

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee

UD361/2008

against

2 Employers

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr K. Buckley

Members: Mr D. Hegarty  
Ms H. Kelleher

heard this claim at Cork on 7th October 2008

Representation:

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Claimant :

Mr Kieran Hughes B.L., instructed by Mr. Peter O'Hanlon, Doody, Solicitors,  
21 South Mall, Cork

Respondent :

Mr Eamonn Keenan, Sexton Keenan & Co., Solicitors, 170 Walkinstown Road,  
Dublin 12

The determination of the Tribunal was as follows:-

#### **Respondent's case:**

The sales and marketing manager in his evidence told the Tribunal that he has been fifteen years in that post and has spent most of his working life with the respondent. He was a party to the process that employed the claimant. The Cork base opened in late 2003 and they had a vacancy for a soccer club representative. They were looking for a person with a soccer background, to provide quality, service and reliability. The claimant commenced his employment on 10<sup>th</sup> July 2006. A minimum sales target of €300K for the calendar year was set. This was the minimum viable target for all sales representatives. The claimant was made aware of his targets when he was taken on. The post was commission driven therefore the more sales the more one was paid. The claimant reported to witness who was responsible for soccer sales throughout the country. The Munster sales team

including the claimant worked out of the Cork office. Under the guidance of the area sales manager meetings took place in Dublin early each month to discuss sales strategies and where the business was going. Witness also came to the Cork office twice per month to discuss and target clubs. Each month the sales figures were furnished to the sales representative.

From the claimant's start date in July 2006 to the following Christmas was termed as the "bedding in-process" and this was in the contract. His figures were not great but witness felt the claimant had the ability but it never progressed to the standard where the respondent was happy. In January 2007 the claimant was over the "honeymoon period" and witness made the decision to keep him onboard. In January 2007 a minimum sales figure of €300K was set for the claimant and this was explained at the first and subsequent meetings. Customer complaints from the Cork office were received stating that the claimant was not available to take calls and he was not giving the customer service for which he was employed. The claimant gave excuses such as the phone broke down and on a number of occasions he was late for appointments. On 16<sup>th</sup> May 2008 the respondent met with the claimant and he was told that the respondent was unhappy with his performance and that he would need to improve. The onus was on witness to get the claimant to perform and it did not happen. At a meeting in Cork on 1<sup>st</sup> July 2007 there was negative feedback from 10/12 locations visited who stated that the claimant was not doing what was required of him. Following this meeting on 1<sup>st</sup> July there was no great improvement. While the claimant said he was negotiating with large soccer clubs these negotiations did not come to fruition. He had on-going communication with the claimant. On 3<sup>rd</sup> October 2007 the claimant sent an email explaining that his absence the previous two days was because he was sick. Witness felt this was a lame excuse and a culmination of his poor performance.

There was also an incident with a local soccer club where the customer stated that he had paid the claimant in cash yet this was not entered in the respondent's books. It was then written off. The claimant's version was that he handed the cash to the Cork office yet they did not have it recorded. This was the only glitch in the six years the office has been open. A hand-written receipt was given to the respondent three weeks prior to the hearing of this case but it was not dated or signed by the claimant. Witness had also told the claimant he had been using his laptop for non-business reasons. The claimant was dismissed because of his sales performance. On the day prior to the monthly soccer meeting of 4<sup>th</sup> October 2007 witness had spoken to the financial director and it was felt the claimant would be let go. The claimant was asked to stay back after the meeting and his poor sales performance was highlighted. He was told that the respondent's reputation was starting to be tainted. The claimant did not plea for his job. He was told he could hold on to his car for a week or two or until he got another job. He was paid everything he was due. Witness got the impression from the claimant that he was expecting to be dismissed. After the laptop was returned from the service provider a report was furnished which stated that inappropriate material was found which may have led to a dismissal.

In cross-examination witness stated that while he was told of the claimant's past work history at the recruitment stage, he was also aware that he did not have sales experience. The target sales figure of €300K was arrived at from research of the clubs in the area and this was the minimum to make it financially viable. He was not aware of the 2005 target. While complaints in respect of the claimant were made to the Cork office he did not have a "complaints book" to record these, they were compiled internally. There was no written communication to the claimant stating that he would lose his job if he did not achieve the target figure. The decision to dismiss the claimant was taken a week or so prior to 4<sup>th</sup> October 2007. He was dismissed for poor work performance. The claimant did not receive any written warnings about his poor performance. Witness felt the claimant was well aware of the complaints and the customer is always right. In relation to electronic

communication the observation was made internally in August/September 2007. He could not recall if he told the claimant at the time.

In answer to questions from Tribunal members witness said that the previous person in the claimant's post had been there five months. There was no letter of dismissal.

The Tribunal also heard evidence from the area sales manager for Munster. He was involved in the first two interviews when the claimant was recruited. When dissatisfaction was expressed with the claimant he spoke with the previous witness who was happy to deal with the situation directly. The claimant was answerable to the previous witness.

In cross-examination witness stated that he plays soccer but in his work he looks after the GAA. He was not aware that the claimant was to be dismissed.

### **Claimant's case:**

The claimant in his evidence told the Tribunal of his work experience prior to joining the respondent. At the interview he was not told of the target. He was given a database of current customers and he had to add to that list. No one went out to the clubs with him and his working hours were flexible. He went to all the sales meetings and in 2006 most of the sales representatives were more senior than he. From July to December 2006 his performance was not discussed at those meetings. The meetings were general where they spoke of competitors and he learned from other sales representatives. He thought he was doing well. The sales and marketing manager said he was on the right road. At the meeting in January 2007 he was told that €300K was the target and this was sent by email. He was also told that in relation to his sales in 2006 he had made a good start. The meetings after that ran as normal and there was no mention of performance. On 16<sup>th</sup> May 2007 he had an individual meeting with the sales and marketing manager where sales were discussed but he was never told he could lose his job. There was no mention of complaints from customers. The next months' meetings were normal and there was nothing said at the September meeting to concern him. His sales in August were at €21K and this was to be expected as it was the peak time. He felt he was doing fine and he always had a contact in the pipeline. Large clubs came on board and he also brought in some smaller clubs that are still with the respondent.

He was notified of all meetings by email and at some date in September he was told of the monthly meeting on 4<sup>th</sup> October 2007. The sales and marketing manager always emailed his sales figures. He left Cork at 7am to get to the meeting in Dublin. He then went to lunch and there was then be a discussion regarding the accounts. The claimant was told there was bad news, his sales figures were not up to scratch. He was given his P.45 and a cheque with other monies owing. He was shocked. The sales and marketing manager was well aware of how much he enjoyed the job. He gave back his laptop and he drove back home from Dublin. On the road he rang the sales and marketing manager and told him he was shocked. When he asked why he was let go he was told his figures were not good enough. The claimant mentioned the €21K sales for August. He had been kept on after the first six months, then another six months and he was never told he would be fired if he did not reach his targets. There was no mention of complaints or suspicions. He left his car at the Cork office. He was not paid his commission for October and November. The Tribunal was then told of his efforts to obtain alternative employment.

He had a good relationship with the clubs and on Saturdays he did personal deliveries for them. In relation to "monies" not accounted for as referred to by the respondent, the claimant dropped the

money into the office and he gave a lotto ticket as their receipt. No one spoke to him regarding the laptop and something untoward. He got the laptop when he started with the respondent and there was data on it and he does not know where the laptop has been since. He did not access poker sites or adult nature sites.

In cross-examination witness said he was given his monthly figures by the sales and marketing manager and they were kept in invoice books. January to March is a quiet time but he was progressing on the customer base. There was not a continuous assessment of sales and target performance. He was told his figures by email and at the monthly meetings he was given a printed copy. At the meeting in May he was not warned about his sales figures. The only discussion he had with the sales and marketing manager was about competitors and while he gave the claimant advice over the phone he did not come to clubs with him. The first he heard of money not accounted for was at the hearing of this case. While he knew he had a target of €300K for 2007 he was not told that he had to achieve this to keep his job.

In answer to questions from Tribunal members in relation to the money that could not be traced witness said that he was coming from a soccer match and did not have the receipt book with him. He had always handed all monies in to the respondent.

At the conclusion of the hearing it was accepted that there was some commission still outstanding to the claimant and the respondent's legal representative stated he would liaise with the claimant's legal representative in this regard.

### **Determination:**

A Disciplinary Procedure is specifically provided for in the Contract of Employment. The procedure is set out in very plain terms. In this particular instance, even though a procedure is in place, it was clearly not followed. Therefore the Tribunal found the company procedure to be flawed and on that basis the dismissal was deemed to be unfair.

No evidence was produced by the respondent of complaints allegedly made by customers about the performance of the claimant. No proper record or personnel file was produced. The evidence of the respondent was that the claimant was given verbal warnings. This was not accepted by the claimant. No written warnings were issued. The only other evidence produced by the respondent was that of the Sales and Marketing Manager's own notes that he had discussed sales with the claimant. The claimant was of the view that these notes related to meetings that were in the nature of "chats" as might generally happen at a sales meeting. The Tribunal was of the view that this was supported by the actual notes themselves.

There was a conflict between the parties in relation to the Leaside AFC Account of €599.92. The claimant said he obtained the money from Leaside and paid it into the Cork office. Leaside had paid and produced a receipt signed by the claimant. While the respondent said that the monies were not recorded as being received it could not prove beyond reasonable doubt that the monies were not paid into the Cork office. The Tribunal was also of the view that a formal complaint should have been made to the claimant in relation to the issue.

The Tribunal disregarded the respondent's evidence in relation to the material on the computer laptop. It was contended by the claimant, and not contradicted by the respondent, that some of the claimant's predecessor's data was on the computer. Furthermore, other parties may very well have had access to the computer between the time that the claimant left his employment and the

computer was subsequently analysed.

Given that the respondent's procedures were not followed, the Tribunal was not satisfied that a reasonable or fair procedure was followed in dismissing the claimant. Cognisance was given to potential future losses in this case and taking this into account the Tribunal awards the claimant the sum of €34,000.00 under the Unfair Dismissals Act, 1977 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

