EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:		**CASE NO.**
EMPLOYEE	Claimant	UD819/2008

Against

EMPLOYER Respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J Flanagan BL
Members: Mr M Murphy
Mr O Nulty

heard this claim at Dundalk on 18th December 2008 and 9th April 2009

Representation:

Claimant: Mr Niall Beirne BL, instructed by Mr Paul Marren, Martin E. Marren, Solicitors, 10 Northumberland Road, Dublin 4

Respondent: Mr Aaron Shearer BL instructed by Mr Conor Breen, McDonough & Breen, Solicitors, Distillery House, Distillery Lane, Dundalk, Co. Louth

The determination of the Tribunal was as follows: -

Preliminary point

The claimant had initiated her claim by filing a T1-A form in which she had nominated two persons as her employer; one was the respondent and the other was a limited liability company. Counsel for the respondent explained that the claimant had at first been employed by the limited liability company and that later the claimant had been transferred into the employ of the respondent. Counsel for the respondent stated that there had been continuity of service in the periods of employment with both the respondent and the limited liability company. The claimant had transferred employment from the company to the respondent without an intervening break and the respondent had agreed to regard the claimant as having continuity of service on foot of transfer of undertaking from the date of commencement of her employment with the limited liability company. On behalf of the respondent it was stated that at the date of termination of the claimant employment the respondent alone had been her employer. In the light of this submission on behalf of the respondent and in the absence of disagreement on behalf of the claimant the Tribunal therefore

dismisses the claim under the Unfair Dismissals Acts against the limited liability company and finds that the respondent was the employer of the claimant at the date of termination of employment. The fact of dismissal was not in dispute and therefore the respondent case proceeded first.

Opening statements

Counsel for the respondent stated that the claimant's employment had been terminated by reason of redundancy. The respondent had sent a cheque to the claimant in the amount of the redundancy lump sum but this cheque had been returned uncashed by the claimant.

The respondent was a sole trader and operated a real estate business using a trading name. A severe downturn had occurred in the respondent's business in 2007 and 2008. It was the respondent's view that the business could not continue as before and remain viable as a going concern. The respondent tried to reduce expenditure by eliminating the salary costs of the highest earning employees. This decision was made on the advice of the respondent's accountant. The business could not have survived without this cost cutting exercise.

Counsel for the claimant stated that the claimant was dismissed on 10th June 2008. The claim that her dismissal was on grounds of redundancy was a bogus claim. The claimant had been invited to a meeting and had been given various options. At the meeting, the respondent had told her that he did not do procedures. The claimant was never asked, consulted or informed about alternatives to redundancy. The employment had been terminated by way of an unfair dismissal and the respondent was attempting to run away from what he had done under the guise of redundancy.

Respondent's case

The respondent registered a trading name in 2006 for the purposes of trading on his own account as an estate agent. This business was launched in June 2007 with the opening of new premises. The respondent had been prepared to fund his estate agency as a loss leader for a number of years. The respondent was a sole trader established to sell property while the company was a limited company which provided mortgages and was a mortgage brokerage. Both businesses had been very much connected. The claimant had been employed by the respondent as a manager in the estate agency.

The respondent gave sworn evidence and said that he was the majority shareholder in the company that had initially employed the claimant. The company was a mortgage broker and provided independent mortgage advice. The respondent was also a sole trader carrying on the business of an estate agent. The claimant was ultimately employed by the respondent in the estate agency business. The respondent described the estate agency as being a subsidiary business to that of the company. The company had been trading for approximately ten years and had six full time employees at its height.

The claimant first commenced employment with the company in 2004. The claimant had previously worked for a large life insurer. The claimant had a multiplicity of roles during her employment with the company and with the respondent. The claimant's speciality was selling personal insurance to clients. She had also acted as the personal assistant to the respondent. At first the claimant had worked unsocial hours but this changed over time. The claimant had been a good timekeeper and she and the respondent had got on well together. The respondent had helped her with the purchase

of her first family home not long after she had commenced employment.

The respondent had sponsored the employees by paying half the cost of the Life Insurance Association examinations. Obtaining this qualification qualified the employee to work in the insurance business. On passing the examination the respondent re-reimbursed the employee with the balance of the course fee. The working relationship had been very positive. Salaries had been increased and the respondent had always honoured the wage increases agreed in the national partnership agreements.

At the commencement of her employment with the respondent it was envisaged that the claimant would travel on behalf of the company because a financial advisor needed to call to people in their own homes. The claimant had told the respondent that she required travel and subsistence money for such things as insurance and other car expenses. The travel allowance was paid monthly by cheque and was an expense and therefore did not form part of the claimant's wages.

Business improved between 2004 and 2006 and the highpoint was in 2006 when various changes were made and the respondent commenced trading as an estate agent. The company absorbed some of the expenses of the respondent's new estate agency such as rent and salaries. The claimant became employed by the respondent as his office manager for the respondent's estate agency in 2006. The claimant's job involved trying to secure properties to sell and showing and selling properties to customers. Her new job involved a physical move in location to an upper floor within the same building. The claimant was very co-operative and happy with this move because it gave her a certain amount of autonomy.

The respondent's estate agency dealt with one housing developer only and did not deal in second-hand properties. The year 2007 saw a downturn in the business. Being a new entrant to the market and due to the downturn in the property market generally, the respondent's estate agency incurred losses and had to be financially supported by personal funds provided by the respondent and his wife. The respondent's estate agency was difficult to establish as a going concern but since the company brokered 90% of the mortgages raised on the properties sold by the respondent, the respondent was happy to support the estate agency business as a loss leader to the benefit of the company.

The respondent had a background in accountancy but an outside accountant did the annual accounts of both the estate agency and the company. However, the losses encountered by the businesses in 2008 surprised the respondent. He discovered that running two businesses required a lot more of his time than he had anticipated. There were huge overheads and being a sole trader meant pressure from the banks. Money had not been easy to come by in 2007. In 2008 the respondent looked at the financial position of his businesses. On the basis of advice received the respondent had entered the property rental market in an attempt to generate some extra income. Amongst other measures the advertising and marketing budget was reduced by 20% and the respondent worked in these areas himself so as to further cut costs. Around February or March 2008 a credit union loan was obtained and capital injections of €25 000 and €15 000 were put into the business in order to reduce the bank overdraft. The respondent was the largest independent broker outside Dublin and he had a good relationship with the banks.

Every so often a staff meeting would be held to review the progress of the company. A staff meeting was held in March 2008. The reason for having this particular meeting was because staff morale had deteriorated due to the decline in business activity. Customers who had their mortgages approved were not taking them up. The meeting had been called to identify new business

opportunities and to promise staff that their jobs were secure.

Another staff meeting was held on 26th May 2008 at the instigation of the respondent's wife. The respondent had suffered a health scare and was experiencing a lot of stress. Prior to the staff meeting the respondent and his wife went through the issues that were to be discussed at the meeting itself. These issues related to the office. The respondent's wife also attended at the staff meeting.

After this meeting the respondent and his wife met with the claimant and K. The respondent described K as the claimant's work colleague. They met the claimant and K individually. These meetings were held because of what had been alleged to be a breach of confidentiality in relation to two clients. Confidential information had allegedly been given to a third party. This third party was a friend of the claimant and did not work for a financial institution. The confidential information that had allegedly been given to this third party was accurate and had allegedly come from the files on these clients held by the respondent's businesses. This allegation had been brought to the respondent's attention two week's earlier. At this meeting, the respondent told the claimant that this was a serious offence and was one which warranted dismissal. The respondent also told her that he had never dismissed anyone before. The respondent told the claimant that she was aware of the difficulties of the business and that they were facing the prospect of making staff redundant. The claimant was suspended for two weeks with pay while the allegation was being investigated. The claimant gave no reaction to the news of her suspension. The claimant had wanted to take two weeks leave but the respondent had said that he could not start such a precedent.

There was a further meeting on 10th June 2008. Between 26th May 2008 and 10th June 2008, the respondent received the audited accounts of the company from his accountant. The accounts showed a loss for the year 2007 and within the financial services sector such a loss could not be sustained. The respondent felt that costs could not be cut further but his auditor insisted that savings of €50 000 to €60 000 per annum had to be made. Either further cost cuts had to be made or income had to be increased. The only cost that the respondent could cut was on wages and salaries. The decision was made to make staff redundant between 27th May and 10th June 2008. The respondent stated that this had not been an easy decision to make.

The respondent contended that it was not accurate to say that at the conclusion of the meeting on 10th June 2008 he had offered the claimant a third option of being dismissed immediately with no notice but that he would continue to pay her until the end of the month. The respondent was aware that the claimant was going on holidays so he had offered to pay her until her return from holidays and then make her redundant with a statutory redundancy payment. The respondent felt it was the best that he could do to ease the blow for the claimant.

The respondent denied that the redundancy was a sham redundancy. The claimant had access to the bank statements of the business and so would have been fully aware of the downturn in activity. The respondent stated that subsequently the bank statements were sent directly to the home address of the respondent. The claimant had raised the issue of the scale of other people's salaries. The respondent stated that she had gone to him to see if she could have an alternative arrangement such as working some days of the week and claiming social welfare for the days not worked. The claimant owned properties herself and so was aware of what was in the future.

The respondent denied that he had sacked the claimant. He said that he never sacked anyone in his life.

In cross-examination, the respondent said that he was not suggesting that the claimant had resigned. The respondent said he did not sack her but that he had terminated her contract of employment by reason of redundancy.

Both businesses had suffered a downturn in business. The claimant had fulfilled functions in both the estate agency and the mortgage brokerage. The accountant had presented accounts for the company, which had been the main earner. The respondent had made twenty-five sales from the commencement of the respondent's estate agency business to date. Staff salaries had been paid from the accounts of the company. The respondent agreed with the proposition put to him in cross-examination that the claimant had been an employee of the respondent personally but that her contract of employment had been terminated on the basis of a downturn in the accounts of the company. The respondent explained that the two staff members of the respondent were paid for by the company. The respondent said that he knew the level of money going into the company as he and his wife were funding it. He had been advised that if he put money into this company that it would be difficult to recover it. The respondent agreed with the claimant's representative that as an employer he was obliged to pay the salaries of his staff.

The respondent stated that another employee, P, had told the respondent that someone was talking outside the office about confidential information from files in his office and that this person should be sacked. Two weeks later, the claimant spoke to the respondent about the same matter. The respondent had asked to speak to the claimant but it was the claimant who had raised this topic with the respondent first. On 14th May 2008, the claimant had shown the respondent stuff on her telephone but he had not given it his attention. The next day, the claimant had approached the respondent again with an allegation that she was being bullied, that her name was being called intoquestion and that she wanted something done about it. The following day, the claimant came to therespondent again and said that she could not deal with people talking about her. The respondent denied that he had used the threat of solicitor's letters. It was put to the respondent that all the claimant had wanted was his support and that she would have been happy for solicitor's letters to be sent. The claimant had wanted days off with pay but the respondent did not allow this and the claimant had not been able to take annual leave because she had not accumulated the required days for same. The respondent confirmed that he remembered the claimant submitting two sick certificates.

The meeting on 27th May 2008 had been conducted with the respondent's wife and all of the staff. The respondent had concerns about staff morale. He had not conducted an investigation into the comments about the claimant at this stage because of the ill health he had suffered. The respondent's wife had taken control of the meeting and P and the claimant had contributed the mostto it. The respondent agreed that the claimant had spoken about the isolation she felt and about theslight on her reputation due to the allegations.

Following the meeting, the respondent and his wife told the claimant that they were going to suspend her on pay so as to conduct an investigation into the allegations that had been made and the interpersonal office issues. The decision to suspend the claimant and another manager had been made by the respondent and his wife prior to the start of the staff meeting. The claimant had not been forewarned about the suspension decision. The suspension had been immediate and the claimant had been told not to contact the office.

The respondent confirmed that the claimant had requested particulars of the matters being investigated. By a letter dated 28th May 2008 to the claimant, the respondent had written that a follow-up meeting to the meeting of 27th May 2008 would be held on Monday 9th June. By letter

dated 30th May 2008 to the respondent, the claimant had confirmed that she would be present at that meeting and she had requested the details of what was being investigated and the allegations thathad been made against her. The respondent had replied to the claimant's letter dated 30th May 2008by letter dated 6th June 2008 stating that the main issue of the investigation was "the alleged disclosure of confidential information concerning clients of this firm to a third party". The respondent confirmed that by this stage he had spoken to his accountant and that he had decided onstringent staff cuts. The respondent could not recall the exact date on which he had spoken to hisaccountant but the redundancy decision had been made by him some two or three days prior tomeeting the claimant. The respondent had even attempted an alliance with a competitor in an attempt to avoid redundancies. No hint about redundancies had been given to the claimant becauseof the difficulty of the decision, which had only been made on the weekend before they met.

At the meeting on 10th June 2008, the respondent had outlined his investigation and the seriousness of the allegation. The claimant had said that she was "going to get" the person who had made the allegation but the respondent told her to be careful as it was hard to prove such a thing. The respondent told the claimant that she was aware of the position the respondent was in and that adecision had been made to make her and another manager redundant. When asked by the respondent, the claimant had said that she wanted to hear about his investigations so he had told herthat the breach of confidentiality was a serious offence which deserved dismissal but he had neverput anyone on the dung-heap, that there was a downturn in the business and so the decision was forredundancies.

It was put to the respondent that he had said to the claimant that "he didn't do f***ing procedures" but he replied that this was an offensive remark and that he did not do bad language. It was highlighted to him that by letter dated 12th June 2008, the claimant's legal representative had written to the respondent stated "We are specifically instructed that a meeting with you held onTuesday 10th June, when our client, inter alia, raised with you her concerns about your failure toapply proper disciplinary procedures your response was to tell her that "I don't do f***ing procedures!"". It was put to the respondent that he had not replied to this letter to deny this statement nor had he instructed his legal representative to do so, and today at the hearing was thefirst time that the truth of the statement was being denied by him. The respondent maintained thathe had been trying to maintain contact with the claimant and had failed to get through to her on theday before he received the letter. He never got the opportunity to deny the statement until today'shearing. For him, the bigger issue was the claim of unfair dismissals. It was also put to the respondent that the allegation of his use of bad language had been made on the claimant's T1-A form filed with the Employment Appeals Tribunal and even at that stage, no denial had been madeby him. The respondent replied that he had refuted a number of the allegations that had been made.

The respondent denied that he had not used fair procedures in relation to the claimant and he denied that he had dismissed her on 10th June 2008. The respondent had made her redundant on that day and he had not been prepared to give the claimant the nature of the allegations in writing because of their seriousness. The respondent had not sacked the claimant because of the allegations but had made her redundant. The respondent denied that the claimant had brought the allegation to his attention in the first instance. P had told him about the allegation first and had said that the claimant and the other manager should be dismissed.

The respondent denied that he had given the claimant three options in relation to the termination of her employment as set out in the claimant's T1-A form, they being;

a) immediate dismissal
b) redundancy
c) immediate dismissal without notice but paid until the end of the month, such payment being treated as an error on the part of the respondent

He said that he gave the claimant two options, being;

a) immediate redundancy
b) as he was aware that she was going on holidays for two weeks, defer redundancy until then and then pay her statutory redundancy and provide her with a good reference

The respondent stated that the claimant had embraced him and had asked about her P45 form.

The respondent denied that he had suggested creating a sham redundancy because being in the financial business, such things cannot be said, nor had he offered to make a €200 payment per week "in error" to her until the end of the month because such an offer would be illegal. The respondent said he had only offered the claimant two options.

The respondent said that he would have obtained advice from his accountant in relation to the redundancy and the redundancy paperwork. He had received the various redundancy forms from his legal representative shortly after speaking to the claimant. No action had been taken on the forms for a further six weeks because the respondent had been out of the office due to ill health. The respondent had called to the claimant's house out of concern for her and she had returned her P45 form because it was incorrect.

The cheque for redundancy was dated 16th July 2008 and the redundancy forms were received in the office of the claimant's legal representative on 29th July 2008, dates which were subsequent to the claimant instructing her legal representative. The respondent gave the claimant verbal but not written notice of the termination of her employment. The claimant had not been provided with a contract of employment or with disciplinary procedures.

It was put to the respondent that the claimant had only been provided with a P60 form for 2005, which she had used in securing her first mortgage. The respondent contended that the claimant owned four properties and it would have been impossible for her to get mortgages for such properties without having first provided P60 forms. It was unfair to allege that he had told lies to the Tribunal and not provided P60 forms to the claimant. There was no obligation on an employer to keep copies of P60 forms on an employees file.

The respondent had decided to make the claimant redundant because she was the highest wage earner in the organisation at €30 000 per year. He had to let his most experienced and qualified manager go because she was the most expensive, despite having paid for her to get her LIA qualification. The respondent confirmed that the staff members who had remained in employ mentdid not have this qualification. The option of the claimant working reduced hours had beendiscussed in April 2008 but this option had not suited her. The option of working reduced hours hadnot been put to the claimant at the meeting on10th June 2008. The breach of confidentiality was notthe reason why the claimant had not been offered the options of part-time work or job sharing. Twostaff members were earning in the region of €30 000 each per year. The options had been to dispense with them or four other staff members who were earning less. One employee had herworking week reduced to two days per week prior to the claimant being made redundant. Therespondent denied that this employee had requested part-time work.

In relation to the staff, the respondent said that the financial advisor continues in employment, P works part-time, S is on maternity leave and Q works two days per week but is paid by a

developer.K had also been a manager but she was made redundant the day after the claimant's redundancy. The claimant had worked for the respondent in the estate agency and the respondent had needed Kto stay on to train the others because of her skills. It was put to the respondent that K had wantedredundancy because she was going to do further studies in teacher training but the respondent replied that she had wanted to resign as a manager because she was not happy. The respondent didnot dispute that K had been retained in employment until 15th August 2008 but she was needed soas to impart some of the skills she possessed to the remaining staff. The respondent denied that hehad accommodated K in her leaving her post.

The respondent confirmed that he had also employed the claimant's mother but her services had been dispensed with as part of cost cutting of an overhead expense in the same week that the claimant had been made redundant. This decision had been made by the respondent and his wife. The reason the locks on the office had been changed was because the keys had been lost. This had been explained to the claimant and all other members of staff at that time.

The respondent had no other meetings with the claimant after 10th June 2008 although he confirmed that he did speak to her on the telephone on two occasions after that date. When put to him that he had told the claimant that he would prolong the process because of his deep pockets, he replied that he had never threatened the claimant that she would have to sell her property.

Replying to questions from the Tribunal the respondent said that his website gives the details of the staff that are employed in both companies. The respondent confirmed that he is a sole trader operating the business of estate agent while at the same time running a company whose business was that of a mortgage brokerage. The respondent stated that the auctioneering business is bonded and licensed by the Court but is not registered with auctioneers associations. The respondent accepted that a mortgage provider is not allowed to hold an auctioneer's license. The respondent stated that there had been no contravention of financial rules and regulations.

The respondent's accountant then gave sworn evidence. The accountant confirmed that he was a chartered accountant and had been in practice for some twenty years. He was both a friend and an accountant to the respondent and they talked as friends over the years. He had first audited the accounts of the company in 2003.

By 2007 the scale of the economic downturn had created a much bigger shock to the business than had been anticipated. The overheads for 2007 were too high. The respondent had borrowed approximately €50 000 to improve the building and had also invested his savings from the maturity of his SSIA into the company. Throughout 2007 the commissions were decelerating. From doingthe accounts of the company around May 2007, the accountant concluded that cash flow was beingfunded by loans and that the losses for 2007 were around €43 000. Businesses such as this one which rely on commissions cannot predict their earnings and this business had fixed overheads suchas wages and salaries, rent, telephone, advertising, stationary, et cetera, but no fixed income. Wagesfor 2007 excluding the director's salary amounted to €100 000. The major overhead was wages andrent and if things remained as they had been in 2007 then the business faced a major difficulty. ForJanuary and February 2008 commissions remained below what was required. The accountant toldthe respondent that the company was facing a situation in which it could no longer trade as a goingconcern and that if the business continued to endure such losses it would require liquidation. Inresponse the respondent ceased taking a salary in 2008.

When questioned as to the relevance of the accounts of the company which carried on the business of a mortgage brokerage to the decision to make the claimant redundant from her position as an

employee of the respondent in his role as a sole trader carrying on the business of an estate agent counsel for the respondent explained that both the company and the respondent had traded from the same building and the company was the main source of income for both businesses. Although both businesses were separate legal entities they were economically connected. The respondent as a sole trader had been running an auctioneering business and was the claimant's employer. However the estate agency business was in financial difficulty and indeed had never made money in this activity. It was the company that paid the claimant's wages although the claimant had been made redundant from the respondent as a sole trader. The Tribunal reminded the parties that it had been the respondent's direct evidence that the estate agency business had been set up as a loss leader for the benefit which it provided to the company in earning commissions brokering mortgages for the properties sold by the estate agency.

The accountant confirmed that he had only ever completed accounts for the company and not for the respondent in his business as estate agent. While stating that the respondent had suffered due to the economic downturn, the accountant had not completed accounts for the respondent himself and so was not in a position to give professional evidence in relation to this business because no professionally prepared set of accounts existed for the estate agency. The respondent was a sole trader and commenced business as an estate agent in 2007. Professional accounts were not required for the respondent as a sole trader. From the accountant's knowledge and recollection the estate agency business had made a loss of approximately €20 000 in 2007. Profit from rental income was predicted for 2008.

The accountant's evidence was that the claimant's employment had transferred to the respondent on 28th April 2008 and that her wages were paid by the company until that date.

The accountant stated that the estate agency had been formed when the property tide had already turned. The respondent never made money in that role and by 2008 the accountant insisted that the respondent recognise how serious the situation was for this business. The respondent had maintained that he would financially support the estate agency but the accountant required the respondent to satisfy him that such commitments could be funded. It was the accountant's view that the respondent was only looking at one business while the accountant was looking at the businesses in their entirety, both the company and the respondent. The accountant was concerned that while it seemed to the respondent to be a solution to the problems of the company, moving the claimant from the company to the respondent personally was only moving the problem around and was not addressing the overall issue of overheads.

The key meeting between the accountant and the respondent occurred on Friday 30th May 2008 at 4.30pm in the respondent's office and the meeting went on until 8.30pm. The accountant emphasised the seriousness of the meeting to the respondent and that he was not prepared to be fobbed off. He insisted that there be no distractions at this meeting such as people calling or telephones ringing. The respondent was asked for his expectations for the respondent's estate agency business. There had been a rapid deceleration of fee income in 2007 while the expenses remained high. The accountant considered the fixed costs of rent, telephone and wages to be high and if something was not done about these overheads, the business would be in serious trouble. Transferring the claimant's employment to the respondent had been an attempt by the respondent tobroaden his base and reduce costs in the company. However, the whole economy was in a downturnand the accountant told the respondent that shifting costs from one part of the business to anotherwould not save him. The respondent had said that he did not want to make anyone redundant.

At the meeting of 30th May 2008 the accountant told the respondent that there were fundamental issues which needed to be addressed and costs would have to be reviewed. The respondent's salary as a director had been the equivalent of someone in a similar position elsewhere. The rent that was received for the building the businesses occupied – and of which the respondent was the landlord – was, in the opinion of the accountant, as high as it could be but that it was still not enough to cover the cost of the mortgage repayments on the building, despite having been increased by 50% between 2006 and 2007. The accountant needed to be assured that the undertakings which had beengiven by the respondent would be fulfilled but the accountant believed that the cost cutting measures would not be enough to solve the problems. The respondent had cut out his own salary for2008 and was depending on the salary of his wife. The accountant told the respondent that becauseof the losses sustained in 2007 the company would go into liquidation if overheads were not reduced further. The accountant was satisfied that if costs were reduced the respondent would survive and the respondent was told that if qualified audited accounts were produced banks wouldnote the same. The accountant's advice to the respondent was to cut costs at the top, that €40 000 to€50 000 in wage cuts would have to be made and that the claimant and another manager would have to go. The accountant said that the respondent was in denial and that no employer likes to tellstaff that they are to be sacked. Nonetheless, the respondent had to face reality. The accountant toldhim that costs had to be cut and that taking money from one place or another would not help. Theaccountant signed off on the accounts of the company on 10th June 2008 on the basis that therespondent had decided to let the claimant and another go and that he would approach the bank.

In cross-examination, the accountant did not accept that the figure given for the respondent's gross salary for 2007 in the accounts of the company was a real reflection of his wages. Rental income did not mean profit. The rent on the company's premises was increased by 50% in 2007 to pay for the mortgage on those premises. The mortgage brokerage company and another company were the only tenants in the building. The accountant agreed that rents had not increased by 50% locally during this time.

The accountant agreed that the level of overheads had alarmed him and he had told the respondent that expenses – including wages – would have to be reduced. Losses to the business would still have been €50 000 to €60 000 even with the claimant's move to the respondent and the accountanthad to look to the overall situation of both businesses. He agreed that he did not have professionalknowledge of the accounts of the respondent but the respondent had told him how things were withthe estate agency. The accountant had not been involved in the setting-up of the estate agency.

The accountant confirmed that he had no professional knowledge of the accounts of the estate agency when the respondent decided to dismiss the claimant. The claimant's suspension had occurred on 30th May 2008 despite all staff being told by the respondent on 25th May 2008 thatthere would be no lay-offs and even though the respondent had been informed in April 2008 aboutthe difficult financial position of the company.

The accountant had told the respondent about the forms that had to be completed in relation to making a person redundant and about the 60% redundancy rebate that he could claim back from the State. When the accountant was queried if he had advised the respondent as to who to make redundant, the accountant replied that deep cuts had been required and making employees other than the claimant and another manager redundant would not have been sufficient. However, he honestly did not remember if he had advised the respondent on whom to make redundant.

In her sworn evidence, K confirmed that she had been employed by the company from 7th April 2003 until 11th July 2008. At the time of the hearing she was doing teacher training. In June 2007, the respondent promoted K to the position of office manager. However, she took this new responsibility lightly because the respondent was still the boss. She confirmed that she had worked with the claimant and that together they had put a deposit on an apartment.

In 2006 the number of mortgage applications being made per month was in the forties and the applications were being approved at a 96% rate. In 2007 the number of applications went to thirty to thirty-five per month but mortgage approval took longer to get and there was a reduction in approved mortgages being taken up by customers. K took leave at the end of 2007 and went to Australia. When she returned in February 2008 to the position as manager mortgages had plummeted. At that stage, she had flagged to the respondent that she was unhappy with the position of office manager. On her return K found that morale was very low and with no work to do things were being made up, lies were being told about each other and there was bitchiness in the office.

While she had been in Australia, she had received a call from the respondent who had told her that things were slow but that her job still existed for her. In April 2008 the respondent had told the staff that all jobs were guaranteed. However, no one was coming into the office to purchase property and no one was getting a mortgage. The respondent had also told the staff members that there was no money coming in to the business so all staff members were fearful for their jobs.

On her return from Australia, both K and the claimant had met together and had prepared their *curricula vitae*. They had also applied to a bank for jobs as team leaders, positions which they had seen advertised.

At the May 2008 meeting the respondent's wife had spoken first and had expressed her concerns about the respondent's health. She had said that she could not understand the personal issues that had been introduced into the office. K had declined to offer an opinion at this meeting. When this meeting had concluded, the respondent and his wife had met with the claimant and K individually. K was the second person they met. At this meeting, K was told that a member of staff was being bullied and that this was being taken seriously. K was told that she was being suspended on two weeks pay. While on suspension, K went on holidays to Dubai. She returned to the office on 10th June 2008. At that time, the respondent told her that he could not take one side over the other in relation to the bullying allegation and K replied that that was fine. The respondent also referred to his meeting with the accountant. He became upset and told K that she was being made redundant. K confirmed that her dismissal had been on grounds of redundancy because that was what she had been told. At the meeting, the issue of discipline had been discussed first. Subsequent to this, the respondent had contacted K, apologised to her for her redundancy and requested that she return to train him and the remaining staff. This she did until 11th July 2008.

K had applied for teacher training at the start of December 2007 while in Australia because of all that she had heard about the economic downturn in Ireland. The respondent had said that he would try to keep her position for her but he could not guarantee same and she had not been prepared to return to that situation. Her initial application had been refused because of an incomplete form. She had renewed her application in June 2008, had been accepted in July 2008 and had commenced her training in August 2008.

In cross-examination, K confirmed that 11th July 2008 was the last date on which the respondent paid her but that she had worked on in the office beyond that date getting her own workload

finished. K said that she was not paid beyond 11th July 2008. K had always been employed by the company.

K and the claimant had attempted to purchase an apartment together and had approached the builder to negotiate a reduced price. K said that the respondent had not been happy with their approach because it had not been a group approach made by the business.

K agreed that there had been bad feeling in the office between staff members and the purpose of the meeting of 26th and 27th May 2008 had been to clear the air. All the staff had attended this meeting and had been asked to state their issues. K stated that she could not remember what the claimant had said at the meeting. When it was put to her in cross-examination that the claimant had said that she felt isolated, that her character had been attacked and that she was being ganged up on by three others, K stated that she could not remember this. At the meeting, K had said that the claimant was entitled to her opinion.

K confirmed that she had not received a contract of employment from the respondent. In June 2008, she was suspended on two weeks pay pending an investigation. She had not been involved in the investigation. K said that she was suspended for two reasons, the bullying of the claimant and because she had a previous disciplinary issue. In relation to the bullying of the claimant, K explained that, when entering her office from upstairs, the claimant had overhead her say that she – the claimant – had spoken about two clients outside of the office. K stated that she could not believe that the claimant would have done this because this would be wrong as a breach of confidentiality.

When questioned if the respondent had conducted an investigation into the claimant's allegations of isolation and bullying, K stated that the respondent had made no findings. At the investigation and suspension meeting in May 2008 K had been asked for her views in relation to the claimant's allegations and she had told the respondent that she had not made anything up but she had highlighted a breach of confidentiality. At the subsequent meeting, the respondent had told her that nothing further was being done about the allegations and that she was being let go for reasons of redundancy.

K confirmed that the respondent was involved in real estate and that clients were common to both businesses. K stated that though the claimant was manager in the respondent's estate agency business in June 2007, the claimant really did not do anything there and, in hindsight, her view was that the claimant was still doing mortgage application work for the company. Although the claimant had moved upstairs to the office of the respondent's estate agency as manager in June 2007, the claimant still had her own desk in the office downstairs of the mortgage brokerage company where she helped out with this business.

K confirmed that at the staff meeting in June 2008 she had told the respondent that she did not want to continue in the role as manager. A compliance officer had told her that as a manager she held the same responsibility as a director. K had not known about this and was not happy about it. K was not receiving the same wage as a director and so was unhappy to take on the same level of responsibility as a director.

Claimant's case

In her sworn evidence, the claimant confirmed that she commenced employment in May 2004 with

the company as an insurance accounts manager. The company was a mortgage broker which was owned by the respondent. After a year and a half, she became involved in mortgages. She gained her qualification and she had a good relationship with the respondent.

The respondent decided to open a real estate business as a sole trader and in 2007 the claimant became involved. She had shown an interest and in July was appointed as its manager. The business got organised and the respondent took on one builder's housing development. This estate kept the respondent's business going. In 2007/2008, the respondent's business was slow but properties were sold by it.

The claimant's job was to secure business, including taking photographs of properties that were for sale, give estimates on the value of properties, produce property brochures, put properties on the respondent's web site and show properties to customers. The claimant's office in the respondent was on the top floor but she did not exclusively work here. She helped in the company when this business was busy and while K was in Australia. The company and the respondent were entered through the same door thought their offices were on different floors of the building. All the staff had gotten on well together. If a property was being sold to a customer, an effort would be made to be the mortgage broker for that purchaser as well.

In May 2008, as the claimant had come down from her office to enter the office of the company where three colleagues were working, she overheard K say that she – the claimant – was speaking about major clients outside of the office. The claimant had gone straight to the respondent and told him about this. The claimant did not know the clients that were being referred to and only found out this information on the day after her suspension. The respondent had not seemed surprised by her information. The others had seen her go into the respondent's office. The claimant asked him to call the girls in to resolve the matter but he had refused saying that they would not tell the truth. He had said that he wanted to think about things over the weekend. The claimant took two days off because of headaches. She could not stand being isolated, ignored and bullied. The claimant told the respondent that because of the bullying, she wanted to take a week off and he had agreed. He had said that he would send a solicitors letter to the person who was making the allegations about the claimant.

There were no changes in things when the claimant returned from leave. The clear-the-air meeting on 27th May 2008 was attended by all members of staff. The respondent's wife attended the meeting and was very positive. The respondent's wife opened the meeting by expressing concernabout the respondent's health. The respondent's wife said that employment policies and procedureswere being worked on, as that was a statutory requirement. However, the claimant never receivedthese procedures. The meeting continued with the staff with least experience being the first to beasked for their views. One agreed that there was a bad atmosphere in the office. Another raised noissues. The claimant told of feeling bullied in the office by three people. Naming the person she hadoverheard make the allegations about her, the claimant had said that she felt that nothing was beingdone to help her. The respondent did not reply to this but had moved on to get the views of K. Khad agreed that the overheard conversation had occurred and that there was a bad atmosphere in theoffice.

Following the meeting, the claimant was called to the respondent's office and told that she was being suspended for two weeks pending an investigation into the breach of confidentiality, the bad office atmosphere and the sending of an email seeking a cheaper price on a property. The claimant asked the respondent for the name of the person who had make the allegation of the breach of confidentiality and for the names of the clients involved in same but the respondent had said that

after taking legal advice, he did not have to give her this information. The claimant was then suspended on two weeks pay, told to hand in the keys to the building and not to contact the other staff. The claimant was very surprised as this was not what she had expected. The claimant stated absolutely that she had not breached office confidentially.

The claimant was suspended on 27th May 2008 and next day, received letter dated 28th May 2008 stating that a follow-up meeting would be held on 9th June 2008. The date of this follow-up meeting was subsequently changed to 10th June 2008. The claimant replied by her letter dated 30th May 2008 and in same was stated *"Please let me have details of what is being investigated and the allegations made against me."* The reply dated 6th June 2008 stated in part therein *"As was indicated to you at our previous meeting there were a number of issues of concern but the main issue was the alleged disclosure of confidential information concerning clients of this firm to a third party. I indicated that I would investigate this allegation and report my findings to you at a meeting on 9th June. I will have completed this process before the said meeting and I will inform you fully at that time as to the information available to me. It is inherent of the nature of the service that this company provides that our clients must be absolutely assured that confidential information particularly of a financial nature is only disclosed and utilised in appropriate circumstances. Therefore in this context I am unwilling in a communication of this nature to include the names of the clients involved. I will provide a full verbal report to you at the said meeting and this will form the basis of any further discussion that will take place."* In an e-mail dated 6th June 2008 from theclaimant to the respondent it was stated that *"...in relation to details of what is being investigated and the allegations made against me…Can you please inform me of the above details before the meeting so as I can be prepared."* The claimant confirmed that she was not supplied with thedetails of the allegations or the names of the clients involved prior to the meeting on 10th June 2008.

At the meeting, the respondent told the claimant that he had conducted the investigation and had met with a number of people, including a person (*hereinafter referred to as C*). C was not an employee of the business. The respondent had found that the claimant had breached confidentiality in relation to two clients. C had said that the claimant had talked about the two clients in a bar one night. The claimant asked the respondent about procedures but he had replied no, that he was within his rights and that he *"...did not do f***ing procedures."* The claimant had not been given an opportunity to reply. The respondent gave the claimant three options, they being:

a) immediate dismissal on grounds of breach of confidentiality with two weeks notice
b) redundancy with two weeks notice
c) continue to be paid until the end of June, then paid €200.00 per week until the end of August and at that stage made redundant and given a reference.

He said that he was making the third option because he liked her and he gave her until the following Friday to decide. When she told the respondent that she would have to seek legal advice, he had said that she could not afford it because she had a daughter and a mortgage and also that he would deny making the third option. The respondent never mentioned the financial strain that the businesses were suffering but that he was dismissing her for breach of confidentiality. The claimant was horrified at her dismissal and of being bribed.

The claimant confirmed that up to that time, her mother had cleaned the offices of the respondent. This came to an end when the claimant was suspended, when she found that the locks had been changed.

The claimant confirmed that she did not receive written notice of her dismissal nor did she receive the forms relevant to redundancy. Her employment ceased on 10th June 2008 and she was paid until

the end of the month in lieu of notice. The claimant's solicitor received the RP50 form and cheque for redundancy on 29th July 2008. The redundancy cheque was dated 16th July 2008 and the cover letter was dated 10th July 2008. It was accepted by the parties that the date on the letter was incorrect and probably a typographical error.

The claimant gave evidence to establish her loss. The claimant confirmed that she had failed to secure alternative employment in spite of applying for work and attending at interviews. The claimant did not receive a reference from the respondent as this was only offered with option (c) above. The claimant had recently applied to do a nursing course. Counsel for the respondent accepted the evidence of the claimant's job applications.

In relation to the allegations that had been made against her, the claimant stated that she now feels paranoid that people are talking about her and she no longer socialises locally. This feeling had also caused stress in her home. The claimant was also concerned that she still appeared on the respondent's web site as an employee.

In cross-examination, the claimant stated that she was let go for disciplinary reasons and not on grounds of redundancy. She was unable to answer if she would still be employed by the respondent today or if the volume of work that she was doing at the time her employment ended would have kept her in employment. She accepted that there had been a substantial downturn in the work of the respondent but highlighted that she had worked in both businesses. When put to her that the respondent was not making money and that there was the evidence of the economic downturn, the claimant replied that she was not aware of the figures for this business. She was the manager of the respondent's estate agency business but denied that she had seen the invoices that were relevant to it.

The claimant accepted that there had been a substantial downturn in the business and that this could have been a reason for termination of her employment. However, the downturn had nothing to do with her dismissal. The respondent had told her that she was been dismissed for breach of confidentially.

The claimant confirmed that she had not re-applied for jobs in the mortgage or real estate business because her name had been tarnished by the allegations. People knew about her dismissal and stories about it had been relayed back to her. She had not been made redundant.

The claimant returned her P45 form to the respondent's accountant's office because it was incorrect. It had indicated that her employment had commenced on 28th April 2008 and that sheonly had nine insurable weeks of employment. She had not spoken to anyone when she returned theP45 form but left a note on the envelope that contained the form explaining that it was incorrect.The form was subsequently returned to her.

From 2007 on the claimant was the manager of the respondent's estate agency business but she also spent approximately one day per week working for the company. While K was in Australia the claimant was working full-time in the company. The claimant had named both the company and the respondent himself personally in her application to the Employment Appeals Tribunal because she was being paid by the company. The claimant did not accept that there was a huge interconnection between both entities. The claimant was not familiar with the accounts that showed a downturn in the finances of the company.

The claimant confirmed that she had applied for a job in a local bank. This change would have been

to better herself as the position in the bank would have involved a team of people reporting to her.

After the April meeting the claimant telephoned K because of the atmosphere in the office. She denied that the telephone call had been made because she was worried about her job. The respondent had sent a memo stating that jobs were secure for twelve months.

It was put to the claimant that K had been happy to accept her redundancy and if K had been treated in a similar way as that alleged by the claimant then K would also be making a claim of unfair dismissals to the Employment Appeals Tribunal. The claimant replied that she did not dispute the evidence that K had given to the Tribunal nor could she speculate on the actions of K. K was going on the teacher-training course. The claimant stated that although she had not been present for the meeting between K and the respondent, the respondent had subsequently told her that if K had not accepted redundancy then the respondent would have given K *"the boot"* the next day and also that K had not been given any options.

The claimant confirmed that she had had a good relationship with the respondent. He had assisted with good childcare and he gave her a cheque for her mortgage. In return, she had given him cash. The claimant did not accept the respondent's evidence that it had been necessary to make the highest earning staff redundant.

The representatives for the claimant and the respondent both accepted the figures as set out on the claimant's T1-A form for gross weekly wage and regular bonus or allowance.

The claimant stated that she had also received an additional payment as commission. The claimant received commission for the sale of insurance and mortgages to clients. The claimant stated that every three months she would go into the respondent's office where false travel claims were made up on a claim sheet. The claimant confirmed that she had not travelled to Galway or Emyvale as stated on the claim sheets that were presented to the Tribunal. If the claimant was owed commission she had to complete the mileage sheets for the same amount in order to be paid. The respondent made up the claim sheet and the claimant signed it. The respondent said that he needed it for his accountant. The commission was paid by cash and cheque. The claimant did not know if tax was deducted from this payment.

Closing statements

The representative for the respondent stated that the respondent rejected the claimant's evidence in relation to travel. Mileage was paid as a vouched expense and the figure for regular bonus or allowance was paid to the claimant as part of her income. The claimant was made redundant because of the downturn in the business. The respondent genuinely believed that a redundancy situation existed. The respondent's accountant had told him that the business would not survive without cuts. If the respondent had not made the claimant and K redundant the business would not have survived. Termination of the claimant's employment was necessitated by the economic downturn.

The representative for the respondent submitted that the selection process for redundancy did not offend the legislation. There had been two managers, one in each entity and both had been selected for redundancy. The staff members who remained in employment were not employed as managers. The respondent's accountant would not sign off on the accounts because the business would no longer be a going concern. Without the cuts, the business would not have survived to the end of the

year.

The representative for the claimant agreed that the economic downturn was a consideration. The claimant had been unable to secure alternative employment since her dismissal. No professional accounts had been produced to prove that the respondent's estate agency was in financial difficulty. The accounts that were produced to the Tribunal were for a company that had not employed the claimant. No accounting evidence relating to the respondent had been produced to show that the claimant would have been made redundant then or at some later stage. Furthermore, the RP50 formand cheque for redundancy had only been received by the claimant's solicitor on 29th July 2008, which was not consistent with the respondent's evidence that he had made the claimant redundant in June 2008.

Determination

The Tribunal notes the evidence of the claimant of the creation of bogus expense sheets by the respondent in order to bring about the payment of commission without the payment of tax or PRSI. The Tribunal has examined some of these expense sheets and has had regard to the oral evidence of the claimant that the journeys for which travel expenses were claimed did not take place. The Tribunal notes in particular the evidence that the respondent's estate agency was engaged exclusively in the sale of properties on behalf of one local builder and yet journeys to the other side of the country were the subject of travel claims. The Tribunal is subject to a mandatory statutory obligation to bring to the attention of the Revenue Commissioners matters indicating non-compliance in relation to the payment of taxation and therefore the Tribunal has no choice but to direct that a copy of this determination be forwarded by the secretariat to the Tribunal to the Revenue Commissioners for their consideration.

The Tribunal notes that in his oral evidence the respondent repeatedly referred to himself personally as being a subsidiary of the company. The Tribunal does not accept that a natural person is or can be a subsidiary of a limited liability company. The respondent frequently referred to himself in the third person when describing his role as a sole trader carrying on the business of an estate agent. It is a practice of the Tribunal in the writing of a determination to avoid giving the names of persons in the body of the determination for the purposes of facilitating publication. For the purposes of ensuring clarity the Tribunal instead uses the term "respondent" consistently throughout this determination. In response to a question from the Tribunal the respondent stated that there was a prohibition upon a mortgage broker operating as an estate agent. The respondent explained that it was the limited liability company which carried on the business of a mortgage broker and himself personally who carried on the business of an estate agency and since the company had a separate legal personality to the respondent as a natural person that there was no breach of this restriction. The Tribunal has no particular role in relation to policing this restriction and therefore has heard this explanation without further enquiry or taking any particular view on the matter. The sole concern of the Tribunal is to establish who was the employer of the claimant and has done so upon basis of the uncontroverted statement of the respondent that he employed the claimant at the material times. The Tribunal assumes that the reason the respondent described himself in the third person and as a subsidiary of the company had something to do with emphasising this distinction; as far as the Tribunal is concerned the respondent and claimant accept that the first employed the second and there is no necessity for the Tribunal to analyse the many connections between the respondent's estate agency business and his company's mortgage brokerage business to establish this matter.

The Tribunal heard evidence that the employees of both the mortgage company and the respondent's estate agency purchased the houses which were then sold on to purchasers. There was a lack of clarity in the evidence before the Tribunal as to why this was done or even if the ultimate purchasers were aware that the homes were the subject of this transaction but as there was no claim before the Tribunal that any sums earned constituted part of the remuneration of the claimant the Tribunal has not enquired further. The Tribunal also notes the evidence that when the claimant wished to purchase a house the respondent provided her with a cheque as she only had cash. It was not made clear to the Tribunal why the claimant could not lodge the cash to her own account and thereby obtain a cheque. There appears to have been a practice whereby the employees were encouraged or at least facilitated in carrying out transactions upon their own account and the downturn in the property market may have created tensions amongst the individuals involved creating a factor leading to the dispute before the Tribunal.

It was the respondent's case that he suspended the claimant from work for a period of two weeks pending an investigation into an allegation by K of a breach of confidence and suspended her colleague K in relation to a counter-allegation by the claimant against K of making a false allegation of breach of confidence and so bullying the claimant. The respondent went on to make the case that it was during this period of suspension that he discovered the necessity to make them both redundant as well as discontinuing the services of the claimant's mother. The Tribunal accepts that there a decline in business activity but is unwilling to regard the timing of the so-called redundancies as a mere coincidence. Having carefully considered this matter, and indeed the entirety of the evidence adduced, the Tribunal prefers the evidence of the claimant and therefore finds on the balance of probability that the claimant was unfairly dismissed.

Section 7(3) of the Unfair Dismissals Acts, 1977 to 2003 provides that "*"financial loss", in relation to the dismissal of an employee, includes any actual loss and any estimated prospective loss of income attributable to the dismissal and the value of any loss or diminution, attributable to the dismissal, of the rights of the employee under the Redundancy Payments Acts, 1967 to 1973, or in relation to superannuation*." The Tribunal is not fully confident that it was placed in a position to ascertain with exactitude the remuneration of the claimant earned in the course of her employment and therefore must use its best estimate. Accordingly, the Tribunal awards to the claimant the sum of €25 000 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)