

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE –**Claimant**

UD770/2008

MN715/2008

against

EMPLOYER
- **Respondent**

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1967 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr. M. Forde
Mr. K. O'Connor

heard this appeal at Killarney on 22 April
and 18 September 2009

Representation:

Claimant:

Mr. Dan O'Connor, Terence F. Casey & Co.
Solicitors, 99 College Street, Killarney, Co. Kerry

Respondent:

Mr. Fergus Long, Ronan Daly Jermyn Solicitors,
12 South Mall, Cork

The determination of the Tribunal was as follows:

The respondent publishes a local newspaper. It employed the claimant as a staff photographer from 13 July 2005. A clause in his contract of employment provided: "You will be paid 25% commission on all sales to the public of your photographs through the office". The claimant signed the contract on 29 July 2005. Whilst there may have been some issues during the employment it was, nonetheless, uneventful in a disciplinary sense. The respondent had supplied the claimant with the equipment used by his predecessor but as time went on he complained about it and then purchased his own camera without the respondent's authorisation. He later purchased a laptop without authorisation when there was no need for it as there were several terminals in the office.

Some time in April/May 2008 the respondent received complaints from a customer enquiring as to the whereabouts of some photographs the claimant had taken on 3 May 2008, at a function which the claimant attended in his capacity as staff photographer, and for which she had paid him at the

time they were taken. As there were no records of any such order being processed through the respondent's photo sales system the general manager/editor of the respondent (GM) to enquire further into the matter. His enquiries revealed that a similar incident had occurred with another person and while no money had changed hands on that occasion it had been made clear to the customer that payment was to be made to the claimant rather than the respondent. A further incident came to light in which the claimant had asked a fellow employee to make a personal payment to him (the claimant) for photographs he had taken of a sporting event.

On the morning of 22 May 2008 GM called the claimant in to ask him about the circumstances of the first incident. The claimant admitted that he had sold the photographs to the customer in a cash deal. The claimant initially asserted that this was the only incident of this kind that he had been involved in but when the second and third incidents were put to him he conceded that it had happened a few times. At this time GM told the claimant that he considered his behaviour constituted a breach of contract. The claimant accepted this adding that he had been "caught for money" because his expenses were not being paid quickly enough. The claimant then accepted that, on occasion he had been both late submitting his expense claims and submitted claims for expenses to which he was not entitled.

On the afternoon of 22 May 2008 GM met the claimant again, this time in the presence of the CEO who had travelled from Cork. The claimant was given an opportunity to outline his version of events. He explained that he had been "stuck for money" and that he had taken out a personal loan to buy his own camera, which he had used to take photographs for the respondent. He had submitted an invoice for this to the respondent but no payment was forthcoming. At the meeting, he initially maintained it had happened only once but then when other names were put to him he accepted he had begun requesting personal payments for photographs, taken in the course of his employment, in 2005 when he had purchased a camera and had requested such payment on five or six occasions but he later admitted that it had happened more often. Initially, the claimant denied having given photographs to another newspaper but when he was informed that a freelance photographer had complained that he had been undercutting him the claimant conceded that he had done so on 15/16 occasions but said that he had not got payment for these. These photographs were taken when he was attending venues for the respondent and at its expense. The claimant then conceded that his contract did not allow him to act in this manner. He offered to reimburse the respondent to the extent of €500 or €600 but was unsure as to the exact amount involved. The claimant accepted that his conduct amounted to gross misconduct, which was a ground for dismissal.

GM met the claimant on the morning of 23 May 2008. The claimant apologised for what had happened and said it had occurred because he was "caught for cash". He again offered to repay the respondent if he was allowed to keep his job and promised that it would not happen again. GM told him he would report it to the company and that it was a matter for the company. GM then told the claimant not to report for work over the weekend and that he would be in touch on 26 May 2008.

After the meeting of 23 May GM and CEO decided that disciplinary action was warranted. They met claimant on the afternoon of 26 May 2008 and CEO summarised the claimant's admissions and the respondent's view on the following matters:

- that he had used the respondent's equipment, time and mileage expenses to take pictures and sell them for his own benefit and retained the cash for his personal use from 2005
- that the respondent had suffered revenue loss and reputational damage where people had prepaid for photographs but did not receive them until complaints were made
- His behaviour was a breach of his contract of employment amounting to gross misconduct, and a breach of trust, warranting disciplinary action up to and including dismissal

CEO told the claimant that he would be given the opportunity (at a later meeting) to put forward any justification or mitigating circumstances to explain his behaviour at the next meeting which would be on 28 May and he could bring a work colleague or an alternative with him to the meeting. He was again warned that the penalty could be up to and including dismissal. He was suspended on pay pending the outcome of the process.

The next meeting was on 28 May 2008 when the claimant, who waived his right to be accompanied, met GM and CEO. The claimant brought a comprehensive written statement with him in which he complained of the following:

- having to use his own equipment (camera, flashgun, flashcard, and laptop)
- not being paid expenses either in timely fashion or in the correct amount
- not being reimbursed for equipment purchased
- commission drying up from mid 2007
- never receiving bonuses

In response CEO and GM pointed out that:

- The claimant was given the equipment used by his predecessor. Nobody had the authority to buy equipment on a personal basis without pre-authorisation. Breakdowns of equipment had been handled in an efficient manner.
- The claimant had been submitting expense claims several months at a time despite being expected to submit them on a monthly basis. Claims that were submitted needed clarification. CEO and GM accepted there had been a problem over the payment of commissions but the claimant had never raised the issue. The claimant's attendance record did not merit the payment of bonuses in circumstances where he had received discretionary payments while out sick.

CEO told the claimant that the grounds he had raised did not justify his behaviour in diverting the respondent's funds for his own personal benefit and that a decision in the matter would be communicated to him by 30 May 2008.

The claimant met CEO and GM on 30 May 2008 and read out a letter of dismissal, which was given to the claimant. The claimant was dismissed for:

- Breach of trust, confidence and loyalty to the respondent
- The reputational damage caused to the respondent by the claimant's failure to deliver photographs which had been pre-paid for by people who thought they were dealing with the respondent
- Diversion of funds from the respondent for personal use leading to a loss of revenues

The claimant was advised of his right of appeal against his dismissal. Arrangements were put in place to pay the claimant outstanding commissions and expenses. The claimant appealed his dismissal. The group marketing manager conducted the appeal by reviewing all the papers in the case as well as the claimant's letter of appeal, he looked at the process adopted during the investigation and disciplinary process and at the decision to dismiss. He found that the procedures and decision to dismiss were fair. The failure of the claimant's appeal was notified to the claimant's solicitor in a letter of 18 June 2008.

At the Tribunal hearing the claimant asserted that during his interview for the position it was agreed with GM that he could charge sister papers for photographs he had taken in the course of his work. This was denied by GM. Furthermore, his position was that the term of his contract, which provided for 25% commission on all sales to the public of photographs "through the office" meant

that he was entitled to sell his photographs privately if the sales did not go through the office. This was especially so in circumstances where he was using his own equipment. He further contended that the copyright in the photographs resided in him. CEO refuted the latter argument on the basis that under the Copyright Act, 2000 copyright, in work produced by an employee in the course of employment, resides in the respondents. It was the claimant's evidence that he had not raised these issues during the entire internal process because he had admitted to the allegations hoping that the respondent might adopt a more lenient response to the allegations against him and furthermore they slipped his mind due to panic.

Determination:

The Tribunal is not persuaded by the claimant's argument that the aforementioned term in his contract of employment entitled him to directly benefit from the sale of photographs, which did not go through the office.

Whilst the Tribunal heard argument on behalf the claimant as to the use an author may make of a work produced in the course of employment with the proprietor of a newspaper or periodical under subsection (ii) of section 23 of the Copyright and Related Rights Act, 2000, that subsection deals with infringement of copyright in the work and the claimant was not dismissed for such infringement. Furthermore, section 23 of the said Act provides that the employer is the first owner of the copyright in work made by an employee in the course of employment.

The claimant may have had issues with the payment of both his expenses and commission but it is clearly not acceptable to correct a perceived wrong in one area by taking compensation in another area. The Tribunal is satisfied that the respondent adopted a proper course of action in regard to the payment of expenses and commission. The claimant never raised an issue about the late payment of commission until the disciplinary process had commenced. The Tribunal is satisfied that the procedures adopted by the respondent in dealing with the issues raised during the investigation were fair. It is further satisfied that the claimant was made aware of all the allegations against him and provided with an opportunity to answer those allegations. The Tribunal accepts that it was reasonable for the respondent to believe that the claimant's behaviour amounted to breaches of trust, confidence and loyalty to it. Accordingly, there were substantial grounds justifying the dismissal/ The penalty of dismissal was not disproportionate in the circumstances. For these reasons the claim under the Unfair Dismissals Acts, 1977 to 2007 fails. Dismissal for gross misconduct disentitles the claimant to payment in lieu of notice under the Minimum Notice and Terms of Employment Acts, 1967 to 2005. The claim under these Acts also fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)