same people present as on 15 March 2007. At this meeting IM put to the employee the question of when it would have been reasonable for the employee to escalate the matter of the UK payslips. The employee stated that he thought the whole thing was just a paper work exercise. The employee again met IM and the note taker, without anybody accompanying him, on 23 April 2007. As the employee did not have any bank statements by this time IM told the employee that his recommendation was to move things to a disciplinary hearing. IM again raised the issue of breach of trust with the employee. IM wrote to the employee on 26 April 2007 to confirm that the matter had moved to the disciplinary phase. The issue for consideration was “gross breach of trust”. The employee was asked if he wished to see a copy of the employer’s disciplinary procedure before the hearing.

A third store manager was appointed as disciplinary manager (DM) by HR. DM conducted a disciplinary meeting on 16 May 2007. A Trading Manager accompanied DM and a different fellow employee from the one who had accompanied him during the investigation process accompanied the employee. The employee still did not have the UK bank statements at this meeting. DM went through the notes of the meetings compiled by IM. And after a 45 minute recess told the employee that he was to be dismissed due to his lack of actions, which meant there was a lack of trust as the onus had been on the employee to chase the issue to get it resolved. The dismissal, effective 22 May 2007, was confirmed in a letter of 21 May 2007 from DM to the employee. The first three paragraphs of this letter state

“Further to the hearing held under the company’s disciplinary procedure on 16 May 2007, I am writing to confirm my decision. At the hearing I heard evidence about the following issue:

- Continual receipt of payment through the UK payroll while also receiving payment having been transferred to ROI payroll. Failure to take the appropriate actions to investigate the UK payroll statements that you received and also your failure to bring it to the attention of payroll management.

Having given consideration to all the information presented at this hearing, I can confirm you will be dismissed on a summary basis with payment in lieu of notice with effect from 22 May 2007 for gross misconduct, namely breach of trust.”

In accordance with the employer’s procedure the employee exercised his right of appeal against the decision to dismiss him. This appeal was heard on 28 June 2007 by a fourth store manager (AM) who was accompanied by a fifth store manager. The employee was not accompanied at the appeal hearing. AM went over the notes of both the disciplinary and investigative meetings with the employee and then wrote to him on 29 June 2007 denying the appeal and confirming the decision to dismiss.

Determination

There is a fundamental conflict of evidence between the claimant and the respondent’s witnesses in

this matter. The Respondent does not claim Mala Fides, or that the Claimant intentionally set out to enrich himself by claiming two salaries. They accept the situation arose initially out of a mistake on their part. They do however maintain that the claimant should have done more to remedy their mistake, and that his failure to do so was a breach of trust, justifying his dismissal.

The question of who knew about the employee continuing to receive UK payslips after he had transferred to the Irish payroll and when, must be determined. HR became aware some time in January 2007, when she was told by SM, and immediately contacted PM who confirmed that the employee was on both payrolls. The employee's position that he spoke to both SM and PM about the continuing UK payslips was checked out by IM who as part of his investigations telephoned PM. His evidence was that PM had no recollection of any conversation with the claimant about his still being in receipt of UK payslips. PM is no longer employed by the employer and was not made available to the Tribunal. It seems to the Tribunal that PM had responsibility for the department that made the original error, which led to the employee not being removed from the UK payroll. The Tribunal notes that no evidence was proffered of any investigation into the actions of PM or her department in this case. It is common case that SM had some involvement in the distribution of the UK payslips to the employee before he transferred to the Irish payroll. It was never suggested to the Tribunal that there was any difference in the method of distribution of the employee's UK payslips after his transfer to the Irish payroll. The Tribunal finds it difficult to accept that SM was unaware that the employee was continuing to receive UK payslips until January 2007. The Tribunal is satisfied that the employee did bring the matter of his continuing receipt of UK payslips to the attention of management before SM highlighted the matter in January 2007. The employer made the case that the employee should have escalated the matter to a higher level of management than SM. The Tribunal, being satisfied that the employee was not aware that monies were still being lodged in the joint account, accepts the employee's position that SM did not regard the matter as being serious. The Tribunal must accept the claimant's evidence that he did inform PM or her department of the continuing payslips, in the absence of direct evidence to the contrary. Even if we did not accept this it is hard to see what further the employee should have done. There would therefore appear to be no justification for the claimant's dismissal.

Having considered the facts of the matter attention must now turn to the procedures adopted by the employer. The Tribunal is not satisfied as to the separation, if any, between the investigative and the disciplinary process, and the sufficiency of the investigation. The disciplinary process handled by DM was merely a case of DM going through the papers prepared by IM. The employee was afforded no opportunity to challenge or cross-examine the evidence of SM and PM at any stage in the disciplinary process. This was unsatisfactory, and not in accordance with best practise.

For all these reasons the Tribunal is satisfied that the dismissal of the employee was unfair. The Tribunal feels compensation is the appropriate remedy and awards the claimant €38,000.00 under the Unfair Dismissals Acts, 1977 to 2007

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)