

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIM OF:  
Employee

CASE NO. UD70/2007  
MN49/2007

against  
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: Mr P O'Leary BL

Members: Ms J Winters  
Mr J Moore

heard this claim at Dundalk on 19th June 2008

Representation:

Claimant: Mr John McGuigan BL, instructed by Mr. Pádraig O'Donovan  
Pádraig O'Donovan & Co., Solicitors,  
Abberley Law Centre, High Street, Tallaght, Dublin 24

Respondent: Mr Alex White BL, instructed by Mr. Ciaran O'Mara  
O'Mara Geraghty McCourt, Solicitors,  
51 Northumberland Road, Dublin 4

The determination of the Tribunal was as follows:

Respondent's Case:

The claimant was dismissed due to her refusal to accept changes in her sales territory and the structure of sales commission. The claimant had been notified and consulted prior to the change, and although she wasn't happy with the changes, the company considered that the changes should be made.

The respondent company is a furniture wholesaler, which supplies retailers throughout Ireland. The claimant commenced her employment as a field sales representative in December 2001. The position involved selling and providing customer service to retailers in a given territory. Sales representatives are expected to make monthly calls to customers in their territory to make sales, take back returns, increase the number of the company's products on display and establish new accounts. The claimant's contract of employment stipulated that the sales area she covered and the sales commission structure were subject to change to suit the needs of the business.

Over time the company found that less fashionable lines weren't selling and this caused a backlog in the warehouse. As the sales commission for all lines of furniture was the same, there was no incentive for the sales representatives to sell items that were harder to sell than more fashionable products. The

company decided to introduce a new sales commission structure to encourage sales staff to sell less popular lines, which the company believed could result in staff earning higher commission.

At a meeting in May 2006 the company notified the sales representatives of the new commission structure being introduced. At a meeting on 25<sup>th</sup> August 2006 more specific information was given to staff. The claimant was also informed of changes to her sales area with the removal of Carlow, Kilkenny and her part of Wexford. The intention was that the claimant would be able to reach all the customers in her area monthly, which were Dublin, Meath and Kildare and part of Wicklow, and develop new accounts. The claimant had not opened any new accounts in her area in the previous year.

The claimant was unhappy with the proposed changes and, before going on annual leave for two weeks, emailed the Director of Operations (DO) on 31<sup>st</sup> August 2006 to object to them. The claimant continued to work as normal on her return from annual leave. The claimant emailed DO on 10<sup>th</sup> Oct 2006 to ask for a salary increase to offset what she thought her projected loss would be. DO disputed the figure that the claimant suggested she would lose. As other sales representatives were unhappy with the changes the commencement date for initiating the new system was put back to the end of November 2006, in order to facilitate further discussions on the issue and to recruit an extra sales representative.

A disciplinary meeting was held with the claimant, the date of which was in dispute, but was either the end of October or beginning of November 2006. The meeting was called to raise performance issues with the claimant and was unrelated to the sales commission and sales area issues. The issues addressed at this meeting included the claimant missing sales targets, not replying to emails and incorrect paperwork. DO intended to review the situation a month later. DO contested that this was a noisy meeting or that he made any accusations at, or disparaging comments to, the claimant, but rather, that the claimant said very little in the meeting. The National Sales Manager (NSM) who sat in on this meeting gave evidence that it was a calm meeting and that DO had not called the claimant a liar contended by the claimant.

The claimant commenced sick leave on 3<sup>rd</sup> November 2006. On 7<sup>th</sup> November DO wrote to claimant advising her that if she did not comply with the company changes from 30<sup>th</sup> November her contract would be terminated. The claimant responded by email that she did not accept the changes and requested that the grievance process be initiated to deal with the issues and asked for an independent adjudicator. DO did not accept that the grievance procedure was a suitable process for the claimant's issues and instead offered to meet the claimant. DO considered that the operational changes being brought in affected all sales staff and were not specific to the claimant. The claimant advised that as she was on sick leave she would be unable to meet DO. DO wrote to the claimant on the 18<sup>th</sup> December 2006 and spoke to her on 20<sup>th</sup> December 2006 to confirm that she was being dismissed and gave her one month's wages in lieu of notice. The claimant was not advised of her opportunity to appeal. NSM was not exactly sure when he recruited the claimant's replacement, as it happened very quickly, but he believed it was a couple of days before the claimant finished.

#### Claimant's Case:

The claimant began as sales representative in December 2001 covering half of Leinster. She earned salary plus commission and received a bonus every six months if over target. She had always received her bonus. The claimant believed that the loss of part of her sales area, involving twenty-seven or twenty-eight customers, would result in an annual loss to her of nineteen or twenty thousand euro. She had built up those areas well and had a good relationship with the customers.

When the claimant spoke with DO at the end of August he informed her of the changes to her sales area and commission. The claimant emailed DO shortly after indicating her unhappiness at the changes. The claimant agreed to meet DO at the end of September. At the meeting DO told the claimant that she was underperforming and was the weakest link in the company. The claimant sent an email to DO on 10<sup>th</sup> October asking to be compensated for her loss by increasing her salary by twenty thousand euro, but did not receive any response until her notification of the disciplinary meeting.

At the disciplinary meeting the claimant believed that DO wished to get rid of her and wanted her to give her notice. The claimant explained that the drop in sales for the previous month was due to her holidays, but DO informed her that she should have made alternative arrangements. DO called her a liar over the supply of a sofa to a retailer, which the claimant denied was her fault. The conclusion of the meeting was that the claimant had to increase her sales. The claimant felt that she was being pushed out of the job. She went on sick leave the following week.

On 28<sup>th</sup> November the claimant emailed DO and requested that the grievance procedure be invoked to deal with her complaints. The claimant understood that the grievance procedure would be adjudicated by the Chairman of the company, DO's father, and in the circumstances suggested that an independent adjudicator hear the case. The claimant gave evidence that she believed that the situation could have been resolved if she met with the Chairman. The claimant had previously worked directly for him in one of his shops and had a good relationship with him. DO refused the claimant the opportunity of invoking the grievance process.

The claimant was informed of her dismissal on 20<sup>th</sup> December 2006 via phone call, which was followed up by letter. The claimant sent an email in January again seeking the grievance procedure to be invoked, but was again refused by DO. She was not offered the opportunity to appeal. The claimant received one month's salary in lieu of notice.

## Determination

The Tribunal, having carefully considered the evidence in this case, determines that the claimant was unfairly dismissed. The respondent totally failed to implement their own grievance handling procedure in this case which had been invoked by the claimant, for some reason not furnished to the Tribunal in evidence at the hearing, and thus deprived the parties the opportunity to resolve this matter amicably. While the DO may have considered this matter outside the scope of the agreed procedures this did not make it so and he was not entitled to so consider. A grievance procedure such as this is binding on both parties and once invoked cannot be excluded by the other. It is of course the right of management to manage the company's affairs but they must do so in accordance with the agreed procedures.

The manner in which the claimant was dismissed while out on sick leave was also unfair. She heard of her dismissal by telephone, which was followed up by a letter. The claimant was entitled to the courtesy of at least an interview before such action was taken against her. The Tribunal note that her position was filled probably at the time of her dismissal and notification of her replacement was made to staff within days of her dismissal, which on the balance of probabilities indicates that her replacement was in line prior to her dismissal. The claimant was not offered the right of appeal, which was also contrary to terms of her contract of employment.

In the circumstances and because of the expressed wish of the parties the Tribunal deem the most appropriate remedy to be compensation. The Tribunal finds that the claim under the Unfair Dismissals Acts, 1977 to 2001, succeeds. The Tribunal note that the claimant was on disability benefit for a period of four months after the dismissal and therefore was incapable of working during that period,

and so, the Tribunal awards the claimant the sum of €27,500.00 (twenty-seven thousand five hundred euro). As evidence was heard that a payment in lieu of notice was paid to the claimant, the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

## EMPLOYMENT APPEALS TRIBUNAL

### CLAIM(S) OF:

Caramel Byrne, 3 Lindisfarne Avenue, Bawnogue, Clondalkin, Dublin 22

### CASE NO.

MN49/2007

UD70/2007

against

Furniture Link International Limited, Dundalk Logistics Park, Dublin Road, Dundalk, Co. Louth

under

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

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms P. McGrath BL

Members: Mr M. Murphy  
Mr O. Nulty

heard this claim at Dundalk on 31st October 2007

### Representation:

Claimant(s) : Mr. John McGuigan BL instructed by:

Mr. Pádraig O'Donovan, Pádraig O'Donovan & Co., Solicitors, Abberley Law Centre,  
High Street, Tallaght, Dublin 24

Respondent(s) : Mr. Alex White BL instructed by:

Mr. Ciaran O'Mara, O'Mara Geraghty McCourt, Solicitors, 51 Northumberland Road,  
Dublin 4

The determination of the Tribunal was as follows:

### Respondent's Case:

The Director of Operations gave evidence on behalf of the respondent. He stated that the claimant commenced employment in 2001. The respondent's business involved the importing and distribution of furniture. In 2005 the claimant's weekly gross pay was €1,050 per week. A yearly bonus of €5,000 was paid to her if she reached the targets set for her and was paid in July. The respondent company employed around 73 staff, 4 staff worked in the "field" (1 being an agent), around 20 staff worked in administration and the remainder worked in the warehouse. The claimant was employed as an area Sales Representative, dealing with existing clients and on the look out for new accounts. She reported to the Sales Manager.

The claimant's contract was opened to the Tribunal. The witness explained the commission structure. The claimant would be paid ½% commission on any "container" sales. Excluding "container" sales she would be paid ½% on sales up to €157,000 and commission on sales over that amount was 1%.

There was a provision in the contract that commission on sales could change. The contract also stated *“failure to achieve sales targets on a consistent basis may result in your position being terminated”*.

The witness stated that the sale of furniture in Ireland changed in 2006. Customers preferred fashion items than the existing stock. A new variety of furniture was required which practically sold itself. However the older types of furniture were still in stock, which had to be sold. Management discussed the matter at length and it was decided that the focus of the Sales Representatives had to change to promote the older stock. It was decided that the stock would be categorised in three categories. Category 1 had a commission rate of 0.3%, category 2 had a rate of 0.65% and category 3 had a commission rate of 2%. Category 2 related to about 80% of the respondent’s stock. Category 3 related to the older stock.

A sales meeting was held in June or July 2006 and the new categories of furniture and commission rates were explained. There was no decision made as the company wanted feedback about the changes. The claimant had attended the meeting.

Another meeting was held with the claimant and other staff on August 26<sup>th</sup> 2006 concerning the change in commission. The staff were generally not in favour of the change. One Sales Representative did not want to change at all. He emailed the claimant on August 27<sup>th</sup> 2006 concerning the change in the commission structure. The witness told the Tribunal that the Sales Representatives were only focused on themselves and not the respondent company. The company had to change the way they managed their business or it would go into decline. He explained to that the Sales Representatives commission would not reduce with the new commission structure.

The whole company was in jeopardy. The entire country had changed, there was more traffic on the road and more stores to visit. The areas allocated to the Sales Representatives had to be reconsidered. The witness explained that the claimant covered an area from Louth to Wexford, including Dublin; it far exceeded any other area. The claimant had told him that she had had problems acquiring new accounts due to the time spend in traffic. A new Sales Representative was hired to cover the southeast area. On August 31<sup>st</sup> 2006 the claimant wrote to the witness. She was disappointed in the removal of 3 counties from her sales area. The witness told the Tribunal that the claimant’s job description would not change. On November 7<sup>th</sup> 2006 the witness wrote to the claimant. The witness explained that the new commission rates did not commence in October 2006, as 2 sales representatives were not happy with it.

When asked if he received an email on October 10<sup>th</sup> 2006, he said that he could not remember. He had given all the documents relating to the claimant to his solicitor. The claimant was absent on sick leave from November 6<sup>th</sup> 2006. She never returned to work but exchanged emails with the witness. She was invited to a “special” meeting to hear her objections to the changes. When asked, the witness stated that the respondent company wanted to introduce the new commission system by January 1<sup>st</sup> 2007 but wanted all four sales representatives to be on board before commencement.

More emails transferred between the witness and the claimant. She was under her doctor’s supervision but requested a meeting as she wished to proceed with the grievance procedure. On December 1<sup>st</sup> 2006 she was sent a letter to terminate her employment due to her “non-cooperation” in the matter of the commission rates. The witness told the Tribunal that he would have preferred if the claimant had remained on with the respondent company.

When asked, the witness said that the person who replaced the claimant had left after a few months.

On cross-examination the witness stated that he had been advised by his solicitor in respect of the claimant’s contract being followed. He stated that her wages were not being reduced by € 20,000

under the new commission rates. He explained that the claimant's area had been reduced but she still had the South Dublin area. When put to him, he said that he had not wanted the claimant or any other representative to leave. He agreed that she had been replaced two days after her employment had been terminated but the respondent had a business to run. When put to him, he said that he had told the claimant that the situation of the revised commission rates would be reviewed 6 months from his commencement.

When put to him, he stated that he had had no animosity towards the claimant. When asked, he stated that the claimant's replacement's wages had not averaged around € 1,000 per week. He agreed that an email had been sent to all staff regarding the claimant's replacement three days after her dismissal but that that person did not commence employment till January 2007.

When asked by the Tribunal he said that the person who had initially complained about the change in commission rates had been on a higher salary than the claimant but that he had negotiated it prior with management.

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

The claimant gave evidence.

She told the Tribunal that she had had a meeting with the respondent's witness in May 2006 and informed there would be changes in the commission rates and her areas would be reduced. She told the Tribunal that this would cut her sales by half, meaning a drop of over € 20,000. When asked, she stated she had compiled the calculations herself.

She commenced annual leave in September and on her return was called to a meeting complaining of her lateness, that she had the worst sales record and that she was the "weakest link". She informed him that she had not agreed with the new changes.

On October 31<sup>st</sup> 2006 she was called to a disciplinary meeting. It was stated that she had not reached her targets for the previous 3 months. The claimant explained that she had been absent on leave for nearly one month and had not been given a target for the third month but she had not argued about it at the meeting. The claimant also told the Tribunal that the respondent's witness had accused her of being a liar.

The following week that claimant was absent on sick leave suffering with stress and vertigo. She told the Tribunal that she felt pressured to take on the new changes. She asked to invoke the grievance procedure and suggested, in the circumstances, that an independent adjudicator or arbitrator hear her case. The claimant told the Tribunal that she had wanted to continue working.

The claimant gave evidence of loss. She was out of work for 3 months.

On cross-examination she said that the loss of € 20,000 would have been due to the loss of the Carlow/Kilkenny/Wexford areas. When put to her, she agreed that it was up to the respondent how they configured their staff. When asked, she stated that it was much easier to sell stock under the category of 1. Category 3 had to be reduced in price, as the customers were not keen on purchasing the older stock. She agreed that the respondent had to try make a profit.

When asked, she stated that she was unaware if she had been given the specifics in August about the changes. She had objected when the 3 counties had been taken from her. When put to her she agreed that she had been invited to a special meeting and had asked for a grievance meeting but, at the time, was too ill to attend.

**Determination:**

The Tribunal does not refute the employer's entitlement to re-structure nor is the employer obliged to consult with staff on the detail. However, the Applicant raised a very real fear that her income would drop. She indicated the reduction in her remuneration would arise with the loss of her three lucrative counties, together with the new commission structure.

The Applicant did not have a good working relationship with the Director of Operations. He did nothing to foster good relations and was utterly unprofessional in his dealings with her. As the Applicant was on the road so much, her relationship with the said Director was not of great import. However with the introduction of the new commission and sales areas it was essential that the Director of Operations be available to discuss these changes on a one to one basis and in a positive atmosphere.

Describing the Applicant as the "weakest link", telling her she was "dishonest" and calling her in for spurious meetings did nothing to alleviate the Applicant's concerns.

In the circumstances it was hardly surprising that the Applicant had to go on sick leave.

Crucially, the Applicant asked to invoke the grievance procedure to review the structural changes and to discuss a raise in salary where there might be a drop in commission. The company failed to follow its own grievance procedure. In its subsequent dealings with the Applicant the company failed to act reasonably.

It is only on the rarest of occasions that the Tribunal will come across a situation where an employer has so blatantly infringed the rights and integrity of an employee. The Tribunal finds this to be such an occasion.

The Applicant was forced into a situation wherein she had no alternative other than to hand in her resignation. The Respondent's behaviour gave rise to this situation and a situation of constructive dismissal arises. Accordingly the Tribunal awards the Appellant the sum of € 35,000 under the UnfairDismissals Acts, 1977 to 2001.

Loss having been established the Tribunal awards the sum of € 3,188.16, this been four weekly gross wages, Minimum Notice and Terms of Employment Acts, 1973-2001

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