

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

EMPLOYEE  
- *claimant*

CASE NO.  
MN2405/2010  
UD2456/2010

against

EMPLOYER - *respondent*

under

### MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005 UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. T. Ryan

Members: Mr C. McHugh  
Mr P. Trehy

heard this claim at Dublin on 5th June 2012  
and 6th September 2012

Representation:  
\_\_\_\_\_

Claimant(s):

Respondent(s):

### **Respondent's Case**

The general manager (BN) told the Tribunal that the respondent offered an online service for booking hotels which was similar to a travel agent. It sold hotel rooms directly to clients. The respondent signed agreements with hotels and was allowed to use their availability. The claimant commenced employment with the respondent in 2005 as a sales executive and progressed to the position of sales account executive. These positions were sales related but with different titles. The claimant pitched for hotels and logged them on to the system. The claimant was bound by the agreement and the respondent agreed with the hotels that it would sell rooms for them. If the respondent was successful it could take commission out of the booking. It had a non-compete clause and without customers the respondent would not exist as competitors could offer a similar service at a better rate. The respondent had an excellent data base.

The witness commenced employment with the respondent in February 2010 as a general

manager. He was given the relevant data and everything was agreed through him. An affiliated website offered additional service if booking rooms. An affiliate used the respondent's data base and shared the profits. The respondent paid on invoice issued by the second party. The respondent had approximately 120 affiliates in 2010 and it now has about twenty.

The claimant was involved in [hotelservers.ie](http://hotelservers.ie). Hostel hoppers was an idea for an affiliate and a business proposition which was created by the claimant and (JB) the owner of the respondent business. It offered services for hostels and dormer rooms. The claimant tried to get (JB) to work together in another joint venture but (JB) was not willing to go to that operation. The witness gave evidence that the claimant worked in the office three days per week and worked from home on Mondays and Fridays by agreement with the company. The witness was attempting to change that work arrangement but no agreement had been reached on a variation of his contract at the time of the claimant's dismissal.

On 23 April 2010 the claimant took five lever arch files from the office which contained valuable information including signed contracts between the company and clients. The claimant raised a suspicion by doing this and the witness told the Tribunal that the claimant was using the information contained on the files as leverage for the transfer of a domain name from the company. The witness was not able to confirm if the claimant had taken documentation home with him previously for work purposes. He could not confirm if the company had given the claimant an express direction not to bring documentation home. He stated that it was not necessary for the claimant to take all the lever arch files home to find contracts. Contracts are filed alphabetically and a search for a contract takes less than one minute. Following the removal of the files there was an exchange of e-mails concerning the removal of the files. These e-mails were opened to the Tribunal and the claimant was told to return the files to the office.

The witness gave further evidence that he was not at work on Friday 23 April 2010. He returned to work on Monday 26 April 2010. The claimant was not at work and he spoke with the claimant on that day or the following day concerning his absence from work. The witness stated that he could not recall the facts as it is now over 2.5 years ago. He was slowly introduced to the events of the previous Friday and viewed CCTV footage of the claimant removing the files. He met with the claimant on Wednesday 28 April 2010. He could not recall exactly what was said at that meeting but did not recall telling the claimant that he was sacked. He requested that the claimant sign his resignation as a director. He did not make any notes of that meeting. It was a very brief meeting and he gave the claimant a letter signed by (JB) which contained a number of allegations against the claimant. The company were going to carry out an investigation into the matter and this letter formed the basis of the investigation. He accepted that the letter did not outline the possible consequences for the claimant. The witness told the Tribunal that he hoped that the letter would open dialogue with the claimant but the claimant went into denial. He also gave the claimant a letter signed by (JB) dated 23 April 2010 informing him that his services were no longer required as a director. The letter also stated *inter alia* that he was suspended without pay with immediate effect in order to establish the facts for the alleged acts of gross misconduct.

A disciplinary meeting took place on 31 May 2010 to investigate the matters. In particular the witness gave evidence that he sought an explanation into the improper use by the claimant of his company credit card. He received no explanation from the claimant and found the claimant's attitude to be unreasonable. He gave evidence that the claimant did return four archleaf folders by 26 or 27 April 2010 but never returned the fifth folder which he had removed. The investigation focussed on the removal by the claimant of the valuable files and

use of the same leverage by the claimant. Following the meeting of 31 May 2010 the claimant was dismissed as of 2 June 2010 by way of letter dated 4 June 2010. The witness gave evidence that it was his decision to dismiss the claimant and denied that he told the claimant on 31 May 2010 that it would be a decision for (JB). The basis of his decision was the removal of the files from the company by the claimant and the use of them as leverage to obtain something else from (JB). He confirmed that (JB) did not attend the meeting of 31 May 2010.

### **Claimant's Case**

The claimant gave evidence that he commenced working for the respondent company in November 2005. He was initially employed as a telesales agent and latterly as an accounts manager. By agreement with the owner of the company, (JB) he worked from home on Mondays and Fridays each week. It was possible to do so as it was an internet based business. Following the appointment of (BN) attempts were made to change this arrangement but no agreement had taken place. He gave evidence that he was involved in a separate joint venture with (JB) which was working well and had entered into discussions on another joint venture with (JB). This venture did not occur as (JB) bought the domain name himself.

On Friday 23 April 2010 he was due to attend a trade show at the RDS. He removed files from the office with the intention of working on the files from home. He told the Tribunal that it was necessary to have the files as he needed to send copies of contracts to a client to obtain payment for 28 outstanding invoices. The client had refused to pay the invoices without this information. He gave evidence that it was not an unusual occurrence for him to remove folders from the office. He did not remove the files from the office to get the attention of (JB). Later, on 23 April 2010 he received a phone call from (JB) informing him to return the folders. He gave evidence that (JB) said to him that he was sacked as a director and suspended as an employee and sacked. (JB) went mad on the phone, using foul language and threatened to call the Gardai. When he received the phone call from (JB) he accepted that he said "now I have your attention". He did so as he had sent him approximately twenty e-mails over the previous four days and it was very difficult to contact (JB). He told (JB) that he would return the folders on Monday and had no discussion with him on that day over the transfer of the domain name. He then spoke with another director known as (GD) who told him not to worry and return the files next week.

When he arrived home he discovered that he was shut out of all the work systems. He telephoned (BN) on Tuesday 27 April and he was told to come in to work the following day, Wednesday 28 April. He did so returning four folders. He gave evidence that he met (BN) who told him that he was sacked and no longer worked for the company. He was told that he was suspended as an employee without pay pending an investigation. A detailed letter from the claimant's legal representative dated 5 May 2010 dealing with the allegations which had been put to the claimant was opened to the Tribunal. The claimant also had difficulty dealing with the allegations because he had been blocked out of the company's systems and his legal representative had pointed this matter out in the aforesaid letter of 5 May 2010. His password was no longer operational and his e-mails were blocked. He accepted that he held onto one folder that he had removed from the office on 23 April 2010. He told the Tribunal that this folder had nothing to do with the respondent company and contained details of his private joint venture with (JB).

He attended the meeting on 31 May 2010 and the issue of his credit card expenses was not raised in detail with him. He told the Tribunal that (BN) told him that a decision in the matter

would be made by (JB). He was not advised that he could appeal the decision and was never furnished with any company disciplinary procedures. Since his dismissal he has not secured any alternative employment and the Tribunal was provided with oral and documentary evidence in relation to his attempts to mitigate his loss.

## **Determination**

The General Manager of the respondent company gave evidence that he was unaware of the fact that the claimant was dismissed/suspended on Friday 23 April 2010 and phoned the claimant on Monday 26 April 2010 to find out where he was. The Tribunal finds it difficult to accept this in view of an e-mail from (JB) dated 28 April to the claimant and cc'd to the General Manager which stated that at an EGM on the previous Friday (23 April) the General Manager was appointed Director in place of the Claimant. Because the claimant took home files on 23 April 2010 he was telephoned by (JB) that same evening and told he was sacked as a director, suspended as an employee and sacked. The claimant had no written contract of employment and there was no grievance/disciplinary procedure.

It was agreed with (JB) that the claimant could work from home on Mondays and Fridays. He was also allowed to take home files to carry on his work. He was never told that he could not work from home.

The letter from the General Manager dated 21 May 2010 invited the claimant to a meeting "to discuss recent events and analyse all correspondence exchanged between us". This letter should have advised the claimant that serious disciplinary action might result. There is a conflict between the parties as to who actually sacked the claimant. The respondent's General Manager gave evidence that it was he who took the decision to dismiss and it is clear that the General Manager actually signed the dismissal letter dated 4 June 2010. Indeed the General Manager gave evidence that he took the decision without consultation with (JB) yet (JB) dismissed the claimant (according to the claimant's evidence) on Friday 23 April 2010. The Tribunal is surprised that (JB) was not called to give evidence as he would have been able to deal with the alleged sacking on Friday 23 April 2010. He would also have been able to give evidence as to who exactly took the decision to dismiss the claimant as the Tribunal is not convinced that it was the General Manager alone who took the decision.

The claimant's access to the company IT system was blocked which made it difficult for the claimant to deal with some of the allegations against him such as alleged misuse of the company credit card, although the Tribunal accepts that this did not form part of the decision to dismiss the claimant.

The Tribunal notes that no minutes were available of any of the meetings which is surprising. The evidence of the General Manager was generally unhelpful as he could not recall many of the issues that answers were sought on.

Taking all the evidence into consideration the Tribunal finds that the claimant was unfairly dismissed and deems compensation as the appropriate remedy. The Tribunal awards the claimant the sum of €55,000.00 under the Unfair Dismissals Acts 1977 to 2007. As no evidence was adduced in relation to the claim under the Minimum Notice and Terms of Employment Acts 1973 to 2005 this claim fails.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)

