EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.
EMPLOYEE UD984/2009

-claimant

against

EMPLOYER

-respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms F. Crawford B.L.

Members: Mr E. Handley
Mr. S. O'Donnell

heard this claim at Dublin on 18th March, 13th May and 8th October 2010

Representation:

Claimant : Mr Gerard F Burns, Burns Nowlan, Solicitors,
31 Main Street, Newbridge, Co Kildare

Respondent : Mr Brendan Kirwan B L instructed by
A&L Goodbody, Solicitors, IFSC, North Wall Quay, Dublin 1

The determination of the Tribunal was as follows:

Respondent's Case:

The claimant commenced employment with the respondent (an accountancy firm) in 1999. The Human Resources Manager in the employee relations section gave evidence that she provides human resources advice to the senior managers and partners when required, as well as having responsibility for policies and alerting employees to legislation updates etcetera.

The Human Resources Manager outlined a number of internal documents and procedures to the Tribunal including the grievance and disciplinary policy, the performance improvement plan (PIP), the performance management development process (PMDP) and the capability policy. The capability policy was utilised from May 2008 and the Human Resources Manager outlined to the Tribunal how this policy had previously been part of the grievance and disciplinary policy. The same steps were incorporated into both the respondent's disciplinary and capability policies. However, the disciplinary policy deals with misconduct issues whereas the capability policy deals with performance issues. The capability policy was brought to the attention of staff through an emailed newsletter and was available for their perusal on the respondent's intranet.

The partner or manager has input into the rating given to an employee through the performance management development process (PMDP). All employees must take part in a PMDP, as it allows employees to set out their goals on an annual basis including their development and training needs. A mid-year review is part of the process and a manager may indicate at this stage which rating the employee is heading towards at the end of the year.

If an employee receives a rating of 1 or 2 at their annual review they automatically enter into a performance improvement plan (PIP). A PIP is an informal method to help an employee improve and a timeline is agreed for this process between the employee and their manager. The goal of a PIP is to help, coach and guide the employee to better performance. If an employee has partaken in a PIP for a number of months without improvement then the Line Manager can decide to escalate the issue by invoking the capability policy.

During 2008 the claimant underwent a PIP. The claimant's Line Manager approached the witness in the latter part of 2008 and enquired about escalating the issue, as the claimant's performance had not improved. The Human Resources Manager outlined to the claimant's Line manager that the next stage was to invoke the capability policy. The claimant's Line Manager was a senior partner and would have been aware of this policy but the HR Department recommends that managers and partners contact the department for advice when deciding to invoke the policy. It is however the manager or partner's decision to actually invoke the procedures.

The Human Resources Manager attended subsequent meetings in relation to this matter from the time of October 2008. A capability meeting was held on 14 October 2008. The Human Resources Manager opened the meeting and made notes. The claimant confirmed at the meeting that he had received a copy of the capability policy and that he did not wish to be accompanied to the meeting.

The claimant was issued with a written warning by letter dated 21 October 2008. Further capability meetings took place prior to the claimant's Line Manager making a decision to give the claimant a final written warning. The claimant appealed this decision and the appeal was heard on 19 December 2008. The Human Resource Manager was not present at the appeal. A letter regardingthe appeal dated 22 December 2008 issued to the claimant. The decision to issue the final writtenwarning was upheld. In January and February 2009, the claimant and his Line Manager met on anumber of occasions. The claimant's work performance did not improve and a meeting was arranged for 18 February 2009. The decision to dismiss the claimant was communicated to him atthe meeting and this decision was later confirmed in writing to the claimant in letter dated 20th February 2009.

In cross-examination the Human Resources Manager outlined that appraisal ratings given to employees are established through guidelines provided by the human resources department and are assessed through round-table discussions within the employee's department. An employee's manager identifies the rating to be given to an employee through these guidelines and in consultation with other individuals that the employee worked with throughout the year.

The Human Resources Manager stated that options of re-deployment or demotion instead of dismissal were not discussed between her and the claimant's Line Manager. The senior manager or partner makes the decision and the Human Resources Manager does not provide an input into the decision unless requested by the senior manager or partner.

It was confirmed there were approximately ten redundancies in the respondent company during the past year but they did not occur in the department in which the claimant had worked.

In reply to questions from the Tribunal, the Human Resources Manager admitted that the claimant's right to appeal the decision to dismiss him was not outlined to him in the letter of dismissal. She added that it was stated within the capability policy that an employee could appeal the decision to dismiss him.

The Human Resources Manager stated that approximately 45 out of 1100 staff members are currently undergoing a PIP. Many employees undergo a PIP and continue thereafter in their employment. Other employees leave the employment of their own accord. The Human Resources Manager is not always aware if a member of staff has been placed on a PIP until a manager informs her that this is the case.

A former and now retired senior partner (the claimant's Line Manager) at this accountancy firm also referred the Tribunal to certain internal documents and procedures operated by the respondent and used in this case. These were a performance management development process plan (PMDP), a performance improvement plan (PIP), and a capability policy. The former related to an annual appraisal of employees by a fellow colleague holding a higher status and position within the firm. Those people were respectively called a reviewer and a reviewee. In this case the claimant was always the one under review. The respondent's business year commenced on 1 July so these appraisals took place in the summer. The overall rating for an employee ranged from 1 to 5 with a sixth category labelled "not rated" which was generally applied to staff who had either just joined or left this entity. The higher the score the more advantageous it was for both parties as the employer satisfied itself it had a very competent and strong performer. Conversely the lower the score the more dreadful and troublesome it was to all concerned. From the evidence produced the claimant got a score of 3 on his PMDP apart from the appraisal for year ending 30 June 2008 where he dropped a point. Besides damaging his reputation and status within the firm and among his peers he was also deprived of a bonus payment and a salary increase. In addition to those consequences this senior manager set up a personal improvement plan for him. According to the respondent a PIP is invoked where significant underperformance and under achievement of goals are identified from assessment under the PMDP plan.

This senior partner who worked for the respondent for over thirty years was, apart from two years, the claimant's direct manager from 1999 onwards. The witness said that on a personal level he found the claimant fine but that on a professional rating he described the claimant's work as lacking in detail and was generally dissatisfied with his contribution and overall performance. He cited a number of examples where the claimant's work actually caused embarrassment and awkwardness to the respondent resulting in the firm and the witness having to rectify and enhance the claimant's work. Among the witness's complaints of the claimant was his inadequate management style, his poor quality of work and on occasion the claimant's practice of producing cut and paste documents. This is not what the witness expected nor wanted from an experienced senior manger. Notwithstanding those defaults the senior partner awarded the claimant a 3 in the PMDP because "I was being lenient".

A 3 mark carries the following citation as regards performance: *Fully met in comparison with relevant peer group meets goals and, in achieving normal high expectations, exceeds in some areas* . However, in evidence the witness stated that a score of 3 did not mean that the reviewee fully met all requirements. Besides, he told the claimant that his 3 score was only marginal. A 2 score concluded that the reviewee had only partially met expectations and that an improvement in one or more performance areas was needed.

As part of the PIP programme the witness asked two other senior managers to work closely with the claimant with the aim of improving his performance and addressing shortcomings in his work. The witness also held a number of "low-key" meetings with him throughout the spring and summer of 2008 as part of this plan. That segment ended in October when the claimant was invited to a capability meeting that October.

According to the respondent a capability policy is invoked where a performance improvement plan has not resulted in acceptable improvement and where capability issues need to be further addressed. Such a policy could result in sanctions including dismissal. That policy was in force by May 2008.

In a letter dated 21 October 2008 the witness issued the claimant with a written warning due to his continuing poor performance and extremely low level of chargeable hours. Chargeable hours are the mechanism whereby the respondent makes money from its transactions with its clients. The witness added that the low level of those hours by the claimant was of lesser concern than the low level of his work. At least two further capability meetings took place attended by the witness and the claimant prior to the witness again writing to the claimant on 24 November 2008. That letter read in part:

Taking into consideration the mitigating factors that you outlined, I have decided that our concerns are sufficient to merit a final written warning.

While that letter contained information on a right to appeal on that decision there was no mention or warning that this continuing situation could lead to dismissal.

The witness acknowledged receiving a written detailed response from the claimant, dated 1 December in which the claimant listed several points of appeal. The claimant questioned the validity of using the capability policy in sanctioning him and also raised other issues. The witness "did not revert to that at that stage". Human resources managed an appeal hearing with no input by the witness. A senior partner in the audit division accompanied by a human resource person on 19 December 2008 heard that appeal. A written report on that hearing carried the title disciplinary appeal hearing-the witness said that this was a typing error and should have read capability hearing.

A letter relating to that appeal hearing, dated 22 December issued to the claimant from the firm bearing the name of the witness. In evidence the witness explained that this letter was mainly drafted by human resources with some additional material from him. In that letter the witness expressed a degree of annoyance and frustration at the claimant's emphasis on the respondent's use of the capability policy rather than focusing on his ongoing underperformance at work. He accepted that some of the wording in that letter particularly the use of pronouns and possessive adjectives was loose. The decision to uphold the decision to issue a final written warning was however made by the senior partner in the audit division but communicated by the witness. In addition to the concerns expressed earlier to the claimant the respondent also had constant problems with what it called deliverables from him. A deliverable took the form of a report and/or proposal by an employee dealing with a client. There was no formal reaction from the claimant to the respondent's letter of 22 December.

Two further capability meetings took place in January and February 2009 attended by the claimant and witness. The claimant's work performance was not improving in that period and he accepted an invitation to attend a follow-up meeting on 18 February chaired by a human resource person. Prior

to that meeting the witness indicated that a decision to dismiss the claimant had been reached in conjunction with a human resource colleague. That decision was verbally relayed to the claimant during this last capability meeting. There, he was given three months' notice that his employment with respondent was to be terminated. The claimant was not given a right to appeal that decision.

Similar to earlier such meetings the claimant gave no satisfactory explanation for his performance at this particular meeting. No notes or written record of the meeting of 18 February 2009 were available or furnished to the Tribunal unlike the practice from other meetings. A letter dated 20 February 2009 written by the witness to the claimant confirming the outcome of that meeting was however submitted into evidence. The final paragraph contained the following:

I have therefore decided to dismiss you from your employment with the firm. You will receive three months notice. Further to your confirmation, your last day of employment is 20th March 2009 and you will receive two months pay in lieu of notice.

The witness justified this decision of the performance or more precisely the lack thereof of the claimant. He added that the claimant might have been a devoted employee but he produced "pretty poor quality" work over the years. His performance was so poor that during earlier discussions with human resources and other partners it became clear that other colleagues did not want to work with him. It followed that at the time of his notice of dismissal no alternatives such as a transfer or a demotion were offered to the claimant. Throughout his dealings with the claimant the witness was guided by the human resources division and he believed that he acted in accordance with their policies and in line with the respondent's procedures and policies.

At the resumed hearing on 8 October 2010 the witness was questioned by the Tribunal. He stated that it was normal for an employee to have nine hundred chargeable hours in the year. The problem with the claimant was that the respondent was not satisfied to trust him with clients. The claimant was given sufficient work so that he could charge for it.

In cross-examination he stated that work was done by a different senior manager in the previous year and the claimant had a similar portfolio allocated to him. The work that was being allocated to the claimant was not done.

DQ gave evidence that he was a partner in the respondent for six years and had been employed for eighteen years. He was a manager and signed off on claims. The claimant was a colleague and they worked together in 2001 on a mutual client. He did not work with the claimant after that. The Human Resources Manager asked him to attend the claimant's appeal hearing. NM was HR representative. He met the claimant's Line Manager and the Human Resources Manager and was given the background. There was nothing presented at the appeal hearing that led him to believe that the process was not fair, the meeting lasted thirty-five minutes. Subsequent to the meeting UM drafted notes and he asked UM to respond to the points raised by the claimant in a document produced at the appeal hearing. He had no further involvement. He along with UM issued a letter to the claimant. He gave instruction that a point raised should be responded to in a letter to the claimant.

In cross-examination he stated that he met with UM to obtain details of what had occurred regarding the appeal. He disagreed that it was not a fair procedure. The process was fair and a balanced approach. The claimant had the opportunity at the appeal hearing to put his case forward on 19 February. UM was no longer employed with the respondent. The claimant gave the points at

the appeal. He tried to elicit the process followed to determine what the claimant worked at and if he had a plan to address the defence regarding the situation he was in. The claimant's Line Manager was not at the meeting on 19 December 2008. The letter dated 22 December 2008 sent tothe claimant addressed the questions regarding the respondent's capability policy and that it didapply and it addressed the various items regarding performance and work done, specifically itemsraised by the claimant's Line Manager. He was assigned to deal with the appeal and UM and theclaimant's Line Manager drafted the letter to the claimant dated 22nd December with the final written warning. When asked if he was charged with hearing the appeal and also issuing a decisionhe replied he issued a decision to two colleagues. As far as he could recall he issued the decision. He gave an instruction to MM to deal with PD in a letter following on from the appeal. The claimant's Line Manager signed the letter, he was a party to the entire process and the witness wasnot party to all of the process. He dealt with the claimant's appeal in a fair and professional manner. When asked if he had familiarised himself with everything that occurred he replied that headdressed the points that the claimant raised and he also responded to the points regarding performance. It was very clear from UM and the witness that they had held a meeting.

In answer to questions from the Tribunal he stated that he did not see the letter sent to the claimant.

He requested that UM and the claimant's Line Manager address the points. He left clear instructions that this should be addressed completely. The performance of the claimant led him to having been on PIP. He asked UM and the claimant's Line Manager to deal with issues to address performance issues. He spoke to UM and the claimant's Line Manager regarding issues they had with the claimant. When put to him that he should have investigated the performance because of the final written warning he replied that the claimant was on a first written warning as well as a final written warning and was appraised at rate 2. When put to him why he did not write his own report of the appeal in his reply in the letter to the claimant he replied these items were dealt with. He reviewed and discussed the correspondence with the claimant's Line Manager. He did not write the letter of 22 December as he asked UM and the claimant's Line Manager to address the matter. He did not question the letter prior to issue as he was out of the office on Monday.

The Human Resources Manager first approached him regarding the appeal. He then spoke to the claimant's Line Manager. He did not speak to the claimant before the appeal hearing. UM was appointed as independent HR representative to sit on the appeal with the witness.

Claimant's Case

The claimant outlined in detail to the Tribunal his extensive employment experience prior to commencing employment with the respondent in 1999. He commenced employment with the respondent on 20 April 1999. His earnings at December 2001 were €41,000. In August 2007 his earnings were €93,250 and he received a bonus of €11,635.99. He worked 39 ¼ hours per week. He worked on assignments, prepared proposals, met clients and managed assignments. He did not charge for preparatory work. When this work was completed he issued an invoice. Some work he won himself and other work was assigned to him by the respondent. He had very little control to increase his fee and he had to report back to his client and justify the increase. His yearly workload varied and he spent approximately one third looking for new work, one third on administration and one third on chargeable accounts. He received work from other partners in the firm; he managed large projects and had a fair amount of responsibility

He undertook work on project O and made a presentation to a client. Some formatting errors were discovered on this document, which were brought to his attention. He created the document and

showed it to a senior manager. A number of changes were suggested which he did and he updated the document. He was responsible for the development of the document and it would be then signed by JW. He was disappointed that he had made an error in formatting.

The claimant outlined to the Tribunal a series of meetings that he attended. At a meeting, which he attended on 21 April 2008, the claimant stated that no one had approached him directly regarding the quality of his work. He was given feed back on assignment X in 2007/2008. Prior to this meeting he had undertaken two to three assignments a week. He did not hear from RAS partner in relation to this. He was told that partner E had made a complaint about the quality of the BCP proposals that he had undertaken work on. This was the first time that his Line Manager spoke to him. If a client disagreed with the rate he charged they may ask for a reduction and he had stopped a reduction in fees. In 2007/2008 it was more difficult to win business and to charge clients. He attended a meeting on 31 July 2008 to discuss financial performance and account C. The claimant had assisted MH a partner in another part of the firm on a proposal and the feed back from the client was positive.

On 15 August 2008 he met with his Line Manager to discuss progress on the PIP. He was asked to assist with Channel 1 work. He had not undertaken Channel 1 work in eight years. He had sixty important clients. Channel 1 work was audit work, and Channel 2 work was non-audit advisory services. His Line Manager allocated sixty clients to the claimant and this work was not a high earner.

He met with his Line Manager on 15 September 2008 to review Channel 1 work. At a meeting on 19 September 2008 he was asked to do work on TSRS. The process at the end of C was to give the client feedback. He received a letter from the Human Resources Manager on 10 October 2008 with a sense of dread. It was a formal document putting him on notice and he was not happy. He was aware in July/August that PIP was being introduced. He made contact with the Human Resources Manager who passed it to UM and he heard nothing further from UM.

On 14 October 2008 he attended a meeting with his Line Manager and the Human Resources Manager in relation to the PIP and they sought to improve capabilities and looked at it in a positive way. In October 2008 reference was made to work that he undertook in 2005 and 2006. He was given an annual review rating of 3. There were no adverse comments other than from his Line Manager. There was a policy in the respondent to reduce costs. He agreed that his chargeable hours were low. He received a written warning from his Line manager on 21 October 2008. This was a bit of a shock to him. He was confused as to whether this was a PIP or a disciplinary process. A meeting took place on 29 October 2008. At the meeting were the claimant, his Line Manager and the Human Resources Manager. He felt that the comments made to him at the meeting were indirectly leading towards disciplinary. He was not aware that anyone in the respondent was dismissed. He contacted HR about improving his performance but his call was not returned. He felt the way forward was to look for ways to improve. Work that he undertook three years previously was being discussed. A meeting took place on 20 November 2008 following on from the written warning on 21 October 2008. No one discussed with him the basis of the capability policy. No other executive had raised issues with him. He questioned the issues that were raised over the last three years. He felt that he had addressed the issue regarding formatting and the proposals. He felt in retrospect that he was sidelined from undertaking chargeable work.

When he received the final written warning dated 24 November 2008 he felt that the respondent was out to push him out. He was aware that senior managers left after receiving a rating of 2. He did not receive any support from HR and no avenues came his way for improvement. Work that he

had undertaken years previously was presented to him at a final meeting.

At the appeal meeting on 19 December 2008 he met with DQ and UM. He was questioned on his performance with the respondent; he was asked what action he had taken in looking for a job. He informed them he was applying for a job. He took out his points of appeal and he raised the first and second points and he then gave this document to DQ. DQ and UM concentrated on his performance with the respondent in previous years and his chargeable hours. He could not recall a discussion on the points he had raised. He admitted that his chargeable rates were low. He felt that the appeal hearing was a grilling session and all the points he had presented at this meeting were not raised.

He received a letter dated 19 January 2009 requesting him to attend a meeting on 21 January 2009. He could not recall the one piece of information that he was awaiting to close off an account. The outstanding issue at the meeting was S account, which had not been signed off. He attended another meeting on 17 February 2009. Every time he attended a meeting he was presented with bad news. A follow up meeting was arranged for 18 February 2009. His Line Manager told him that he was being dismissed and that all further correspondence should go to HR. He had no opportunity to give feedback and was not allowed to comment to his Line Manager, the meeting lasted twenty minutes and he left the office and went home. He received a detailed letter of dismissal dated 20 February 2009 in which it outlined to the claimant the areas of concern the respondent had with his performance. The claimant stated that his Line Manager did not go into that level of detail at the meeting. He left the respondent on 20 March 2009.

He outlined to the Tribunal the steps that he had undertaken to gain alternative employment. He stated that a number of the companies he sought employment with had a connection with the respondent and he could not take up employment with these companies.

In cross-examination when asked if the respondent was entitled to alter the policy and procedures at any stage without altering the contract he replied to his detriment without agreement. JMX was discussed with him before it was implemented. He agreed that the contract left room for policy and procedures to be introduced. He agreed he should be willing and able to adapt to new procedures. He received twenty e-mails a day and about five related to his role. The capability policy was for his and staff benefit. He scored a 3 rating overall.

He accepted that the question of quality of work came on to the capability meeting. He accepted that as a senior manager that he had to go out and win work. He agreed that his Line Manager channelled work to him He received a half days training in JMX. He did recall telling his Line Manager that a target of 900 chargeable hours was very high. He had a very low total of chargeable hours. He asked two colleagues to come to the capability meeting with him on 15 October 2008 but they declined. He was aware of the terms of the capability policy in October 2008. He took a note of this meeting after the meeting. When put to him that the capability policy gave a right of appeal he replied he responded to the letter of 21 October. He disagreed with the conclusion that his Line Manager had reached. He accepted that his Line Manager identified two projects for him. The targets that his Line Manager set related to work targets. He received a weekly report of charged hours and these were at the low level. He had to get a detailed breakdown of chargeable hours. When asked that the Line Manager raised issues about his performance with him on an ongoing basis he replied that he had received a bonus that year. The meeting of 18 February 2009 lasted for twenty minutes. S and W accounts were not discussed in great detail on 18 February 2009. He believed that his performance was raised at a meeting on 17 February 2009. He was able to retrieve a draft document that contained an error before it reached a client.

In re-examination he stated that the O account was a proposal.

Determination

The Tribunal finds after having heard all the evidence in the case and taking all matters into account that the Claimant was unfairly dismissed from his employment on grounds of performance.

The Tribunal also concludes that the Respondent Company did not adhere to its own procedures, making the dismissal process inherently unfair. In this regard, the Tribunal finds, inter alia, that there was a lack of any reference to an appeal procedure in the dismissal letter and there were no notes from the meeting to dismiss the Claimant.

The Tribunal also concludes that there were no other alternative options rather than dismissal considered by the Respondent Company prior to the decision to dismiss and this was confirmed by the Respondent's Human Resource Manager who was not asked for her option on any alternative options.

In determining that the Claimant was unfairly dismissed the Tribunal has carefully examined and has had consideration to the documentation submitted, the case law referred to the Tribunal and the oral submissions made by both Parties.

The Claimant did accept that his chargeable hours were low.

Having decided that the Claimant was unfairly dismissed under the Unfair Dismissals Acts, 1977 to 2007, the Tribunal awards the Claimant the sum of €60,000.00 by way of compensation under the aforementioned Act, which the Tribunal considers to be appropriate in all the circumstances.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)