

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE - **Claimant**

UD2305/2009

MN2438/2009

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: Mr M. Gilvarry

Members: Mr P. Pierson
Ms H. Murphy

heard these claims at Carrick on Shannon on 13 April 2011
and 26 January 2012

Representation:

Claimant:

Ms Alexis Mina BL instructed by Ms Elaine O'Toole,
Collins Solicitors, Breifne House, Main Street,
Carrick on Shannon, Co. Leitrim

Respondent:

Ms Mary Fay BL instructed by Ms Louise O'Byrne,
Arthur Cox, Solicitors, Earlsfort Centre,
Earlsfort Terrace, Dublin 2

The determination of the Tribunal was as follows:

The respondent is a holding company for some 60 hardware/building supply stores across the country. These stores are owned by the operators of the individual stores who are shareholders (members) of the respondent. The Moate store (the store) got into difficulties such that the respondent had to take direct control of it in 2008.

The claimant, whose late father had been a founding member of the respondent, was employed

from 21 January 2008 as business development sales representative. At all times during the employment the claimant was residing in Dublin. In May 2008 the claimant became involved in the operation of the store and soon after became its general manager reporting to the then CEO of the respondent. The claimant expressed an interest in purchasing the store and becoming a member of the respondent. The employment was uneventful until December 2008 when the claimant was faced with a requirement to provide funds for work done by the finance broker (the broker) who was assisting him in his attempts to take on the lease. On Sunday 21 December 2008 the claimant met the broker and gave him a cheque for €5,000-00 drawn on the store's account. His position is that at the time this was the only cheque book that he had with him.

The claimant did not bring this cheque to the attention of the then CEO. He was questioned about it by the bookkeeper of the store on 6 January 2009 when he instructed her to put a notation in the ledger that the cheque was for the broker. The claimant's position is that there is a further notation in the ledger that refers to him. Despite this reminder from the bookkeeper the claimant still did not tell the then CEO about the cheque.

Sometime later the financial controller challenged the claimant about the cheque. The claimant's position is that this happened in mid to late January 2009. The respondent's position is that this happened on 12 February 2009 and that the then CEO, who retired at the end of February 2009, spoke to the claimant that evening and warned him as to the seriousness of what he had done and told him that the board would have to be advised of what had happened. It is common case that the claimant agreed to repay the money, on the respondent's case this was to be immediate, on the claimant's case it was to be by the end of February. Later on 12 February 2009 the claimant spoke to three board members to inform them of the situation.

The claimant issued a personal cheque for €5,000-00 to the store's account and this was lodged in the store's bank in Moate on 20 February 2009. That afternoon the claimant met the incoming CEO (the CEO) and the financial controller in Dublin to discuss the broker cheque and two other cheques, one drawn in December 2008, the second in January 2009, which the claimant had issued to two customers of the store to compensate them for deposits lost when a contractor recommended to them by the claimant had absconded with those deposits. The CEO accepted the claimant's explanation of the two cheques but reminded the claimant that he should have told the CEO about them. The respondent's position is that at this meeting the CEO issued the claimant with a verbal warning for using the respondent's funds for his own personal business, his conduct could be considered to amount to gross misconduct and he could have been suspended pending an investigation into the matter.

There was an issue with the date on the cheque which the claimant says is 18 February 2009 and it was returned for initialling of an alteration of the date. The claimant's bank, in Longford, then wrote to the claimant at his mother's address, the address the bank had for the claimant, to inform him of the circumstances of the returning of the cheque. By the claimant's own admission he then put the matter on the "long finger". On 23 February 2009 the claimant and a representative of the broker met with the CEO and the chairman of the respondent to discuss and clarify issues around his proposed purchase of the store.

The respondent's position is that when the CEO raised the problem with the lodgement of the

claimant's cheque the claimant told the CEO that the problem with the cheque had been dealt with but the claimant was in fact referring to a cheque which had been tendered by a debtor of the store and which had now been processed satisfactorily and not to his own cheque.

On 20 March 2009 the CEO sent an email to the claimant taking him to task for an email the claimant had sent to the financial controller in which the claimant made complaints about the way the financial controller had treated him and also revealed his proposed purchase of the store which he was only to discuss with the CEO and the chairman. The penultimate sentence of the CEO's email states "As you are aware, I am currently investigating matters which arose earlier this year within the business".

The minutes of the respondent's board meeting of 29 April 2009 reveal that if funds were not in place within 48 hours it was proposed to withdraw from the proposed deal with the claimant to purchase the store. Moreover the CEO told the board it was his intention to suspend the claimant on full pay pending further investigation.

The CEO attended the store on 12 May 2009 and towards the end of the day he suspended the claimant. The €5,000-00 was repaid to the store's account by a third party cheque on 15 May 2009. On 15 May 2009 the claimant received a phone call from the CEO in which he was called to a meeting on 18 May 2009. The claimant was unaccompanied at the meeting with the CEO and a HR consultant. At the conclusion of this meeting the claimant was informed of his immediate dismissal for gross misconduct for taking company money for personal use. A dismissal letter was issued on 18 May 2009. The respondent's position is that a copy was given to the claimant at the time of the dismissal. The claimant received a copy of the dismissal letter postmarked 3 June 2009.

Determination:

The Tribunal is satisfied that the respondent's management first became aware of the claimant's use of the store's cheque for his personal use on 12 February 2009 when the then CEO spoke to him about it and told him it was a serious issue which would have to be brought to the board's attention. When the claimant met the CEO on 20 February 2009 his cheque had been lodged in the store's bank. While the Tribunal accepts that the CEO admonished the claimant for his actions it is not satisfied that this amounted to a formal verbal warning. Letters from the CEO to the claimant on 18 and 23 February 2009 in regard to his prospective purchase of the store were opened to the Tribunal. In contrast no documentary evidence in regard to the meeting of 20 February 2009 was proffered. The Tribunal is driven to the conclusion that the CEO was prioritising the claimant's prospective purchase of the store over the disciplinary issue which had undoubtedly arisen. The CEO hinted at the disciplinary issue again in his email of 20 March 2009 to the claimant. Once the respondent had decided to withdraw from the sale of the store to the claimant at the end of April 2009 it is clear that the disciplinary issue received higher priority. The only documentary evidence of this disciplinary process is the letter of dismissal. Even if the Tribunal were to accept the respondent's position that the claimant was given a copy of the dismissal letter at the time of the dismissal on 18 May 2009 this suggests that the CEO's mind was made up on the matter such that the claimant was denied fair procedures. For all these reasons

the Tribunal finds that the dismissal was unfair. The appropriate remedy in the circumstances of the case is compensation. However the Tribunal is satisfied that the claimant's conduct in using the respondent's funds for his own purposes and then in delaying repayment of the monies almost up to the time of his dismissal amounted to serious misconduct and in so doing contributed to his own dismissal to such an extent as to lead the Tribunal to make no award of compensation under the Unfair Dismissals Acts, 1977 to 2007.

The Tribunal awards €1,360-85, being one week's 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)