

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.  
UD1437/2008

EMPLOYEE

*-claimant*

against

EMPLOYER

*-respondent*

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr D. Hayes BL

Members: Mr E. Handley  
Mr. S. O'Donnell

heard this claim at Dublin on 17th April 2009  
and 13th July 2009  
and 14th July 2009

#### Representation:

Claimant: Mr. Conor Bowman BL instructed by Ms Aoife O'Neill  
Solicitor Fitzpatrick Gallagher McEvoy, Solicitors, Orby Chambers,  
7 Coke Lane, Smithfield, Dublin 7

Respondent: Ms Rosemary Mallon BL instructed by Ms Gill Woods  
Solicitor Mr. Arthur Cox, Arthur Cox, Solicitors, Earlsfort Centre,  
Earlsfort Terrace, Dublin 2

The determination of the Tribunal was as follows:

The claimant's employment, with the respondent, commenced in February 2004. He was employed as a financial planning consultant. His job entailed the sale of financial products, such as pensions and life assurance to customers of the respondent. He resigned his employment in September 2008. He claims that the circumstances of that resignation are such that it amounts to a constructive dismissal.

AM was the respondent's Head of Bank Assurance and was, in effect, the claimant's direct line manager. Towards the end of March 2008, the claimant was asked to a meeting by AM. A complaint had been received that the claimant had forged a customer's signature. He was told that the matter was still being investigated. On 7<sup>th</sup> April 2008 he again met AM, on this occasion with another employee, and the allegation was put to him. Reference was also made to a number of pensions cases that the respondent wanted to inquire into. The claimant was thereupon suspended on full pay. He was escorted off the premises. He was required not to contact

fellow employees or customers during his suspension and he was to telephone the respondent each morning.

Towards the end of May 2008 he was asked to a fact-finding meeting. There was a second such meeting a few days later. He was subsequently sent a copy of the notes to which he made a number of corrections and returned a signed copy. In mid-July he was summonsed to a disciplinary hearing. This was to be chaired by the respondent's Head of Operations, DK. The forgery allegation formed no part of this process. The Tribunal was told that the respondent had been unable to further substantiate it with the customer and accordingly intended to proceed no further with it.

The claimant told the Tribunal that it was his opinion, in advance of the hearing, that there was a hidden agenda to get rid of some people for unknown reasons. He said he felt that there would be a disciplinary hearing and that he would be dismissed. His opinion was that the procedure would be a sham.

He attended the disciplinary meeting on the 29<sup>th</sup> July 2008. He was accompanied by his legal advisers. He said that he brought them because of his view that there would be a "fit-up". In advance of the hearing there were discussions between his representatives and the respondent. During the course of these it was alleged that the proposed chairman made a comment about the claimant. It was alleged that this comment was prejudicial and showed a bias. It was further alleged that the comment showed that the chairman had already formed an opinion of the claimant's character. The hearing did not proceed. After further discussions, the respondent decided to replace DK as chairman of the disciplinary hearing, albeit while rejecting any assertions about his impartiality. The claimant, through his solicitor had sought the appointment of independent third party. The respondent instead appointed PC, a regional manager with a subsidiary of the respondent. He had had no previous involvement with the matter. The claimant told the Tribunal that he had no way of knowing whether PC had spoken to DK about the matter or no way of knowing whether PC had formed any opinion. The test in such a circumstance is the manner in which a disciplinary hearing is conducted. The implication of the claimant's concern is that an employee could not be disciplined until he was satisfied that the decision-maker had formed no views about the issues in advance. This would allow disciplinary procedures to be effectively stymied.

The claimant, through his solicitor, made a request that he be allowed to inspect the files of comparator employees used in the investigation of the allegations into his product selling. The respondent did allow him to inspect his own files and those of his customers. The respondent's position was that the comparator files were not required and that the claimant had been furnished with all relevant documentation.

By letter dated 3<sup>rd</sup> September 2008 a request was made on the claimant's behalf in respect of four issues. Firstly, the request for an independent chairman was renewed. This was rejected. Secondly, the request for comparator files was renewed. This too was rejected on the basis that all relevant documentation had been provided and that the issues at the hearing would relate to the allegations against the claimant and that these files had no relevance to that. Thirdly, a request was made for the names of all witnesses to be called by the respondent. This information was furnished. Finally, a request was made to allow the claimant to contact the customer who was the subject of the original complaint and for him to be permitted to give evidence if necessary. In response it was pointed out that during the initial investigation a number of attempts had been made to contact that customer for him to substantiate his complaint. He had failed

to respond and accordingly any allegation was excluded from the investigation and the disciplinary process. On that basis the claimant was asked to refrain from making any such contact.

The claimant concluded that he was not going to get an impartial hearing from anyone within the respondent's organisation. He believed that the comments made at the first hearing were not made in isolation and that he was never going to get a fair hearing.

It was suggested that there was more than a whiff of bias and that the claimant was left with no option but to resign.

In order to succeed in a claim for constructive dismissal an employee must prove that the conduct of his employer was so unreasonable that he was left with no option but to resign or that there was a breach of contract of such a fundamental nature that he had no other option. It has long been held by the Tribunal that this is a high bar for an employee to pass. The Tribunal is satisfied that there is no requirement that an employer engage an independent third party to conduct disciplinary proceedings. For it to be otherwise would be to impose an intolerable burden on employers. The requirement is that any disciplinary proceeding is conducted fairly. The Tribunal is satisfied that any unfairness that there might have been had DK conducted the disciplinary hearing was remedied by his replacement.

It is to engage in speculation to say whether the disciplinary procedure would have resulted in the claimant's dismissal. The Tribunal is of the view that it is preferable to allow the procedure to be exhausted. In that way, it is easier to assess its fairness or otherwise. In the ordinary course, should an employee seek to allege constructive dismissal, he ought to have engaged in a grievance procedure, or at least in some way, informed his employer of his complaints so as to afford his employer an opportunity to remedy matters. In this case the claimant did not wait to see the outcome of the disciplinary process. Nor does he appear to have given sufficient weight to the existence of an internal and subsequent external appeal.

The Tribunal is satisfied that, whatever the merits, if any, of his concerns, the claimant's decision to resign was premature. He may have had concerns about the, in his view, likely unfairness of the process and he may have formed the view that the respondent would not be impartial. However, the test is that the employer has acted so unreasonably as to leave the employee with no option but to resign. The Tribunal is satisfied that the claimant had other options. In the circumstances, this claim, pursuant to the Unfair Dismissals Acts, 1977 to 2003 fails.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

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