EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF: CASE NO.

EMPLOYEE–**Claimant** UD849/2010
MN809/2010

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 T. Ryan

Members: Mr M.J. Murphy
Ms A. Moore

heard these claims at Cavan on 13 July
and 21 & 22 November 2011

Representation:

Claimant:
Mr Hugh Byrne BL instructed by Mr Kieran O'Brien
on the first two days, Mr Killian O'Brien on the final day,
both of Bowler Geraghty Solicitors, 2 Lower Ormond Quay, Dublin 1

Respondent:
Ms Rosemary Mallon BL instructed by Ms Gill Woods,
Arthur Cox Solicitors, Earlsfort Centre, Earlsfort Terrace, Dublin 2

The determination of the Tribunal was as follows:

The claimant was employed as a bank official from February 2006 and made permanent in 2007. The employment was uneventful, with the claimant having worked on cash and in the vault, until December 2009 when the claimant was working as a customer service officer in the respondent's Cavan branch ('the branch'). The respondent's IT system is programmed to highlight situations where a member of staff performs transactions on their own account other than those which are carried out as a customer would be able to do.

In December 2009 there were two so-called "red flags" raised in regard to the claimant on account of two transactions, the first on 3 December and the second on 17 December, whereby the IT system indicated that the claimant had performed transactions on her own account.

The branch manager (BM) received notification of the red flags from December's activity in an email from the area manager (AM) on or around 26 January 2010. BM then spoke to the claimant, in an informal manner, to mention that the flags had been raised and accepts that she may have indicated to the claimant that it might lead to a slap on the wrist.

On the first day of this hearing it emerged that the respondent had in place a policy whereby a so-called "buffer" was applied to DD payments from the accounts of all staff members. The effectof this buffer, which was controlled from a central lending unit, was to provide a set amount, applicable to all staff members, of an additional facility to prevent non-payment of staff DD's whenthe overdraft limit was exceeded. In the claimant's case this facility amounted to almost five timesher overdraft limit. It seems that this policy only came to light when, around May 2011, its levelwas considerably reduced in keeping with the current straitened financial times.

BM met the claimant to carry out an investigative or fact find meeting into the two incidents on 28 January 2010. The claimant declined the opportunity to be represented at this meeting which was attended by the claimant, BM and the claimant's supervisor, (CS), who acted as note-taker.

The incident of 3 December 2009 involved the reversal of a direct debit (DD) which had been paid despite having been cancelled some days before. The practice in the branch was to hold a manual record of cancelled DD's in a folder and part of the claimant's duties involved the reversal of DD's which had been paid as their cancellation had not yet been processed through the respondent's IT system. The claimant's position was that she may well have reversed her own DD in this manner but did it as part of her normal duties and was not aware that it involved her own account. BM was prepared to accept the claimant's explanation of this incident.

The incident of 17 December 2009 involved a DD which the IT system indicated should not be paid because the claimant's account was overdrawn beyond her agreed limit. The claimant accepted that she had overridden that indication and manually inputted for the DD to be paid in circumstances where her salary was due to be paid the following day and her account had been similarly overdrawn the previous month and the DD processed. BM then told the claimant that her conduct potentially amounted to Gross Misconduct where she had avoided the unpaid fee which would otherwise be imposed and amounted to fraud. The claimant was suspended with pay pending a disciplinary hearing into the matter.

AM wrote to the claimant on 2 February 2010 setting out the allegations against her and inviting her to the disciplinary meeting which was held on 9 February 2010. She was advised of her right to representation and was warned that the potential outcome could result in dismissal. The specific issues to be discussed were

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1. The allegation that you keyed online reversals on your own account
2. The allegation that on 3 December you keyed an alteration to a DD on your own account
3. The allegation that on 17 December a DD hitting your own account was reversed online by you and an instruction made to pay. The DD would otherwise have been bounced due to insufficient funds"

She was warned that the allegations could be considered to amount to "knowingly falsifying or suppressing the records of the Group, or any other document" or could be considered as "misappropriating or withholding money belonging to the Group" both of which constituted gross

misconduct within the respondent's disciplinary policy. Enclosed with this letter were the notes of the fact find meeting, the record of the online reversals, the Group's code of conduct and the Group's disciplinary policy.

The disciplinary meeting on 9 February 2010 was conducted by AM. The claimant was accompanied by her union representative (TU). Also in attendance were a representative from the Human Resource Department (HR) and a support manager who acted as note-taker. The claimant offered the same explanation for the 3 December incident as she had at the fact find meeting. The claimant then told AM that in relation to the 17 December incident she had similarly been going through the folder on 17 December and seen that it was going to be unpaid. When it was put to her that the DD would not have been in the folder as it had not been cancelled the claimant agreed with AM.

The claimant, whilst acknowledging that she did not have authority to make credit decisions for customers, told AM that she didn't know that she wasn't allowed to do what she had done. She added "I know I have made a mistake and am really sorry". TU told AM that what the claimant had done was a regular occurrence with staff.

The meeting was then adjourned for AM and her colleagues to consider their decision. During this adjournment AM spoke to CS to seek clarification on the working practices in the branch. After some 40 minutes the meeting reconvened and AM announced the decision that the claimant was to be dismissed for gross misconduct. On 15 February 2010 AM wrote to the claimant setting out in detail her decision to dismiss.

The third paragraph of this letter deals with the main reasons why the claimant was dismissed.

"I confirm that you were dismissed from the service of the bank with immediate effect on 9 February 2010 for Gross Misconduct, specifically that you "knowingly falsified or suppressed the record of the Group" by overriding the Bank's back-office system and instructed it to pay a direct debit that was down to be unpaid. I also considered that by taking this action you avoided a banking fee, which I consider to be 'misappropriation of money belonging to the Group'."

AM concluded that, despite not accepting the claimant's explanation of the 3 December incident, it did create a potential conflict of interest in breach of the respondent's code of conduct but did not amount to gross misconduct, rather it amounted to misconduct. The incident of 17 December was the reason the claimant was dismissed.

The claimant was notified of her right of appeal and the subsequent appeal was heard on 14 May 2010. The appeal was conducted by JH a senior manager and head of commercial products. The claimant was represented by a different union representative and there was a note-taker present. The decision to dismiss was upheld by this internal appeal. JH told the Tribunal that even if he had known of the buffering system when he heard the appeal he still would have upheld the decision to dismiss. The claimant then availed of the opportunity of an external appeal as provided for in the respondent's discipline and grievance policy. This appeal was heard on 10 February 2011 and the claimant was notified of the rejection of her appeal on 16 February 2011.

Determination:

In the course of a lengthy letter of dismissal, dated 15 February 2010, the respondent confirmed that the Claimant was dismissed for Gross Misconduct in relation to her actions on 17 December 2009. .(The claimant's conduct/actions on the 3 December 2009 were considered by the respondent but the respondent concluded that this did not amount to gross misconduct). As referred to above the reasons for dismissal are set in the third paragraph of the letter of the 15th February 2010. It is worth quoting the third paragraph in full:

"I confirm that you were dismissed from the service of the bank with immediate effect on 9 February 2010 for Gross Misconduct, specifically that you 'knowingly falsified or suppressed the record of the Group' by overriding the Bank's back-office system and instructed it to pay a direct debit that was down to be unpaid. I also considered that by taking this action you avoided a banking fee, which I consider to be misappropriation of money belonging to the Group".

In considering the totality of the evidence the Tribunal focussed in particular on the reasons for dismissal contained in this paragraph.

Firstly that the Claimant:
".. knowingly falsified or suppressed the record of the Group' by overriding the Bank's back-office system and instructed it to pay a direct debit that was down to be unpaid." The claimant may have processed transactions on her own account but in no way can she be said to have falsified or suppressed any record. There was no evidence given to the Tribunal that any document was falsified or suppressed.

Secondly that:
".. by taking this action you avoided a banking fee…[which was considered to be]..misappropriation of money belonging to the Group' ". On the first day of this hearing it emerged that the respondent had in place a policy whereby a so-called "buffer" was applied to DD payments from the accounts of all staff members. The effect of this buffer, which was controlled from a central lending unit, was to provide a set amount, applicable to all staff members, of an additional facility to prevent non-payment of staff DD's when the overdraft limit was exceeded. In the claimant's case this facility amounted to almost five times her overdraft limit. It seems that this policy only came to light when, around May 2011, its level was considerably reduced in keeping with the current straitened financial times. While the Tribunal is satisfied that (strangely) none of the bank's employees who were involved in the dismissal, including the claimant, had any knowledge of the existence of the buffer the fact remains that the respondent cannot rely on the "misappropriation of money belonging to the Group" as a ground for justifying the dismissal. There was never going to be any money belonging to the Bank misappropriated because the DD was never going to be unpaid.

Thirdly that the claimant was dismissed for:
"Gross Misconduct" . The Banks Discipline and Grievance Procedure defines Gross Misconduct "as a serious breach of the Group's rules and procedures or of the recognised and accepted standards of conduct which results in a breakdown in the relationship of trust and confidence between the group and the member of staff concerned". It goes on to say that Gross Misconduct may justify dismissal without notice and without previous warnings. It also provides certain examples of Gross Misconduct though it adds the caveat that the examples were not exhaustive to the ones given in the Disciplinary Procedure.

Even by the Banks own definitions of Gross Misconduct there is no evidence given to the Tribunal that the Claimant was guilty of "Gross Misconduct".

The Tribunal notes that JH a senior manager Head of Commercial Products gave evidence that he heard the appeal and the crucial point for upholding the dismissal was that the Claimant had transacted on her own account and that the issue of the fee was not the main issue. He also stated that even if he had known about the buffering he would still have dismissed her. The Tribunal further notes that an employee transacting on her own account is not defined as Gross Misconduct under the Banks Discipline and Grievance Procedure. (The Tribunal acknowledges that the Claimant's transacting on her own account was unwise and a breach of the Bank's Code of Conduct set out under "Managing and restricting Potential Conflicts of Interest").

The Tribunal had to consider if the dismissal was proportionate to the alleged misconduct. Does the punishment fit the crime? In considering this question the fact that the Tribunal itself would have taken a different view in a particular case is not relevant. The task of the Tribunal is not to consider what sanctions the Tribunal might impose but rather whether the reaction of the Respondent and the sanction imposed lay within the range of reasonable responses. The proportionality of the response is key and that even where proper procedures are followed in effecting a dismissal, if the sanction is disproportionate, the dismissal will be rendered unfair.

The Tribunal must also consider if the employer complied with Section 5 of the Unfair Dismissals (Amendment) Act 1993 which provides that the reasonableness of the employer's conduct is now an essential factor to be considered in the context of all dismissals. Section 5, inter alia, stipulates that:

".....in determining if a dismissal is an unfair dismissal, regard may be had……to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relationto the dismissal"

For all these reasons the Tribunal finds that the dismissal was unfair. The Tribunal considers compensation the most appropriate remedy and awards the Claimant €35,000.00 under the Unfair Dismissals Acts, 1977 to 2007. In deciding on this figure the Tribunal notes that the Claimant secured a temporary job in Dublin which she left of her own accord and thus missed out on fourmonths salary totalling €7,800.00 approximately.

The evidence shows that, albeit as a gesture of goodwill, the claimant received ten days pay in excess of her entitlement having been dismissed without notice on 9 February 2010. This is the amount of her entitlement under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and in such circumstances the Tribunal proposes to make no further award in this regard.

Sealed with the Seal of the
Employment Appeals Tribunal

This ________________________

(Sgd.) ________________________
(CHAIRMAN)