

## EMPLOYMENT APPEALS TRIBUNAL

**CLAIM OF:**  
EMPLOYEE  
- *claimant*

**CASE NO.**

UD316/2009  
MN318/2009  
WT134/2009

against

EMPLOYER  
- *respondent*

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007  
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005  
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. D. Mac Carthy S C

Members: Mr. J. Reid  
Ms. M. Finnerty

heard this claim at Dublin on 13th May 2010 and 14th May 2010

**Representation:**

Claimant: Ms. Marguerite Bolger S.C. instructed by Hayes, Solicitors, Lavery House,  
Earlsfort Terrace, Dublin 2

Respondent: Ms. Mary Paula Guinness B.L. instructed by Mr. Ciaran O'Mara,  
O'Mara Geraghty McCourt, Solicitors, 51 Northumberland Road, Dublin 4

**The determination of the Tribunal was as follows:**

At the outset of the hearing the claimant's representative withdrew the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

**Respondent's opening submission**

The respondent's representative told the Tribunal that the respondent company is a specialist technology company that develops software. The claimant was employed by the respondent as a Human Resources Manager. During an extremely sensitive time in the company, the respondent feels that the claimant carried out a gross breach of trust by sharing sensitive information with members of staff on financial and other matters.

The office was open plan and two people were given the information referred to, some of which

was misinformation. The respondent felt that this was wholly inappropriate, given the claimant's position within the company and the sensitivity of the information. The respondent also felt that the claimant was undermining her line manager and making judgements on what was coming down the line in terms of the company's operations. She was sharing her view on how the company spent money. The respondent's representative said the nature of the sensitive information would be explained further by the witnesses in their direct evidence.

The respondent afforded the claimant fair procedures and the claimant did not challenge the people within the company about their statements. The claimant was subsequently dismissed.

The respondent's representative told the Tribunal that as it is a very specialised company, the employees are highly trained and difficult to get. The respondent did not want employees to leave the company of their own accord prior to having the situation explained to them. At the time the company had 50 employees over two countries. Subsequently, 11 redundancies have taken place.

### **Claimant's opening submission**

The claimant's representative told the Tribunal that the dismissal was flawed on two fronts, firstly from a procedural point of view, because the company's case is that the claimant was suspended on 30<sup>th</sup> October but it is the claimant's case that she was dismissed on 30<sup>th</sup> October and the process that followed was a complete sham. The company's case has always been that the claimant was advised by telephone that she was suspended on 30<sup>th</sup> October. The claimant will say that she was advised by telephone that she was dismissed.

Secondly, if the claimant was "suspended" on 30<sup>th</sup> October and the Tribunal find the meeting of the 5<sup>th</sup> November procedurally fair, to the extent that the company viewed there were any issues; dismissal of the claimant was wholly inappropriate.

On 6<sup>th</sup> November 2008 the claimant received correspondence from the company, which would appear to be a summary of the company's position at that time. However, in the company's opening statements they refer to "sensitive information being disclosed". The company never put these issues to the claimant.

The company dismissed the claimant because she was a woman who was known to be actively trying to become pregnant. The purported reasons for dismissal were a sham to cover a dismissal that would have been better than a redundancy and for the company to avoid paying the claimant while on maternity leave in line with her contract. The claimant did become pregnant which increased her loss and she did not receive maternity benefit from Social Welfare.

It was the claimant's understanding that following on from the meeting on 5<sup>th</sup> November there would be further steps. The claimant was told by KH at the outset of the meeting on 5<sup>th</sup> November that if she did not agree that she said, "suspended" during their phone conversation on 30<sup>th</sup> October, then they would have a problem.

### **Respondent's Case**

In October 2008, RG was in the kitchen area and drifted into a conversation between the claimant and another manager. The other manager did not stay long and RG and the claimant started discussing the economy and the recession. During the conversation RG was speculating that maybe the IT industry would not be too badly hit. The claimant felt that the economy was so bad that anywhere could be hit and told RG that once the projects lined up came to an end there was nothing else lined up for the company.

During this conversation, the claimant and RG began to speak specifically about a project that GL was working on. The claimant told RG that the project was losing money and financially not turning out to be as good as it should have been. RG thought the conversation was a little "strange". When queried on this by the Tribunal, RG explained that within the company the management style is quite flat, everybody talks to everybody. However, RG felt it was strange to talk to him about the details of specific projects.

RG further explained that he found the conversation "slightly strange". He felt that if he were out in a social setting and told about the projects it would not seem strange because it's a very informal company and that is where the gossip would happen. It would not be usual for gossip to be shared in the kitchen because it is one corner of an open office.

On returning to his office RG went into the kitchen and there were two colleagues there. He shared the details of the conversation, which had taken place with the claimant. He told them that he felt it was strange for her to be talking to him about it. At the end of this conversation, KH, a member of senior management arrived into the kitchen. RG and his two colleagues ceased their conversation. RG thinks that KH must have asked the other girl what they were talking about because she later phoned him to find out the details of what had been discussed.

RG does not recall being asked to make himself available to attend a meeting with the claimant.

During cross-examination, RG confirmed he left the company on 8<sup>th</sup> or 9<sup>th</sup> January 2009. Approximately, three or four days prior to this he was asked to make a statement, about his conversation with the claimant, for the company files.

The Tribunal heard evidence from CG, a technical support manager within the company. CG has been employed by the company for 11 years. CG explained to the Tribunal that the company operates from two separate buildings. There is Unit 24 and then there is another building in Charlotte Quay. In Unit 24 there are two main open plan areas and the kitchen is next to one of the open plan areas.

CG told the Tribunal that she overheard some of the conversation that RG had with two colleagues in the kitchen. As she did not hear all of the content of the conversation she went to RG's desk and asked him about it. RG told her what the claimant had said to him. CG told him that this was not true and the claimant should not have spoken to him about it. CG did not take the matter further at this time because she was not present for the conversation herself.

The following Tuesday CG went to the building where the claimant worked because she needed to chat with an engineer about a project. After her chat with the engineer CG went to speak with the engineering manager who she felt was quite sharp with her. CG then went to the claimant, because she was her friend, and told her that the engineering manager had been sharp with her. The

claimant suggested that CG have a chat with him directly about it. CG agreed but herself and the claimant decided to go for a cigarette first.

On their way for a cigarette CG enquired if there had been any news from the management team who were in the US. The claimant said there wasn't and that in her opinion the trip was a waste of time. The claimant then commented on how another member of the management team, KP, the chief technical officer, had treated her last week. She told CG that he was very rude to her and when another member of staff arrived he told her that the meeting was finished even though he could have waited for another ten minutes. The claimant said that she felt he wasn't listening to her and he had spent all of the previous week playing on his laptop and wasn't of any help when the server went down.

CG told the Tribunal that when they finished their cigarettes she took the claimant's advice and went to speak with the engineer manager about him being sharp with her. She then went back to the claimant's office. She sat down with the claimant and informed her that she had cleared the air with the engineer manager. Speaking about KP, the claimant said that if it wasn't for PR, the Chief Executive Officer, "he would not get a job in a poundshop." The claimant went on to say that she had been talking to the bookkeeper in the respondent's sister company who told her that the sister company had no money left. CG told the Tribunal that these kinds of conversations were normal between herself and the claimant because they were friends but she felt that the claimant was trying to discredit KP by making these comments. CG felt that if he was on his laptop he was working.

CG felt that the claimant had put her into an awkward position by making these comments to her because she was aware of what the claimant had previously discussed with RG. The following day CG went to KH to discuss the situation because she felt what the claimant was saying was inaccurate and could be damaging to the company and not fair on the people commented on. CG also felt that it was wrong of the claimant to discuss matters of this nature because of her position in human resources. CG was asked to be available for a meeting but was not required to attend one.

During cross-examination CG did not agree that the claimant, as a friend, might have been referring to her own situation with KP as a way of empathising with CG. CG further disagreed that it is a natural response to empathise with a friend in such a situation.

CG confirmed that the conversation with the claimant had taken place one and a half years prior to this hearing and at the time KH, the Vice President of Programming, had told her that she may want to write down the details of her conversation with the claimant in order to remember them. CG did not do this.

In November 2007, CG handed in her notice because of her own problems with KP. She felt that she was not being managed properly by him. CG told the Tribunal that although she had her own issues with KP, she never questioned his position. CG confirmed that although the claimant advised her to talk to the engineering manager about her issues with him, she did not afford the claimant the same opportunity and instead went to KH to discuss the conversation she had with the claimant.

CG told the Tribunal that the conversation with the claimant, including the time taken to have a cigarette, lasted approximately fifteen minutes.

CG agreed that in June/July she had discussed the sister company with the claimant and the sister company is something they would have chatted about.

The Tribunal heard evidence from KH, the VP for Programming within the company. KH told the Tribunal that she spoke to the Chief Executive Officer and the Chief Financial Officer before carrying out the dismissal of the claimant. KH made the decision to dismiss the claimant based on the claimant sharing information of a sensitive nature. The sensitive information was in relation to financial issues and redundancies. The information was sensitive because of the timing.

The claimant was aware that there were redundancies pending within the company. The people that work for the company are very highly qualified and the company wanted to be given the opportunity to hold on to good members of staff. KH felt that the information shared with RG in the kitchen area was inaccurate and some of it was sensitive. The information given to RG was then spread around to other people, so it was not just the two witnesses who were made aware of it.

At the time all of the senior management team were in the U.S. and it is important to be able to trust the Human Resource person. KH received a phonecall from CG, who told her that the claimant was undermining the company's financial status and people in the company. CG said that she was not the only one that the claimant had spoken to. KH was alarmed by this because unbeknown to CG, she was aware of the pending redundancies. It was crucial to the company that when the announcements about redundancies were made that the staff being retained knew that their jobs would be secure.

KH called the management team in the US and informed them about what she had been told. Their reaction was that the sharing of this information was a breach of trust. They told KH that if there was validity to this they could not have the claimant in the office. Based on this, the claimant was suspended until it could be investigated.

KH phoned the claimant and told her that she was being suspended pending an investigation. She then went to RG and CG to establish further facts. She phoned the company's solicitors who told her that a proper investigation would have to be carried out. KH booked a room in a hotel so that they would be on neutral ground. KH sent an email to the claimant about meeting with and told her that she could bring somebody to the meeting with her.

When KH met the claimant she told her that she wanted to make it clear to the claimant that she had not been dismissed. She told the claimant she could understand if she was shocked by the phone conversation but she had just suspended her pending an investigation, and had not dismissed her. KH asked the claimant to explain what happened. KH tried to be specific. The claimant was talking a lot; she got upset and denied the allegations. KH told the claimant it was very difficult for her because she was being told one thing by the witnesses and something else by her. KH encouraged the claimant to chat with the witnesses about the allegations but the claimant declined. KH then scanned through her notes from the meeting and asked the claimant if they could reach an agreement on the things they disagreed on.

At the end of the meeting KH contacted the senior management team and explained that she was concerned about the validity of the details provided by the claimant and explained some of the specifics. She happened to mention the comment about KP to PR, the CEO. He said he knew the claimant's opinion on him because she had said it to him before. KH told PR that this was just further evidence that the claimant's credibility was worrying. After speaking to all the relevant parties, given the circumstances and the facts about the redundancies KH and the senior management team felt there was a gross breach of trust and therefore had to dismiss the claimant.

KH told the Tribunal that redundancies and scaremongering about same were the central issue in the claimant's dismissal and any undermining of a boss or finances in the company were completely inappropriate. KH said the reason that CG rang her was because the claimant had said stuff to RG as well as to her and the company could not have that kind of information going to their highly qualified members of staff.

### **Determination:**

The respondent finished detailing their case for dismissal on the first day of hearing. On completion of the respondent's evidence, the Tribunal received an application from the claimant's representative that the respondent did not show substantial grounds justifying dismissal. The Tribunal has considered this application and in doing so, the Tribunal has referred to a High Court decision, *Memorex World Trade Corporation Trading as Memorex Media Products and The Employment Appeals Tribunal*, which laid down that the Tribunal should be slow to grant such applications, but can do so if the case is clear.

In doing so the Tribunal must approach the respondent's case at its height and on face value. The Tribunal feels that the case made by the respondent falls into three stages.

1. In its opening submission the respondent's representative told the Tribunal that the claimant was a Human Resource manager, somebody in a position of importance, who held sensitive information, some of which she released, and in doing so the respondent no longer had trust in the claimant and decided to dismiss her. The respondent's representative said that the claimant shared sensitive information about finances, which would be detailed by witnesses in further evidence.
2. The evidence was that RG said that a conversation took place in a kitchen area. It was general chat about dole, economy, etc., and the claimant said that every industry had been hit and once the company's current project finished there were no more coming down the line. RG told the Tribunal that he found this conversation strange. The Tribunal did not find that RG's evidence, on its own, amounted to much.

CG told the Tribunal that she went to the claimant about a problem she was having with a member of staff. She was friends with the claimant. CG and the claimant went for a cigarette together and their conversation continued. In the course of that conversation certain comments were made about KP and the claimant also commented on a sister company not having much money left as per the bookkeeper.

The Tribunal regards these two conversations as of a totally different nature. At this stage the Tribunal was still waiting to hear the "sensitive information" being released, which was the pending redundancies. The claimant did not release this. It is the Tribunal's view that the conversation was only idle chitchat.

3. KH went into evidence. The Tribunal allowed her to speak freely so that she could address all aspects of the respondent's case and in doing so, the Tribunal overruled objections from the claimant's representative. Furthermore, the Tribunal provided her with time to look over her notes to confirm that she had put forward all of the evidence necessary. While she was fairly eloquent, she failed to convince the Tribunal of the respondent's case.

The Tribunal looked at the case from the view of suspension. The Form T2 submitted by the respondent refers to conduct, *“the claimant was dismissed following an investigation into certain misconduct by her as a HR Manager”*. In accordance with section 6(1) of the UnfairDismissals Act 1977 *“the dismissal of an employee shall be deemed to be an unfair dismissal unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal.”* Section 6(4)(b) of the 1977 Act sets out conduct of an employee as one of these substantial grounds. This section of the Act goes on further to provide a more explicit version, *“In determining for the purposes of this Act whether the dismissal of an employee was an unfair dismissal or not, it shall be for the employer to show that the dismissal resulted wholly or mainly from one or more of the matters specified in subsection (4) of this section or that there were other substantial grounds justifying the dismissal.”*

In order to be fair to the respondent, the Tribunal addressed an alternative case that the respondent could have made, but did not. The Tribunal looked at the position of human resource manager held by the claimant. The company would have been entitled to rely upon such a manager to behave in a professional manner as required. If the person in this position did not act or perform accordingly, this could be seen as a substantial ground, separate from the issue of conduct.

Having looked at this scenario the Tribunal feels that, at most, the claimant was indiscreet. The Tribunal is not unanimous on the use of the word discreet but indiscretion in itself is something the Tribunal feels could have been corrected with a warning. The Tribunal is not unanimous that the claimant was indiscreet. The conversation the claimant had with RG was gossip and backbiting and furthermore, in October 2008 the majority of people discussed the economy.

Based on the respondent’s case alone we find the dismissal of the claimant unfair under the Unfair Dismissals Acts 1977-2007.

The claimant gave evidence relating to loss and was cross-examined on same. Accordingly, the Tribunal awards the claimant €148,000 as “just and equitable having regard to all the circumstances” under Section 7 of the Act of 1977.

The claimant failed to adduce evidence of the details of her claim under the Organisation of Working Time Act, 1997. The Tribunal dismisses the claim under this Act.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)