

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

Employee

CASE NO.

MN105/08
UD101/08

Against

Employer

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 B.L.

Members: Mr. T. O'Sullivan
Mr. P. Woods

heard this claim at Dublin on 20th May 2008 and 15th July 2008.

Representation:

Claimant : Ms. Anne Brennan, O'Mara Geraghty McCourt, Solicitors, 51
Northumberland Road, Dublin 4

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

The determination of the Tribunal was as follows:-

Claimant's Case:

The claimant commenced employment on 6th November 2006 as a Trade Sales Executive Grade 1. He had four and half years prior experience in the sales area. His probationary period was twenty-six weeks. His commencement salary was €28,000 per annum payable on a four weekly basis. A bonus of €1000 could be earned by achieving his target of €30,000 of new business sales. His target was €390,000 (€30,000 x 13). A payment of €35 was to be paid for each €1000 euro over target. He accepted the car allowance offered by the respondent for the initial six months instead of a car. If his targets were achieved in his first year he would be promoted to Senior Trade Sales Executive. His job entailed selling hand dryers. He reported to the General Manager.

When he commenced employment there was no register of customers. He built up a list of

contractors and wholesalers. His job entailed 50% indoor work and 50% outdoor work. He set about contacting electrical contractors and at a later stage wholesalers. He sent out in the region of 500-700 mail shots to contractors in the 26 counties. He also posted out brochures. He made contact with contractors who were listed in a weekly magazine.

On 3 April 2007 he had a meeting with the General Manager. New targets were proposed. His original target was €390,000 per annum. The proposed new target was €974,778, a 150% increase. He had to reach the target to receive his bonus. His basic pay of €28,000 increased by €1,500 to €29,500.

The claimant's initial reaction was that he would not achieve the target. He informed the General Manager accordingly. He believed his terms and conditions of employment could not be changed after five months without negotiation. He asked the General Manager to consult with management. The General Manager, having spoken to management in July said they would not discuss the proposed changes.

The claimant applied and was interviewed for the job of General Manager in July/August 2007. The Commercial Manager interviewed him. He felt he did a good interview. One to two weeks later he was informed that he would not be offered the job but was offered a Senior Sales Representative position. He was offered 1% of sales. He declined the offer of the job. The Commercial Manager was disappointed because the claimant was well thought of within the Group.

The General Manager resigned on 13th September 2007 and a new General Manager was appointed. He communicated with the new General Manager about the proposed new targets. The claimant indicated that the target was unreasonable and that he was unlikely to achieve it. He said he hoped to achieve €800,000 approximately and would endeavour to increase it. He also contended that if he could get three big wholesalers to buy, his target could increase by €200,000 approx. Two of the three wholesalers needed bigger margins and the third wholesaler indicated they could buy cheaper in the UK.

In mid October 2007 the claimant had a meeting with the General Manager. He spoke about his entitlement to a pay increase. The General Manager said he did not know anything regarding a pay increase. The claimant referred to his terms and conditions of employment. The General Manager contended that this did not mean anything and that the company could change the terms and conditions. The General Manager then spoke about a further sales target. The claimant contended that he could only achieve €800,000. The claimant wanted his original terms and conditions implemented. A new target of €829,245 was discussed. An e-mail from the General Manager to the claimant outlined changes in the target for periods 9 to 13. The claimant felt if he did not achieve these figures in the periods he would be penalised.

On 5 November 2007 the claimant queried his salary to date and noticed a shortfall and asked that it be clarified. He felt somewhat sceptical that things were beginning to deteriorate. He e-mailed the General Manager about the validity of his contract and was asked to attend a meeting the following Monday, 12th November 2007 with both the General Manager and the Sales Manager to resolve matters. The claimant indicated that he was willing to try and resolve matters in a meeting with the General Manager only and not with the Sales Manager present. The claimant asked for the meeting to be postponed until he could secure another person to accompany him. He received a further e-mail from the General Manager instructing him to attend the meeting at 10.00 a.m. as arranged and that the Sales Manager would be present. The General Manager insisted that the claimant attend on his own.

The claimant attended the meeting on 12th November 2007 alone. The General Manager told him that he did not like being managed, that he was strangling the progress of the company and that he would not allow the claimant to bring the company down. The General Manager said that if the claimant's demeanour did not improve he would have no problem getting rid of him. The General Manager suggested that the claimant liked to do his own thing. The General Manager also said that the claimant's job depended on his sales improving. He threatened the claimant with termination of his employment. The claimant said the General Manager was agitated and was blaming him on the ills of the company. He asked the claimant if he had anything to say and the claimant felt he was trying to provoke him to comment. The claimant's position was threatened five times. He was dumbfounded.

The claimant honestly believed that there was a ruse to get rid of him. He was shell-shocked. He asked the General Manager to furnish him with his complaints in writing and that he would respond to him. The General Manager refused to give him a record of the meeting saying he should remember it all. The claimant had never been criticised before. The previous General Manager had told him that he was happy with him. The claimant generally got on well with him.

A month later the claimant queried a reduction in his salary and he was informed that a new structure had been implemented from 12th November 2007. There were allegations that his sales figures were decreasing. The claimant always exceeded his original target. There were peak periods. €50,000 was a good figure. The building trade was changing. The company had lost two orders to contractors. Christmas time was always low.

On 16th November 2007 the claimant invoked the company's grievance procedure and wrote to the Managing Director, requesting an investigation be conducted into the General Manager's conduct. Also on 16th November 2007 the claimant was asked to attend a meeting with his Sales Manager. The Sales Manager was newly appointed to this position. The Sales Manager requested he change his hours of work. His new hours of work were to be 9 – 5. He previously started at 7.30 and worked through lunch until 4.30 pm. He was only to come into the office for two hours a week. He was told to go out on the road five days a week.

The claimant said the job would suffer as a result. He could not work those hours. Prior to this no one had any problem with his hours of work. The mail shots he had sent out were done over weekends or in the evenings. He never thought about those extra hours he had worked. He loved his job. He did not agree to any of these rules in his original contract of employment. The claimant said his sales figures were always very good and that he was still sending out quotations and that he could achieve his target of €800,000 approximately.

In late November 2007 the claimant could not find his list of wholesalers. The Sales Manager had taken it and phoned a selection of the claimant's wholesalers. The Sales Manager was informed that the wholesalers had not heard from the claimant. It then became apparent that the Sales Manager had not spoken to the correct contact names in each of these wholesalers. The claimant had approximately 50 customers on that list that he telephoned to clarify matters.

The claimant attended a grievance meeting with the Commercial Manager on 29th November 2007 and outlined his grievances. Separate investigatory meetings were held with the General Manager and the Sales Manager. Upon the completion of the investigation into the allegations of harassment and bullying the Commercial Manager wrote to the claimant on 3rd December 2007 indicating that he could find no proof of harassment or bullying. The sales target was reviewed and lowered

owithin 5% of the claimant's own estimate. The company indicated that it reserved the right to change bonuses, commissions and targets as per the contract of employment. The Sales Manager was to issue the claimant with a new document clearly stating his salary, targets, bonus and commissions and expected work practices.

A further meeting took place between the Sales Manager and the claimant on 3rd December 2007. An action plan, weekly call plan, sales log and quotations were discussed. A nokia headset for the claimant's car was to be provided. The sales orders were to be written up and faxed to the office. The claimant was expected to know goods prices by heart. The Sales Manager told the claimant that his performance was abysmal. A complaint from an office worker was shown to the claimant. The complainant had said the claimant had hassled her, put her under pressure and told her to do his (the claimant's) work. A heated discussion then ensued. The claimant repudiated the contents of the letter.

In an e-mail to the Sales Manager on 10th December 2007 the claimant responded to each of the items discussed at the meeting of 3rd December 2007. The claimant suggested that the Sales Manager manage, organise a market survey, the company's market share, their competition and their pricing.

On 10th December 2007 the claimant appealed the Commercial Director's decision. On 12th December 2007 the Sales Manager requested the claimant attend a Capability and Performance meeting on 20th December 2007 to discuss his failure to achieve his targeted volume of sales for the previous six months. On 14th December 2007 the claimant queried a discrepancy in the bonus paid to him for period 9 and asked that it be credited to his account by close of business on 18th December 2007. On 15th December 2007 the claimant wrote to the Sales Manager and requested a postponement of the Capability and Performance Meeting schedule for 20th December 2007 to allow him to speak to the union, seek professional advice and also enquire about his statutory rights. The Sales Manager afforded the claimant a postponement. On 17th December 2007 the Sales Manager wrote to the claimant and outlined his salary, target, bonus and commissions and expected work practices. On 18th December 2007 the General Manager wrote to the claimant indicating that two accusations of bullying and harassment were made against him by two employees in the company in the previous two days. The claimant felt the allegations were groundless. The Finance Manager was appointed to investigate the allegations. The timeframe for conducting the investigations was arranged for week commencing 14th January 2008.

The claimant's appeal meeting took place on 19th December 2007. The claimant spoke about being verbally threatened, being humiliated, harassed and bullied and the setting of impossible targets and impossible deadlines.

By letter dated 21st December 2007 the Managing Director informed the claimant the he did not believe he had been the victim of harassment or bullying and responded to a document presented by the claimant at his appeal meeting on 19th December 2007. The Managing Director in his letter undertook to speak to the General Manager about the claimant's targets and bonuses. A Strategy and Working Practices meeting was arranged for 17th January 2008 which would discuss a set of action plans and clarify the working practices the company expected of individual employees.

The claimant had never seen sales figures from the acquired business and his impression was that the acquired business achieved nothing like the figures in his target.

The claimant believed that the Managing Director had taken things on board, that he had a fair

hearing as he could say what he wanted, but felt that no weight was given to what he had said. He considered that the General Manager was being exonerated and that the basis of what he had said in his original complaint was correct.

On the 3rd January the claimant received a letter from his new Sales Manager in respect of unauthorised absences from work over the previous five weeks. He said he had always given ample notice in relation to taking annual leave except in emergencies.

The claimant tendered his resignation on the 8th January 2008 as he felt that relationships had deteriorated so badly after the meeting of the 12th November 2007 and that he could no longer do his job under these conditions. He felt that the company were trying to get rid of him and that he had been banished from the office.

The claimant established loss for the Tribunal.

Under cross-examination the claimant said he previously worked as a territory manager with no staff reporting to him. He confirmed that the General Manager had changed his original target in April 2007. On the 3rd October 2007 he had submitted a memo to the General Manager outlining his projected sales for the year up to 31st March 2008, in which he said €800, 000 would be the most likely figure. He accepted that his original target of €390,000 was not difficult.

The claimant did not believe the tone of his e-mail to his new Sales Manager to be aggressive. He believed that his new Sales Manager was unsure of his job because he was newly appointed to that position. He assumed the new Sales Manager was trying to change his conditions of employment. He denied being contentious of the Sales Manager.

The claimant contended that his position was threatened on five occasions. He felt he might have been too relaxed at the grievance meeting he attended with the Commercial Manager and was stunned when he received the outcome of this meeting. In relation to his appeal hearing with the Managing Director he felt that he had received a fair hearing and assumed that both he and the General Manager would be investigated and expected an outcome one way or another.

The claimant denied ignoring the new Sales Manager. He was quite frustrated at the meeting he attended with his new Sales Manager and the General Manager on 12th November 2007 because the Sales Manager kept nodding his head in agreement with the General Manager.

The previous Sales Manager employed by the respondent gave evidence. He commenced employment in June 2006 and said that the respondent company acquired the business that sold hand dryers. The person (CM) who sold the dryers on behalf of the acquired business was gravely ill, so his position was vacant for about four to six months. The claimant had one meeting with CM. He said that when the claimant commenced employment the respondent had no client list as CM had just left notes and faxes.

He said he had prepared the document with the claimant's original sales target of €390,000 (€30,000 x 13), which he had based on CM's sales. The Managing Director had confirmed the target. He was happy with the claimant who was bringing in more sales than anticipated. He had no issues with the claimant when managing him.

In relation to the new target and bonus structure that the claimant received on the 3rd April 2007, the figures came from a meeting he had with the General Manager and Managing Director. He told

them at the time that the targets were unrealistic and that it was a huge increase and as a result of this his own targets had increased. A number of individual targets were increased at this time and these increases had crucial financial effects.

He spoke with the General Manager as he felt the target was too high, but he was told that targets had to stay where they were. He did not see the acquired business accounts but did not ask how the figures were reached. He presented the new targets to the claimant and the claimant thought they were unreasonable and asked him to revisit them. He spoke again with the General Manager who came up with a new bonus scheme for the claimant but with no actual change in the target figure.

Under cross-examination he agreed that the original target of €390,000 was not difficult. He said even though he was the Sales Manager he was not involved in the budgeting meeting that took place in England. He admitted he had broken down the new target over the periods, but the overall figure was still a massive target.

Respondent's case

The Commercial Manager who works for a different division of the parent company gave evidence. He was involved in integrating the two businesses into one and he ended his association with the Respondent Company at the end of 2006 and commenced with another company of the Respondent group.

He interviewed the claimant for a General Manager position within the group, in August 2007. He deemed the claimant to be unsuitable for that position but instead offered him a senior sales position. The claimant declined that offer.

The Commercial Manager was asked by the Managing Director to investigate the claimant's grievance. He spoke to the claimant, the General Manager and the Sales Manager in the course of the investigation. His conclusion was that he did not believe the claimant to be a victim of harassment and bullying. He accepted that it was probably pointed out that if the claimant did not reach his targets there could be consequences. He thought the claimant wanted the General Manager to be told off. He felt that there was a breakdown in relationships between the three individuals involved.

Regarding the meeting held on 12th November 2007, it was clear that heated discussions from both sides took place. When he spoke to the General Manager he did not admit to making threats, however he strongly told the claimant that targets would have to be met. He took notes of his meetings with the three individuals involved but they were not available on the day of the hearing.

The Managing Director for the Washrooms Division UK and Ireland gave evidence. He explained that the new target from April reflected the inertia sales of the acquired business plus allowance for new business growth. The claimant's role was different from his predecessor in that the previous person was self-employed and the claimant's role encompassed both old and new business. The target for 2007 was achievable.

On receipt of the claimant's grievance appeal letter he arranged a meeting with the claimant. Targets were discussed. He wanted to understand why the claimant thought the targets were unreasonable and to explain to him where the figures had come from. The meeting lasted several hours. His findings were similar to those of the Commercial Manager.

Under cross-examination the Managing Director denied that the claimant's original target had been run by him and said the original target figure was an error of local management. Before carrying out the appeal he was aware that the claimant was not accepting the new target. He reiterated that he had asked the claimant to give him a clear wording of his version of events but that this changed all the time. The General Manager's evidence did not support the claimant's evidence. He understood that the claimant was upset and that he was entitled to appeal to a senior manager. He asked the General Manager if he had threatened the claimant with dismissal and he denied this. He did not have notes of the meeting between himself and the General Manager.

The General Manager gave evidence. He commenced employment with the respondent in November 2006. He worked in the acquired business and was aware of the level of sales. He said that CM was a part time agent who worked from the office and was responsible for achieving 50% of total sales of hand dryers. There were monthly management accounts and sales figures available for the acquired business going back eight or nine years.

The claimant's new target was based on figures of the acquired business and it was achievable. The claimant had been told of the new target before April and he had discussed this with him. He asked the claimant for a sales forecast in preparation for a half yearly review meeting in October 2007, and the claimant had written to him projecting sales of €800,000.00 for the year, but also raised the issue that his original target was €390,000.00. He told the claimant he would discuss his target when he returned from the yearly review meeting.

He explained to the claimant that CM's figures were only part of the sales of the acquired company and that the claimant was different to CM and that he had a car allowance. He wanted the claimant out and about meeting clients and generating new business.

At the meeting of the 12th November 2007, the claimant's only contribution was to raise his voice towards the Sales Manager once. At no stage did he say that the claimant would be dismissed. He told the claimant that he had come up with a new target and bonus scheme, that they needed to get back on track and if it continued that he would have no choice to discipline him. He did not furnish the claimant with minutes of this meeting.

He recalled three occasions where the claimant reported sales figures directly to him while ignoring the Sales Manager. It appeared that the claimant did not want to take any direction from the Sales Manager. Although he worked in the hand dryer business for thirteen years and the claimant only worked there for a short time, the claimant would constantly tell him how well he knew the business and ignore him.

Under cross-examination the General Manager said he had touched base with the claimant on his arrival in the company and had not discussed targets with the claimant in the early days.

The claimant furnished him with a copy of his targets, which the claimant had received on his commencement with the company. The General Manager checked the claimant's file and this document was not on it and there was no reference to it in the claimant's commencement letter. He agreed that the claimant was being paid in agreement with the structure outlined in this document.

He could not discount whether or not the Sales Manager had given the claimant this document on commencement but felt it was bizarre that the Sales Manager could pre-empt the budget by agreeing these targets. He explained that the new target came from the sales figure of the previous year of the acquired business plus an allowance for growth. He was aware that the claimant was unhappy with the new target set in April 2007 and had discussed this with the Sales Manager at the time but felt that the new target was fair. When the claimant raised concerns again in July 2007, he did not address the issue of targets.

The General Manager contended that the purpose of the meeting of the 12th November 2007 was to clarify outstanding issues with the claimant. He felt that the situation was spiralling out of control, as there was a downward trend within the sales figures. It was evident that the relationship had broken down between the claimant and new Sales Manager and he tried to bring them together at this meeting.

In respect of the new regime that the new Sales Manager sought to introduce for the claimant, from day one the claimant had a car allowance and this was to allow him to be out meeting customers and generating new business. He felt that the claimant spent less than 50% of his time in the office before this and that they had sales representatives that functioned without a desk in the office. The

claimant had a key fob that allowed him to work remotely.

When the claimant handed in his letter of resignation he asked the claimant when he proposed to leave. The claimant responded that if they insisted that he should stay he would, but if not he would leave straight away.

The General Manager told the Tribunal that the meeting the claimant attended on 12th November 2007 was not a disciplinary meeting and felt a representative accompanying the claimant to this meeting would be counter productive. He wanted to bring the claimant back on track.

The new Sales Manager gave evidence. He commenced employment with the company on 5th November 2007 and had seventeen to eighteen years experience in the sales area.

The purpose of the meeting of the 12th November 2007 between the claimant, the General Manager and himself was to combat and reinvigorate the flagging of sales figures. The claimant had jumped down his throat at this meeting and it became clear that the claimant was going to be a handful.

When he received the e-mail from the claimant on 10th December 2007 he was dumfounded as no one had ever spoken to him like that. The claimant's attitude to him was poor, he wanted to bypass him and report directly to the General Manager, and he ignored him on more than one occasion. He lodged a grievance of bullying and harassment against the claimant on the 18th December 2007. This was not addressed as the claimant left the company shortly after that.

Under cross-examination he said his first introduction to the claimant was as part of a meeting in which the whole sales team attended. The meeting of the 12th November was heated as the claimant's sales were criticised. He did not accept that the claimant's position had been threatened five times during this meeting. The General Manager had referred to disciplinary procedures during the course of the meeting if the claimant's targets were not achieved.

The claimant's work pattern was 7.30 am to 4.30 pm. He wanted the claimant to work the standard hours of 9.00 am to 5.00pm, be on the road networking and proposed that the claimant come into the office for two to three hours on the last Friday of a four-week period. Being on the road was normal practice for sales representatives. With a hands free set the claimant could take general calls and he could use the faxes of customers to send in orders.

The new Sales Manager explained that the purpose of his phone calls to the claimant's customers was to introduce himself to these clients. He became aware during the telephone conversations that some customers had not heard of the 5% discount.

Determination:

The Tribunal has carefully considered the evidence adduced in the course of this two-day hearing. The claimant is making the case that he was constructively dismissed as his employer had created a situation such that he could no longer reasonably be expected to work there. The onus is on the claimant to prove his case on the balance of probabilities.

Taking the original letter and contract of employment into account, the Tribunal notes that there was an agreed commencing salary and bonus structure and that there was to have been an agreed place of work (either the claimant's home or the employer's office). Initially the claimant's employment went well and his line manager came forward to give evidence of his satisfaction with

the claimant. As things worked out the claimant was spending up to 50% of his time at his desk and 50% of his time on the road generating business.

Then in April 2007 things started to change. Primarily a new pay and bonus structure was being imposed together with targets that almost trebled the figures to be attained by the claimant before he could expect to work up any bonus. In the course of the two days evidence it was never satisfactorily explained to the Tribunal where these figures came from. Whilst there may well have been “inertia” expectations, how these were calculated was not presented in evidence. Without a full and reasonable explanation of why the target figures were trebled the Tribunal cannot but find that their unilateral imposition was unfair.

Very reluctantly the company did engage in a revision of the targets though again the revised figures afforded no comfort to the claimant and were produced in a vacuum. It was never satisfactorily explained to the claimant how these figures were going to be attained and what assistance might be available to him. The period between April and November 12th 2007 was a period of immense pressure for the claimant who was watching the salary he thought he had secured on entering the job, being whittled away.

Matters came to a head at the meeting of the 12th November 2007 in connection to which much evidence has been adduced. In considering the three versions of this meeting the Tribunal prefers the evidence of the claimant. This was a heated meeting where threats of sanction and/or dismissal were made to the claimant in the event that he failed to reach the targets imposed. It is noted that the claimant was refused a request to bring a colleague to this meeting and labelling the meeting a “contract/target meeting” does not hide the fact that both the two members of management and the claimant knew that this was going to be a difficult meeting. It was particularly ill advised of management to disallow the claimant to bring along a colleague especially in the circumstances where the meeting degenerated into up to five threats of dismissal being made.

At the same time management were trying to impose massive changes in the claimant’s work practices. In particular it is noted that the claimant was being encouraged to stay on the road all day, everyday and have minimum contact with the office and the administrative facilities contained therein.

The claimant submitted that the proposals were unworkable and the Tribunal finds that there did not seem to be a logical explanation for the drastic changes being suggested other than to keep the claimant out of the office. Suggestions such as using customers fax machines and getting a hands free phone kit were all by way of a smoke screen to disguise the fact that the aim appeared to be to make the claimant’s working day as difficult and awkward as possible.

In conclusion, the Tribunal is bound to find that the contract of employment and the terms and nature of the claimant’s employment was being interfered with to such an extent that the claimant could no longer continue in the workplace and was entitled to consider himself to be reasonably dismissed.

The Tribunal notes that a grievance procedure was conducted and went on appeal to the Managing Director in the UK. In considering the procedure the Tribunal finds that same was not conducted in a satisfactorily manner and in particular the findings have no bearing on the evidence which had been adduced. However as no notes or statements taken in the course of the investigation were produced to the Tribunal, the Tribunal cannot make any conclusive findings in relation to this process either way.

In addition to the foregoing findings, the Tribunal must also consider the conduct and behaviour of the claimant throughout the period from April 2007 to January 2008. There can be no doubt that the claimant did not at all times conduct himself appropriately and the tone and content of the email of the 10th December 2007 is seen by this Tribunal as being well outside the accepted norms. The Tribunal accepts the evidence of managers that the claimant was a “hot head” and prone to doing things his own way. They certainly made his management difficult and it was unacceptable that the claimant would use some of the language and methods of abuse, which he apparently did. To this extent the claimant must be seen to have partially contributed to the situation.

The claimant succeeds in his claim under the Unfair Dismissals Acts, 1977 to 2001 and is accordingly awarded €60,000.00, which takes into account the fact that the claimant will not readily find commensurate employment given his age.

As no evidence was adduced in relation to the claim for minimum notice, the claim under Minimum Notice and Terms of Employment Acts 1973 to 2001 is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

