EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE – claimant

CASE NO.
UD1409/2009
MN1386/2009

against
EMPLOYER – respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr M Gilvarry

Members: Mr D Morrison
Mr T Gill

heard this claim at Sligo on 10th March 2010 and 26th May 2010

Representation:

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Claimant(s): Mr Trevor Collins
Mullaneys Solicitors
Thomas Street, Sligo

Respondent(s): Mr John Barry
Management Support Services (Ireland) Limited
The Courtyard, Hill Street, Dublin 1

The determination of the Tribunal was as follows:

Respondent's Case:

The respondent is a facilities provision company who provided their client, a financial institution, (hereafter referred to as "the bank") with a security guard/porter, the claimant.

The respondent company was contacted by the branch manager of the bank, on March 30th 2009. She reported that a local garage had contacted them as they had discovered opened bank statements belonging to the bank's customers' in the claimant's car, which had been traded in three months previously, in January 2009. The letters were dated May and June 2008. The client advised the respondent company that they no longer wished to have the claimant working at the bank anymore.

The area manager of the respondent company met the claimant on March 31st 2009. He suspended the claimant on full pay pending an investigation. The area manager gave evidence that the claimant stated that he must have forgotten to clean his car before trading it in.

He was told to not to enter any of the bank's premises while on suspension. Later that morning the representative received a phone call from the branch manager who stated that the claimant had entered another of the bank's premises. The representative contacted the claimant who told him that he was just finishing delivering the post that he already had in the car.

The claimant was invited to an investigatory hearing on April 2nd 2009. He attended with his solicitor. The claimant contended that he had cleaned his car before trading it in.

A respondent witness, the operations manager for the North-West, stated that after the meeting she and the area manager went to the garage to apologise, as the garage was a bank customer, for a number of phone calls they had received, believed to have been made by the claimant. The witness agreed that it would have been preferable had she confirmed at the garage whether the post was found open or sealed. She spoke to the accounts person at the garage. The garage manager was unavailable. She didn't find out who had found the letters. The post was opened when it was delivered to the bank.

The contract with the bank was being re-negotiated at the time of the incident and ultimately it was not renewed.

The branch manager gave evidence that a part of the claimant's duties was delivering post, including bank statements, to customers, to the post office, to other branches and to other banks. The claimant also carried out personal errands for the branch manager.

She was contacted by the accounts person at the garage who told her that post had been found in the claimant's car when it was being valeted. The employee who found the statements gave them to her. The accounts person told her that they were open when the valet gave them to her.

When the area manager came to the branch to meet the claimant on March 31st 2009 she told him that she no longer had confidence in the claimant continuing in the role.

The claimant had been working at the bank over a year at the time of the incident. The branch manager contended that when he started she discussed his duties, the nature of the role and about confidentiality. The claimant was hired through the through the bank's previous security service provider and continued when the contract changed to the respondent company.

The next witness for the respondent gave evidence that she took the notes at the disciplinary hearing on April 16th 2009. She normally worked in the Munster area and had no working relationship with the claimant. She attended the meeting with the security operations manager. The claimant was accompanied by his solicitor. The claimant had been provided with a copy of the investigatory report which was discussed.

The claimant was advised by letter of April 20th 2009 that he was being dismissed with immediate effect for gross misconduct for being negligent by leaving the client's letters in his car and thereby also breaching the company's confidentiality policy, bringing the company's name into disrepute and facilitating unauthorised access of confidential information concerning the respondent company and its clients. He was informed of his right to appeal in the letter.

The claimant appealed the decision. The claimant solicitor wrote to the regional director outlining the events and his unhappiness with the procedures, especially regarding the investigation as witnesses central to the investigation were never interviewed such as anyone from the garage who found the letters or the branch manager. He also complained that the claimant had never been shown the letters.

The regional director heard the appeal on Tuesday 19th May 2009. He went through the issues put forward by the claimant's solicitor. He contended that the claimant had received a company handbook. They didn't normally give contracts to employees who transferred in from another company they just use the previous company's.

The regional director did not find any reason to change the decision made. Leaving letters in his car was a serious case of negligence, which had a huge effect on the relationship with the client, which was a big contract for the company in the UK and Ireland. He would have considered redeploying the claimant to another role if they had any situations vacant in the area but there weren't any.

Claimant's Case:

The claimant's partner gave evidence that she and the claimant cleaned out his car before giving it to the garage in January 2009. She phoned the garage twice when the accusation arose to find out what was happening. The claimant told her that he had not phoned the garage or the bank.

The claimant gave evidence that when he started his employment on December 19th 2007 he did not get a handbook or a written contract of employment from the company that hired him. His original employer described his role as a static security guard to watch the door and stairs. A few days after starting the branch manager asked him to deliver some post. Over time he ran more errands. Items were left in the outbox for him. He began using his own car.

The respondent company took over the contract in April 2008. He did not receive any documentation from them. He met the area manager a few weeks later and was told to continue carrying out postal duties.

When the area manager told him he was suspended he was shocked and said there were no letters in the car. He had checked the car before giving it to the garage and it had been valeted two or three weeks previously.

He received the employee handbook a few days after being suspended. He denied ringing the bank or the garage after the investigation commenced. He denied leaving the letters in the car. He had never lost items before. He did not believe that the issue was properly investigated. He believed that the company made their decision on the day and told the branch manager that he wouldn't be returning.

During cross-examination the claimant denied that he said to the area manager that he must have forgotten to clean out his car. He agreed that his partner had phoned the garage and he had not revealed this when he was asked if he had contacted the garage.

The claimant gave evidence of loss. He accepted that he would no longer have been in the position in the bank after the position was removed at the end of June 2009.

Determination:

The claimant was employed by the respondent in carrying out its contract for the bank. The bank was entitled to ask for the respondent to replace the claimant. There was nothing wrong in the respondent company telling the client that the claimant would not be coming back and that was in no way pre-judging the investigation or the disciplinary process, as it was the client's prerogative as to who would be furnished to them.

The accusation made by the bank against the claimant was quite serious and if proven the sanction of dismissal could be an outcome. However, the company was impeded in its investigation by the reluctance of the bank to co-operate fully in the investigation and in particular to allow them to contact the garage, a customer of the bank, to obtain evidence directly for the investigation.

As a result the investigation was less complete than good practice would dictate. However, the claimant's attitude to the investigation, which was to primarily complain about procedural flaws, did not assist and his strong denial of responsibility was made manifest only at the hearing before the Tribunal and was not effectively pressed before then.

Taking all factors into account the Tribunal believes that the employer was entitled at the end of a disciplinary process to apply a disciplinary sanction to the claimant, but considers that the sanction of dismissal was excessive.

The Tribunal heard evidence of loss and also evidence that the contract with the bank was, for this location, ended in June 2009, shortly after the date of dismissal. The evidence from the respondent was that there were no posts available in any other nearby site and that the claimant would more than likely have been made redundant on the expiration of the bank contract.

Accordingly, bearing in mind an element of contribution from the claimant, the Tribunal determines that the appropriate remedy is compensation and awards the claimant €3,000.00 (three thousand euro) under the Unfair Dismissals Acts, 1977 to 2007, and €451.20 (four hundred and fifty-one euro, twenty cent) under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, in respect of one week's pay.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)