

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee

UD1334/2005

against

Employer

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr. P. O'Leary  
Mr. J. McDonnell

heard this claim at Cork on 24th October 2006 and 4th December 2006

Representation:

Claimant(s) : Timothy Lucey & Company, Solicitors, North Square, Macroom,  
Co. Cork

Respondent(s) : Mr. David Browne, McNulty Boylan & Partners, Solicitors,  
26/28 South Terrace, Cork

The determination of the Tribunal was as follows:-

This is a claim for constructive dismissal.

#### **Claimant's Case:**

The claimant was the only witness. The respondent approached the claimant in October 2003 and offered her the position of Sales and Marketing Director in the company. They discussed the role and agreed terms and conditions. MD, Managing Director of the company and HKJ's husband, issued a letter of employment to the claimant. The respondent had the license to a brand name for hotels and she was to be responsible for implementing it nationwide. There were six core pillars to define what the brand stood for. The value of having a brand is that people worldwide could rely on a set of standards in every hotel that carried the brand. The claimant was the Director of Sales and Marketing for the brand in this country and she worked with MD to agree a way forward and to decide how to define the brand in Ireland.

In her sales function the claimant had to recruit and manage a sales team and direct overall sales of her own team and the sales people employed by the hotels that would carry the brand. She would also liaise between the hotels and the head office of the brand and with her colleague in the UK who oversaw the UK and Irish market. She had fifteen years experience in sales and marketing at an international level. She received a very specific job description from MD that reflected her “skills set” which she had developed in positions held previously.

The claimant commenced employment with the respondent in January 2004. At the beginning of November 2004, HKJ casually mentioned to the claimant that she was going to handle the marketing end of the business and that she would issue her (the claimant) with new business cards that described her as Director of Sales. There had been no prior discussion between them about this change. By memo dated 4 November 2004 the claimant sought clarification from HKJ as to which areas of sales were to remain within her remit. In a discussion with HKJ, over cup of coffee, her full title was restored to her when she told HKJ how unhappy she was with the change.

An addendum to the claimant’s contract of employment was left on her desk. The addendum contained a “competition clause” restricting employees (including the claimant) from acting in competition with the respondent’s business. By email dated 1 February 2005 the claimant indicated to HKJ that she was unhappy with the twelve-month restriction on working in the industry after leaving the respondent because it covered her area of specialisation. She further indicated that she would not sign the addendum. She felt a change was taking place and she was uncomfortable. She was also being excluded from meaningful weekly discussions or meetings.

At the end of March 2005 the claimant received a communication from MD informing her that henceforth she would be receiving her salary in gross pay rather than net pay as hitherto. In her letter of reply dated 30 March 2005 the claimant queried the change with MD and indicated that she would not consider any changes to the terms of their existing agreement without a discussion. MD then called her into his office and asked her if she had a problem with him. She told him she did. He could not give her a reason for changing to paying her gross salary rather than net. They agreed to revert to the original salary arrangements. Her annual salary review should take place in January. He told her there was no money available for an increase in her salary. The claimant had no expectation of a salary increase because the business was not performing according to plan. She was amazed that MD felt it did not warrant a discussion.

At this time, the claimant’s communication with management was decreasing and was mainly in writing; their verbal communications were quite tense. On Saturday 21<sup>st</sup> May 2005 she received an email from MD on her blackberry about “discounting” rates for hotel B, the respondent’s new project. She was confused about the discounting rate and forwarded the email to the co-ordinator. She missed the last line in the email requesting her to be at a meeting on Monday, 23<sup>rd</sup> May. On the Monday, she had attended the office and left at 4.00pm, as per her work plan. She received a letter dated 24<sup>th</sup> May 2005 from MD seeking an explanation for her non-attendance at the meeting on Monday and referring to her having scheduled two days holidays for the end of the week without prior consultation. She had applied for the leave seven months previously when she submitted her calendar to HKJ and MD. She sent an apology for missing the meeting and explained that she had not picked it up at the end of the email on her blackberry. HKJ accused her of lying. When the claimant asked her for reasons for the accusation, HKJ said she didn’t want to continue the discussion and shrugged her shoulders. The claimant felt she had been unjustly accused. By letter dated 25<sup>th</sup> May 2005 she tendered her resignation to HKJ. She had sent monthly updates of her calendar to both HKJ and MD and submitted evidence to the

Tribunal to show that none of her emails to MD had been read and only two sent to HKJ had been read.

By letter dated 27<sup>th</sup> May 2005 MD replied to the claimant's letter of resignation pointing out that she was required to serve three months' notice as per her contract. After that, communications ceased between her, MD and HKJ. She was due to leave on the 29<sup>th</sup> July 2005. The week before, MJ approached her and said that he would not be there for her final day and suggested "doing thera-ra thing" (farewell drinks) in advance of her leaving. She compiled a "handover file" and discussed the details with MD. Colleagues approached her on the 22<sup>nd</sup> to wish her well on her last day. She informed them she had a week left. She attended work on the 25<sup>th</sup> and 26<sup>th</sup> July and received a letter at home on the 26<sup>th</sup> from MD saying that he had not expected her to attend the office as a result of their conversation on 22<sup>nd</sup> July 2005. The claimant established loss for the Tribunal.

The communication process at work had been very "ad-hoc". Executive meetings were not held. Based on her experience she felt there was a need for a strict structure of communication and information. During her period of employment she had put together a document, which she had hoped would become the business plan for the company and left it on MD's and HKJ's desks for discussion. She was complimented on the format of the document but was given no opportunity to discuss it. Her department was not allocated a budget and as situations arose she had to get MD's input. She did not know what expenditure she would have and she could not do very efficient short, medium or long term planning; this had a ripple effect on the sales managers she worked with in the hotels.

Communication between them became tense. MD had been extremely busy as the workload was increasing and he became more irritable and aggressive when she would approach him to arrange meetings or initiate discussions. She had a heated discussion regarding this when he came into her office in December 2004 and said, "This place is like a kindergarten". She told him that he was the problem and they discussed his disregard for proper communication with his team. This discussion had been heated and loud. He called a meeting for the senior people in his office. The meeting became heated and was stopped. The claimant, having already expressed her feelings, had no input into the meeting but realised that the communication process was in serious trouble. MD issued a memo after this meeting saying that there would be monthly meetings with the executive team but by the time the claimant left the respondent in July, none had taken place. She sent a memo to MD in December requesting a meeting regarding her budget and she received no reply.

Under cross-examination, the claimant accepted that communication was a two-way process. She also accepted that she did not invoke the grievance procedure but added that there was no need to as the matter was resolved. She had suggested engaging the HR consultant in December who had introduced these policies. She made a decision to reject the addendum to her contract in its totality. She had known HKJ socially prior to her employment. The "new" business cards, that had identified her as "Director of Sales", had been binned. She regarded the communication regarding the missed meeting as "pathetic and infantile". She had been allowed flexibility when attending appointments during the week and had worked over the weekends to compensate. There was an open door policy if you were "brave enough to go in". She had a company credit card and always paid it if she bought personal items with it. On long business trips it was useful if she couldn't access cash. It did not suit her to resign as she had great aspirations for the job.

### **Respondent's case:**

MD told the Tribunal that he obtained the Ramada franchise for Ireland in September 2003. He and his wife had known the claimant prior to her employment with the respondent. There was no problem with the claimant's work. She was responsible for setting up the sales and marketing of the franchise. He could not recall any conversation around the end of November 2004 regarding the claimant's title. There were lots of discussions about the business going on at the time. The claimant's title was not changed and she held her title as Director of Sales and Marketing until her resignation. There was no intention to undermine the claimant. He showed proofs for business cards to the Tribunal from November 2004, when the respondent was changing premises, that showed that the claimant was referred to as "Director of Sales and Marketing".

He could well have passed the remark that the office was "like a kindergarten". This conversation led to the meeting in December 2004. He wanted the employees to air their grievances at the meeting. There were strong-willed people at the meetings and they discussed their concerns which he encouraged as he wanted to clear the air. As far as he was concerned matters were satisfactorily resolved. The meeting lasted about an hour. A consultant, having reviewed the employees' letters of engagement recommended that the addendum should be issued to everybody in head office. The consultant was engaged on the claimant's advice. All the staff signed the addendum except the claimant who felt that the restrictive covenant would restrict her in relation to future employment. MD had no problem with her not signing.

The claimant was paid a net amount and it was grossed up. However, problems were encountered because of the delays in presenting expenses. Where a company car is provided private mileage is subject to benefit-in-kind and if expense claims are not submitted it is assumed that all the mileage is for private use. The claimant was not submitting her expenses on time and this was increasing the company's tax liability. It was suggested that the payment method be changed from net to gross. This was the problem, not gross or net pay. However the claimant's concerns were taken on board and she continued to receive a net amount. There was also concern about the use of the company credit card.

Whilst they had a programme to hold more regular meetings, this was difficult to arrange as people were travelling and away from the office a lot. However, communication continued by email and mobile while they were away. Whilst communication at a general level may have suffered it continued at the individual level with everybody. He might have lost his temper if things were not resolved but he was not in general irritable and aggressive. As far as he was aware the claimant was given more latitude than other members of staff. It was not possible to decide budgets in advance in this new business as it depended on the number of hotels that became involved. The claimant did the sales and marketing budget and he approved the expenditure for the trip to the US and Berlin. The claimant's overall plan was good but it was subject to the vagaries of finance.

Witness has an open door policy and members of staff wander in and out or they can talk to himself or the co-director on the phone whenever they need to discuss matters. The main project at this time was getting Hotel B up and running. There was a problem about the discounted rates for the opening of the hotel; the claimant had sent a letter discounting the rates but these had already been discounted. He arranged a meeting with the claimant for 23<sup>rd</sup> May to clarify the matter. The claimant did not attend this meeting and he wrote to her the following day to seek an explanation. There was never a question of the hours the claimant worked. Prior to her handing in her resignation the claimant had told witness that she was going abroad. It was not his intention to ignore the claimant. With regard to the insurance discs they had to change from

individual to group therefore the discs had to be replaced. He was not aware that the claimant had grievances and he would have had a meeting to discuss matters had he known. He believed that the grievance procedures worked. He outlined how he deals with emails and he did not treat the claimant's emails any different to those from other staff. At the claimant's farewell drinks witness participated in the same way as when other staff members leave the company. Since the date of the claimant's resignation there had not been a request for a reference and he would have no hesitation in giving a good one.

In cross-examination MD said his objective was to reach a turn-over of €1.5 million. Projections were based on bringing in hotels on set dates but budgets are done on a monthly basis. They hoped for 35 hotels in five years. They signed six hotels in 2004 but only opened two. They did not reach their aspirations for 2004. The claimant had strong opinions which she expressed and he valued them. He expected that everybody would utilise the grievance procedure if the need arose. The claimant was a very organised person who had the ability to do things in a very structured way but the respondent company was still "finding its feet".

HKJ told the Tribunal that she and the claimant had been very good friends and they socialised on a regular basis; she frequently called to the claimant's house on her way home for a drink and did so during the week before the claimant tendered her resignation. In April 2005 she received a telephone call from the claimant asking her to bring her dog to the vet and she obliged. She and the claimant had been very close. They had booked two days off together to attend the Dublin Horse Show and in April 2005 they had agreed that witness would pay for the tickets and the claimant would look after the accommodation. They had social contact right up to her handing in her notice of resignation although the claimant had indicated otherwise in her evidence.

Prior to her resignation the claimant passed by HKJ's office and said that she did not receive the email dated 21<sup>st</sup> May 2005 from MD asking her to meet with him. The witness told her she believed she did receive it. She did not call the claimant a liar; this is not a term that she would normally use. There was no further discussion. The witness pointed out that during the hearing before the Tribunal the claimant had said that she got the email but had not read the last line.

When she received the claimant's letter of resignation dated 25<sup>th</sup> May 2005 she told claimant that she should pass the letter to her husband who was her employer but then the witness decided to pass it on to him. She agreed that her husband had a quirky sense of humour and the claimant complained about it. His advertisements did not appeal to the claimant either. Witness did the promotions. She and claimant would discuss the advertisements. Sometimes she agreed with the claimant's view and sometimes she did not. Her husband is not aggressive or irrational but the claimant complained that the advertising was not done properly.

The witness never had a conversation with the claimant about changing her title. It would be outside her remit to do so; it was not her job to hire or fire anyone. The claimant was very precise about her emails and they can be validated by their date. She received a memo rather than an email from the claimant dated 4<sup>th</sup> November 2004 where she referred to her (the witness) having advised her about a change to her job title. She did not get a memo because there was no such meeting/discussion. There was no change in her title. The claimant could have ordered her own business cards. Witness did not order or pay for business cards and there was no relevant invoices in existence. Their roles overlapped and advertising would come under the heading of marketing. She discussed everything with the claimant and she was not aware of any problem that the claimant had with her.

The respondent was advised to make amendments to the contracts to safeguard the company in preserving business confidentiality. It was not the intention to restrict an employee after leaving the company. The claimant was the only employee who did not sign up and the respondent accepted this. She was at the meeting in December where her husband said to the claimant and the others present that if he was the problem he would sort it out. The discussion was not heated and she felt that it cleared the air. Every opportunity was given to express ones views.

In answer to questions from Tribunal members witness said that the claimant always communicated with her by email and she had never received a memo from her.

Evidence was also heard from the Purchasing and Operations Manager who has been working with the respondent since July 2003. He had many changes to his job title as the company developed. He thrived on the changes. These changes had been discussed with him. He was at the meeting at the beginning of December 2004. MD told them that there were some tension and communication problems in the office and that it appeared that he was responsible. MD opened it up for discussion and wanted to know how he could change. People were slow to start. The witness remembered little about the meeting except the interchange between himself and MO (another employee), which continued after the full meeting ended. As far as he could remember MD was quite conciliatory and did not raise his voice. He was aware of the grievance procedure and the up-dated version of it but he never had need to use it as he raised any problems he had informally with MD or HKJ. He felt that he was not given enough slack by MD and HKJ to get on with his job. When the specifics of the addendum were explained to him he was happy to sign it. He has had multiple roles and he is happy as everything was explained to him.

He was aware that the relationship between the claimant and HKJ was very good and that it did not change. He was aware of their trips to the RDS but that did not interest him. He was not aware of the business card issue with the claimant. At meetings he had with management he did not feel slighted. He received the information he needed through the email system. He would say that MD was cranky rather than aggressive and impatient and it was HKJ who bore the brunt of this rather than the claimant. During his working life he had previously worked with better bosses than MD but he has also worked with worse. In December 2004 during the period of the launch of a particular hotel the issue between another employee and himself was sorted and now they both respect each other. He does not have a company car but did at one point and he got his own disc.

### **Determination:**

There is no evidence before the Tribunal that the Managing Director ever contemplated or took any steps to change the claimant's title from Director of Sales and Marketing to Director of Sales. There is a dispute as to whether such steps were taken by the co-director. In any event the evidence is that the claimant retained her original title until the time of her resignation. Once the claimant objected to the proposed changes in relation to her pay (for which the respondent had good reason) and the addendum to her contract of employment the respondent without the least argument conceded to her objections and did not implement them even though the evidence is that all other employees signed up to including the addendum in their contracts of employment.

A problem arose because the claimant inadvertently missed a meeting with MD. By letter dated 24 May 2005 MD sought an explanation for this as he was entitled to do. In the same letter he was critical of her for having arranged two days holidays without prior consultation, which was an error on his part. There is a dispute as to the words that passed between the claimant and HKJ about the

email of 21<sup>st</sup> May 2005. The Tribunal accepts on the balance of probability HKJ's evidence on that conversation. The claimant's previous approaches to MD, whenever she had a problem, had been fruitful. The Tribunal finds that the conduct of the respondent was not so unreasonable as to justify her resignation and claim for constructive dismissal. The claim under the Unfair Dismissals Acts 1977 to 2001 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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