

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

Employee - *claimant*

CASE NO.

UD825/2008

against

Employer – *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr D Hayes B.L.

Members: Mr T O'Sullivan
Mr G Whyte

heard this claim at Dublin on 28th November 2008, 27th March 2009 and 3rd July 2009

Representation:

Claimant: Mr Seamus Clarke BL instructed by Mr Donough Shaffrey, Shaffrey & Co., Solicitors, 1 Aspen Court, Cornelscourt Village, Dublin 18

Respondent : Mr Michael Coghlan, Coghlan & McNally, Solicitors, 11/13 Sundrive Road, Kimmage, Dublin 12

The determination of the Tribunal was as follows:

Background:

The respondent is an I.T. company, which provides, inter alia, accounting and data management packages and technical support. It has two offices, one in Finglas and one in Naas.

Respondent's Case:

The Sales Manager, LM, gave evidence that on the 11th June 2008, he was asked by a friend of the claimant (hereinafter CB) to register a domain name for a new company (hereinafter AB). LM had previously registered domain names for CB.

Subsequently, the claimant's husband, DD, who had been providing consultancy services to the respondent, withdrew his services on the 1st July 2008. This event raised a suspicion with the SalesManager and he considered there was something unusual about the behaviour of the

claimant and her husband up to the 1st July 2008. LM discussed his concerns with JM, the sales director. As instructed by JM, LM did an internet search and discovered that the claimant was a director of the AB entity. From looking at AB's website, LM formed the view that there were similarities in the range of services offered by AB and the respondent. The Sales Manager reported these findings to the Sales Director.

JM gave evidence that he has overall responsibility for sales and marketing. He confirmed that LM had contacted him with a number of concerns after DD had resigned. The internet search had provided them with an address for AB, which was trading and had opened an office.

From the Companies Registration Office they learned that the claimant was a director of AB. AB was carrying out the same business as the respondent. JM was concerned for the respondent's business and its employees. He asked JW, the technical director, to vet correspondence from the claimant's email. Screenshots of emails were opened to the Tribunal. From JW's report it was discovered that on the 30th June 2008 the claimant had sent a total of 57 emails to various email addresses, including those for DD, CB, her own personal email account and to an email address for AB. The emails contained customer codes and keys for software packages. Keys and codes are used to prevent the unauthorised use of software. If a customer wants an enhanced software package the respondent gets a code through a software supplier to open up the customer's software package.

JW's findings were sent by email to MC, the Managing Director who was on annual leave. It was decided that JM would place the claimant on paid leave, pending an investigation. JM met the claimant on the 9th July 2008 and gave her a letter, which stated it had come to light that she was listed as a director of AB. The letter stated that her husband had recently sent an email to the respondent's clients saying that he was no longer working with the respondent but was now working with AB. The letter further stated:

"It is critical for the business to investigate the situation as a matter of extreme urgency.

To this end, pending the outcome of this investigation, you are being placed on paid leave with immediate effect in order to enable the company the necessary time to investigate the matter in greater detail.

This in no way reflects your position with the company at this point in time and we would ask you to co-operate fully with the company in attending any meetings necessary to assist the company in bringing these matters to a conclusion."

During cross-examination JM did not recall the claimant speaking to him previously about the wisdom in sending keys and codes via email to avoid delays. He acknowledged that logging on remotely to the computer system can be a slow process.

JW gave evidence that he primarily runs the service division. JM had asked him to provide a report, based on his analysis of the claimant's non-work related emails. On the 30th June 2008 an inordinate number of emails passed to DD, CB, the claimant's own personal email account and to an email address for AB. A test email was first sent to the new company (AB) from the claimant's account on the 30th June 2008. Fifty-six emails followed.

The majority of the information contained within the emails was release codes to fix and enhance existing software. The witness provided an example of the Take Five accounting system for which

there is a license fee to use the product and in some instances a charge for a new release key. Details are unique to each individual customer. Another email contained an entire list of clients' payroll product. The day after the emails were sent, DD resigned with immediate effect.

JW told the Tribunal that non-corporate email accounts can be more easily hijacked. The respondent's email accounts have security measures in place to protect against this.

JW told the Tribunal that he could not see a valid, technical reason why the information had left the company in the form that it did. If the claimant had raised an issue that she had a difficulty looking at information at home it could have been investigated. He himself works from home on occasion without difficulty. Remote access is available and a firewall is in place, which requires the credentials of a username and password. Once he presented his report, JW had no further involvement.

During cross-examination JW disagreed that the keys and codes did not have a commercial value. He confirmed that he was previously a director of another company. He formally resigned as a director of this company in November 2005. The respondent was aware of this from the time he commenced employment in April 2006.

The Managing Director, MC, of the company gave evidence on behalf of the respondent. The claimant commenced employment in July 2005. The claimant was a good employee who had received performance-related bonuses throughout her employment. The claimant had shown a good aptitude on the marketing side and also in organising seminars. They had tried to get her more involved and to delegate the administration to others. She was very good with customers.

He referred to the terms and conditions of the claimant that she signed shortly thereafter. In particular to two clauses;

1. "No employee can carry out work which could take business from the company. (We operate a no nixers policy)"

This clause he explained was because of past experience with employees leaving and soliciting business from their clients.

2. "Under no circumstances will customer information i.e. Database or Accounts information be removed from the control of the company without the written permission of the Managing Director"

This relates to similar past experience where information was removed and used in their new employment.

He referred to a circular published AB that he was given when he returned from annual leave on 21st July 2008. This document announced the appointment of AB's management team. DD was named as part of this team; he had previously done consultancy work for the respondent. Another individual named is CB, the claimant's best friend who also is the daughter of the CEO of this new company. The CEO also had previously worked with the respondent. This circular outlined the services that they offered some of which crossed over with the respondent's. The new company was providing advice and support on various technologies most of which were also provided by the respondent. The general terms and conditions of the new company were also similar, although not identical, to the respondent's.

Previously, in March 2008 the claimant had approached him and asked if she could have every

Tuesday off, he queried as to why but she would not tell him. He allowed her to take this one-day a week off.

JM telephoned him while he was on holidays to bring all of the above to his attention. It was decided to place the claimant on paid leave while they investigated the situation.

On his return from annual leave, a board meeting was held. At this meeting it was decided that they would have to talk to the claimant. He telephoned her after the board meeting and arranged to meet with her. Throughout the process he attempted to keep an open mind. He had tried to get across to her that this meeting would be informal, just to obtain her facts and views. He explained that the practise in the company is that they tend to talk to each other rather than write. The claimant had asked him if she could bring someone with her, he did not think it was necessary as it was in the early days of the process and he was only trying to find out what had happened.

The meeting took place on the 25th July 2008. The claimant arrived at the meeting with CB, who was not a fellow-employee. CB put a tape recorder on the desk and MC felt that that set the tone of the meeting. He told the claimant that if the tape recorder was not removed he would terminate the meeting. The tape-recorder was put away under protest and the meeting proceeded. MC said that he was making no accusations but that certain matters required answers. He went through a list of questions and wrote down the claimant's answers after the meeting.

She admitted that she had sent the respondent's customer spreadsheets to her own email address as she had needed them locally on her hard disc as it was easier to use. As to why she had sent emails to her husband and AB, it was the same reason as it was easier to access, and that she was having problems with her gmail account and had set up an AB mail account. She did not explain why she sent the emails to her husband, other than that it was a mistake. She admitted she was a director of the new company but could not remember for how long.

MC explained that he felt that matters were serious and that they should take a break. He also wanted to talk to his colleagues. Having deliberated with his colleagues, he decided that he required the weekend to consider the matter.

He wrote to the claimant on Monday 28th July setting out that in his opinion that what had occurred was a serious breach of trust on her behalf. Her actions were a breach of the terms of her contract of employment and amounted to gross misconduct. However, he wanted to be fair to the claimant so he placed her on one week's suspension, informing her that if she wished she could make further representations on her behalf. If not, her employment would be terminated on the 4th August 2008. He said that he wanted to give her a further opportunity to present such further evidence or explanation, as she saw fit.

At this stage he had not, he said, made his mind up to dismiss the claimant, he thought she might come back with a plausible reason for her actions. The claimant responded by letter on the 29th July, raising the fact that the meeting on the previous Friday was informal. This witness explained that he had intended this meeting to be informal, however, when the tape recorder was placed on the desk it became formal. Within this letter the claimant requested that he outline the grounds for her dismissal and that the process did not amount to a thorough investigation, as detailed in her first letter of suspension.

This witness replied by requesting the claimant to attend a meeting on the 30th July to allow her to explain why she thought the grounds given for her dismissal was insufficient. He also asked her to

put forward any additional information that she would like the respondent to consider before reaching its final decision. The claimant replied by letter that she would not be attending the meeting unless he outlined the reasons in writing for her threatened dismissal.

MC explained she had been informed an investigation was taking place into her having become a director of AB. She was aware from her terms of employment that she had breached her contract by sending information out of the company. She had not sought permission to send these emails. He explained that the claimant had not been suspended by JM, but put on paid leave.

The Managing Director wrote to the claimant on the 30th July detailing the reasons for her proposed dismissal. As a result of the answers she gave to the question posed to her in their opinion her actions could amount to gross misconduct. He went on to explain that she had emailed customer account information to a gmail account of AB in excess of 50 times which she had also copied to her husband. That her terms of employment stated that she must seek written permission of the Managing Director before removing sensitive information. He invited her to let him know if she wanted a further meeting with them to make representation on her behalf before close of business on the 1st August before the respondent would make their final decision. The claimant declined by letter on the same day to attend a further meeting. After this the decision was made to dismiss her.

It took them a month to recover their laptop; the claimant had worked from home and had remote access to company information. They sent a solicitors letter on the 12th September seeking the laptop's return. They received it a week later and the laptop had been professionally cleaned. The new company have taken customers away from them and are now their competitors. He had had a good relationship with the claimant and was shell-shocked when he discovered what she was doing.

It was suggested in cross-examination that MC had made up his mind after the first meeting and the rest of the procedure was "mere window-dressing". MC did not accept this analysis. It was put that in his first letter he had told the claimant that her actions amounted to gross misconduct and that in his second letter he told her that her actions *could* amount to gross misconduct [Tribunal's emphasis]. He disagreed that he had made the decision to dismiss the claimant on the day of the meeting and reiterated that he wanted to give the claimant every opportunity to explain her actions. He said that he felt that JT felt that she had not been giving a fair opportunity to address matters and that he merely sought to provide such an opportunity. He insisted that the tenor of the meeting of the 25th July was informal but official. It was put to him that he had not sent a letter inviting the claimant to the meeting on the 25th July. It was put that the claimant thought that she was being investigated for being a director of AB, as the emails were not mentioned in the claimant's letter of suspension. He accepted that the emails were not mentioned in the letter, as they had not been uncovered at the time of writing the letter of suspension.

A letter of the 7th May 2008 to the claimant from this witness was produced and read in to evidence. This letter raises the issue of the claimant not following proper procedures for taking time off, requesting her to adhere to the procedures or if not it could lead to disciplinary actions. He had also requested her a few weeks previously to hand over an account to R and the web-hosting renewals to G or K. The claimant had not done this. He thought if he could relieve the claimant of these duties she could concentrate more on her marketing role.

Claimant's Case:

The claimant denied that she intended to steal software keys and codes from the company. The software company was discontinuing the software product and the claimant wished to create a spreadsheet of all the keys and codes to be accessed by both of the company offices in Finglas and Naas. The claimant had requested that the software company forward the keys and codes to her company email address; each client code having to be sent individually. The claimant disputed that the keys and codes were of any particular value. She did not consider this to be dishonest and had informed other staff that she was setting up a spreadsheet of the keys and codes for the to-be discontinued software.

The claimant was having computer problems and the 'term session' on her computer kept crashing. Due to this problem she emailed documents to her gmail address so she could download it onto the second office network. The claimant could not access her own gmail account and so had used the gmail address of the new company AB, which her husband said was not in use. The claimant also sent test emails to her husband's email address on occasion if she was having a problem with her work email. The claimant did not give it a second thought, as it had never been a problem before. She had collated the keys and codes, in a folder, for an earlier software package that was being discontinued. She told JM that it should be done for the Naas site also.

The claimant was informed that she was being suspended by JM in a letter dated 9th July 2008, which he read to her. She was not given the opportunity to say anything and was asked to remove herself from the building. She tried to tell him that AB was simply the incorporation of the business previously carried on by MB. He said that her explanations would have to wait for the investigation.

The claimant was asked to a meeting with MC, which he described as 'an informal chat', on 25th July 2008. When the claimant asked if she could bring someone with her the managing director told her it was standard to bring a staff member. The claimant said that she wanted to bring her own representative and brought her friend, CB, with her. She said that MC was shocked when she appeared with CB at the meeting. CB wanted to record the meeting but MC refused on the grounds that it would make what was an informal meeting, formal. The meeting consisted of the claimant answering a series of questions the managing director had prepared. She accepted that she was given an opportunity to answer the questions.

The claimant agreed she was a Director of AB company. She said that she was a non-executive director and so was not involved in the day-to-day running. She said that she had become a director so as to facilitate her friend, MB, in changing from sole trader status to that of a company. She had previously worked with MB for about ten years. Her husband had joined with the CEO to set up the new company and was no longer contracted to the respondent company. The claimant agreed that it looked suspicious that she emailed her husband about the company contract renewals, the day before/after he announced his departure from the respondent company. However, she emailed him the list of contracts due for renewal, as he had dealt with monthly renewals and she wanted to know if he wished to increase the fee for the support services. She also did not know exactly when her husband intended to leave the company as she had been to the hospital that day and they hadn't spoken much.

The managing director told the claimant to go for a coffee after the meeting and come back at 11am. When she returned he told her that he didn't believe any of her answers and that he would reflect over the weekend. He also suggested that she reflect over the weekend. Her salary did not go into her account as usual that Monday.

The managing director wrote to the claimant the following Monday, 28th July 2008, and told her that in his opinion her actions amounted to gross misconduct and was a breach of trust. He stated that if the claimant did not make any further representations her employment would be terminated on 4th August 2008. The claimant wrote back on 29th July 2008 seeking details on the grounds for her dismissal and disputing the managing director's findings. The claimant questioned the thoroughness of the investigation and pointed out that the meeting of the 25th July was supposed to have been an informal conversation.

The claimant refused to attend a further meeting suggested for the 30th July 2008 on the basis that the grounds for her dismissal had still not been outlined. The managing director outlined the grounds for dismissal in a letter dated 30th July 2008. The claimant responded but refuted the claims and pointed out that the managing director had already made the decision to dismiss her in the letter of the 28th July 2008. The claimant stated that she would await his decision and refused a further invitation to a formal meeting, as she had no further representations to make.

The claimant was informed of her dismissal by letter dated 5th August 2008. She forgot that she still had a company laptop at home and stated that the company IT unit had wiped its memory as she had been having difficulties with it. The claimant agreed that the two companies provided a similar service, but claimed that only a handful of the respondent's clients had come to the new business.

Determination:

The claimant commenced her employment with the respondent in July 2005. She had previously been employed by a company that was acquired by the respondent. She was dismissed in August 2008.

The claimant's husband, DD, worked for the respondent as a consultant. CB, a friend of the claimant, also worked for the respondent as a consultant.

In June 2008 CB asked LM, an employee of the respondent to register a domain name for her. This he did. The claimant maintained an interest in this registration. On 1st July 2008, DD announced that he was withdrawing his services as a consultant with immediate effect. LM told the Tribunal that his interest was piqued and he googled the claimant and DD. He discovered that the claimant was a director of AB, the company for which he had registered the domain name. He noted similarities between AB sphere of activities and that of the respondent.

LM reported his findings and further investigation revealed that the claimant had sent a large number of emails to non-respondent email addresses. The emails contained details relating to customers of the respondent. The claimant told the respondent that she was preparing a spreadsheet containing all the information included in the various emails. The claimant was working on a remote network and her network access kept expiring. She explained that she sent the information to the other email addresses so that she could gain better access to the information thereby allowing her to work more efficiently. The email addresses to which she sent the information included her personal email address and addresses belonging to DD, CB and AB. Her explanation was, in effect, that to use the customer-related information that was received from the software supplier on her workplace desktop she was obliged to send it from that desktop, attached to an email, which she could then open at that same desktop computer. The respondent did not accept that she was

required to do this. This appears to the Tribunal to be a reasonable conclusion. The respondent was entitled, in the circumstances, to reach the conclusion that the claimant's behaviour did not have an innocent explanation.

The claimant was called to a meeting with MC, the managing director. She was told that this was an informal meeting. The Tribunal is satisfied that it was not, in fact, an informal meeting. She was not sufficiently made aware in advance of the meeting of the allegations being made against her, in that there had been no previous mention of the sending to the emails. She was not made aware of the severity of the possible consequences of the meeting, in particular that dismissal was a possible outcome. She was not formally advised of her entitlement to have a representative at the meeting.

Comment was made about the fact that MC had prepared a list of questions of which the claimant had no knowledge in advance of the meeting. An employer is, of course, entitled to prepare for an investigatory or disciplinary meeting. An employee must be put on notice of the allegations being made. There is no requirement to put an employee on notice of every question that it is intended to ask.

The Tribunal is satisfied that the procedural deficiencies in the claimant's dismissal were such as to amount to an unfair dismissal. However, the Tribunal is also satisfied that, by her behaviour, the claimant significantly contributed to her dismissal. In the circumstances the Tribunal is satisfied that, in accordance with the preference of the parties, compensation is the appropriate remedy. Pursuant to her claim under the Unfair Dismissals Acts, 1977 to 2001, the claimant is awarded compensation in the amount of €2000.00 as being just and equitable in all the circumstances.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)