EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:		**CASE NO.**
EMPLOYEE	- claimant	UD962/09

against

EMPLOYER - respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. M. O'Connell B.L.

Members: Mr. N. Ormond
Mr. S. O'Donnell

heard this claim at Dublin on 23rd March 2010 and 11th June 2010.

Representation:

Claimant: Mr. Conor Bowman B.L. instructed by O'Mara Geraghty McCourt, Solicitors, 51 Northumberland Road, Dublin 4

Respondent: Ms. Rosemary Mallon B.L. instructed by Arthur Cox Solicitors, Earlsfort Centre, Earlsfort Terrace, Dublin 2

The determination of the Tribunal is as follows:-

The fact of dismissal is in dispute.

Claimant's Case:

The claimant commenced employment with the respondent, a bank, in January 2004 as a financial planning manager (fpm) in the Bancassurance area of the bank. In April/May 2007 she transferred to the Mortgage Broker Unit and remained there till the end of the year. She was promoted in January 2008 to Senior Financial Planning Manager and returned to the Bancassurance area. The main objective of her role was to meet clients and sell products. Clients were introduced through Branches. Her target was income reviewed and a quarterly bonus was based on annual target.

The claimant was contacted by a customer to say that she had received a sinister phone call from a Bank employee enquiring if she had been coerced into making an investment and the caller asked her which bank employee had handled the investment. The customer was so frightened she drove to the Branch to express concern about this.

The claimant received many telephone calls from her manager asking her for details on her meetings with clients. On 15th December 2008 she attended a meeting and was informed that an investigation was being carried out in relation to allegations of her falsifying sales documentation and fraudulently claiming sales credit. At that meeting she was suspended on full pay. She was forbidden to attend at any of the bank's branches without JB's prior approval and was told not to communicate with any employee while the investigation was being carried out.

She was asked to attend a formal fact find meeting on 19th December 2008. She did not attend this meeting. By letter dated 18th December 2008 her legal representative wrote to the respondent seeking copies of all documents pertaining to the allegations and statements taken from customers and employees in advance of a rescheduled meeting.

One of the allegations made against the claimant concerned the sale of €2m worth of investment bonds to a couple (Mr. & Mrs. C) in February 2007. The claimant had spoken to Mr. C and offered advice how best to make an investment. Following her meeting with Mr. C she moved to a different part of the bank and she asked that another colleague deal with the investment. She said the bank insisted that she handle it and not to worry about the paperwork, someone else would do it. She contended that the submission of fact finds without meeting customers was common practice in the Bank. The €2m investment was made in 2007 and would have involved a bonus of €60,000/€70,000 and an overseas trip, but the claimant said she did not receive any of this.

The claimant together with her union representative attended the fact find meeting on 14th January 2009. At that meeting she was questioned about customers, Mr. C's investment at length and also questioned about phone calls not being an appropriate way of fact finding.

Following the fact finding meeting the claimant was asked to attend a disciplinary meeting. She sought legal advice. She wanted to call ten witnesses including two customers, Mr. C and Ms D and one employee, Mr. F. At the initial disciplinary meeting on 27th February 2009 preliminary submissions were made and the meeting was adjourned to facilitate the attendance of the various witnesses. A request was also made that she be allowed contact Mr. & Mrs. C and call them as witnesses.

Prior to the disciplinary meeting scheduled for 26th March 2009 the respondent contended that it would be a matter for Mr. McK, the decision maker, to decide on the relevance of Mr. C and Ms D and sought submissions from the claimant. By letter dated 11th March 2009 the respondent said that the attendance of Mr. D, and the request to cross-examine Mr. C did not come within the claimant's entitlements. By letter dated 20th March 2009 the respondent said it was open to the claimant to make submissions as to their relevance at the disciplinary hearing and if Mr. McK made a decision on their relevance he would subsequently request their attendance.

The witnesses were crucial to the claimant in order to defend her name. She could not understand why the respondent wanted written submissions in relation to the Mr. C, Ms D and Mr. F.

She had lost trust in the Bank and felt badly treated. What she was being accused of was common practice in the bank over many years. She chose not to go to the disciplinary hearing. She felt she would not be afforded a fair hearing. She was at the end of her tether and had a difficult choice to make. She felt the bank wanted her out the door. By letter dated 25th March 2009 she tendered her resignation.

The claimant secured work in early August 2009 in a mortgage brokers at a significantly lower

salary.

Mr. C told the Tribunal that he had been interested in making an investment. In early 2007 he met the claimant four times in the Bank and four times in his home in the presence of his family. Together with his wife they made an investment of €1m each in a six-year bond. He dealt exclusively with the claimant. No one from the bank had contacted him concerning difficulties with the bond. After the investment he wished to speak to her and was surprised to hear that shehad moved on. He asked for her mobile number but was told it was not available.

Respondent's Case:

A customer contact service process was implemented in financial services in Northern Ireland to gather customer feedback of the services offered by the bank's financial service. It was based around the customer experience during the meeting with the financial planning managers (fpms). Customers were randomly selected. An issue came to light that a customer had not met the financial planning manager. Paperwork in the form of a financial fact find had been created for the customer and submitted by the fpm in question. As a result, it was necessary to conduct further customer care calls.

A similar contact exercise commenced in the Republic of Ireland in November 2008. A random selection of customers of 93 fpms were contacted. Of the 93, twenty-two employees attended disciplinary hearings and three dismissals occurred.

CB conducted a fact-finding exercise. As part of the customer contact exercise a random selection of thirteen of the claimant's customers were telephoned. Three customers had purchased bonds and stated that they had not met with the claimant and fact find documents submitted by the claimant indicated that she had met these customers. The claimant included these sales in her weekly return, which resulted in credit being recorded against her target.

The claimant met with CB. The claimant brought to the respondent's attention the sale of two bonds to two customers, Mr. & Mrs. C. Subsequently it transpired that the claimant had dealt with bond sales when she was not authorised to give advice and was not working in the bancassurance area at that time.

The findings of the fact find report were that the claimant failed to follow the sales process, that she had conducted an unauthorised sale to a Mr. & Mrs. C while not working in the area at that time and had fraudulently claimed sales credits.

A disciplinary meeting conducted by the Head of Impaired Debt, Retail Debts, Mr. McK who would be the decision maker, was scheduled to take place on 20th February 2009 but this was postponed. The claimant sought the names of the witnesses the respondent intended to call. By letter dated 26th February 2009 the claimant's legal representative confirmed her attendance at the rescheduled disciplinary meeting on 27th February 2009 and outlined ten people (which included employees and customers) that they wished to question at the meeting. Preliminary submissions were made at that meeting to facilitate the attendance of various witnesses who the claimant wished to question. Subsequently, the respondent agreed to have seven employees present at the disciplinary meeting but said it was a matter for Mr. McK to decide on the relevance of employee Mr. F and customers Ms D and Mrs C. Mr. McK did not want to involve customers unnecessarily and was anxious to proceed with the disciplinary hearing. It was open to the claimant to make

submissions as to their relevance at the meeting and for Mr. McK, at his discretion, to determine their relevance. If he decided on their relevance he would subsequently request their attendance. He had some experience in disciplinary matters and was impartial and fair minded. He wanted to hear the evidence.

The disciplinary hearing was rescheduled for 26th March 2009. This meeting did not take place as the claimant tendered her resignation by letter dated 25th March 2009.

Mr. McK refuted any suggestion that he had made up his mind before the hearing. He regretted that the claimant did not enter the disciplinary process. Had she gone through the disciplinary process and been dismissed, she could have appealed internally. If that failed she could have appealed her dismissal to an independent person.

Determination

This is a case of constructive dismissal in which the onus of proof moves from the respondent to the claimant to prove – as required by Section 1 of the Unfair Dismissals Act 1977 – "that the termination by the employee of her contract of employment with her employer, whether prior notice of the termination was or was not given to the employer, in circumstances in which because of the conduct of the employer, the employee was or would have been entitled, or it was or would have been reasonable for the employee, to terminate the contract of employment without giving prior notice of the termination to the employer…"

The respondent was carrying out a general investigation into certain practices in the organisation and having carried out these investigations, was satisfied that the claimant – among others – had questions to answer. Among the queries raised by the respondent concerned an assertion by the claimant that in the course of her work as a financial planning manager, she had met with three customers who had purchased bonds from the respondent. The respondent had reason to believe that the claimant had not in fact met with the three customers involved.

In accordance with the respondent's procedures, it set up a disciplinary process in the course of which, it refused to allow the claimant bring all ten of the witnesses she wanted without – in respect of two of the witnesses – submissions being made as to their relevance. The Tribunal is critical of the approach taken by the respondent in relation to this matter. The evidential value or otherwise of the witnesses could have been determined in the course of the proposed hearing. The refusal to allow the witnesses attend without requiring the claimant to convince the respondent of their relevance shook her confidence in the process. Indeed the respondent's honesty was brought into question after it falsely asserted in a letter dated the 11th of March 2009, that it had been in contact with Mr C, one of the witnesses on whose evidence the claimant wanted to rely.

Ultimately, the disciplinary hearing arranged for the 26th of March 2009 – having been rescheduled on two occasions because of differences regarding the relevance of two named witnesses sought by the claimant – never took place. The claimant tendered her resignation on the 25th of March 2009 because she had no trust in the respondent's disciplinary process.

Despite the respondent's mishandling of the issue of the two named witnesses, the Tribunal believes the claimant should have attended the disciplinary hearing. She had been told that eight of the witnesses she wanted to bring along could attend. The option of calling the two remaining

witnesses on her list was still open to her, albeit that her legal advisers would be required to make submissions. The disciplinary hearing would have given her a further opportunity of assessing the intention of the respondent before making a final decision on the future of her employment.

In short, the behaviour of the respondent did not amount to an attempt to deprive her of a fair hearing. The Tribunal does not accept that the respondent, despite having made an issue of two of the witnesses, had decided to dismiss the claimant in advance of the disciplinary hearing. She should have participated in the disciplinary process and allowed it take its course without prejudice to her concerns about the two witnesses.

In the event that she was dismissed, she had access to an internal appeal and a separate external independent appeal mechanism.

The approach taken by the respondent – though questionable in some respects – was not so objectively unreasonable as to justify the claimant's lack of trust in the disciplinary process and her decision to resign. The claimant had viable alternatives but decided not to take them.

Having considered all of the oral evidence – and the substantial volume of documents – it is the view of the Tribunal that the claimant has not discharged the burden which is required in order to prove she was unfairly dismissed. The Tribunal also had regard to the Judgment of Mr Justice Finnegan delivered on the 12th of February, 2009 in the Supreme Court appeal in the case of *AdamBerber v Dunnes Stores Limited* [2009 IESC/0].

Accordingly, the claim fails.

Sealed with the Seal of the
Employment Appeals Tribunal

This 6th day of July, 2010

(Sgd.) ________________________
(CHAIRMAN)