

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
EMPLOYEE – *claimant*

CASE NOS.
UD1535/2009
MN1523/2009

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: Ms O Madden BL

Members: Mr N Ormond
Ms N Greene

heard this claim at Dublin on 28th July 2010, 13th December 2010 and 14th December 2010

Representation:

Claimant: Mr Padraig Lyons BL, instructed by Mr Daniel Holohan of
Lavelle Coleman, Solicitors, 20 On Hatch, Lower Hatch Street, Dublin 2

Respondent: Mr Cathal McGreal BL, instructed by Mr Padraig Ferry of
Ferrys, Solicitors, Inn Chambers, 15 Upper Ormond Quay, Dublin 7

The determination of the Tribunal was as follows:-

Dismissal was not in dispute. Page 1 of T1A was agreed by both parties..

The claimant was dismissed after an investigation of a purchase order which could have cost the company €130,000, but was minimised to €30,000. The respondent's representative contended that in some cases an issue is so serious that it would be permissible to depart from procedures.

The claimant's representative contended that the allegation was never put to the claimant and he denies any allegation of wrongdoing.

Respondent's Case:

The first witness for the respondent company was an ex-employee who reported to the claimant. She was with the company for ten years and had set up the Dublin department of the company, which operates a global supply chain procurement service for electrical components.

The witness contended that in January 2009 the claimant told her to process a large order of drive kits from a customer that the customer had sought a quote on but had not ordered. She said that the claimant told her to lie about an order and say that there was a verbal agreement. Every order required a validation order through their computer system. Orders could not be completed until the validation process was complete. The validation order was not completed until the middle of February 2009.

The claimant insisted that the order was pushed through even though there was no purchase order. The sales for January 2009 had been poor. Sales commission was payable to all of the salespersons involved. The witness did not want the commission as she knew what she had done was wrong. The witness sent the claimant an email asking him to confirm that she should proceed with the dummy order (she said she must have received a reply as she proceeded). She used a shortcut for a quick purchase.

The customer did not want as many kits as had been put through on the order. There was a series of emails between the witness and the customer concerning the number of kits to be ordered. The claimant was pressurising the witness to get the order placed.

During cross-examination the witness explained that the quotation request came in two months before Christmas 2008 for 500 drives. She responded with the quotation in November 2008. The customer then requested a quote for kits and she quoted them for that. At the end of December 2008 she reduced the quote from €860 to €660 per kit in an effort to get the order. She had copied the claimant on all of the quotation documents. The end of January is the company year-end and the pressure was on to reach targets. By the end of January 2009 the client still had not ordered. The client did not have a clear outlook on what they would need. The client agreed 125 kits but later said they only needed ten kits.

An ethics committee within the company investigated the order. She knew that she had created a fraudulent order. She forwarded all her emails to the VP of HR in June 2009. On June 23rd 2009 the VP of HR interviewed the witness over the phone. She received a reprimand. Her contract was not renewed at the end of 2009.

Originally they anticipated an order for 500 kits. Later an order for 250 seemed likely. At the end of January the order had not been validated. The claimant expected an order for 125. In the event 10 kits were ordered in February and later a further 26 were ordered. She was not confident of receiving an order for 125 kits. She had known the customer for 8 years.

It was months before the ethics committee i.e. the VP of HR, spoke to her. The ethics committee talked to shippers, engineers and accountants. When she was phoned she was not told who was investigating and what. She worked for the respondent for 10 years. A customer would request a price for a product. She would quote a price. The customer would negotiate. Then the customer would send an order. A sample of the product would go to the customer for validation. In this case the product was validated in February.

Everyone knew that what happened was not right. The claimant wanted her to push for and order for 125. She felt that it was not right to process the order but the claimant said otherwise 10 people could lose their jobs. She was under pressure.

The managing director gave evidence. In January he was aware the order was in the offing. The ex-employee reported to the claimant who in turn reported prospective orders to him. An order of 250 would have been significant.

Very occasionally an order is processed contrary to company policy if a customer has said I will purchase. He was at home when the claimant phoned him on 31st January to say there was a commitment for 250 kits. He was relieved because the company needed the business.

The managing director agreed that no purchase order for the kits existed on 28th January 09. But a purchase order was anticipated and people were getting organised so that the order could be shipped direct to the customer enabling the order to be included in the January accounts. Shipping direct would entail the risk of the product not having the correct labels and documentation.

The managing director believed the claimant had a commitment from the customer. A few days later the claimant told him the order was for 20 kits and not 250. The claimant regarded it as a renege so the managing director asked him to contact the customer.

An ethics committee set up in corporate headquarters in California investigated the transaction. The managing director was called to a meeting in California and received a written reprimand. Before the meeting the managing director received no correspondence relating to the investigation. Once the managing director knew that an ethics committee was investigating he stopped talking to people about it. If he spoke to the claimant about the investigation he would have said that he should cooperate. The claimant's meeting was in Dublin. The ethics committee phoned him.

In the opinion of the managing director the claimant did wrong in accepting a verbal order. The company is quite strict about what constitutes a purchase order. It is not common to accept a verbal or an email purchase order. Sometimes an email is accepted but it is not usual to accept a verbal order. As a result of that the claimant earned about €600 in profit share. The managing director did not instigate the investigation he had hoped to work through the matter.

Only 40 of the kits purchased to fill the anticipated order were sold. The remainder were returned to the supplier at a knock down price. The company made a loss.

A member of the ethics committee gave evidence. He has been an executive with the respondent for 10 years and is based in California.

If a customer wants to buy something 90% of the time a formal purchase order is submitted. An email or more rarely a letter may be used to make an order. When an order is entered on the system the buyers will source grey material (products not freely available but out there) to fill the order. The product is then checked and shipped to the customer. The product must be shipped before the company will recognise the revenue.

In this case an invoice issued to the customer for 250 kits. The customer did not pay and complained that they did not order it. The finance section was aware of an uncollectible invoice. In June the CEO of the company became aware of the issue and set up the ethics committee to investigate.

The investigation was not done in ink. The ethics committee set about interviewing everyone involved and asked the interviewees to supply documents. The company's core values are honesty, integrity and respect. The company uses a uniform commercial code an order over \$500 needs documents. A verbal order is not acceptable. An email order is acceptable but not desirable.

The ethics committee member investigated by phone and stayed at arms length. No formal accusations were made because at that stage they did not know whom to accuse. The three-member ethics committee phoned the claimant on 22 June. At this stage he was not accused and he was not told what to say or not say. They went through the order process with him, took notes and thanked him.

On 30th January the claimant thought he had an order. The managing director should not have allowed the claimant to book the order. He was called to California for a reprimand and retraining. The managing director did not try to mislead the company. There was no evidence that the ex-employee told the claimant there was a verbal order, in fact she did the opposite.

The claimant violated company procedure to count revenue in a month before product shipped. This was a particularly serious matter because the company was changing its accounting year, resulting in January 09 accounts appearing in the accounts for two years. The claimant also told the shipping manager to show the order shipped. The database showed that the customer collected the order. As a result the audited accounts were false.

When he investigated the matter the ethics committee member did not just believe what the claimant's former colleague said. He looked for the emails. The claimant's former colleague was reprimanded and had to do ethics training again. The ethics committee member was satisfied that she had opened a dummy account on the orders of the claimant. The claimant did not appear to be telling the truth at investigation. A verbal order is not acceptable but in this case there was not even a verbal order. The investigation found no order.

The claimant was informed on 1st July 09 that he could be dismissed. The ethics committee spoke to the claimant on the phone. The claimant knew about the investigation and he attempted to influence the ex-employee in what she would say to the investigation. The matters arising from the investigation by the ethics committee were not put to the claimant because no local employee could be impartial in dealing with the claimant.

No one told the claimant he had a right to a representative. There was no difficulty with him having a representative. No documents were given to the claimant. The ethics committee did not write to the claimant in advance of the meeting and neither did the local HR.

The decision to dismiss him had not been made before the meeting started. If something had come up the claimant would have been suspended. The claimant was told that the ethics committee found that there was no order in any format and that unless he could refute the allegation he would be dismissed. The claimant was annoyed and uttered profanities and left the room.

The decision to dismiss the claimant was made after the meeting. If they found reason to believe the claimant thought a verbal order existed a reprimand might have been appropriate. However in these circumstances dismissal was the appropriate sanction. A letter of dismissal issued to the claimant electronically the next day. The letter on file is the letter sent to the claimant. There was no second page. The letter did not state that the claimant had the right to appeal the decision to dismiss him. The claimant did not appeal.

The terms of the claimant's contract were followed at all times. Because of the seriousness of the claimant's behaviour it was correct to skip Stage 1 of the disciplinary procedure.

The account manager gave evidence. At the time of the incident he was the purchasing team leader. At the end of January 09 he believed that the customer would order 250 kits made from 500 drives. He had secured the stock required to fill the anticipated order. He created a purchase order to purchase the stock pending receipt of the order from the customer.

Claimant's Case

The claimant gave evidence. He joined the company in 2005 as a supply chain manager. Later he was promoted to VP procurement. At first there were 100 employees later that was 60. He supervised the sales team of three or four people including one in Malaysia. Each sales team member had a major client and was expected to try and expand sales.

In November 08 the former employee asked the procurement team to source drives.

The claimant told the Tribunal that he always worked honestly and hard. He lived by his reputation. He believed that the client intended to buy the kits. The price was structured around the client buying 250 kits. He did not talk to clients but relied on information supplied by account managers. The former employee was telling him that the order was secure and she expected it to be formalised in February 09.

The validation process was going through quickly and smoothly and this added to his belief that the client would purchase. The validation unit was shipped and the technical validation concluded in December. The validation of the packaging was not concluded and that was the delay. He did not have a written purchase order but he knew the client would not issue one until the validation was complete.

The claimant phoned the managing director on the last day of January and they talked about the order. The former employee was 100% certain the order would come. The claimant had a doubt but felt that she generally got an order when she said. The managing director told him to cut the order off to ship it to the customer.

They needed a purchase order before the kits were shipped. They were discussing shipping without a purchase order. The claimant was considering a drop ship, sending the kits directly from the supplier to the client. Goods would usually come to Dublin first for inspection and packaging.

The claimant was confident the order would come. The only remaining issue for validation was to sign off on the box and this was a relatively simple issue. When the purchase order did not come soon after validation was completed he spoke to the former employee. She still expected an order for 250 kits. The client was beginning to go cold. He suggested to the former employee that she ask the client to order half and take the remainder as a call off. He expected an order for 125 kits on 17th February 09. However an order was received for 40 kits.

In June the CEO phoned him to ask about the order. The claimant told the CEO the order for 250 kits was shipped off the system on 30 Jan and there was no written purchase order. A second phone call came through on his mobile phone when he was at home on 24 June or perhaps 22 June. He was not told that it was a disciplinary meeting. He thought that the compensation committee were

looking at whether bonuses should have been paid. The order shipped without a purchase order but the managing director agreed. The claimant believed from the former employee that the order was made.

On the day of the third phone call the HR manager came to him at about 4.30pm and told him the US wanted to talk to him. She brought him into a room to take the call. They introduced themselves as the ethics committee. They had investigated and found that he had acted fraudulently. He told the managing director fraudulently that an order existed. The claimant denied the allegation. His employment was terminated with immediate effect. The claimant was annoyed and used expletives before leaving the room. He received the letter of dismissal the next day and it contained no offer of an appeal of the decision.

The claimant got no notice of the meeting on 1 July. He was given no documents supporting the allegation against him. During the phone meeting the claimant was given no opportunity to defend himself. If he had the opportunity to defend himself the outcome would have been different. The claimant accepted that both he and the managing director breached company procedures. The claimant felt that his actions did not warrant dismissal. The managing director was not dismissed.

Determination

The Tribunal carefully considered all the evidence adduced in this case. The action taken by the claimant resulted in inaccurate end of year accounts for the respondent. His action also had the potential to cost his employer a significant amount of money. However there were difficulties in the manner in which the respondent investigated the matter and instigated disciplinary proceedings. No written notice of the matter under investigation was given to the claimant. He was not given any advance notice of the meeting at which he was dismissed. The procedures used by the respondent were inadequate. Accordingly the claim under the unfair Dismissals Acts 1977 to 2005 succeeds. However the Tribunal are of the view that the claimant's behaviour contributed significantly to his dismissal. Therefore no award is made to the claimant.

The claimant is awarded €3,138.70 being two weeks pay under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)