

## EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

Employee

UD354/2005

against

MN268/2005

Employer

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2001 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001

I certify that the Tribunal  
(Division of Tribunal)

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

Members: Mr. T. O'Donnell  
Mr. T. Kennelly

heard this claim at Limerick on 4th and 5<sup>th</sup> September 2006.

Representation:

Claimant: Mr. Edmond J. Dillon, Michéal Glynn & Co., Solicitors,  
Cecil House, 6 Lower Cecil Street, Limerick

Respondent: Mr Glenn Cooper, Dundon Callanan, Solicitors, 17 The Crescent, Limerick  
Mr. Derek O'Sullivan and Ms Paula O'Hanlon, IBEC Mid - West,  
Gardner House, Bank Place, Charlotte Quay, Limerick

The determination of the Tribunal was as follows: -

#### **Preliminary Issues:**

At the outset of the hearing the respondent raised two preliminary issues. Firstly, whether the unfair dismissals claim had been lodged outside the statutory six-month time limit for initiating such a claim in that the claimant was dismissed on 8<sup>th</sup> September 2004 and the claim was lodged with the Tribunal on 25<sup>th</sup> March 2005. Secondly, the respondent contended that it was not the claimant's employer at the time of his dismissal. The Tribunal, being conscious of the statutory provision for extending the time for lodging an unfair dismissal claim and the complexity of the issues herein, decided to hear the full evidence of the parties present.

**Background:**

The claimant was originally employed by the respondent. For business reasons the respondent and G set up a joint venture company (the new company). A major part of the respondent's business was transferred to the new company, including that part of the business in which the claimant was employed. The transfer took place on or around 1<sup>st</sup> September 2004. The claimant is claiming constructive dismissal against the respondent herein. It is the respondent's case that the claimant transferred over to the new company but around the time of the transfer had asked to be made redundant. The new company combined roles and acceded to the claimant's request. The respondent denies that it was the claimant's employer at the time of his dismissal on 8<sup>th</sup> September 2004.

**Claimant's Evidence:**

The only witness was the claimant. He commenced employment with the respondent in 1983 and for the most part held the position of sales manager of the soft drinks division and in the later years reported to the Managing Director (MD). On 8<sup>th</sup> June 2004 MD invited the claimant to attend a meeting with him and another person (JC) the following day. He knew something was going on. At the meeting on 9<sup>th</sup> June 2004 in MD's office MD introduced him to JC and they had a discussion. When MD left his office about twenty minutes later, JC said, "I want to make one thing very clear" and pointing to the ceiling said he (JC) was "up there", pointing to the desk said to the claimant, "That's where you are" and pointing at the floor said, "That's where the sales representatives and the office staff are". JC's tone was vulgar and the claimant felt "very low and like dirt". He was quite surprised at this attitude.

The claimant was not made aware of the position JC held at that time but he was subsequently discovered that he was General Manager (GM) over all the staff and he was reporting to another company (G). At the meeting on the 9<sup>th</sup> June, JC told him that he could "do without him (the claimant) in six months' time", that he would be driving a smaller car, that his expenses would be reduced and that he would put him "under so much pressure for results that he would have to leave".

JC called a meeting with the members of the sales team on 25<sup>th</sup> June 2004 and started it by saying that he had put the witness under so much pressure that he could not sleep at night. The following Monday morning, (28<sup>th</sup> June), when the claimant went to his office all his files were out in the main office and JC told him he was taking over his desk. The claimant was outside in the main office from then on and felt "like dirt". The claimant explained his concerns to the MD.

The claimant was having major problems holding on to accounts because JC had raised the prices of the merchandise by 10%. The claimant was the sales manager and this was his area of responsibility. MD was surprised when the claimant complained but nothing changed. On 2<sup>nd</sup> July 2004 JC asked him to attend a meeting but JC never turned up to it. JC's secretary informed the claimant that he had cancelled it. This happened on two or three more occasions. JC had the claimant's mobile phone number and had previously contacted the claimant on it but had not used it on these occasions.

In mid August the claimant was given a draft contract with the new company to sign. The claimant already had discussions with the new company. When JC asked him to sign the contract the claimant told him that it was with his solicitor and JC was very annoyed and told him he could be done without. The claimant was very stressed at this stage. He never signed the contract. He had been with the respondent for twenty-one years and JC had only been there three months.

There was a particular problem with one customer who was complaining about the new price increase.

When he went to JC with the problem he was told to “go away and manage” and sort the problem out. Then JC lowered the prices for the customer behind the claimant’s back. The claimant felt “very, very low” and “fairly stressed”. He explained the situation to MD and told him he would take redundancy to get out. His GP referred him to a psychiatrist who gave him a medical certificate to cover an absence of three months but he didn’t take up this option. He was prescribed medication and his behaviour and private life were adversely affected. He did not know if MD or JC knew he was under pressure. The claimant took up employment with his father-in-law two weeks after his employment with the respondent was terminated but at a lesser wage, two years later he took up a sales position with a soft drinks company and he then became self-employed.

The claimant attended for another meeting with JC on the 31<sup>st</sup> August 2004 but once again the meeting was cancelled. On that occasion JC’s secretary told him he could work as a representative. The claimant refused to sign another contract of employment with the new company. JC invited the claimant into his office on 8<sup>th</sup> September 2004 and presented him with three documents for his signature. He signed them. These pertained to his previous request for redundancy. After signing them, JC handed him a cheque there and then. He refused to shake JC’s hand. The claimant felt betrayed.

Under cross-examination, the claimant told the Tribunal that he first knew about the joint venture company in February 2004. He received a formal letter from the respondent regarding a transfer of undertakings in May 2004. MD told him that JC was not his boss and to go to himself if he had any problems. He knew JC was the General Manager designate of the new company and that he was from G but it didn’t seem to him that JC was only in the respondent company on a “look and learn” capacity. The claimant did not know why the new company start date was put back to September 2004. He was under the impression that the start date for the new company was the 8<sup>th</sup> September 2004. He took the redundancy because he couldn’t take the treatment from JC any longer. JC told him that it was MD who wanted him out of the company but the claimant didn’t believe this. He was not invited to have any representative at the meeting with JC on 8<sup>th</sup> September 2004. The claimant had asked MD for redundancy some time in August 2004. Anything he did for JC was just not good enough. JC started giving him orders from the first day he arrived, which was 9<sup>th</sup> June 2004.

### **Respondent’s Evidence:**

The only witness for the respondent was the MD of the company. He told the Tribunal that his business was primarily involved in bottling, distributing and marketing soft drinks and a small element was wine distribution. The claimant was the sales manager of the beverage division (soft drinks and mineral water business). He had a number of sales representatives reporting to him and he reported directly to the MD. In 2002 the respondent company’s business was suffering substantial losses. A consultancy firm was employed to direct the company back to a profit-making business. Five members of the management team (including the claimant) met with the consultants to form a plan of action. After twelve months a number of improvements had been made but the market overall was dominated by large multi-national companies. MD and AR approached a company who specialised in mergers and acquisitions. They devised a business plan to present to potential partners. The only alternative to this was to sell the business. A company (G) indicated their interest. The claimant would have been aware of this activity due to his attendance at management meetings where it was discussed.

In early 2003 there were intensive negotiations between G and the respondent company which led to the establishment of a joint venture company (the new company). The respondent and G each owned 50% of the new company with G having management control and the option to purchase the new company in six years. The new company was incorporated in late August and the transfer of business from the respondent took place on 1<sup>st</sup> September 2004. A general manager was required before the business could be launched and with that in mind G recruited JC. Letters were issued to all employees regarding

the new company in May 2004. The only part of the respondent's business not transferring was the bottling section, as G was not interested in it. MD put the Assistant Managing Director (AR) forward to G for consideration for the new position of general manager of the new company but G was not satisfied with his experience in management. G recruited JC in May and he worked on a project in G for a few weeks. MD agreed to G's request that JC come to the respondent company to observe the business before he took over as General Manager of the new company. MD, AR and another had been involved on part of the respondent in the negotiations with G but it was a transparent operation and the management team were kept informed.

MD had no knowledge of JC's background. JC was never an employee or manager of the respondent company. JC's role was limited and MD had made it clear to all that he (MD) was still in charge of the company. JC had requested that the sales routes be documented. This was a huge undertaking and MD assigned AR to help the claimant in that task. It became a major issue between JC and the claimant. MD felt the job needed to be done anyway and felt AR would bear the brunt of the work.

Price increases had been debated in the company previously that year and a decision to implement them had been made in April 2004. The management committee, including the claimant, made this decision and the claimant's input was critical. Due to ongoing negotiations with G, the increase had not been implemented. There was an increase of 3%, not 10%, made in August under MD's instructions and this was not decreased while he ran the company. When JC moved into the claimant's office, MD asked the claimant if he had an issue with it and the claimant said no. JC was initially on G's payroll.

Several employees had issues with the new contracts and the MD had asked the claimant to reassure all employees that there would be no change in their terms and conditions of employment. Some signed contracts and some didn't, it never became a material issue. When MD received the letter from the claimant dated the 30<sup>th</sup> August, it was not an immediate issue for him as he had been through the issues previously with the claimant. He had asked JC to recruit new sales staff and JC assured him that the claimant would not be required to work with anyone with whom he would be uncomfortable. MD had daily conversations with the claimant to try to reassure him that he had a future with the new company despite personal differences.

MD told the Tribunal that all employees were aware of the transfer date, as it was a "red letter day" for the company. It was a great relief for the company and all of its employees. The claimant approached MD with a request for redundancy on the 1<sup>st</sup> or 2<sup>nd</sup> of September 2004. He told MD that his family had acquired a business and that he wanted to work there as the Sales Manager. Furthermore, the claimant didn't like JC, felt he couldn't work with him and would be grateful if the MD would approach G to request redundancy. MD approached G and suggested that the claimant would want to leave if offered redundancy. G came back and said that JC could combine roles and could offer redundancy to the claimant. The claimant was very pleased. MD had no input into the redundancy package; he only advocated the claimant's case. MD had no dealings with JC about it.

Under cross-examination, MD told the Tribunal that he had asked the claimant to give JC as much co-operation as possible. On receiving complaints from the claimant, MD was concerned that JC had exceeded his authority and he had approached G on two separate occasions regarding JC's behaviour. He had made it clear to the claimant that he (MD) was still in charge of the respondent company and JC was there to "look and learn". MD would not have drawn the same conclusions as the claimant but the claimant should have come to him with any issues. MD had gone to G regarding JC's behaviour as he felt it would be more "impactful".

In answer to the Tribunal's questions, MD said that the company lost out because of the claimant's decision to leave. MD is a director of the new company. JC communicated by email with the claimant as he (JC) was based in Dublin for most of the time. It was the new company that made the claimant

redundant and paid his redundancy.

### **Determination**

The sales and marketing sections of the respondent's business was transferred to the joint venture company/the new company on 1<sup>st</sup> September 2004. The part of the respondent's business in which the claimant had been employed (the sales section) was transferred to the new company. The Tribunal is satisfied that the claimant was aware that the date of the transfer to the new company was 1<sup>st</sup> September 2004 and that the claimant had been transferred to the new company on that date.

The effect of the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003, S.I. 131/03 is that the claimant has continuity of service as between his former and new employment and thereby his long service with the respondent falls to be recognised when calculating his entitlement to notice under the Minimum Notice and Terms of Employment Acts 1973 to 2001. Accordingly the claimant was entitled to eight weeks notice. Section 1 of the Unfair Dismissals Act 1977 defines the date of dismissal. Under subsection (b) of that Section, which is the relevant Section in this case, the claimant's date of dismissal is the date on which his statutory notice, if it had been given, would have expired. The date of dismissal for the purposes of the Unfair Dismissals Acts is eight weeks later than 8<sup>th</sup> September 2004. Thus the claim for unfair dismissal that was lodged on 21<sup>st</sup> March 2005 is within the six-month statutory time limit for initiating the claim.

JC was the General Manager designate of the new company but had some involvement in the respondent company prior to the transfer. On 25<sup>th</sup> August 2004, shortly prior to the transfer, the claimant's former solicitor wrote to JC at the respondent company's address, complaining about JC's behaviour and a number of terms in the contract of employment, which the claimant was asked to sign, in relation to the transfer and indicating that the claimant was contemplating bringing a constructive claim. However, some days later the claimant for various reasons indicated to the Managing Director of the respondent company (MD), who is also a director of the new company, that he would be interested in a redundancy package. On 8<sup>th</sup> September 2004 the new company made the claimant redundant and he received his redundancy payment on that date.

In the circumstances, the Tribunal is satisfied that the respondent herein was not the claimant's employer at the time of his dismissal. Accordingly the claims under the Unfair Dismissals Acts 1977 to 2001 and the Minimum Notice and Terms of Employment Acts 1973 to 2001 against the respondent herein are dismissed. In reaching its decisions on the issues herein the Tribunal took cognisance of the facts that the claimant was medically advised to take time off work, which in the event he did not do.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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