EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO. UD1068/2009

EMPLOYEE ***-claimant***

against

EMPLOYER ***-respondent***
under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. McGrath BL
Members: Mr J. Goulding
Ms M. Maher

heard this claim at Dublin
on 16th April 2010 and 31st August 2010
and 1st September 2010 and 2nd September 2010
and 20th December 2010 and 21st December 2010

Representation:
Claimant: Mr M. Forde SC instructed by Mr. Conor Maguire Solicitor, Conor Maguire & Co, Solicitors, Blacklion House, Greystones, Co Wicklow

Respondent: Mr. P. Hanratty SC, Ms Mairead McKenna BL instructed by Ms S. Masterson Power Solicitor Byrne Wallace, Solicitors, 2 Grand Canal Square, Dublin 2

Background:
The claimant in this case is a bank official and the respondent is a bank.
Counsel for both parties opened their cases.

The Tribunal heard evidence from the respondent witnesses. Various senior managers gave evidence as to the banks case and as to the policies in the bank. Evidence was heard as to the "speak-up" policy in the bank and the claimant's use of the policy. The Human resource manager for the bank gave evidence as to the grievance and disciplinary procedures and the use of those procedures.

The Tribunal heard evidence from the claimant.
Both counsel submitted comprehensive closing statements.

Determination:
The Tribunal has carefully considered the evidence adduced in the course of the five and a half days of oral testimony and legal submissions.

The claimant commenced employment with the respondent company in 1993 and worked with the company for sixteen years until his dismissal in 2009.

Difficulties had been experienced between the parties in the past, which had culminated in a period of sick leave in 2001. It is common case that there are High Court proceedings extant which deal with that period and the Tribunal can have no view in relation to the years preceding the time relevant to this matter save insofar as it does seem to the Tribunal that the claimant had been working steadily and satisfactorily from 2003 to 2007 and a promotion in 2007 would tend to support that the company recognised some ability in the claimant.

Difficulties arose from May 2007 at which time the claimant was seconded from the Capital Markets division to the Corporate Lending department. Initially the claimant was happy to be seconded as the move was seen as allowing him an opportunity to develop his skills and experience. The assumption was that the secondment would end in and around November 2007.

For some years the company practice has been to have a comprehensive performance review which purports to be a two way process wherein both subordinate and supervisor work together to enhance performance and achieve goals. The practice was that any bonus payment to be made was to be at the discretion of management and would relate to performance. It seems that the obligation was on the supervisor to flag any risk that there may be in getting a Bonus payment by reason of a failure to perform.

For the working year of 2007 the claimant's performance review should have had the input of up to three direct line managers. Mr. W supervised the claimant for up to two and a half months up to the middle of March 2007. Then Mr. M supervised him for two months up to the middle of May 2007 at which time the claimant came under the management of a Mr. T D for a six month period up to November 2007 and in fact Mr. TD in not releasing the claimant at the end of the proposed secondment period was the person in charge of the performance review for the balance of 2007.

No reason has been given to explain why the secondment period of six months continued beyond what had been initially understood between the parties. Despite the fact that by the end of 2007 there had been a clear breakdown in relations between the claimant and TD, the claimant was being kept on under his supervision.

In compiling the performance review Mr. TD, who started the process in August 2007, did not seek the input of Mr. W with whom the claimant says he had always had a good working relationship. An e-mail/ letter from Mr. M dated the 10th of August 2007 was relied upon by Mr. TD although this letter was not in the recognised format and did not allow for the usual employee input. Theletter was opened to the Tribunal and is recognised by the Tribunal as not having been in any waypositive from the claimant's point of view.

The interim performance review commenced in August 2007 by way of a one to one between the claimant and TD. There can be no doubt that there were workplace issues which needed to be addressed by TD and the Tribunal recognises that the failure by the claimant to accept responsibility for fundamental workplace errors was very frustrating for TD, who the Tribunal believes was a credible witness, dealing with a person who consistently came across as an obdurate, stubborn and difficult employee.

By the end of August 2007 the claimant was refusing to engage with TD his line manager by reason of his belief that the performance meetings coupled with the letter from M was the start of some

sort of campaign. The Tribunal accepts this was a very difficult period for both the claimant and TD. The former felt victimised and the latter felt he was being prevented from managing the claimant against a background of threats of litigation and/or of being accused of being a bully.

Eventually the matter deteriorated to such an extent that third parties were required to be in the same room as the two and the performance assessment simply remained incomplete. The onus lay with TD to discipline his subordinate.

The Tribunal notes that there was no intervention to ameliorate this situation, which is surprising where the resources of a large human resource department is readily available.

On or about the 16th January 2008 Mr. TD together with the relevant management team conducted the final performance reviews for all the employees in the department and made their various recommendations with respect to the bonus amounts that would become payable on foot of these finalised annual reviews.

By the middle of February 2008 the final details and findings, (albeit incomplete), of the claimant's performance review was made known to the claimant. It had been made clear to the claimant along with all members of staff that the upcoming bonuses would be performance related as per the accepted practice in the bank.

Within 24 to 48 hours of receiving his performance review the claimant made a confidential complaint under the respondent's "speak-up" policy, which allows for the discreet and confidential investigation of irregularities and unacceptable practices within the workplace. It is worth noting that the claimant's complaint was not made anonymously but that he could have reasonably expected that his identity should remain confidential. The complaint made concerned amendments which were being made, to the accounting and reconciliation systems in operation in the capital marketing division. The claimant did name TD as having been responsible for these practices.

A Mr. PB, manager in regulation and operations risk conducted the investigation. The Tribunal is satisfied that the investigation was thorough and complete and the respondent bank can take comfort in the knowledge that the Tribunal recognises the integrity under the "speak-up" system and the outcome which was published to the claimant in April 2008 demonstrates that the claimant's observations had been correct insofar as the practices lacked, the "transparency required" in the workplace. The evidence was that the practises were rectified on foot of the investigations and findings. Absolutely no finding of impropriety was made against TD whose integrity is beyond reproach.

An inordinate amount of time was given over by Counsel for the claimant to the entwining of the speak-up system with the subsequent events, which led to the claimant's dismissal. This was an unnecessary exercise in muddying the waters. On balance, the Tribunal does not accept that the claimant's activation of the speak-up policy had any bearing on the ultimate reasons given for the dismissal. The company has been concerned that there could be no perception that an employee who invokes the "speak up" programme runs the risk of having bonus payments withheld and/or might ignite an internal campaign that sets out to ensure a dismissal. The Tribunal is absolutely satisfied that this did not happen in this instance.

For the avoidance of any doubt, the Tribunal accepts that the management decisions made regarding the payment or non-payment of any bonuses pre-dated the activation of the speak-up policy.

The only criticism that the Tribunal might have with respect to the "speak up", was the disclosure of the claimant's name, which was unfortunate, which however, had no bearing on the investigation conducted.

On 26th February 2008 the claimant was on notice that bonus allocations were being made. The claimant believed that he would be getting a bonus of some sort and opts for written notification of his allocation in circumstances, of course, where he is still refusing to attend meetings with his line manager. A series of e-mails is evidence of the strain in relations.

The Tribunal recognises that by the end of March 2008 the claimant was feeling increasingly isolated and marginalised. He got word that the bonuses of all his colleagues had been paid and on checking his account he realised that his bonus for 2007 had not, as yet, reached his account. Whether it was late or simply never coming was not yet known to the claimant.

It is common case that on the 25th and 26th of March 2008 the claimant accessed the bank accounts of several of his colleagues and departmental superiors for the purposes of determining whether the bonuses of these colleagues had been paid and more importantly to determine whether he had been left out by design. He carried out these actions in the spirit of needing to find out for himself whether or not he was being overlooked for the purposes of payment of bonuses. The claimant's sense of disbelief or incredulity was evident to the Tribunal in the course of his evidence.

It is an unfortunate fact that collateral to the opening up the personal accounts of colleagues the claimant also opened the account of a non-bank employee account holder, albeit by mistake.

There can be no doubt that as part of his training, the claimant in common with all bank officials knew that it was inappropriate to access accounts without authority. The Tribunal notes that there is also no doubt that the claimant had the general facility and authority to access these accounts. This facility was required by the claimant in the course of his day-to-day employment. However the Tribunal accepts the banks view that the accessing of these accounts over the 25th and 26th March 2008 in the circumstances admitted to was extremely inappropriate.

In his evidence the claimant accepted that it had been the wrong thing to do and from the start no attempt was made to deny that he had looked at these accounts. The fact of the invasion of the accounts came to light very quickly.

The claimant does not take issue with the investigation that was conducted into the unauthorised opening of client accounts and for the duration of the investigation and through the disciplinary process the claimant was suspended on full pay.

The investigation was conducted in a fair and independent way by a Mr. MOD and an appeal hearing was conducted by a Mr. B.

Mr. MOD made the following finding:
-The allegation of unauthorised access of customer accounts was proven against the claimant.
- The unauthorised access was done for purposes other than in the course of his job role and/or company requirements.

The bank grievance and disciplinary procedure allows for the sanction of dismissal in various different circumstances including such obvious examples as, embezzlement, fraud, forgery and

physical violence. Also included are acts of the unauthorised disclosure of confidential information and/or the unauthorised departure from accepted operation, which result in material loss.

It is noted that the list of conduct meriting dismissal is not intended to be exhaustive and in this case the respondent has invited the Tribunal to include into this non-exhaustive list a finding that the intentional unauthorised access of accounts for no reason other that to discover information relating to the payment of bonuses should be inferred as being conduct to which dismissal should attach.

In looking at all the matters before it, the Tribunal must have consideration for the fact that the claimant had none of the criminal intent which attaches to cases such as fraud, and embezzlement aforementioned. The claimant did not disclose any information to third parties, inappropriately, or at all. It is also noted that the accessing of these accounts was not being used for improper purposes and the claimant has in no way benefited from the accessing of the accounts. In taking these last two points into account the Tribunal notes that this was the criteria which was highlighted to the Tribunal in a letter of the 16th April 2008, (Which was created in connection with the Whistle blowing policy) and which represented bank ethos and the standards it expected of employees under it's own code of conduct.

The response of dismissal is a disproportionate response to the claimant's actions and the Tribunal finds that the response was unreasonable and accordingly the Tribunal finds the dismissal unfair in all the circumstances. This determination is unanimous. Accordingly the claim under the Unfair Dismissals Acts 1977 to 2007 succeeds. The Tribunal finds that the response never fell within the bands of reasonableness proposition being put forward by the respondent.

A more reasonable approach would have been to suspend the claimant without pay for a period of time. The lengthy suspension would demonstrate the seriousness with which the company viewed the behaviour. A period of six months suspension would have been reasonable.

In a majority determination regarding the remedy the Tribunal directs that the claimant be re-engaged into an appropriate department and/or branch of the respondent company and paid basic salary commensurate to that salary which was being paid to him when his employment was terminated. The re-engagement should be backdated to have commenced six months after the dismissal in keeping with the view that the sanction of suspension should have sufficed.

Dissenting opinion in relation to remedy
It should be noted that in a minority finding of only one person sitting in this division of the Tribunal, the view was held that re-engagement is unworkable and that compensation for remunerative losses would have been the more appropriate remedy and the breach of trust argument put forward by the respondent in response to a request of re-engagement is accepted.

Sealed with the Seal of the
Employment Appeals Tribunal

This ________________________

(Sgd.) ________________________
(CHAIRMAN)