EMPLOYMENT APPEALS TRIBUNAL

CLAIM AS: CASE NO.

UD637/2009

EMPLOYEE **–claimant**

against

EMPLOYER **–respondent**

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division AS Tribunal)

Chairman: Ms. P. McGrath B.L.

Members: Mr. P. Pierce
Mr. P. Woods

heard this claim at Dublin on 4th February
and 27 & 28 April 2010

Representation:

Claimant: In person

Respondent: Mr. Barra Faughnan B.L. on the first day,
Ms. Helen Callanan B.L. on the subsequent days
Both instructed by Mr. David Fagan,
Eversheds O'Donnell Sweeney,
One Earlsfort Centre,
Earlsfort Terrace, Dublin 2

The determination of the Tribunal was as follows:

The respondent is an importer and distributor of timber products including flooring and decking. The claimant was employed as a counter sales person in the respondent's Finglas branch from 11 October 2004. Whilst in this role the claimant received gifts or tips from satisfied customers, particularly at Christmas time. It was his evidence that management were aware of this and no issue was taken with his receiving such gifts. In April 2006 the claimant was promoted to the position of customer service representative. Among the duties in this role the claimant followed leads and sold flooring materials to clients. The respondent offered a supply and fit service for flooring and it was the claimant's responsibility to arrange for sub-contract fitters to install the flooring material. The arrangement was that the respondent billed the client for supply and fit, the claimant arranged the

fitter and the fitter billed the respondent.

In or around June 2007 the need arose to find a fitter to satisfy an urgent need to lay a floor for a relative of a director of the respondent, as none of the fitters regularly used by the claimant were available. The director with responsibility for the Finglas branch (NC) effectively the claimant's report suggested a fitter (ND) that he had heard of from the claimant's predecessor. ND was approached and the floor fitted to the customer's satisfaction. During the evening following the installation of the floor ND contacted the claimant to ascertain his whereabouts, came to see him where he was socialising and gave the claimant €100-00. The respondent's position was that the claimant had told ND and his wife (GF) that he (the claimant) generally got 10% back from fitters on jobs that he handed out.

By August 2007 ND was established as one of six approved fitters of floors for the respondent. Over the next few months ND carried out around 40 installations for the respondent. In November 2007 ND facilitated the claimant in getting an up-grade of golf clubs at no cost to the claimant. On 7 November 2007 ND supplied and fitted a floor for the claimant's mother free of charge. Shortly after these events problems arose on three installations carried out by ND. Two were relatively minor matters, which were easily resolved; the third involved an installation, before the claimant became customer service representative, for which ND had purchased product from the respondent. The claimant became involved in November 2007; the floor was lifted and replaced by another fitter at ND's expense and the replacement floor charged to ND's account with the respondent. After these three incidents of problem installations the claimant decided to restrict the amount of work offered to ND, as he was not satisfied with his standard of workmanship. This combined with a downturn in the economy led to ND's last job with the respondent being in January 2008.

A dispute developed between the respondent accounts payable office and ND over the non-payment of the account for the replacement floor. This crystallized when NC arranged to meet ND and GF on 15 July 2008 about the overdue payment. ND put his complaints about the replacement floor and the subsequent loss AS work from the respondent. Included in his complaints were a series of allegations about the claimant

- Demanding approximately 10% pay back for work a "kickback"
- Golf clubs purchased for the claimant as payment for work received and golf lessons arranged
- Approximately €1,700-00 paid over for works received
- Flooring held back from customers jobs that were over-measured by the claimant to be later laid in his mother's home
- Telling ND "cause trouble and you will never get another fitting job" at the time of the floor being lifted and replaced
- Not turning up for site inspections

On 18 July 2008 NC spoke to another fitter (AF) who told him that the claimant had on occasion been given around €50-00 from jobs where AF had done the site inspection and received cash from the client.

On 28 July 2008 the Human Resource Director (HR) of the respondent wrote to the claimant setting out the allegations against him from both ND and AF. He was invited to a disciplinary meeting on 30 July 2008, advised of his right to representation and the procedure to be followed was set out. NC, HR and the claimant, who waived his right to be represented, attended this meeting.

At this meeting, held at 9-30am, the claimant stated that ND and GF had a "personal vendetta" against him and the allegation of kickbacks was "ludicrous". The personal vendetta related to the floor that was lifted and replaced and which led to ND not getting work from the respondent.

He accepted that he had received €100-00 from ND after the first job but insisted this was the only time he had received cash from ND. He accepted he did not pay for the upgrade of his golf clubs st ating that ND had a relative in the pro-shop who owed ND a favour. He denied receiving golf lessons at ND expense. Whilst accepting his mother got a free floor he insisted the material was not in unopened packs from over measured customers, rather it was loose material, which ND happened to have collected over time. It was accepted by the claimant at all times through the disciplinary process that the flooring his mother received was exclusive to the respondent.

At 1-00pm on 30 July 2008 NC and HR met ND and GF. At this meeting GF alleged that, initially, invoices were hand delivered to the Finglas branch in envelopes containing cash until the claimant instructed them not to do it that way. There was an allegation that the claimant was given €100-00 cash for a €1,000-00 job that wasn't to a customer of the respondent on or around 13 October 2007. A €200-00 receipt for golf lessons for the claimant was produced. ND added that the claimant had told them to keep leftover packs of skirting saying "keep them you'll use them on another job". The respondent's have a policy of accepting back from clients any full packs of material remaining after installation is complete. The respondent company concedes that none of these matters were ever proven.

NC and HR again met the claimant on 31 July 2008. The claimant accepted that invoices were initially hand delivered. He denied receiving cash in the envelopes. He denied receiving cash resulting from the work on or around 13 October 2007.

On 12 September 2008 HR wrote to the claimant offering him the opportunity to meet ND and GF. This meeting occurred on 16 September 2008 and was attended by HR, NC, the claimant, ND and GF. At this meeting it was accepted that the floor for the claimant's mother was to be a surprise after she had seen a sample and liked it. The claimant again denied receiving golf lessons. Apart from €100-00 in June 2007 the claimant denied receiving €1,700-00 from ND and GF who had no records to back up this assertion. The claimant's position was that he expected to pay for the supply and fit of his mother's floor. GF put to him that it would make more sense in that case if he had bought the floor from the respondent with his staff discount.

On 24 September 2008, having availed of the opportunity to offer amendments to the respondent's notes of the meeting of 16 September, the claimant met HR and NC and was then issued with a letter of dismissal setting out three allegations against him.

- "Kick Backs" from ND and GF

HR found that the notion of a personal vendetta by ND and GF was hard to reconcile with the free upgrade of golf clubs. It was inappropriate, as a company representative, to accept such a valuable gift from a supplier. It was similarly inappropriate to accept cash be it €100-00 or €1,700-00. HR found that the claimant probably did receive the golf lessons.

- Free floor and fitting from ND and GF

HR accepted that if the claimant expected to pay for it the claimant he would expect it to be bought by the claimant from the respondent at staff discount rate. If aware of stockpiling by ND the claimant should have enquired where the product was coming from to ensure that neither the respondent nor its customers were at a loss. It was unacceptable to accept the free floor without reporting the situation to the respondent. It was unconvincing that the claimant could not have forced ND to accept payment where the claimant could have denied further work to ND.

- Retaining €50-00 fitter's charge from AF on a number of occasions

This was found to be unproven, as it was not gone into in any more detail

In conclusion HR found that the claimant had misconducted himself in accepting gifts of cash, golf clubs and the supply and fitting of flooring from ND. Although a first offence the issues had been going on for a long period of time and did not constitute a single offence. The failure to advise the respondent of the issues suggested that the respondent could no longer have trust and confidence in the claimant. He was summarily dismissed that day and told that he could appeal to the Managing Director (MD) within seven days.

The claimant lodged his appeal with MD by way of a detailed four-page letter on 30 September 2008. Having been told his appeal was limited to written contact he requested and obtained consent for an oral hearing and this took place on 9 October 2008. MD conducted the appeal with another director taking the notes of the appeal hearing. The claimant, who again waived his right to be represented, and HR were present to put their respective sides of the appeal.

On 20 October 2008 MD wrote to the claimant upholding the decision to dismiss as many of the findings by HR were based on matters admitted by the claimant. He also found that HR was entitled to take the view that in certain matters ND and GF were more credible than the claimant. MD was in agreement that the respondent could no longer have trust and confidence in the claimant.

Determination

The Tribunal has carefully considered the evidence adduced in the course of this three-day hearing. The Tribunal must determine based on the evidence heard and the representation made whether the employer acted fairly and reasonably in dismissing the claimant. The respondent company repeatedly asserted that it dismissed the claimant by reason of three admitted findings of fact, namely:

1. The claimant received a single cash payment of €100.00 as a gesture of goodwill from the floor fitter ND.
2. The claimant accepted a gift from the same fitter ND of a golf club upgrade with an undetermined value but certainly with value.
3. That the claimant accepted a free floor fitting from the said floor fitter ND using materials whose provenance was undetermined but acknowledged to have originated with the respondent.

In addition to these three admitted evidential findings the respondent also relied on the fact that the claimant could not seem to see or recognise that the accepting of gifts and favours in the course of employment is unacceptable to the employer. The respondent company conceded that this failure to recognise any wrongdoing on his part contributed to the ultimate decision to dismiss the claimant. In essence the respondent had lost all trust and confidence in an employee whose judgement was so badly impaired.

On considering all the relevant evidence the Tribunal has concluded that the respondent was justified and acted reasonably in coming to the findings it did.

The claimant's appeal under the Unfair Dismissals Acts, 1977 to 2007 fails.

This _____

(Sgd.) _____
(CHAIRMAN)