

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE **-claimant**

UD1814/2009

against

EMPLOYER **-respondent**

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Taaffe

Members: Mr. L. Tobin
Mr. J. Flannery

heard this claim at Dublin on 1 November 2010
and 8 & 9 March 2011

Representation:

Claimant:

Mr. Conor Bowman B.L. instructed by, on the first day,
Ms. Aine Curran and on the subsequent days Mr. Peter Murphy
both of O'Mara Geraghty McCourt, Solicitors,
51 Northumberland Road, Dublin 4

Respondent:

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

The determination of the Tribunal was as follows: -

The claimant began employment with the respondent from August 1997 as a telephone sales representative. After some time spent in e-banking the claimant became a financial planning manager (FPM) in 2005. In this position the claimant was one of a team of seven or eight reporting to an area manager (AM) in the respondent's financial planning division selling products involving pension, investment, income protection and life and serious illness insurance. FPMs are allocated certain bank branches and are put in contact with customers by branch staff and then give advice about the products. The selling of these financial products is subject to scrutiny by the financial regulator, there is a consumer protection code (CPC). The respondent's comprehensive sales guide for FPMs (the guide) was opened to the Tribunal.

The employment was uneventful until November 2008 when the respondent conducted a customer

satisfaction survey in Northern Ireland, which revealed one case whereby a customer had purchased a product without meeting an FPM in conflict with the requirements of the guide. A similar customer satisfaction survey was then conducted in this jurisdiction and this survey disclosed two sales that the claimant had made, one in August 2008 the other in September 2008, where the customer had not met the FPM before the sale. As a result of this discovery AM telephoned the claimant on 26 November 2008 to advise him that he was being suspended pending further investigation. This suspension was then confirmed in a letter of this date. The claimant was not to approach either customers or staff of the respondent for a three-month period. On 2 December 2008 the claimant wrote to AM in response to his suspension and, inter alia, put AM on notice that he felt that the actions he had taken had been at the behest of AM.

An investigation into the issues arising from these matters was then put in train under an Investigation Manager (IM). After correspondence between the parties and their representatives during which the claimant was supplied with details of the sales concerned and a copy of the guide the claimant and his union representative met IM on 22 January 2009. At this investigation meeting the claimant confirmed he had neither met the customers nor concluded the sales of the investments. Both of these sales were at a level below that at which it was essential for an FPM to be involved, the claimant claimed sales credit for both sales.

The claimant further told IM of a sale in February 2007 where he had completed the paperwork after the sale in a similar way to the matters raised by the respondent. In this case the claimant told IM that AM had instructed him to “take ownership of the business” during a sales team conference call. This sale was at a level where the guide calls for the involvement of an FPM unless this is cleared at Area Manager (both branch and financial products) level. The sale was to customers who had told the branch manager that they did not wish to meet an FPM.

IM’s report states that bank records had been falsified in that fact find reports and suitability letters had been completed which clearly stated the claimant had met customers when he had not. This was a breach of CPC regulation, which states, inter alia, *before providing a product to a consumer a regulated entity must prepare a written statement setting out the reasons why a recommended product is considered to be the most suitable for that consumer.*

IM’s report was issued on 6 February 2009, IM spoke to one of the claimant’s colleagues (CC), a senior FPM, on 24 February 2009 and an updated report from IM issued the same day. On 9 February 2009 a senior manager (SM) from the respondent was appointed as the decision maker in a disciplinary hearing to be held following IM’s report. This letter set out in detail the allegations against the claimant. The disciplinary hearing took place on 3 March 2009; the claimant had by now submitted his comments on IM’s report. The claimant sought the attendance of six staff members and the five customers involved in the sales from which the allegations arose. In the event four of the six plus two others who had been involved in the customer survey were available to the disciplinary hearing. The claimant was represented by the same legal team as at the Tribunal. A human resource representative and a legal adviser from the respondent’s legal representatives accompanied SM. A transcript of the hearing was opened to the Tribunal.

At the hearing it was submitted on behalf of the claimant that the allegations against him were minor infractions of paperwork records and that the proceedings against him were part of a rationalisation plan by the respondent. AM was cross-examined at the disciplinary hearing and refused to answer questions about his remuneration package but denied that his motivation in getting the claimant to recall the large investment in February 2007 was for personal financial gain as he said that his remuneration was the same no matter whether the investment was processed by

the branch or by the claimant. As a result of this denial by AM the claimant sought to be granted access to CC, who was not involved in accusing the claimant of any wrongdoing, in private to discuss certain issues that had arisen. This access was denied with SM offering the opportunity to interpose CC to give direct evidence and an opportunity for the claimant's representative to cross-examine him before the examination of AM continued. At this point the claimant and his representatives withdrew from the hearing as they wished to take no further part in it, citing unfairness in not being allowed access to a witness who was there at the request of the claimant and who, as an employee of the respondent, he had been prevented from speaking to since his suspension.

AM did not give evidence to the Tribunal but the transcript of the disciplinary hearing was opened to it. The Head of Business Support for Financial Services (HB) gave evidence about the incentive scheme applicable to AM's grade in 2007. HB's evidence clarified that AM was incorrect when he told the disciplinary hearing that it made no difference to AM whether the February 2007 investment went through branch or the claimant.

There was no further correspondence between the parties until 30 March when SM wrote to the claimant informing him of the decision to dismiss him with three months' notice ending on 30 June 2009. The dismissal was for gross misconduct in that the claimant falsified records of sale in a regulated business creating reputational, regulatory and financial risks for the respondent. Despite there being two further avenues of appeal open to the claimant, firstly to a two person internal appeals committee and secondly to an independent person, the claimant advised the respondent in a letter from his solicitors on 16 April 2009 that the claimant would not appeal the decision as his experience from the disciplinary process was that he could not expect fair procedures from the respondent.

Determination

Having given full consideration to the evidence adduced and to the arguments advanced by the parties in their detailed closing submissions the Tribunal is satisfied that: -

- A) Prior to the enactment of the disciplinary meeting and in the course of its investigation the respondent became aware of certain matters, which were clearly pertinent to this investigation. It does not accept the respondent's contention that, because these matters arose as a result of a separate enquiry, not involving the claimant, they were not relevant and therefore did not have to be disclosed. These matters should have formed part of their investigation and the fact that they did not renders their process of investigation flawed.
- B) Since the investigation was flawed the respondent was therefore not entitled to proceed either to or with its disciplinary process since this process was enacted for the purpose of considering disciplinary action against the claimant.

The Tribunal is satisfied that these matters are satisfactory evidence that the respondent failed to discharge the onus placed on them to behave fairly and reasonably towards the claimant. Section 6(3) of the Unfair Dismissals Acts, 1977 to 2007 provides

“in determining if a dismissal is an unfair dismissal, regard may be had, if the Rights Commissioner, the Tribunal, or the Circuit Court, as the case may be considers it appropriate to do so to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal.”

The Tribunal therefore finds that the claimant was unfairly dismissed within the meaning of the Unfair Dismissals Acts and so determine.

The Tribunal being mindful of the claimant's acceptance that he breached the respondent's regulations gave consideration to the issue as to whether this behaviour contributed to his dismissal. It is satisfied that when the issue of whether the claimant was being authorised to breach the respondent's regulations arose that a proper approach for a responsible employee to adopt would have been to clarify the matter with the respondent. The Tribunal determines that the claimant contributed to his dismissal. When considering the remedy to be applied the Tribunal is mindful of the claimant's duty to mitigate his loss. Accepting that he has had to endure difficult family circumstances in recent times nevertheless the claimant has, on his own evidence, not been available for work since June 2010 having made no meaningful attempts to mitigate that loss since that date. Taking into account all of the foregoing the Tribunal awards €30,000-00 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)