EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:	CASE NO.
Employee	UD12/2008

against the recommendation of the Rights Commissioner in the case of:

Employee-v-
Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

This case came before the Tribunal by way of an appeal by the employee against the recommendation of the Rights Commissioner Ref: r-049774-ud-07/TB dated 20th November 2007

And

APPEAL OF:	CASE NO.
Employer	PW6/2008

against the recommendation of the Rights Commissioner in the case of:

Employee-v-
Employer

under

PAYMENT OF WAGES ACT, 1991

This case came before the Tribunal by way of an appeal by the employer against the decision of the Rights Commissioner Ref: r-049773-pw-07/TB dated 20th November 2007.

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. B. Garvey BL

Members: Mr. F. Cunneen
Ms. M. Finnerty

heard this appeal at Dublin on 17th April 2008 and 9th July 2008

Representation:

Employee: Ms Kiwana Ennis, B.L., instructed by M.P. Black& Co.,Solicitors, 2 Main Street, Malahide, Co. Dublin

Employer: Mr Francis Watters, Senior Lecturer In Law, D.K.I.T, Dublin Road, Dundalk, Co. Louth

The determination of the Tribunal was as follows:

Employee's evidence:

He started work for the company in June 1999 as a sales representative. About 6 employees worked there at the time, JH was the Managing Director. He mostly dealt with JL who was General Manager. He received a contract of employment. He was paid a salary and commission, but mostlycommission. He built up contacts and boosted the company's turnover. In late 2005-early 2006 things changed, he wasn't getting leads from the office. He was told he was overpaid by €17000, but this was never actually sought from him. He used a computer system called Goldmine that onlyhe could use, but the company insisted that he handwrite every transaction in November 2005.They then asked him to increase his targets significantly and a new contract was issued to him inFebruary 2006, which he did not sign. He had no problem with the targets but did have with thecost calculator of 7%. JL said the company was losing money so things needed to be brought backinto line. Another contract was given to him in March, but he went sick with chest pains, the doctortold him to take sick leave due to stress. He was out for 8 weeks from 27 April, and no money waspaid to him at the time. He had negotiated with Dunnes Stores and eventually got the contract forthe company but was only offered 2.5% commission instead of the usual 7%. The company askedfor an independent medical appointment to be made but it never happened. He met JL and JH inBewleys hotel and after a long discussion, an agreement was made, but the sales he made toDunnes were not included in his figures. The final issue of money owed to him was resolved whenJH agreed to pay him €9000, which he accepted. He went back to work on 11 July. He said it wasnever his duty to collect monies from clients for the company but he did it anyway. He met JL several times. He was asked to scrap the letter of 15 September from JH but he refused. He tried tomeet JH but he was never there, he then handed in his notice and he was told that he would be paidhis commission but this never happened. They had reached stalemate, and any agreement madewith JL was overruled by JH. He said that it was ludicrous that he would have to write downeverything when Goldmine was available. He joined another Co on 1 November 2006 and is stillthere. On being asked why he resigned, he said that they had come to loggerheads, so he was leftwith no option, he had to take his health into account.

An administrator (BW) who worked for the company until 2004 gave evidence that Goldmine – a contact data-based software system – was introduced by the company in July 2002 because paper lists were proving to be of no value. It provided a route planner and recorded sales volumes for each month plus projections etc. As a result, she and JH had access to all information relating to therepresentatives and sales. Before Goldmine, daily activity sheets had to be compiled. All staff weretrained to use the system, so the Employee was not the only person who could use it. She said thatshe was involved in setting up the calculations of representatives' commissions and gave accuratefigures in regard to the Employee's commission, but that JH had control of these calculations.

Employer's case:

The managing director gave evidence that he established the company in 1990 for the sale of pneumatic tube systems for the carrying of blood samples from A & E to the laboratory. There were fourteen employees with two in sales. The employee was the most successful sales person. In the second half of his first year in employment he achieved his target. His area was north of theN6 and there were six different employees south of the N6 and the employee's sales representedhalf the sales for the company. JL had been appointed as general manager and it was he whobrought to the attention of witness that the company was not in compliance with Employment Law. A target was set in 1990 for the sale of three standard kits per week. The costs were increasing butthere was no increase in sales. The new contract was €421k however witness sought €442K **(**5%**).** The employee rejected the first draft in January 2006. They agreed to negotiate one area of the target and that witness would have their accountant look at it. The accountant arrived at a figure of€853K and witness was shocked as he felt it would be unfair to increase by 100%. The employerthen said they would look at the figure over a three year period. The second draft looked at a 50%increase on the first year which would put the figure at €614K and the employee stated this wasstill too high. A third draft was produced in May with the employee suggesting a meeting whichresulted in witness feeling happy with the outcome and they shook hands at this point.

It was agreed that Dunnes Stores would be dealt with separately and the employee was to in a different format. In relation to Goldmine they had an increase in turnover from €1.3m to €2.4m in 2006. Goldmine was essential to their business. There was no report to reflect as to what was done each day and there continues to be a problem with such report. Witness required daily activity sheets from all employees. The payment to the pension scheme was made promptly. The annual cost increase was disputed. He felt the issues had been dealt with and the matter concluded. The employee sought a 5% increase which would have increased the overheads further and he was told this increase was not possible. A clause in the 1999 contract stated that changes to the contract would be notified one month in advance.

The employee returned to work on 11th July 2006 and he did not agree to any cost increase but as far as the employer was concerned the deal was done. They measured the target half yearly which meant that if an employee had a poor first half of year it would not affect the second half. They were within a month of half the financial year with no agreement from the employee and he was happy with the 1999 contract and wanted to continue with it. He was very shocked when the employee resigned on 5th October 2006. Witness was on the road selling and the employee brought in 50% of the companies income. He was willing to discuss the resignation with the employee and wrote to him on the following day and while the company was going to suffer he also had to decide who was managing the company. A meeting was held with the employee and he was asked to re-consider his position and he asked if he had to account for his time. He was told that each member of staff and management had to account for his/her time, and his response was "I'm out of here". The respondent was trying to manage the company better. As far as the employee was concerned his diary was open. The companies turnover had almost doubled and they needed to know where each person was scheduled to be in addition to working out a system of leads. Everyother sales person completes the required form and witness himself completed one.

The order book records every order, value and type of product. This information is also recorded on computer but a hard copy is needed for the orders. The employee was the best manager of his accounts in that he knew what was owing in relation to all his customers. Following his resignation the employee went to work the respondent's main competitor.

In cross-examination witness said that the daily return sheets became an issue in July 2005 and the employee was the only one not filling them out. All the information was needed on the daily activity sheets. In relation to commission no payments have been made to the employee since his resignation. Witness said that the employee was due commission on invoices sent out during his employment and he was paid whatever was due in the last week of his employment. Witness stated that the amount of commission due is €17,473 up to the last date of hearing this case. While the employee was out sick he was paid commission.

The general manager giving evidence said that he joined the respondent company on 25th July 2005 and his main mandate was the administration of the firm. Systems needed to be up-graded and he set up a co-ordinated to run the company as a single entity. The daily activity sheet was the system related to sales. A daily record was needed and he likes hand-written records which was agreed with the managing director. The meeting on 28th June was constructive and it concluded amicably. They left the meeting on the basis that there were one or two items in abeyance which would be looked at on another occasion. Dunnes Stores was never part of the commission and it was left for a separate discussion. He was surprised when the employee tendered his resignation as he thought the issues had been sorted. The employee raised small issues which he felt could be re-negotiated. He felt there were other alternatives and that resignation should be a last resort.

In cross-examination witness stated that prior to the employee's resignation he asked if he had to account for his time. It was never his intention to upset the employee and he felt that he saw himself as self-employed.

In answer to questions from Tribunal members as to how the employee was going to be a better sales person by filling out the daily activity sheets witness said that the respondent benefited by having the records. The employee was part of a team and a lot of factors had to be shifted around. The goldmine system would not allow data to be printed off. They spent several weeks trying to get a wording in relation to the annual cost increase being in-compassed into the contract. The employee did not realise that the respondent was not out "to get him". He did not need training but an understanding of how the administration worked.

<u>Submissions re: Payment of Wages appeal</u>

The employee's representative stated that he was due €22K. The commission earned on date ofsale may not come to fruition for some time, but the employee is due – from the date gained to thedate achieved

The employer representative stated that in accordance with the 1999 contract of employment states that commission is not earned at the point of sale as the order may not be complete. Commission is not payable until installation. The Tribunal has jurisdiction to take into account only commission earned as a result of installations up 24th January 2007 which was the date of the Rights Commissioners (application). The amount due to this date is €7,957.17.

Determination:

This was a small company where the claimant's skills as a salesman substantially contributed to its success. However, changes in the reporting systems introduced by the employer, and the employee's reluctance to implement these, caused difficulties in the relationship. Also management changes failed to resolve this situation.

In addition, serious difficulties arose in the approach to administrative systems, which were not resolved. This led to the claimant leaving the company and going to work with their main competitor within a short period, thereby minimising his losses.

Having regard to all the circumstances, the Tribunal finds that there was a constructive dismissal in this case.

Therefore, the Tribunal upsets the decision of the Rights Commissioner and awards the claimant the sum of €11,000.00 under the Unfair Dismissals Acts, 1977 to 2001.

The Tribunal varies the decision of the Rights Commissioner, and awards the claimant the sum of €22,500.00 under the Payment of Wages Act, 1991.

Sealed with the Seal of the

Employment Appeals Tribunal

This ________________________

(Sgd.) ________________________
(CHAIRMAN)