

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
Employee

CASE NO.
UD173/2006

against
Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. O'Leary B L

Members: Mr. B. Kealy
Ms. E. Brezina

heard this claim at Portlaoise on 1st November 2006
and 7th November 2006

Representation:

Claimant:

Mr. Mark Cooney. Fair & Murtagh, Solicitors, Martin Lennon House, Northgate
Street, Athlone, Co. Westmeath

Respondent:

Mr. Simon McDonald B.L. instructed by Mr. Charles J. Flanagan, Bolger White Egan &
Flanagan, Solicitors, 8 Lismard Court, Portlaoise, Co. Laois

The Tribunal heard dismissal was in dispute.

The determination of the Tribunal was as follows:

Preliminary Point:

Counsel for the respondent raised a preliminary point concerning the absence of continuous service. He noted the claimant's T1A form stated employment began August 2004 and ended October 2005. The claimant had two probationary periods during this timeframe and these were reduced to writing. The claimant held two positions in the company. His first position had a six-month probationary period starting August 30th 2004 as a Driver/Maintenance/Sales Person. This position was reviewed in January 2005 and it was decided that the claimant's probationary period be extended by one month. In March 2005 he applied for the position of Store Manager with the company and was successful. This position also had a six-month probationary period. Counsel stated there were different terms for each position.

Determination on Preliminary Point:

The claimant held two positions within the company but this does not affect his continuous service with the company. The only break between his two functions in the company was one weekend and as the claimant did not work weekends the Tribunal is satisfied it does not constitute a break in service that would affect the jurisdiction of the Tribunal.

Respondent's case:

The Tribunal heard evidence from the Managing Director (hereafter called MD) of the respondent company. The company provide equipment for individuals with a disability. When the claimant was interviewed for the position of Driver/Maintenance/Sales Person he would have been told that overnight stays around the country would be required at times and that was accepted. The only issue the company had was that he sometimes had a problem with the overnight stays. The company tried to accommodate him.

In April 2005 the company advertised for a Stores Manager (hereafter called SM). The claimant said he was interested in applying for the position. The MD was surprised the claimant was seeking an alternative position but he thought it might have been because of the overnight stays associated with his position as Driver/Maintenance/Sales Person.

A number of candidates were interviewed for the position of SM including the claimant. The company asked the claimant to write a proposal on how he would handle the transition to the position of SM. The claimant's proposal was attractive for a number of reasons. For example the company did not have a computer system and the claimant stated he would have a software package installed. Also, the claimant had knowledge of the company's products.

The problem was that the claimant did not complete all the items on his proposal in his six-month probationary period. The MD thought a person in a new position should be given time "to get on with it" but he visited the company every day or every second day to check if anything was needed. He would have given whatever assistance was required.

In August 2005 the claimant had a mid review of his probationary period. MD commended the claimant on the work he had done since taking up the position of SM. He also told the claimant he had not completed the implementation of the proposal. The MD used the mid review as a way to highlight issues for the rest of the claimant's probationary period. The stock control system was not working and the company wanted to see this improved over the latter months of the claimant's probationary period. He showed the claimant what needed improvement and implementation. The claimant felt there was not enough time in a day but the MD did not think what needed to be done was unattainable. He outlined the items in a letter to the claimant dated August 4th 2005. The claimant responded with a letter dated September 9th 2005 stating his proposal had been almost completed. MD did not believe this was the case and from this point the problems started. The MD did not feel the proposal items were even halfway reached by September.

MD also wrote a letter dated August 18th 2005 to highlight issues that arose while the claimant was on annual leave stating that standards should not slip in the store when the claimant is on annual leave. The claimant responded by letter dated September 9th 2005.

In correspondence from the claimant and from comments around the office MD had the impression the claimant did not think he had authority to make changes. He outlined to the claimant in letter

dated September 14th 2005 that he had “total ownership and responsibility of the stores.” MD felt the claimant was giving him excuses; the claimant was not even halfway through the proposal. The MD was very disappointed and by September or October he questioned whether or not the claimant was competent for the job.

When the claimant’s probationary period was finished MD had a choice of either extending the claimant’s probationary period, ending it, or re-advertising the job of SM. He met with the claimant and discussed with him that perhaps he was not able for the job due a to lack of experience.

On October 6th 2005 MD asked the claimant if he would he be interested in working as a Stores/Warehouse Technician and he gave the claimant some time to think about the position. There would be a decrease in the claimant’s salary with this position. The claimant asked for a job description of the role but he refused the role. The company needed extra hands in the stores as it was near Christmas time and MD thought the claimant would have taken the position. The claimant did not seem surprised when he did not get the job of SM at he end of the probationaryperiod. The claimant did not defend himself nor did he ask for an extension of his probationaryperiod. The company did not end his employment but offered him an alternative position. MD wasalways available to talk with and he believed he was straight and honest with all areas of the claimant’s employment.

He outlined items on the proposal that were not completed. The Pegasus software was not purchased or implemented. Order processes were not improved. Stock control did not take place. Health & Safety issues were outstanding. Repairs were meant to have a twenty-four hour turnaround period but they were taking two or three weeks. Fifty per cent of the proposal was not done. In hindsight he realised the claimant did not have the experience to do the job of SM.

In cross-examination he confirmed the claimant did not defend himself at the meeting on October 6th 2005. He was surprised because the meeting was not formal and the claimant could have spoken at it. He discussed the SM job with the claimant sometime in February 2005. The claimant approached him after the job had been advertised in the newspaper. He denied he indicated to theclaimant he had the job and that the company had to advertise as a formality. After the companyreceived the claimant’s proposal it was discussed at a management meeting. The MD told the claimant some people had reservations but they were going to give him the job.

He accepted the claimant’s proposal depended on resources and as MD he had the final say on expenditure. He accepted the claimant spoke to him about getting forklifts. He did not reject the claimant’s suggestion about the forklifts but he did reject the suggestion of getting a consultant in to advise them on what forklifts to buy. This consultant would get a 10% commission and the MD believed there was enough staff to phone around and check out prices of forklifts. He denied he knocked back proposals from the claimant as he had outlined to the claimant he had control and authority. The claimant could have advertised for additional staff for the stores. Another employee, (hereafter A) went into the stores on days that were quiet but he was generally very busy with repairs.

It was put to MD the claimant did not have knowledge of the Sage system but of Pegasus system. The claimant told MD that Pegasus would be installed. MD had no knowledge that the claimant had asked for Pegasus but was told that Sage was in operation.

When the claimant was on annual leave the MD walked through the premises. He observed things and he was not happy. He wrote a letter to outline to the claimant what the issues were. He walked through the premises once a week when the claimant was there and he still had reason to complain about what he observed. At the end of the probationary period MD offered the claimant an alternative job with a salary that the claimant could have negotiated. MD had to offer the claimant the same salary as another person doing the job or there would be trouble. The claimant was quite clear anyway he did not want the job. He gave a verbal reference but not a written one after the claimant's employment ended.

Answering Tribunal questions MD said the claimant did not have a huge backlog to deal with when he took up the position of SM. Also, the claimant had resources of one to two people. He believed the time limit given to the claimant to carry out the items on the proposal was sufficient. MD only realised at the three-month review period that all the items on the proposal were not implemented. He accepted the reasons outlined in the letter from the claimant dated September 9th 2005 but he said he did not want excuses. When the claimant was given the job of SM he was given six months to implement the items on the proposal.

The Tribunal heard evidence from the office administrator. She told the Tribunal that she was employed by the company in June 2004 as an office administrator to manage the office, warehouse and had sales function responsibilities. As the company grew so did her responsibilities. She was unable to look after the stores so the company decided to create a new position. The work that she did in the stores was to ensure procedures were carried out and was "hands on", that is liaising with couriers.

They advertised for a stores manager and the claimant told them that he would be interested in applying for the position. The claimant told them two reasons why he was interested in stores work; one reason was that he was not achieving sales targets in his position and the other was that he was not able to stay in locations overnight because his wife was on a night course.

They showed the claimant a copy of the advertisement for the position and gave him a copy of the role the position entailed and the responsibilities. They interviewed the claimant. The claimant went to a management meeting and he outlined his proposal and that he would implement this in a six-month time frame. The claimant then signed a contract.

The witness explained that prior to this she had helped the claimant with preparing his proposal. The claimant was given product knowledge training and was sent an internal memo once a month. They had talked to the claimant about the job profile and also discussed "non conformance" with the claimant. Non-conformance is a term used when products are incorrectly sent out and the claimant was aware of this and that they were putting in measures to prevent non-conformance as opposed to corrective action. They agreed that the claimant would deal with all queries about this.

The stock system and stock room were computerised but the system was slow. Part of the claimant's proposal was to up-grade the computer system claimant was to liaise with the computer company. The claimant was to keep a list of commonly used parts and this was never done. They were to purchase a new forklift as they were in the process of moving and the claimant only obtained one quotation.

The witness outlined other areas of proposals that the claimant did not comply with. She also explained when asked, that to do the tasks specialised training was not required. The claimant did not ask to go on training courses

The witness explained that the claimant declined to accept an alternate job that was offered to him and the MD wished him well.

Claimant's case:

The Tribunal heard evidence from the claimant. he told the Tribunal that he did not have too much "dealings" with the MD. For his sales job his probationary period was three months. At one time he went to a seminar on occupational therapy. On his return the MD asked him if he knew of anyone that would be interested in working in the stores. The MD said "leave it with me" and he would talk to the claimant about the position the following week. The MD told him that the job would be his however he would have to advertise the job.

The claimant felt confident about taking on the role. The position was advertised a few weeks later. The office administrator handed him a letter to attend for interview. He was advised to put a proposal together and that he would be interviewed by the MD and the office administrator. He himself put the proposal together and the office administrator advised him also.

The claimant explained his previous experience in the stores area. Regarding the Sage system the MD told him that because of the amount of money spent on Sage system they were not getting a second system. The claimant was familiar with Pegasus system and had not worked with Sage before. Regarding the stock system the claimant explained that ninety per cent of the stock was in boxes as they had moved from one storehouse to another.

A new forklift was needed because of the new pallet racking system they got in the new stores. He was asked to get quotations for a new forklift. The first quote he got was from a consultant and the consultant charged ten percent. Another quote was for €15,000.00 to €17,000.00 and another was for €21,000.00.

Regarding the personnel in the stores they had not sufficient personnel to do the work. He asked the MD about employing another person and the MD told him that they had not the money to pay the wages of another person. The claimant did not feel that he had total charge, for example, they ordered a racking system and the MD cancelled it and got another system. His order was cancelled without being consulted. At another time he had arranged his desk so that he could check items and hear the phone at the same time. The MD told him to move the desk / to move to another area.

The claimant outlined the work that he did and reiterated that another employee was needed.

The claimant explained that of the tasks that were to be implemented "I did what I could, but the forklift the racking and the PC system was down to him (MD)".

The claimant was asked about his letter of appointment and an outlined payment of €2,000.00. He explained that he never received this payment. The MD told him that the bonus would be held over for another three months and he told the MD that he was not happy about that. The claimant further explained that he did not "have the run of stores" and the MD's "door was not always open".

Regarding the alternative job offer from the MD the claimant told the Tribunal the he asked the MD "Is that the best you could offer" the MD replied to him "it is that or nothing".

In cross-examination the claimant in reply to questions stated “basically that if store manager job did not work out I would go back to stores”.

Determination:

The offer made to the claimant by the Respondent of a new contract on less favourable terms than obtained in his current position constituted a dismissal.

It was the considered conclusion of the Tribunal that the Respondent failed to discharge the onus of proof that the dismissal was fair in this case.

The Tribunal determine that the claimant was unfairly dismissed. Accordingly the Tribunal awards the claimant the sum of 7,500.00, under the Unfair Dismissals Acts, 1977 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)