EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF: **CASE NO.**
Employee UD46/2008
MN33/2008

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. Hurley

Members: Mr. G. Phelan
Mr. T. Kennelly

heard this claim at Limerick on 4th November 2008

Representation:

Claimant(s): Lorcan Connolly B.L. instructed by Dundon Callanan, Solicitors, 17 The Crescent, Limerick

Respondent(s): Mr. H. Pat Barriscale, Holmes O'Malley Sexton, Solicitors, Bishopsgate, Henry Street, P.O. Box 146, Limerick

The determination of the Tribunal was as follows:-

Claimant's case:

The claimant commenced employment with the respondent on 1 November 2005. He had come across a product in a previous company where he had worked. He saw that this product had a potential in Ireland but did not have a legal and financial structure with which to market it. He therefore approached the respondent's owner and his son (*hereinafter referred to as MMc*) with a business plan. As the son (MMc) was taking over the company, the claimant outlined his plan to him. The claimant was asked by both the father and son to join the company as a contract development manager.

Prior to joining the company, the claimant had introduced MMc to a meeting in Dublin where they had secured business worth a quarter of a million euros.

During the first two months, the claimant had been employed on a consultancy basis. From

1 January 2006, he was employed on a PAYE basis as a contract sales manager. The respondent imported and sold fireplaces. The claimant's job was to secure business for the respondent by working directly with architects, builders, developers and such people to sell these fireplaces. During his first year of employment, turnover increased from 1.1 million euros to 2.2 million euros.

In February 2007, the claimant negotiated a salary increase from €63,000 per annum to €72,000 per annum, the increase to commence in April 2007. The claimant was also paid the civil service mileage rate for his travels. A sales target of 3.3 million was set and if same was achieved, a bonus for sales beyond this point would apply. The respondent was extremely happy with the claimant's performance.

The claimant had suggested to the respondent that it needed a brand that would be recognised everywhere. A few months after making the suggestion about creating a new brand, MMc agreed. The claimant came up with the new brand name and the respondent now trades under this name. At that time, MMc suggested that the claimant become a director but the claimant did not accept.

A salesroom was set up in Limerick which MMc controlled. The claimant represented the respondent in Portugal and China. The trip to China did not generate business for the respondent but this was not the purpose of the trip. However, the claimant identified a product source for the respondent at a reduced cost of 40%.

The construction industry had been strong in 2005 and 2006. The biggest contract that the claimant secured was a housing development in Ennis. This contract had been secured after a long and difficult negotiation in a competitive market, which had not involved a tender process. The houses were sealed because gas had been installed in them. The value of the first stage of the development amounted to €400,000 to €450,000.

By October 2007, approximately 200 houses and apartments had been completed. On 5 October, there was a fire in one of the houses. The claimant was informed about the fire on 6 October. He telephoned and told MMc about the fire. He also attended on site. The building contractor, fire brigade and others investigated the fire.

On 16 October, the claimant left home in Limerick for a number of meetings throughout the country. While travelling home from Dublin after 4.00pm that day, the claimant was involved in an accident on the N7 motorway, caused, he believed, by falling asleep while driving. He was lucky not to be injured but was shocked by the accident. The claimant consulted his doctor and told him that he was not sleeping due to events unfolding about the fire. The claimant did not go in to work the next day. That next day, the claimant received a text message from MMc in which he said that he was not surprised that the claimant was not at work, that the accident must had been a terrible shock and that he – MMc – could not cover the ground that the claimant did.

Following this, the claimant went away to Spain for four or five days. Before he left for Spain, the claimant received a telephone call from MMc enquiring how far he would be from Almeria. MMc said that there was a potential supplier in Almeria and if the claimant could go and see him. Under the circumstances, the claimant was surprised and suggested to MMc that he also fly out to Spain and they could both go together to Almeria and while on the journey, they could discuss the developments in Ennis. During the two and a half hour journey to Almeria, they had a long and difficult discussion. When asked by MMc as to what they would do about Ennis, the claimant had said that because the contract had been between the respondent and the developer, the developer

would sue them but they would rely on the fact that they had subcontracted the work to an installer.

On 25 October, the day after returning from Spain, the claimant went to his office. MMc had gone to Ennis that day. He returned to the office that evening and told the claimant that he – the claimant – and another were being blamed for the fire.

On his way into the office the next morning at 9.00am, the claimant saw MMc talking with two others (*A and G*). The claimant made his way to his office and turned on his computer. Five minutes later, he got a call from MMc to go to the boardroom. In the boardroom, MMc told the claimant that he had received plenty of advice and after what the claimant had told him during their road trip to Almeria, he could no longer work with him and he wanted him to resign. MMc said that he was going out until 4.00pm and that in the meantime, the claimant was to divide his files between A and G. The claimant had replied that he was first going to talk to his wife and then he would deal with his files. The claimant was shocked. He spoke to his wife and then came back to the office and marshalled the files, particularly the files in relation to the Ennis contract, which he put into sequence and detailing everything that had happened. The claimant did not discuss the files when giving them to A and G as he believed that they already knew that he was going to be dismissed and they were to receive his files. They also said nothing.

The claimant had no notice of this meeting and did not know that it was going to lead to his dismissal. He was completely shocked by it. He was already under the care of his doctor because of loosing sleep due to the stress he was suffering. The claimant confirmed that MMc had wanted him to resign and to give over his files. Because he was in shock, his response had been automation but he should have fought against his dismissal.

The claimant established his loss for the Tribunal. Following the termination of his employment, the claimant had worked as a consultant and had secured alternative employment in August 2008 but at a rate of pay which was less that what was being earned from his employment with the respondent.

In cross-examination, the claimant confirmed that, for November and December 2005, he had been employed by the respondent on a consultancy basis. The claimant said that he became an employee of the respondent in January 2006 because he only worked for them under their instruction. The claimant denied that he had any tax issues that necessitated his becoming an employee of the respondent in January 2006.

The respondent had an agency relationship with a London Company to supply their specific type of fireplace to the Irish market. In relation to the quarter of a million euros worth of business that he had helped secure, the claimant maintained that his introduction had prevented the London principal selling that companies fireplaces directly into the Irish market, behind the back of the respondent. However, the claimant agreed that the respondent was the Irish agent of the London Company and that legally, the London Company could not have sold their fireplace into the Irish market except through the respondent.

The claimant denied that the increase in sales turnover was solely down to him. MMc and another were also involved in sales. The claimant agreed that MMc had extensive contacts in the construction industry for the sale and supply of fireplaces because the respondent had been involved in the business for over 20 years. However, they had only been involved in local sales. The claimant had been brought in to the respondent to concentrate on sales nationally.
The claimant agreed that the sales target, which had been documented by MMc in an email date 28

February 2007, was 3.3 million euros. It was absolutely specific and provided for bonuses for sales in excess of the target. (*A copy of this email was opened to the Tribunal*). The claimant agreed that he had not met those sales targets but this had been due to the market downturn in the construction industry. The monthly increases in the downturn in the construction industry made the sales target of 3.3 million euros unrealistic and unachievable. The construction industry had collapsed by the time the claimant had left the respondent. The claimant could not specify an exact sales figure that he had achieved except to say that sales were significantly less than the previous year.

The claimant was surprised to learn that MMc had been considering the re-branding of the company prior to it being suggested to him. MMc had seemed reluctant at the idea when the claimant first suggested it. The claimant had come up with the brand name.

The contract in Ennis was substantial and was initially worth €400,000. The claimant did all of the protracted negotiations with the contractors. The contractor had been seeking one specific type of fireplace, which was on supply from the respondent. The claimant had told MMc about the nego tiations but MMc had not been at any of the meetings.

The claimant confirmed that on 5 October, a fire had occurred in one of the houses in Ennis. He had been informed about the fire on the morning of 6 October and had contacted MMc about same. He denied that it had been a fire officer who had told MMc about the house fire in the evening of 6 October. MMc had come to the Ennis site mid morning on that day.

An investigation had been conducted into the cause of the fire and as the claimant had understood it, a piece of combustible material had come in contact with the hottest part of the fireplace. The fireplace had been supplied by the respondent and installed by a subcontractor. While on site that day, the claimant had overheard someone from the contractor's company make reference to a sketch. No reference was made to this sketch during an on-site meeting on 9 October.

The claimant confirmed that the sketch became an issue after the fire. From documents received by the building contractor from building control, enquires were made about the provision of the sketch. Subsequently the building contractor had passed on the documents, including the sketch, to the respondent. It was put to the claimant that he had specifically denied knowledge of the sketch despite being asked about it on a number of occasions by MMc. The claimant explained that while travelling to Almeria, he had said to MMc that the building contractor had suggested that he had supplied the sketch but he had no recollection of doing it. A technical expert in the Netherlands had prepared the sketch. The claimant accepted that he had passed on the sketch and that it had nothing to do with his providence.

The claimant denied that MMc had produced the sketch to him on 25 October. After being dismissed, the claimant had gone through his files to put them into sequence. While doing his files, the claimant found the sketch as an attachment to an email. The email had been from the manufacturers in the Netherlands. He never denied that there had been a sketch but he had no recollection of it despite it being a major issue. He had not compiled the sketch. The sketch showed dimensions of a cut-out which was to go in front of the fire. It had nothing to do with building regulations. Both MMc and the claimant had been told that non-combustible material was being used. The claimant confirmed that following MMc's meeting in Ennis on 25 October, MMc had told him that he – the claimant – and the subcontractor were being blamed for the fire. The respondent lost the Ennis contract.
The claimant had suggested to MMc that joining Retail Ireland would be of benefit to the respondent. The trip to China to the Canton fair, which the claimant described as "a jolly", had

been with Retail Ireland. MMc had been unable to go because of personal reasons. The claimant's contention was that there had been no purpose for the trip and he had not received a business brief or specific instruction as to what he had to do at the Canton fair. Despite this and though employed by the respondent in sales and not production, the claimant had made contact with a potential supplier. While in China, the claimant had travelled to Hong Kong where he had purchased goods for his wife's business in Ireland. His wife was not with him on the China trip. It was put to the claimant that he went on the Hong Kong trip on the respondent's time. The claimant had told MMc about the trip to Hong Kong on his return to Ireland and it had not been an issue then but became so following his dismissal.

The claimant agreed that he had ordered a granite worktop for his kitchen from the respondent. The claimant had discussed it with MMc during the time of his salary negotiations. The claimant had asked if he could use one of the respondent's contractors during his free time for the installation of same and he would be paid directly for his work. MMc agreed provided it did not interfere with his work for the respondent. Everything about the transaction was documented. The accounts department had shown him an invoice for the full amount owed for the worktop in November 2006 but he had felt the he would be able to do a deal for same with MMc. The claimant denied that accounts had approached him for payment for the worktop and the issue of payment had only been raised after his dismissal. The claimant explained that the worktop had been paid for in October 2007 with money taken from a balance, which was owed to him by the respondent. He confirmed that when he got the worktop in 2006, he had not spoken to MMc about payment for it nor had he had been owed money by the respondent at that time.

During the summer of 2007, MMc organised a ball as a fundraiser for a designated charity with which the claimant was associated. The clamant contended that he could not go to this charity ball after being fired. He had not resigned his position within the company but had been told by MMc "I want you to resign. I want you to be gone by 4.30". That instruction was not a resignation.

Replying to Tribunal questions, the claimant confirmed that on 25 October, MMc called him to his office and told him that after what had been said on the journey to Almeria, he – MMc – could no longer work with him and that he was to go and separate his files into two groups for A and G. After this meeting, MMc was not going to be back in the office until 4.30, so the claimant went and organised his files. He had not responded. If that incident happened today, he would respond because he would be more aware of his rights. A family member had advised him to contact a solicitor and this solicitor had advised him that the respondent had dismissed him. Subsequent correspondence and meeting with the respondent had attempted to resolve the issue but without success. The claimant also confirmed that he got no notice of a dismissal. He had to return to the respondent to collect his P45 form. There was no contract of employment and no grievance procedures setting out the steps that would lead to a dismissal.

Respondent's case:

MMc confirmed that he was the managing director of the respondent. The claimant commenced employment with the respondent in November 2005. The claimant's first contact had been with MMc's father. His father had told him that the claimant had a product that the respondent could sell. However, MMc saw that there was no avenue in Ireland for this product. Because of his previous experience, MMc believed that the claimant had good contacts in the construction industry and all MMc had wanted was results. Initially, the claimant was employed on a consultancy basis. However, because of cumbersome tax issues and being involved in his wife's business, the claimant asked that he be paid his salary plus expenses through the respondent's payroll system. This

change was made in January 2006.

In relation to the contact in Dublin, the claimant had been attempting to sell an alternative type of fireplace. However, the building contractor's designer had wanted the type of fireplace, which was from the London Company, and for which the respondent was the Irish agent. The claimant had only discovered that there was an attempt to supply the required fireplace directly to the customer. However, as the respondent had a legal agreement to supply the type of fireplace required, only the respondent could do the job and therefore they got the contract.

MMc denied that the increase in sales turnover from 1.1 million euros to 2.2 million euros was because of the direct involvement of the claimant. MMc looked after the bigger contracts that he had inherited from his father. The respondent was moving from the wholesale business into the area of sales to the construction industry. The claimant brought in the Ennis contract and assisted in bringing in a Dublin contract. MMc also got contracts for the respondent.

In February 2007, a salary increase was negotiated for the claimant. The claimant had told MMc about the potential increase in turnover and in return, MMc had wanted to be generous and had reviewed the claimant's salary. MMc had felt that if he did not increase the claimant's salary, the claimant would leave the company. When the claimant said that he could achieve a turnover of 3.3 million euros, MMc was happy to increase his salary to €72,000. The claimant had set his price to achieve targets and if he failed to achieve this target, he would be pricing himself out of a job. However, the targets were not met and instead, declined by a half. At meetings, the claimant was not good at giving specifics when asked about targets. Instead he talked about how many houses were being built.

MMc confirmed that the idea of re-branding the company had been his. He had been considering re-branding the company from the time he took over. The wholesale of fireplaces was declining. The claimant was asked by MMc to come up with the new brand name, which he did.

In relation to the Ennis contract, the claimant had said that it was worth a couple of million euros. The initial stage was worth €400,000. The contract had been secured with the best-tendered price for the required product, the product being supplied by an agent in Holland. The claimant had tried to make the contract more valuable with add-ons. MMc had hoped to secure all of the houses on the development as same would had assisted with meeting the targets.

The trip to the Canton fair in China had been planned for a number of months. MMc wanted to bring someone with him in an advisory role. However, due to personal reasons, he had been unable to travel so the claimant had gone in his place. The purpose of the trip had been to network and to source product such as marble and stone, which could be used on fireplaces. The claimant would have been aware of this. When the claimant returned from China, he gave a detailed report but nothing came of it. The claimant had also told MMc about his trip to Hong Kong in an effort to establish a business to import woolen products for his wife's business. MMc was annoyed about this but did not confront the claimant about it. He was willing to put up with it on the back of the business that the claimant was going to bring in to the respondent.

In November 2006, a marble worktop was delivered to the claimant's house. The claimant had asked if one of the respondent's employees could be used to help fix up the house and MMc had agreed provided his involvement did not interfere with his work for the respondent. The employee had subsequently complained that he was spending too much time at the claimant's house. MMc confirmed that an invoice would be produced for all goods that are sold. He had believed that the

marble worktop had been paid for but it was not. The claimant had never mentioned payment for the worktop to MMc and MMc only became aware of it after his relationship with the claimant had broken down. The accounts department had told MMc that they had understood that the claimant had done a private deal but this had not been the case.

On 6 October, MMc had received a telephone call from the claimant informing him about the house fire in Ennis. MMc had gone immediately to the site in Ennis. He had asked the claimant why he had not been informed immediately and the claimant had said that he did not want MMc involved. The cause of the fire was found to be timber that had been placed too close to the fireplace and had ignited. The fireplace had been the produce of the respondent but had been installed by a subcontractor. MMc had been concerned but had not thought that it was the respondent's problem.

In the investigation of the cause of the fire, the building controller of Bord Gáis found that building regulations had been broken. The building controller had blamed the gas installer. The respondent's exposure to liability was very big and the building developer cancelled the contract because they thought that the respondent's product was unsafe. The chief engineer of the building contractor had uncovered a sketch, which they claimed had showed how a frame had been build around the fireplace. The claimant had said that he did not remember supplying this sketch but he could have supplied it due to the stress that he had been suffering. However, MMc maintained that the installer should have known his own business and the claimant had no business in telling how to build a house or how to install fireplaces. During a meeting with the building contractor, they had given MMc the sketch. He had hoped to salvage the contract but had failed due to the sketch. The respondent now has €100,000 worth of product in its warehouse, which he is unable to sell. During the drive to Almeria, the claimant had given contradictory information to MMc. MMc was gutted by what he was told by the claimant who had not been honest in what he said.

Issues came to light during the meeting between MMc and the building contractor, which lead MMc to feel that he could no longer trust the claimant. On his return to the office, he called the claimant and highlighted the issues surrounding the trip to China and the taking of the granite worktop. He told the claimant that he could go down the route of dismissal and wanted a decision from him by the end of that day. MMc's preference was to end the relationship but to stay friends. The claimant had replied that he first wanted to consult with his wife. Following this, the claimant had returned and told MMc that he would go and clear his files and give them to A and G. He made it clear to A and G that he had resigned from the respondent. MMc had been upset with this and had offered to assist the claimant in any way that he could. He concluded by saying that they would meet again at the charity ball. Some days later, the claimant returned to collect his P45 form. Subsequently, the respondent received correspondence claiming that the claimant had been dismissed. MMc was upset by this development. MMc confirmed that he met the claimant on a number of occasions following this in an effort to resolve the matter but no settlement had been agreed.

In cross-examination, MMc confirmed that in relation to the Dublin contract, the London Company had assured the respondent that the business they were doing in Ireland would have come to the respondent because the respondent had the agency.

The increase in the claimant's salary was only a proposal. The claimant had sought an increase for higher sales targets being met. If the targets were not met, the increased salary would not be paid. MMc confirmed that he had proposed the figure of €72,000.
MMc gave the credit to the claimant for thinking up the new brand name for the respondent.

However, he had done all of the design work on the new name.

The claimant had produced a detailed proposal arising from and subsequent to the trip to China. He had also brought the source of a product which had a reduced cost of 40% to the attention of MMc. The trip to China was done in the context of all of the business that the claimant would bring in to the respondent. MMc's focus had been on what the claimant was going to do for the business. While the respondent's business had been good, the claimant had seen nothing wrong with doing business for his wife while still being paid by the respondent. MMc had needed someone that he could trust.

MMc had known about the unpaid invoice for the granite worktop before he had traveled to Almeria in Spain.

MMc had gone to a meeting with the building contractor and told him that the respondent had not given an instruction on how to build a chimneybreast by way of the sketch. He had denied to the building contractor that the respondent had supplied the sketch to them and then they had produced the sketch to MMc, which had been supplied to them by the claimant. In Spain, MMc told the claimant that he had lied to him when he had told him that he had not supplied the sketch. He had said that he was suffering from stress at the time and could not remember what he did. However, he had supplied the sketch to the building contractor. The claimant was not straight with MMc and it was because of his lie that the parties were now before the Employment Appeals Tribunal. The relationship with the claimant had broken down and he could not be trusted. MMc also maintained that the respondent would have secured the Ennis contract without the assistance of the claimant because they had the required product at the best price.

MMc believed that the claimant had done the sketch and had supplied it to the building contractor. It was at the meeting on 25 October with the building contractor that it had been confirmed to MMc that they had a sketch supplied by the respondent. Though he did not want to go down the road of dismissal, there had been a breach of trust and therefore MMc could no longer work with the claimant. MMc denied that he had forced the claimant to resign. They had discussed the issues such as the trip to China, the unpaid worktop and the supply of the sketch. Afterwards, the claimant had gone to talk to his wife, apologised and passed his files to A and G. The claimant had breached trust so the question arose for MMc as to how he could deal with the issue and continue to work with him.

In confirming that the claimant had no contract of employment from the respondent, MMc explained that the claimant had "slipped into employment". The respondent's other employees had contracts of employment.

MMc explained that the increase in turnover from 2005 to 2006 had been as a result of the property boom and that it could not be attributed solely to the business that the claimant had done. By the time that business had begun to fall dramatically, MMc realised that the claimant was using the respondent so as to set up his own business for retirement. The claimant had been given every opportunity. In his conscience, MMc could not have been fairer to the claimant. At the time of the dismissal, the claimant's non-appearance at the charity ball had been very disappointing and a huge influence on MMc.

Replying to the Tribunal, MMc confirmed that the respondent's fireplaces had been installed in 100 or 200 houses in Ennis. Not all of the fireplaces had been removed after the fire. The respondent had sourced the gas fires that had been specified by the building inspectors and had subcontracted

their instillation.

Determination:

The Division would refer to a previous Determination of the Tribunal in the leading case of *Gearon -v- Dunnes Stores Limited* (UD367/1988) where it was held that fair procedures in effecting a dismissal had not been followed. The Tribunal then held "*The right to defend herself and have her arguments listened to and evaluated by the respondent in relation to the threat to her employment is a right of the claimant and is not the gift of the respondent or this Tribunal...the right is a fundamental one under natural and constitutional justice, it is not open to the Tribunal to forgive its breach*".

Accordingly, the Tribunal finds in favour of the claimant and awards him compensation in the amo unt of €27000.00 under the Unfair Dismissals Acts, 1977 to 2001. The Tribunal also allows the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 and awards the claimant €1382.62 in lieu of notice, this being the equivalent of one week's pay.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)