EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:	**CASE NO.**
EMPLOYEE	UD2250/2009
	RP2549/2009
	MN2089/2009

against

EMPLOYER
under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr M. Gilvarry

Members: Mr. D. Morrison
Ms. R. Kerrigan

heard this claim at Donegal on 5th October and 1st December 2010

Representation:

Claimant: Mr. Gordon Curley, O'Gorman Cunningham & Co., Solicitors, 16 Upper Main Street, Letterkenny, Co. Donegal

Respondent: Connolly Doyle, Solicitors, St. Oran's Road, Buncrana, Co. Donegal

The determination of the Tribunal was as follows:

Claimant's Case

The claimant gave direct sworn evidence. He commenced employment with the respondent in November 2002, in November 2005 he was promoted to an Associate Architectural Technician. On foot of this promotion he was issued with a new contract, this contract permitted him to participate in limited private/personal work.

As a result of the economic downturn in July 2008 the managing director (hereinafter referred to as MD) met with the claimant and two other colleagues and asked them to agree to work a three day week, the claimant agreed to this as he thought it was on a temporary basis. His specific terms of his contract were not raised at this meeting.

In March 2009 he received a letter from the respondent stating that the condition that allowed him

to do private work was to be omitted from his contract of employment. He was required to sign this letter and return it to his employer by the 13th March 2009. He did not sign or return this letter as he did not agree to it contents, nor did the respondent pursue this with him.

In July 2009 a job advertisement for a full time position within the respondents company was placed on the FAS website, when he confronted MD about this MD said he had uploaded it by mistake and he was testing the waters.

On the 4th August 2009 the claimant was going through his own bank account when he realised he had not received his wage for the previous week. He asked MD about this and MD looked puzzled and wrote him a cheque to cover his wage. On Friday 7th August 2009 he checked his bank account again, and his weekly wage had not gone through. On Tuesday 11th August he informed MD, said there must have been some mistake, he would get his wife to look in to it. On the 12th August 2009 MD and his wife went on holidays, the claimant texted MD in respect of his wage and MD replied saying he would sort it out on his return.

While MD was on holidays the claimant went in to his office to look for job files. While in MD's office he found a letter addressed to him informing him that he was in breach of contract and was being suspended with out pay, also was a slip cancelling the standing order of his wage dated 31st July 2009. He was distraught at this discovery.

MD returned from his holidays on Tuesday 1st September 2009, the claimant wanted to confront him about what he discovered but MD was very busy. That afternoon MD and another colleague (CD) were called down to see MD. MD asked them to give a report on what jobs they were working on, MD was taking notes. MD informed them that there was a problem and asked them to wait while he left the room. MD returned to the meeting room with the claimant's and CD's personal belongings and informed them that they were in breach of their contracts and were suspended without pay effective immediately. He handed them both a letter in this respect and went through the letter's contents with them. The letter stated that they had been working outside the perimeters of their contracts. The claimant questioned this as to what MD meant, MD referred him to the letter that issued in March 2009. The claimant informed MD that he had not agreed with it so he had not signed or returned it to the respondent.

MD also referred the claimant to the 20th August 2009 where a former employee (A) had entered the respondents premises and had accessed a file. MD requested that the claimant provide him with a statement in relation to this incident. He also requested the claimant provide him with a list of jobs he had undertaken privately since his commencement with the respondent. At this meeting MD accused the claimant and CD of costing his company thousands and explained previously he had this issue with a former employee who he was currently suing.

MD informed them that the incident with A entering the office was serious and he was going to the Gardai in relation to it. He provided the respondent with a statement in relation to the event surrounding A. The claimant explained that A had come in to the office, this was not the first time he had returned to the premises, he had been on the premises previously while MD was there. The claimant had no knowledge of the file that A was alleged to have accessed on that day. He had hand delivered his statement of events along with his list of jobs on Friday 4th September 2009.

On the 9th of September MD rang the claimant requesting to meet with him, MD told the claimant that the issues could be resolved and there was work available for him. He also informed the claimant that the situation with A was more serious and he should distance himself from it. The

claimant arranged to meet with MD on the 10th September in the office.

MD greeted the claimant in a friendly manner, and reiterated that he thought that he had breached his contract though never specifically informed him of the work that was outside the perimeters of this contract. He informed MD that he had acted honorably at all times and within his contract at all times. MD felt they could resolve the issue and there was work available and he was also thinking of taking on two temporary staff to catch up due to the two weeks the company had been in limbo. The claimant requested a letter lifting his suspension and also that he could be seen as a senior employee. Also that he would be returned to a five day week and he offered to do overtime if necessary to deal with the backlog. MD agreed with him and said it sounded fine and a new contract would have to be drawn up and it would have to omit the condition allowing him to do private work. The claimant informed him he would like the opportunity to negotiate this new contract. MD informed him he would prepare a letter to lift his suspension and asked him to work the next day. The claimant told him he would think about it.

On the 11th September the claimant rang MD seeking the letter lifting his suspension as he did not feel comfortable returning to work without same. MD informed him that he was currently with his solicitor drafting a letter to that effect and also that his solicitor needed a more detailed statement regarding the incident with A. MD telephoned him ten minutes later and prompted him to write that he thought that A had entered the premises with MD's permission and to say that he had not worked a work station no. 4 on that day. Thirty minutes later MD telephoned him again, requesting the claimant to speak with his solicitor directly, he asked MD if he had the letter ready MD told him he was a man of his word. The claimant felt if he did accede to this request he would be returning to work even though he was being prompted to do things he did'nt want to do. He met with MD and his solicitor, the solicitor assured him that it was an informal meeting and that his evidence would not be used in formal proceedings. He asked the claimant to give details as his times were vague and the computer log showed accurate times. Most of the questions asked of the claimant seemed to implicate CD in the events. The meeting ended.

The claimant did not receive any letter from MD over the weekend so he telephoned him on the Monday. MD informed him that he could not issue him with a letter lifting his suspension as it would leave him open to be sued and that any letter forthcoming would be in the form of a written warning. The claimant received a formal written warning dated 16th September 2009 on the 17th September in person from the respondent. This letter informs the claimant that in conclusion the investigation in to the matters that led to his suspension has concluded. It informs the claimant that he is guilty of gross misconduct in respect of permitting a third party access to company property and for carry out works in a personal capacity that the company could properly carried out. However the letter invited the claimant to continue in his employment on condition that he accepted the amendments made in March to his contract "that employees are expressly forbidden to carry out private works" and changes to his renumeration be made in respect of fees generated. Enclosed with this letter was an acknowledgment to be signed by the claimant agreeing to the terms of the letter. The claimant explained MD gave him this letter and while he was reading the letter MD kept making conversation. MD asked the claimant could he work that afternoon for him so he did. He informed the claimant he could take the letter and sign it later.

The claimant could not comprehend the letter until he sat down with his wife that evening. Previous to this he had not slept for two weeks, that Friday morning he texted MD to tell him he was sick and attended his doctor, who prescribed him with prozac and sleeping pills and informed him that he was suffering from stress, anxiety and depression.

On Monday the 21st Spetember he received numerous telephone calls from MD, he did not answer. He had not submitted a sick cert to the respondents. On Tuesday 22nd September he felt he could not communicate with MD any more so he contacted his solicitor. On the same day he received a letter from MD stating that he was dissapointed that the claimant had not turned up for work Friday, Monday or Tuesday and from his actions he had to accept that the claimant was not returning to work asking him to respond to the letter so that " the formalities of your resignation can be settled". The claimant explained that the written warning he received from the respondent was a kick in the teeth. He was very stressed around this time. He gave evidence of loss to the Tribunal.

Under cross examination he was referred to his terms and conditions of employment "Special Condition" where it sets out the rules for employees carrying out private work for private clients. He accepted he had not always confirmed all works with the respondent before the outset, however it was a limited amount of personal work he could take. He denied he had done work for a developer (AB), AB was going to build his own house and the claimant had suggested that this sitecould be split in two and had telephoned the council on his behalf to see if it was possible. He wasnot paid for this. He accepted that the respondent requested in July 2008 that all private jobs bebrought in to the company, however he did not agree to this. A letter from the respondent to theclaimant dated the 2nd May 2006 was produced in to evidence. This letter is a "second writtenwarning" and refers to a first warning of the 23rd August 2004. It is in respect of the claimantdoing private work for an AC. The claimant denied he had ever received or seen this letter beforenor had he told the respondent about AC. AC's name only arose when he had submitted the list ofprivate work to the respondent as requested.

Respondent's Case

This small company which was founded in the year 2000 was engaged in architectural and building surveying. Its managing director was delighted with the development of the business in its initial stages. In the autumn of 2002 the respondent recruited the claimant as a junior technician. The claimant and the managing director had close family and geographical links and at times socialised together. The managing director told the Tribunal that he was happy with the claimant's work and by November 2005 he had promoted him to associate architectural technician. A contract to that effect came into operation from 1 January 2006.

By that stage there were issues between the respondent and the claimant over the application and operation of outside private work. Up to that time the claimant had been prohibited from undertaking such work. This updated contract allowed him to perform that work under certain conditions including the proviso that he had to inform the respondent at the outset of such work. At that time business was going well with the respondent as it was in the general industry. The managing director wanted to retain the services of his staff including the claimant.

The witness found himself issuing a second warning letter to the claimant in May 2006 in relation to a breach in his contract about outside work. The first warning was issued almost two years previously for a similar matter and an unauthorised absence. The managing director felt betrayed by the claimant's behaviour in not seeking permission to do private work. Following that warning the witness said there were no further difficulties as the claimant then sought and was given permission to carry out further external work.

In May 2008 the witness again issued the claimant with another warning about his failing to seek permission to perform private work. By the end of 2007 and early 2008 the respondent noticed a fall off in business and became concerned about his enterprise and staff. That concern grew and by

March 2009 the claimant was placed on a three-day week. The special condition allowing the claimant to conduct outside work was formally revoked. The claimant made no comment on that change. However, the managing director discovered that the claimant continued to act contrary to that prohibition and as a result issued him with a fourth and "final" warning in May 2009. The witness indicated to the Tribunal that he should have dismissed the claimant by then but was reluctant to do so due to their shared background. By that time the respondent was "in dire straits" due to a significant decrease in business. Prior to taking leave he had decided to terminate the claimant's employment and committed that plan to writing.

A problem arose in August 2009 regarding the payment of the claimant's salary. The witness suggested it was the bank's fault for the non-payment of his salary. He signalled to the claimant that this would be rectified upon his return from holidays later that month. When he resumed work the managing director learned that a former employee had been into the office and appeared to have engaged in some activity there. The witness was "fuming" at that and called a meeting of his staff and asked them to account for their workload. At a meeting on 1 September the witness suspended the claimant without pay and a subsequent warning was issued to him.

A further meeting took place on 16 September when it was agreed between these two gentlemen that the claimant would cease entirely his private work and return to full time work with the respondent. The witness then proceed to furnish the claimant with a letter indicating that he was guilty of gross misconduct. The claimant was asked to sign his acknowledgment of that letter and to agree to abide by his terms and conditions of employment in the future. The claimant never reported back to work instead he texted in to state he was sick. Since there was neither sight nor sound from him the following morning the witness attempted to contact him but without success. He then wrote to the claimant on 22 September and among the contents of that letter was the following:

I find myself with no alternative but to accept that you are not coming back to work and although you did not have the courtesy to formally resign I assume by your actions that you have in fact so resigned and accordingly I accept your resignation and I will now proceed to appoint your replacement.

Shortly after the despatch of that letter the witness received written correspondence from the claimant's legal representatives dated 22 September objecting to the contents of the letter of 16 September. The solicitor's letter stated that it was not possible for the claimant to continue his employment with the company. It sought an apology and compensation for the damage done to the claimant.

The managing director believed that the claimant abandoned his employment because he never signed the acknowledgement of the 16 September letter. No dismissal occurred in this case.

Determination

The Tribunal has carefully considered the evidence tendered in this case.

The first issue to determine is whether the claimant was dismissed. The respondent's case is that the claimant resigned. The claimant contends he was dismissed, expressly or constructively.
The Tribunal determines that the claimant was dismissed expressly by the respondent, by way ofthe respondent's letter dated the 22 nd September, when he purported to accept the claimant's "resignation".

The second issue to determine is whether the dismissal was unfair.

The onus of proof is on an employer who dismisses an employee to satisfy the Tribunal that they had good cause to dismiss the employee and that they acted reasonably in all the circumstances. This includes the right of the employee to have fair procedures applied in the disciplinary process. The respondent carried out a muddled and self contradictory disciplinary process. However he did bring forward a cause for his actions towards the claimant, relating to the claimant carrying out private work without prior approval. The Tribunal finds that the claimant was clearly in breach of the terms of his contract relating to private work, even if it is accepted that no change to that contract prohibiting all private work was agreed to by the claimant. The claimant did not deny that he had failed to seek advance approval for such work; his excuse was that only a small amount was carried out by him. Even without such an express term in his contract, an employee has an implied duty of fidelity and loyalty to his employer (see the remarks of Mr Justice Finnegan in the Supreme Court Case of Berber-v-Dunnes Stores), and should have informed the respondent prior to such work being carried out. The Tribunal accepted the respondent's evidence that he raised the issue of private work with the claimant on several occasions prior to the disciplinary process leading to dismissal. The claimant should have been well aware of the respondent's concerns, even if the Tribunal were to accept his evidence that he received no written warnings about private work. The second ground advanced by the respondent for disciplinary action, viz the visit of A to the premises has not been made out by the respondent and the claimant appears to have been blameless in this regard.

The employer in this case had carried out a disciplinary process which did not follow best practise, and dismissed the claimant by purporting to accept his resignation. The flaws in the procedures followed by the respondent led us to conclude that the respondent has not acted reasonably in all the circumstances. The Tribunal determine that the claimant was unfairly dismissed, and that the appropriate remedy in all the circumstances is compensation. However the Tribunal find the claimant contributed very substantially to his own dismissal and award the claimant the sum of€1,200.00 for compensation for unfair dismissal.

The Tribunal having found the claimant was unfairly dismissed award the claimant €1200.00 under the minimum notice and terms of employment acts, 1973 to 2005

The claim under the Redundancy Payment Acts is hereby dismissed as the Tribunal determines that the claimant's dismissal was not by way of redundancy.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)