

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

Employee

CASE NO.

MN371/06

WT184/06

UD573/06

Against

Employer

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001
ORGANISATION OF WORKING TIME ACT, 1997
UNFAIR DISMISSALS ACTS, 1977 TO 2001**

I certify that the Tribunal
(Division of Tribunal)

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

Members: Mr. M. Forde
Ms H. Kelleher

heard this claim at Cork on 2nd August 2007.

Representation:

Claimant : Ms Liz Scally, B.L., instructed by Ms Susan O'Connor, McNulty Boylan
& Partners, Solicitors, 26-28 South Terrace, Cork

Respondent: Mr. Tim O'Connell, IBEC, Confederation House, 84-86 Lower
Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

This was a case of constructive dismissal and the burden of proof was on the claimant to show that because of the respondent's conduct he was entitled to or it was reasonable for him to terminate his contract of employment.

Claimant's Case:

The claimant told the Tribunal that he commenced employment with Co A in July 1972, when he was twenty-years old. The company were distributors of bearings in Ireland. His job was store-man and telesales. Initially, he worked in Dublin but transferred to Cork where he later became office and branch manager. As branch manager he was responsible for finance, debt collection, stock levels, stores, sales and hiring of staff. In 1994 Co A was taken over by Co B. Management were from South Africa. Initially they had problems understanding the market and changed boss every year. The Dublin office was closed and the claimant was then responsible for the whole of Ireland. In June 2004, just as he was about to go on holidays, the Managing Director informed him that the respondent was taking over Co. B and that it would be a great move for the company and staff. The respondent was well respected in the business and the staff believed it was a good opportunity.

At a meeting with him management enquired about staff roles. When the claimant told them that he spent a few days on the road and a few inside, they told him this could not be maintained and that he would now be either inside or outside. The claimant said he would prefer to stay as he was but that was a non-runner. WX, whom the claimant had hired ten years previously, was made store manager when the claimant went full-time on the road. The respondent had a representative on the road so they took SX off the road to work inside. There was some overlapping of areas between the other representative in Munster and the claimant and in September 2004 the areas were split: the claimant was to cover East Cork and Waterford and the other representative was to cover West Cork, Kerry and the rest of Munster. The claimant was a bit surprised as he got on better in the west but he went with the decision. His decision making responsibility was diminished but if that was what had to be done he accepted it. Things were going okay but it was a bit of a wrench not having responsibility in the branch and spending four or five days on the road.

For over twenty years the employees had twenty-five days holidays and Good Friday as a loyalty bonus. BC told them that the respondent was proposing to reduce their holidays to twenty one days and pay them for the other four days. The claimant asked BC to check if there was room for discussion but he got a negative response. One of his colleagues told him he had agreed to the changed holiday arrangements. While the claimant had not agreed to the change he did not pursue the issue with management. In the January 2005 he noticed an increase in his wage packet and assumed that it was in lieu of the extra four days. He felt that the days were more valuable than compensation and in hindsight he felt that he should have brought this to the attention of the respondent.

In late 2005 there was a lot of reshuffling of staff and Kerry was added to the claimant's area. The claimant felt that some of his colleagues were not happy with the changes. There was also a re-shuffle in early 2006 but the claimant felt his position was okay. The claimant felt that his review in mid February 2006 was a bit negative. The claimant then discovered that the GC had met with someone from another company with a view to offering him a job, but the man in question was not interested.

In early April 2006 his direct manager (DM) and the Operations Manager (OM) had a meeting with the claimant. OM asked him if he was happy on the road. They proposed to move him from being on the road to working indoors on internal telesales on a reduced salary of €30,000 and he would retain the jeep. When they asked him how he felt about it he told them that the figures did not add up. They also told him that WX would be in charge of the office and he (the claimant) would be working alongside SX. He had thirty years' experience and he was being asked to revert to where

he had started. He felt he would not have any responsibility or the same respect. He felt it was a demotion. Doing telephone sales rather than meeting the customers was a complete change. It was suggested that he would go to Kerry occasionally maybe a few days or a week per month to meet customers. He would no longer be earning commission but there was a possibility of a bonus scheme based on profits that could amount to approximately €1,500 annually. OM told him that it would be a cushy job for his age and he would leave every day at 5.00pm. The claimant said he would have to think about it. When he asked OM what the options were he replied, "Not many." When he asked OM if it was a case of "take the deal or walk" he replied "more or less". This was a "bombshell". He discussed it with his wife and family. He felt there was some underlying motive. Two days later he asked OM if he could do anything about the salary but he told him he could not because they were not bringing in the figures and they were going to take a gamble and bring in someone else. The claimant told him it was hard to be motivated when commission would not be paid. The claimant was not given a choice to stay on in his old job. He agreed to revert to working indoors. His replacement was to start at the end of May but there was a long delay in his coming to replace the claimant. He tried to look at the best side but as the months went on little things were playing on his mind. At a trade show DM asked a man at another stand if he knew of anyone looking for a job.

Management introduced his replacement to him and WX asked him to clear his desk for him. Some weeks later the respondent proposed to put the company logo on his jeep. Neither the managers' vehicles nor his colleague's car were to have the logo displayed on them. The claimant felt that these were all little moves pushing him out. WX then told him that SX had said that he hoped that the (the claimant) would not expect him to pack his parcels. The claimant had hired SX and he was now making these comments. The claimant was having problems sleeping and his health was beginning to suffer. He would have stayed on at his old job if he had the choice. Prior to this they had always worked as a team. He felt he was losing respect. He went to his doctor because he was stressed out. He felt that he could not handle it anymore. He went home on sick leave on 16 May 2006 and that was the last day he worked for the respondent. He got legal advice. His solicitor wrote the letter of resignation on his behalf. Under the grievance procedure one brings problems to their managers and as far as the claimant was concerned he was talking to them. He obtained alternative work around 26 June 2006.

In cross-examination the claimant told the Tribunal that while his job title had been Area Accounts Manager he envisaged his role as being that of sales manager. He agreed it was possible that the commission on turnover in the branch could be as good as the commission earned on the road. While there were some positives in his performance review in February 2006 there were more negatives. The claimant agreed that it was he who had used the words "take the deal or walk". He was adamant that the proposal was to move him to telesales but agreed that this was later changed to internal technical sales. Whilst the reduction in salary was minimal it carried a certain implication but it was re-adjusted back up later. He agreed to the internal job because he was looking at the bright side and also because he felt he did not have another option. He told the two managers at the meeting that he had a problem with moving back. He was aware of the grievance procedure. He had been dealing with his line managers and did not want to go over their heads to the directors. Following the meeting where he agreed to the internal telesales position he did not make a formal complaint to DM and neither did he make contact with the Managing Director. He did not think that matters would be resolved by going through the grievance procedure. On legal advice he refused to meet with the respondent following his resignation. He took a month to think about his decision and there was no going back at that stage. He had lost trust and confidence in the respondent and in hindsight he should perhaps have communicated this and other matters in writing to the respondent.

In answer to questions from Tribunal members witness said that while he had concerns about the new position nevertheless he was prepared to move back inside. What made him resign were the little things such as the decision to put the logo on his vehicle, the mention of internal sales and who would pack which parcels. He felt he could not hack it. DM and OM were working with the respondent prior to their taking over the company.

Respondent's Case:

OM (Operations Manager) told the Tribunal that all the managers report to him and he, in turn, reports to the two directors. Under the grievance procedure an employee's first line of contact is their line manager but if there is a problem with that they contact witness. At the meeting on 10 April 2006 they discussed the claimant's performance and the fact that the business was not growing in Cork; over the previous eighteen months issues had been raised at review(s) and meetings about his performance. Because the claimant was spending a lot of time in the office he was not generating business and the respondent felt that he did not want to be on the road. They had a vacancy inside and asked him to consider it. The claimant agreed to think about it and they arranged to meet again on 12 April. His age had not been mentioned and it was not a factor in the proposal. Both of the meetings were amicable. The claimant asked questions about his role and salary. The claimant accepted the job and management were pleased with his decision. The claimant had an enormous amount of experience and in the respondent's business it is not easy to get employees with experience. They were desperate for the claimant to stay with the company. The claimant did not complain and did not put anything in writing.

In cross-examination witness said that there had been a verbal agreement to the reduction in the number of days annual leave and the employees received payment for the lost days. He discussed this with the claimant but the claimant never made him aware that he was unhappy with the arrangement. The claimant's performance was discussed at the review meetings and while there were some problems with his performance this was not the reason for the offer; the claimant had been spending a lot of time inside. As far as witness was concerned the claimant could have stayed in his former job. He accepted that the respondent made a mistake in the salary figure being offered to the claimant. The claimant raised the issue at the 12 April meeting and it was later re-adjusted back for him. The claimant did not formally raise a grievance in relation to the position on offer. Witness accepted that the post on offer was different from his existing position. In answer to questions from Tribunal members witness said he was pleased with the meeting of 12 April. The claimant's only issue was his salary; the issue of packing the parcels was not referred to at the meeting. The possibility of the claimant's staying in his old job was not discussed because the new position was only a proposal. On the 12 April the claimant agreed to move to the internal job. The interview for his replacement was held on 3 May and his replacement started working for the respondent on 15 May. His replacement was thirty-six years of age at the time.

The Tribunal also heard evidence from the claimant's direct manager (DM) at the relevant time and later became National Sales Manager. The purpose of the meeting on 10 April was to offer the claimant the position of internal sales. The claimant took on board the offer and it was agreed to meet again on 12 April. The respondent held extensive training in early January and it was reported back to witness that the claimant did very well on the internal sales aspect. The offer of the internal sales position seemed the logical progression. The meetings were amicable and relaxed. The question of his age never came up and he was never given an ultimatum. At the 12 April meeting the claimant accepted the internal job and DM was delighted with the decision; he felt the claimant's greatest strengths were in the internal sales area. Between 2 April and the date the

claimant resigned witness was in the Cork office at least once every week and sometimes more often but the claimant never raised any problem with him.

In cross-examination witness did not accept that the position on offer to the claimant was a demotion. The claimant had thirty years experience and the respondent did not want to lose that experience. He seemed relieved to be given the opportunity to work internally. He confirmed that the salary offered was a mistake. The respondent was interested in accommodating the claimant. The claimant had been on the road for thirty-four years and was gravitating towards the internal position. The claimant accepted the position and they shook hands. They agreed with the claimant for a handover to the new man who was a direct replacement for him.

In answer to questions from Tribunal the witness said that following the 12 April meeting the claimant was to remain on the road until and he was to move into the internal position when they got a replacement and he did so. He had not indicated that he would resign. The issues raised at the meeting on Monday related to the car and phone. They would not have had reason to go ahead with the meeting on Wednesday 12 April if the discussions had broken down at the meeting of 10 April. Sales/performance was discussed during the first part of the meeting on 10 April; this is the norm for somebody in a sales position. The claimant's performance was static.

The Managing Director, who has been with the company since 1962, told the Tribunal that this is a family business with thirty-five employees. They operate throughout Ireland and have some business in the thirty-two counties. Until the time they received the solicitor's letter of 18 May 2006 they had no indication that the claimant was unhappy. In response to this letter he wrote to the claimant's solicitor on 24 May 2006 because he wanted to sit down and resolve the situation. He felt there had been some misunderstanding and he wanted the claimant to continue to work for the respondent. It had been reported to witness that the claimant had left, was suffering from work related stress and was not answering his mobile phone. MD telephoned the claimant at home on Friday and spoke to his wife. He gave his home telephone number and asked that the claimant ring him at home anytime over the weekend but he did not do so. He gave the claimant his own home telephone number, thinking it might make it easier for him to contact him at home; it was first time he had ever given out this number.

In cross-examination MD said that he approved the proposal in relation to the internal sales position for the claimant but he was not directly involved in the discussions. In his letter to the claimant's solicitor dated 18 May he did not mention the fact that his old job was available as he understood that he was happy with the offer of the internal sales position.

Determination:

The Tribunal is satisfied that the reason for the claimant's resignation was moving him to the internal sales position. The claimant was given time to consider the proposal to move to the internal position and at the meeting of 12 April he agreed to it. At no stage during the meetings in April or in the month thereafter while he remained in employment did he indicate his dissatisfaction with the transfer. Nor did he invoke the grievance procedure in this regard. In failing to communicate his dissatisfaction with the new position to the respondent and thereby give the respondent an opportunity to deal with that dissatisfaction the claimant did not act reasonably. Accordingly, the claim for constructive dismissal under the Unfair Dismissals Acts, 1977 to 2001 fails.

As this was a claim for constructive dismissal the claim under the Minimum Notice and Terms of

Employment Acts, 1973 to 2001 is also dismissed.

The claim under the Organisation of Working Time Act, 1997 was withdrawn.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

