

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE - *claimant*

UD2164/2010

MN2140/2010

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: Ms P. McGrath B.L.

Members: Mr. J. Reid
Mr D. Thomas

heard this claim at Dublin on 19th April 2012 and 20th June 2012

Representation:

Claimant(s) : Mr. Cathal McGreal BL instructed by O'Riordan & Co, Solicitors, 23
Kingram Place, Dublin 2

Respondent(s) : Mr Ken Stafford, Management Consultancy Services, 7 Castletown Court,
Celbridge, Co. Kildare

The determination of the Tribunal was as follows:

Background

The respondent is a subsidiary of another company. The respondent company sells heating and plumbing goods to the trade and has a number of branches. The claimant had over 22 years service with the respondent company and held the position of Branch Manager at the time of dismissal. The employment was uneventful until the claimant's dismissal in August 2010.

Respondent's Case

The Group Finance Manager gave evidence that turnover halved between 2008 and the present time. The claimant's branch did relatively well by comparison to other branches although all branches were impacted by the decline in the construction industry.

The Finance Manager reports to the Managing Director and has responsibility for credit control rules and cash flow. In this regard only the Managing Director has the authority to override the Finance Manager's controls and each branch manager is aware that they are not permitted to override the Finance Manager's credit control rules. Any increase in credit limits must be approved by him. In addition the company do not accept post-dated cheques as reducing a customer's balance.

Customer B was an existing customer with credit limits and terms in place. The Finance Manager issued an instruction that no further goods were to move on customer B's account as there was an outstanding sum on the account outside of the agreed credit terms.

The claimant spoke to the Finance Manager and made him aware that customer B could be placing an order with a potential value of €35,000 but the Finance Manager told the claimant that the order was not to be filled until the outstanding balance was discharged on customer B's account. He did not recall a conversation with the claimant regarding whether or not the order could issue if the customer's balance had reduced to €20,000 but even in this case the Finance Manager's instruction would have remained unchanged. Subsequently goods to the value of €11,302.77 left the company in July 2010 and were sent to customer B. Customer B subsequently went into liquidation owing the respondent €13,000 the bulk of which was the order that the claimant released to them.

The Managing Director gave evidence that the key aspect of the Finance Manager's role is credit control. As the Managing Director he is the only person who can approve changes to credit controls. He holds regular meeting with branch managers and managing credit control is a clear element of those meetings, as the company attempts to mitigate the risk of bad debts. During 2010, procedures were examined to see how they could be improved upon given more difficult trading conditions. The credit controls were not new controls to the branch managers but were simply more rigid as credit control is a crucial part of the business and a key element of working capital. However, there were no changes to the procedures relating to credit limits or terms of credit.

When the Managing Director returned from annual leave on the 21st July 2010 he became aware of the order that had issued to customer B. He subsequently visited the claimant's branch as was routine and he met the claimant as he usually did. It was the claimant who raised the issue near the end of their discussion. The claimant told him that he needed the Managing Director's support as he had sent goods to a customer even though he had been instructed not to by the Finance Manager. The claimant stated that he believed the customer would pay the sum outstanding and that in addition he had two post-dated cheques from customer B.

The Managing Director was astounded as to why a branch manager would carry out such an action especially in circumstances where there was a small margin on the customer account. It was a risk that the company did not need to take especially on an account where payment had not been received for a number of months. The Managing Director was perplexed as to why the claimant would breach an instruction especially in cases where the respondent did not need to

nurture the relationship with the customer.

Further to this it was also discovered that the goods had not been invoiced. In effect this meant that the Finance Manager would be unaware of the goods being sent to customer B. The company has a very strict rule that once goods have left the business for delivery to a customer; an invoice must be raised. It allows stock levels and the customer's account to update, thus letting the Finance Manager know the correct status of the customer's account. After finding out about this issue the Managing Director instructed that an invoice be raised on the account.

The Managing Director spoke to the supplier who informed him that part of an order had not been received and some of the goods were part of this original order. The claimant said that he had made a decision to issue the order as the directors of customer B convinced him and in addition he had two post-dated cheques from the company.

The HR Manager and the Operations Manager (the claimant's line manager) conducted the disciplinary process. The Managing Director was not involved nor did he give instructions in relation to the disciplinary process. However, before the decision to dismiss was communicated to the claimant the Operations Manager asked the Managing Director (without informing the Managing Director of the decision reached) if it would be possible for the claimant to take up another position within the group.

The Operations Director reached a decision that the claimant could not continue in his role as branch manager but the claimant was offered the role of sales manager. The Managing Director discussed this matter with the claimant as they had enjoyed a good working relationship and open and frank discussions. The claimant had extensive product knowledge and a personable nature. The Managing Director was keen to retain the claimant's skillset within the business and he told the claimant that he should think about accepting the position offered. While there was little feedback from the claimant on this issue, he did raise the issue that the branch manager replacing him in his position would be in a better position as he would have the claimant as a sales manager.

Under cross examination the Managing Director of the respondent gave evidence that the claimant's actions warranted dismissal. The claimant held a responsible position as a branch manager and had breached the trust of the respondent. He was given an instruction from the Finance Manager and disobeyed that instruction. The witness gave evidence that on return from holidays on 21 July 2010 he met with the claimant who informed him of the goods order that had been supplied to customer B. While he did not know enough about the situation his immediate reaction was that the claimant had been very foolish and he may possibly have said to the claimant that it might be a P45 issue. He was not pre-disposed to dismissing the claimant and he did not want him dismissed as he had a skill-set that could benefit the company. The claimant had extensive product knowledge and sales skills. He had no influence on the disciplinary process but he was aware that it was likely to result in the claimant's dismissal. He believed that because of the breach of trust the claimant's time as a branch manager were clearly over. Accordingly he instructed the Operations Director to offer the claimant a sales manager position. This would have resulted in a decreased salary of 20% but he believed it was a fair offer and an alternative to dismissal. He encouraged the claimant to accept the offer but gave evidence that the claimant dismissed the idea and did not ask for any details in relation to the alternative position.

The next witness gave evidence that he is employed as Operations Director for the respondent. All branch managers report to him. He gave evidence that he had a number of discussions with the claimant in July 2010 concerning the goods order supplied to customer B. Customer B owed the company €16,000 for a considerable length of time and he made it clear to the claimant that it was a no go order. It was bad business, it did not add up and he was in no way in favour of doing that deal with customer B. He expressed that position to the claimant and as far as he was concerned the matter was put to bed. He was contacted again by the claimant on 16 July 2010 at 8.15am and asked to re-consider the order from customer B. He gave evidence that he was now impatient with the matter and instructed the claimant to walk away from the order. The company did not want that kind of business. He gave evidence that the claimant did not inform him during the conversation that the order had already been delivered to customer B.

The witness gave further evidence that he conducted a disciplinary hearing on 29 July 2010. The claimant was informed that he was entitled to be accompanied by a colleague but he did not bring a colleague with him to the meeting. The Human Resources Manager was also in attendance at the meeting as a note-taker. The facts regarding the claimant's failure to follow instructions from management were put to the claimant and the claimant responded to each point raised. The witness gave evidence that he had considerable respect for the claimant and took some time to reflect on his decision as he wanted to ensure it was a correct decision. He provided a written response to the claimant by way of letter dated 16 August 2010. He informed the claimant inter alia that his actions have breached the trust that must exist between the company and any employee, especially an employee in a position of responsibility. The company regards his behaviour as constituting gross misconduct and dismissal is the appropriate penalty for his actions. However the company, considering his long service and his popularity with staff and customers made an alternative offer of a sales manager role to the claimant. The witness told the Tribunal that this was a genuine offer but the claimant never sought any details or clarification of this proposed new role.

He confirmed to the Tribunal that while the Human Resources Manager instigated the investigation it was he (the witness) who conducted the investigation. He had no difficulty in being a decision maker in the process. He made his decision because he was knowledgeable of the events. He confirmed that he had instructed the claimant on 16 July 2010 that the order to customer B was not worth his job. He gave evidence that it was his understanding that the Finance Manager, had made it clear to the claimant not to proceed with the order. He accepted that the said order had changed a number of times in terms of the monetary value of the order.

The next witness (MW), director of respondent group gave evidence that he conducted the appeal hearing. During the hearing he enquired from the claimant as to the length of the relationship between the company and customer). The claimant told him that it was no longer than 18 months. He gave evidence that the claimant said he regretted his actions and admitted to disobeying a direct instruction from senior management but caveated his regret by saying that he did so for the benefit of the company and had no personal gain. He thought as Branch Manager that his position merited him making such a decision. The witness gave evidence that he assessed the facts and upheld the decision of the Operations Director but extended the time period granted to allow him consider the offer of the alternative position.

The Human Resources Manager gave evidence that he had a discussion with the Operations Director which resulted in him (the witness) writing to the claimant on 28 July 2010 inviting him to the disciplinary hearing on the following day. The witness attended that meeting as a

note taker and to ensure that fair procedures were followed. He gave evidence that the claimant's personal integrity was never an issue and the claimant was adamant that he made the decision in relation to the order from customer B in the company's interest. At the disciplinary hearing the claimant constantly focussed on the fact that he had never had any previous disciplinary issues. The Operations Director made the decision to dismiss the claimant and he (the witness) wrote the letter of dismissal dated 16 August 2010. He also wrote to the claimant by way of letter dated 31 August 2010 informing him of the details of the alternative role offered. The claimant did not seek any additional information on this alternative position but he believed that the claimant did not dismiss the offer out of hand. He gave evidence that the precise loss to the company in relation to the order to customer B was €10,858.00.

He gave further evidence that he did not produce the employee handbook to the claimant during the disciplinary procedure. He believed that the claimant was aware of the existence of the handbook as he (the claimant) in his role as Branch Manager had given copies of the handbook to new entrants during his employment. He had no doubt that the company followed fair procedures in the process. He gave further evidence that he escorted the claimant from the building on the claimant's final day of employment. He was embarrassed to do this but it was his job to do so and the claimant left with his head held high.

Claimant's Case

The claimant gave evidence that he worked for the respondent for 23 years. He was employed as a branch manager and had an unblemished disciplinary record. In July 2010 he was engaged in a deal with customer B and was trying to complete the deal. He believes that he would have completed the deal if he was left in place to do so. Customer B had been in business for 35 years and their tax affairs were in order. They were involved in the heating and plumbing business in schools programmes. He gave evidence that the value of the order to customer (B) changed on a number of occasions from an initial amount of €35,000 to an eventual value of €11,000. He gave evidence that he had a number of discussions with the Finance Manager and the Operations Director concerning the order. He was initially told that the order from customer B was not to be completed without the authorisation of the Finance Manager. However due to the change in the size of the order he believed that it was okay to process once it had reduced to below €20,000 as the Finance Manager had asked him if it was possible to supply an order below €20,000.

On Friday 16 July 2010 at 8.10am he telephoned the Operations Director looking for a direction on the order as he understood the order was due for delivery on the following Monday. The Operations Director told him not to supply the order and to think of what his (the witness) job is worth. He immediately tried to cancel the order but discovered that the goods had already been delivered to the site concerned and there was nothing he could do at that stage. The goods had been delivered to the site 2/3 days early without his knowledge. They had not been due for delivery until Monday 19 July 2010. He met with the Managing Director on 21 July 2010 and informed him of the position on the order. He gave evidence that the Managing Director appeared to be up to speed on the matter and told him that it may be a P45 issue. He attended the disciplinary hearing on 29 July 2010 and responded to each of the issues put to him. He told the Tribunal that he gave an explanation as to why he had supplied the order and believed that €11,000 was not a big order. He admitted that he was at fault for not adhering to the instructions of the Finance Manager but once the value of the order had reduced to €11,000 he believed that it was okay to process the order. He told the Tribunal that 65% of the respondent's sales were done through credit.

Following the disciplinary hearing he continued in his employment and was informed of the outcome by way of letter dated 16 August 2010 from the Human Resources Manager. The letter stated inter alia that dismissal was the appropriate penalty for his actions. However considering his long service and past record, as an alternative to dismissal the respondent was willing to consider demotion with a final written warning. On 31 August 2010 he was offered an alternative position of sales manager with a 20% reduction in salary. He had never tried to conceal anything from the respondent and did not believe he should have to accept an alternative position. He did not accept the alternative offer. He appealed the decision and his appeal was heard by (MW) on 7 September 2010. He accepted that he was given a fair hearing. (MW) upheld the original decision and gave him additional time to consider the alternative offer. He did not accept the offer as he believed that he had been unjustly and unfairly treated. His employment was then terminated. He accepted that he was aware of the contents of the employee handbook and understood what constituted gross misconduct. Since his dismissal he has secured alternative employment and evidence of his loss was submitted to the Tribunal.

Determination

The Tribunal has carefully considered the evidence adduced. The claimant's employment was terminated by reason of his failure to follow the direction of his Group Finance Manager. It was a clear and unambiguous instruction given by the manager not to extend credit to a particular client unless certain stipulations were met. The claimant wrongly believed that he could proceed with a transaction after a number of half conversations with management and having secured well intended commitments from the client in question. Unfortunately, for the claimant the deal went sour and the employer was out of pocket as a result of the transaction in question.

The respondent was absolutely entitled to conduct an investigation and to discipline the claimant arising out of this error in judgment which had resulted in loss to them.

In tandem with the investigation and disciplinary process it is clear that the Managing Director whilst maintaining distance from the process wanted an outcome which would allow him retain the services and experience of the claimant. The Tribunal accepts the bona fides of the Managing Director and accepts that his actions, whilst untimely, in offering the claimant a chance to stay on in the workplace albeit at a significantly reduced salary was well intended.

What is clear from the evidence was the fact that the claimant really never realised that his employment was going to be terminated arising out of this transaction. This clear belief was that he had made an honest mistake and that there would be a sanction but not the loss of his livelihood.

To some extent the claimant must be regarded as having been naïve in this belief and it is clear from the correspondence that his actions were being considered as "gross misconduct". In the claimant's defence his longevity of employment and impeccable disciplinary record must to him have seemed factors in his favour.

The company at the end of the disciplinary process found that the claimant's behaviour was gross misconduct and that his employment would be terminated. The claimant makes the case that this sanction was overly severe where there was no question of dishonesty and his past unerring loyalty to the company.

The Tribunal notes that there were mixed signals being given in that the claimant was being fired but also being offered a job albeit a demoted one at the same time. The claimant accepted in evidence that the company was entitled to apply a sanction of some sort though neither of the options put to him were acceptable to him. It seems perhaps that the claimant never really believed he would be let go.

The Tribunal cannot accept that the job offer was a derisory one in the prevailing climate however the claimant chose not to try and negotiate the new job position and failed to engage with the offer leaving the company with no alternative other than follow through on the sanction.

On balance the Tribunal finds that the claimant's actions did not amount to gross misconduct such that allowed the company to dismiss him, but the claimant's actions were of a very serious nature such that the company would be entitled to apply a lesser sanction.

The claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds and the Tribunal awards the claimant the sum of €10,000.00.

In addition the Tribunal also awards the claimant €5,940.00 being the equivalent of six 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)