EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO. UD2314/2009, MN1627/2011

EMPLOYEE ***-claimant***
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: Mr R. Maguire, B.L.
Members: Mr F. Moloney
Mr C. Ryan

heard this claim at Dublin on 25th January 26th and 27th July 2011

Representation:
Claimant: Ms Ruth Mylotte B L instructed by Mr. Brendan Steen
Solicitor, Steen O'Reilly, Solicitors, 31-34 Trimgate Street, Navan, Co Meath

Respondent: Ms. Anne Byrne, IBEC, Confederation House, 84/86 Lower Baggot Street, Dublin 2

Respondent's Case:

The respondent is a wholly owned subsidiary of a larger insurance group which serves more than seventy –five million customers in over seventy countries. It specialises in providing international expatriate health insurance for employees, individuals and their dependants, wherever they are in the world. Their focus is on earning and maintaining client loyalty by providing a global, market leading, level of service and support.

The representative for the respondent opened their case: the respondent would only evacuate their customers from other countries only on medical advice. The claimant was a member of the health evacuation

The Tribunal heard evidence from the head of Operations who was in charge of a number of departments including the medical services department. He explained that the company manages

different levels of healthcare. One of which is medical evacuations from other countries to the patients home country or to where appropriate medical care can be administered. They also manage the costs of the evacuation and the medical care. Time is critical in the matter of an evacuation as there could be severe consequences.

The computer or e-mail management system filters medical requests and allows the respondent personnel to prioritise requests. If a key word is in the e-mail it will flag it up on the system. The e-mail can also be sent / received in different languages. The system will go to the evacuation queue if the word evacuation is contained in the e-mail. If it does not have the word evacuation it will go into the general queue. The evacuation e-mail goes to the person who makes medical decisions and they are the experts.

On 15th July 2009 at 17.50 an e-mail arrived and transferred to the medical queue. The claimant's shift ended at 19.00. They would have expected the e-mail to be actioned before the next morning. The claimant was the person on duty and no one else was. The claimant was in a role as a medical expert, he was a decision maker and his role was critical.

The next day a co-ordinator pulled the e-mail and actioned the e-mail. This person was not a medical person he was a co-ordinator.

The e-mail concerned about evacuating a patient to the UK. The patient was safely transferred. However they realsied from a report that something was wrong, they also received a verbal complaint from the client. They noticed that the claimant could have intervened in the case fourteen hours earlier. They did not inform the claimant of their concerns as he was on holidays. They met the claimant on 27th July. It was a difficult meeting, the claimant would not sit down, he was agitated and would not properly come into the room. They told the claimant that they needed to investigate and that they were suspending him with pay. The claimant left quickly. The claimant's manager helped him collect what he needed from his desk. They made four attempts to arrange a date for a disciplinary hearing .

The witness further explained the process that went on regarding the evacuation, that they had no issues with the quality of the e-mail system or the other officers involved etc. They looked at the team meetings that the claimant had attended to be sure the claimant was aware of the process and was trained in the process.

The witness explained that the patient in the paticular evacuation case in question could have died. This is why they employ medical staff as it is critical to make an early assessment of a case.

He and two colleagues discussed the situation and they felt that it was a breach of trust.

This witness was a joint decision maker along with the head of human resource and training in concluding that the performance and behaviour of the claimant on 15 July 2009 was a case of gross misconduct and deserving of dismissal. During the course of the investigation meeting on 10 August the witness "would have" reviewed, considered and listened to the facts of this case. That meeting included an input from the medical service manager. That person reportedly stated, among other things, that the email in question did not have the word evacution in its subject line. No one else was formally interviewed or called to attend this investigation meeting and the claimant was the only employee to be disciplined for the delay in acting on it.

The human resource department consisted of a specialist and her colleague who was the head of that section. The specialist was made aware of an incident concerning the claimant and a mismanaged email by the head of operations. The claimant alleged wrongdoing was the sole topic of a meeting she attended with him and the head of operations on 27 July 2009. This witness could understand the behaviour and attitude of the claimant during the course of that meeting as it was reasonable for him to have felt agitated. Subsequent to that meeting and prior to another one on 10 August the witness communicated with the claimant. That correspondence included the issuing of an email trail to him, attempts to arrange investigationary meetings, and detailing the actual allegation to him. This read as follows:

On 15th July 2009 you were covering the late shift from 4pm to 7pm.. You were the only Medical Services Advisor covering this shift. While covering the late shift Medical Service Advisors are responsible for ensuring that all mails received to thje medical department during this time are actioned including and especially evacution cases. The email regarding this evacution arrived at 5.50pm. You clocked out at 7.01pm, without actioning the email.

This witness acted solely as note taker at the meeting on 10 August. The heading on her notes labelled that gathering as an investigation meeting. Also in attendance was the medical services manager whose contribution was that of a technical nature. The witness quoted him as telling the head of operations and the head of human resource and training that the other medical adviser had checked the case on the system before leaving on 15 July to ensure there was nothing outstanding and to ensure a smooth handover to the late shift. This is what should have been done. The witness who identified the other adviser told the Tribunal that she could not exactly remember what that manager actually said and was not in a position to clarify her reported note on the wording she used. Her notes on that meeting were not copied and sent to the claimant and she had no further direct input into this case.

The head of human resources and training first became aware of this case when she returned to work on 3 August 2009. She then took control of it from her colleague, the human resource specialist. In that capacity she wrote to the claimant and his representative on 7 August inviting them to a fourth investigation meeting in three days time. She made it clear that this meeting would go ahead even in their absence. This witness reasoned that had the claimant not been suspended he was rostered to work that day so notwithstanding his exam schedule he was in a position to attend. The meeting proceed as planned and based on contributions from herse lf, the head of operations, and the medical services manager the witness and the operations head concluded that the claimant's lack of action on 15 July regarding the evacution email amounted to gross misconduct.

They reached that conclusion on the answers to their own questions-Was the claimant fully aware of his duties?-Yes, and could he be trusted to work alone on the evening shift?-No Both agreed that dismissal was the approproiate sanction in this case. She conveyed that decion to the claimant in writing the next day. The witness referred to the following clause in the respondent's disciplinary procudure under the sub heading of Gross Misconduct to justify that decision.
Failure or refusal to carry out duties as set out in your terms and conditions of employment, or failure to carry out a reasonable management instruction.

This witness described the contents of an email sent to client services but specifically addressed to an identified medical services adviser as an evacutation email. That email was sent to that adviser on 15 July 2009 at 18.13 local time which in this case was up to six hours ahead of the respondent's office. The previous day client services received email notification regarding a patient in central Asia and a named medical service adviser responseed to it later that day. The helpline manager

"pulled" an email about this case at 17.10 office time and transferred it to the medical pending queue at 17.50. This was the email the claimant failured to notice, read and act on. That ommission was unacceptable as the claimant was expected to deal with emails in that queue at that time. While the witness spoke to the helpline manager about this case no disciplinary action was taken against her as she had properly performed her role. She also understood that the medical services manger spoke to the named medical adviser about this incident.

Prior to the appeal hearing the witness spoke to the chief executive officer about this case only in a human resource context. She also acted as note taker at that appeal hearing which lasted for about fifteen minutes. Following that meeting the chief executive officer also spoke to the named other medical services provider.

The chief executive officer who described the respondent as a fair employer told the Tribunal that while he had no direct involvement in the claimant's case he was aware of it. That awareness was based on reading the notes of the investigation meeting and the relevant emails together with discussions with other staff members with technical and administrative knowledge on how the system actually worked. He took his role as chairman of the appeal hearing seriously and this was his first experience in performing that role. Attending that meeting on 1 September 2009 was his colleague the head of human resources and training acting solely as note taker together with the claimant and his legal representative. The chief executive officer said that this brief meeting was something of an unsastifactory affair. He felt irritated by that representative due to his approach and attitude and was "fed up" with his input. Apart from the claimant stating that his integrity was being called into question and that he was not responsible for the disputed email he had little else to say.

In satisfying himself that this email came into the approproiate box for evacation when the claimant was the only medical service adviser on duty and that he did not act on it the chief executive officer felt both morally and legally bound to uphold the respondent's decision to dismiss him. With significant regret the claimant "had to go" as the respondent no longer had the confidence andtrust in him to perform his duties. According to the witness almost the worst thing such an advisercould do was to fail to respond to an evacution email as that could result in negative exposure forthe company and the patient. The chief executive officer relayed his decision to the claimant inwriting dated 10 September. A full investigation had been conducted and the claimant had beenunreasonable in not participating in that process. That lenghty letter justified his decision on thegrounds of gross misconduct.

Claimant's Case:
The claimant who is a registered general nurse commenced employment with the respondent in April 2008 as a medical services adviser. That role included having the authority on whether or not to allow medcial evacutions for clients in certain situations. This was the claimant's first job in the insurance business. A staff handbook which formed part of his terms and conditions of employment was updated and forwarded to him in April 2009. While the claimant worked in a team with a number of administors and other service advisers he had sole autonomy for medical decisions when working alone. The claimant was the only such adviser when he worked on what was called the evening or late shift which officially started at 16.00 and ended three hours later.

The claimant was the receipent of a letter dated 17 June 2009 from the head of human resources and training which contained not only a verbal written warning but also other disciplinary sanctions against him. The respondent had ongoing concerns about his productivity and overall performance That letter followed on from a meeting he had with his manager five days earlier. That manager and the claimant was, from that time onwards, to conduct a weekly one-to -one session

based on a performance improvement plan. The claimant was happy to fully participate in that plan. His appeal against the warning and its sanctions was unsuccessful. That plan and all other reviews covered all aspects of his work. By June 2009 the respondent had lost a major client and that loss probably contributed in an apparent drop in his measured productivity.

As part of those reviews and performance improvement plans the claimant heard his manger tell him to particularly look out for and give preference to his own inbox emails and emails in the evacution queue. Immediate action was required on all emails in that queue while another queue called medical pending while not unimportant was not dealing with emergency cases. This scenario was particularly important when working alone on the later shift.

On 15 July 2009 the claimant had a meeting with his manager and felt those reviews and plans were going well. Since he was working up to 19.00 that day he had sole responsibility for his section's work from 16.00 and his prime function was to be on alert for incoming emails into his own box and that of the evacution queue. That day his manager and another colleague remained in the office until around 17.00. The last email he attended to that day was at 18.29 and without further mails to address he turned his attention to ongoing case files on his desk while keeping his email boxes open. While he accepted that this looked like there was little activity that evening he remained working up to 19.01 when he clocked out.

The next day the claimant received an email from a colleague at 10.55 and after a "huddle session" he acted on its contents and importance and completed that activity by 11.43. Having subsequently acquired an email trail of this particular email the claimant could see that this email had been transferred into the medical pending queue at 17.50 the previous evening. Due to that routing and queueing system he had not seen it that day nor had it been brought to his attention. It had not been placed into the evacution box and the claimant was not made aware that it needed immediate and urgent attention. The user or administrator who sent it into that queue had read it a minute earlier. That person sat no less than ten metres from the claimant in the same office. Prior to taking leave the claimant also worked on 17 July and no reference was made to him about that mail and its contents.

When he reported back to work on 27 July his manager greeted him and indicated there were no outstanding issues. However, within an hour of that he was called to meet the head of operations and a human resource specialist. The claimant had a feeling that this meeting was to discuss the situation about this email. A delay of fourteen hours had occurred from the request for an evacutionand the decision to grant it. In this case that delay did not negatively impact on the evacutee's health. At that meeting the claimant was told he was being suspended pending an investigation intothe matter. A letter sent to him confirming that suspension stated that the respondent took that action on the basis of an allegation that he failed to carry out a reasonable management instruction. *To ensure that all necessary work is completed before leaving at the end of your shift (that allemails/calls are actioned).* The letter also informed him that on the evening of 15 July 2009 that hefailed to action an email regarding an evacution. Such an ommission was liable to adversely affectthe patient in question and harm the reputation of the respondent.

The claimant was upset and very concerned at this development and its possible implications for the future. That future included the sitting of examinations one of which was scheduled for 11 August. Prior to 10 August three attempts were made to hold a meeting to address the allegatiion against the claimant. Mainly due to the unavailability of the claimant's representative those investigatory meeting had to be postponded. Between late July and the middle of August there was

a series of correspondence between the respondent and the claimant and his representative relating to that allegation and its aftermath. The respondent insisted on a meeting for 10 August and notified the claimant that even in his absence the meeting would proceed. In a lenghty letter dated 11 August the head of human resources who described the previous day's meeting as a disciplinary affair informed the claimant that he was now dismissed by reason of gross misconduct.

The claimant was shocked but not surprised at that outcome. He told the Tribunal that had he seen the contents of that email on 15 July he would have acted on it. Since he had not seen it nor in any way been alerted to it then it was incorrect for the respondent to state that he had breached their trust and confidence in him. Besides he had not acted contrary to the aspect of gross miosconduct on which the company was maintaining. The claimant appealed the respondent's decision to dismiss him to its head of human resources and training and an appeal hearing was set up before the chief executive officer on 1 September. Three days earlier the claimant's representative and solicitor set out in writing five gounds of appeal. The claimant described that hearing as not very nice as the chief executive officer showed animosity towards the claimant's legal representative. He did not feel this short meeting was fair.

The claimant was informed in writing by that officer that the respondent's decision to dismiss him was being upheld. The final paragraph of that three page letter read as follows:

In conclusion I have no option but to uphold management's decision to dismiss you on the grounds of Gross Misconduct as failure to carry out duties in this respect represents a fundermental breach of the trust and confidence in the employee/employer relationship.

Determination

The claimant in this case was dismissed for gross misconduct which is a very serious offence in the work place. In addition to relying on the particular circumstances of this case the respondent also placed emphasis on the following from their handbook on gross misconduct

Failure or refusal to carry out duties as set out in your terms and conditions of employment, or failure to carry out a reasonable management instruction.

Having heard and considered the adduced evidence in this case the Tribunal cannot agree with the respondent that the claimant's input into this situation amounted to gross misconduct or indeed any misconduct at all. Whatever input, if any, he contributed to this email scenario on the 14/15 July it was certainly not one that justified that conclusion and sanction. Indeed as soon as he became aware of the situation on 16 July the claimant acted in a professional and proper manner.

The Tribunal does not accept that a full investigation was conducted by the respondent. Apart from the claimant several other employees were involved in the management of this email. Any interviews or probes into their possible input of this email were not adequately examined.

The claim under the Unfair Dismissal Acts, 1977 to 2007 succeeds and the Tribunal awards the claimant €40,000 as compensation under those Acts.

The appeal under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and the appellant is awarded €826.54 as compensation for lack of statutory notice.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)