

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

Employee

CASE NO.

MN858/2007
UD1109/2007

WT372/2007

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: Mr M. O'Connell B.L.

Members: Mr G. Mc Auliffe
Ms. E. Brezina

heard this claim at Dublin on 2nd April 2008

Representation:

Claimant(s) : Ms Susan Jones B.L. instructed by:
Anne Fitzgibbon, Fitzgibbon & Company, Solicitors, The Penthouse,
121-122 Capel Street, Dublin 1

Respondent(s) : In person

The determination of the Tribunal was as follows:-

Claimant's Case:

The claimant gave evidence. He explained that he had commenced employment with the respondent in April 2006 selling chemicals to hardware companies. He drove his own car and carried small samples of the respondent's products with him covering the Dublin and south Leinster areas.

Prior to working for the respondent he was engaged in sales work but not working out in the field. A friend told him of the respondent company, he attended a couple of meetings with the Commercial Director (known as H) and got the job. Initially he was asked to work on a commission basis only. When asked, he said that he did not know who had mentioned the figure

of € 500 a week. The use of a company van was discussed and the claimant supplied his own mobile phone for the job. H gave him a list of clients to visit.

For the first three months he was paid a weekly wage and the respondent paid his tax and PRSI. After the fourth month H offered him a monthly retainer of € 4,000 for a period of four months but this ceased after one month. He was also to be paid 15% commission. After the fifth month H contacted him again and informed him that he did not know where he had come up with the figure of € 4,000 and asked him to go on a 15% commission basis only which continued until he was let go. The claimant said that he had no choice in the matter in changing to a commission basis. When asked, he replied that he paid his own tax.

The claimant said that he considered himself an employee and would not have dreamt of doing work for anyone else. When asked, he said that at a trade fair it was mentioned that another firm was looking for Sales Representatives. H made a joke on the day was that the claimant “only has one master”. He later denied this.

The claimant told the Tribunal that he had personal difficulties in January 2007 and H wrote him a character reference stating the claimant was an employee.

In June 2007 he informed H that he was taking two weeks leave. There did not seem to be a problem and one of the other Sales Representatives covered his area. There was never a problem in taking a day off either. The claimant explained that he decided his working week but got daily calls from the respondent in relation to clients or orders. His clients ordered the supplies and he placed the orders with the respondent. On the Saturday of the bank holiday in August 2007 he received a text from the respondent to visit a client in Athy the following Tuesday who had a problem with some of the products he had purchased from the respondent. On his return he went to the respondent’s premises and picked up his cheque for July. He was asked to attend a meeting in

The claimant gave evidence of loss.

When asked by the Tribunal if his holiday pay was deducted, he replied that he was just paid his 15% commission for the month. When asked about the hours he worked, he stated that he could start early or finish early. Working hours had not been discussed when he got the job.

On cross-examination he said that he did not remember begging H for a job. When asked, he said that he had not been given terms and conditions of his position. When asked, he said that he had not been employed on a commission basis at the start as he had told H that he could not afford it. He refuted that he had worked with other companies when employed with the respondent. He agreed that he had sold two cars and a van while working for the respondent, these vehicles had belonged to the respondent. When asked, he said that he had not completed time sheets for the respondent and had not said that he would not do it. He explained that it was very hard to judge how long a call to a client could take. When asked, he said that the respondent had provided him with his business cards. He said that he was in daily contact with the respondent and visited the premises at least once a week. H was not always present.

Respondent’s Case:

The Commercial Director (H) gave evidence. He explained that the claimant had asked for a character reference in relation to his personal problems. He told the Tribunal that when he had written the letter he had not known that he would have to defend the wording of it at a later stage.

The witness stated that they had not originally employed the claimant on a commission basis, as the claimant could not afford to be paid that way. In the first three months he was paid € 2,000, a car allowance and 50c-60c for every mile travelled. When asked, he said that he had a Sales Representative working in the west of Ireland on a commission basis and also did some work for another company. This understanding seemed to work for both the respondent company and the employee involved. The witness told the Tribunal that the claimant had said that he would work for another company while being employed by the respondent.

When asked, the witness said that there were many occasions that he could not contact the claimant. He said that he could not be sure if the claimant was working full time for the respondent. The witness told the Tribunal that the claimant and one other sales representative refused to complete the call sheets, as they said they were self-employed. He explained that he told the claimant that he no longer required his services as sales were down and costs were increasing. When asked, he stated that the person who took over from the claimant was paid a salary and was an employee.

When asked, he said that the claimant would have received a P45 for the three months he was paid a salary. When asked why the claimant had not been made redundant, the witness said that the

On cross-examination he said that the claimant was aware of the intention for him to be paid on a commission basis. When asked, he stated that he would not have had a problem if the claimant was working for another company as long as they were not competitors of the respondent. When asked, he said that he had not told the claimant at a trade fair that “a dog only had one master”.

Determination:

The Tribunal accepts the claimant began his employment as a full-time employee on the respondent's payroll and while there was a change in the method of payment after 3 months and subsequently after 4 months the respondent failed to formally notify the claimant of the purported change in the status of his employment.

The Tribunal considered in detail what the true relationship between the respondent and the claimant. The Tribunal notes that on the one hand the claimant provided his own car, paid his own phone and discharged his own tax and PRSI liabilities.

The Tribunal notes that on the other hand the claimant was paid commission on sales which were not sourced by him, he rang the respondent's office for orders and serviced them. He also received payment for days on which he did not work. He worked solely for the respondent and carried business cards which bore the respondent's logo and contact details. By the respondent's own admission and expectation had built up that there would be regular and daily contact between the respondent and the claimant in relation to work being carried out and time taken off.

In all the circumstances and having considered the case law provided and other authorities, the Tribunal deems that the claimant was an employee and was unfairly dismissed from his employment.

The Tribunal does not believe that the claimant made a sufficient effort to mitigate his loss. The Tribunal, using its discretion under Section 6 (a) of the Unfair Dismissals (Amendment) Act, 1993 awards compensation in the sum of € 2,380, which is the estimated equivalent of four weeks

pay after tax.

Having heard the evidence the Tribunal is satisfied that the claimant is entitled to payment of €850.00 that is the equivalent of one weeks wages under the Minimum Notice and Terms of Employment Acts, 1973 to 2001. No evidence was adduced in relation to the claim under the Organisation of Working Time Act, 1997 and therefore the claim fails.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)