

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

Employee
UD903/2007

- *appellant*

CASE NO.

RP482/2007
MN710/2007
WT305/2007

against

Employer

- *respondent*

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2001
REDUNDANCY PAYMENTS ACTS, 1967 TO 2003
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. J. Sheedy

Members: Mr. J. Redmond
Dr. A. Clune

heard this claim at Limerick on 31st July 2008
and 7th November 2008

Representation:

Claimant(s): Mr. Michael Purtill BL instructed by Ms. Ellen Twomey, Twomey Scott & Co., Solicitors, 80 O'Connell Street, Limerick

Respondent(s): Mr. Tom Mallon BL instructed by Mr. Kevin Langford, Arthur Cox, Solicitors, Earlsfort Centre, Earlsfort Terrace, Dublin 2

The determination of the Tribunal was as follows:-

Opening statements:

Counsel for the respondent read into evidence, a letter dated 5 March 2007 from the sales director Ireland to the claimant within which, the employment of the claimant was terminated with the company. Up to that time, the claimant had been absent from work for a considerable time due to illness and as she had been unable to indicate a date as to when she would be available to return to work, the respondent had been entitled to terminate her employment.

Counsel also said that it was inconsistent to make a claim for unfair dismissal from a date in March 2007, while at the same time claim that the claimant had been made redundant at a date which was

earlier than March 2007.

Counsel for the claimant told the Tribunal that, per the claimant's contract, she had been based in Herbertstown, Co. Limerick, which was close to her home. While based in Herbertstown, the claimant worked in the office for a day and a half and, for the remainder of the week, she visited clients throughout the Munster area as a sales representative. This arrangement subsequently changed dramatically; the base was no longer in Herbertstown, her sales region was expanded to include areas in Connaught, and company training which the claimant would have to attend, would be done in England.

The claimant went on maternity leave in July 2005. When due back to work at the end of this period, she went on sick leave. Counsel argued that the whole process of assessing the claimant's fitness to return to work was a fruitless exercise, as her position had been made redundant. Getting the claimant medically fit to return to work was a sham and she should have been made redundant and offered redundancy.

The claimant's counsel rejected argument from counsel for the respondent that the respondent would agree to deal with a redundancy claim from a date in 2005. He said that the claimant was a mother of young children. It had been a slow process for her to find out about her new duties due to a lack of consultation from the respondent. Counsel also referred to a meeting in March 2007 between the claimant and the regional sales manager Ireland when he asked her an unusual question about her plans to have more children.

(At the commencement of the hearing, copies of correspondence/documents were opened to the Tribunal and were subsequently referred to during the hearings).

Respondent's case:

In his sworn evidence, PM confirmed that he is a medical doctor based in Limerick. He was requested by the respondent company to see the claimant. Over the years in his practice, he has examined people with the aim of establishing a realistic date for when they might be fit to return to their employment.

In the case of the claimant, she had been due to return to work from her maternity leave on 4 November 2005. PM first saw her on 23 February 2006. At this medical examination, the claimant had complained of extreme tiredness. She had a baby that suffered from colic and therefore she was getting up a few times each night to the child. She considered that having to get up to the child was the cause of the tiredness and because of the tiredness, she felt that she should not drive long journeys. PM had suggested to the claimant that she refer to a paediatric doctor in relation to the condition of her child and to her own doctor for blood tests to establish if her extreme tiredness could have other causes.

At the next medical examination on 23 May 2006, the claimant said that her baby was still suffering from colic and that she was still getting up to the child at night. The claimant also had blood tests carried out by her own doctor and she reported that these tests showed that everything was normal. The claimant also said that she was not depressed. From this medical examination, PM had formed the view that the claimant was not depressed but that she was still not in a position to return to work.

From the medical examination on 12 October 2006, PM established from the claimant that her child no longer suffered from colic but was now teething so she was still getting up during the night. Her husband was self-employed and away in Dublin for work and as she had two young children, she

still felt that she was unable to return to work due to the long distance driving involved in same. During this examination, the claimant had said that her sales regions had increased from covering areas in Munster to include areas in Connaught. Going to London for training was also being introduced, all of which would involve longer travelling. PM had formed the view that the claimant would have been unfit to return to work for the foreseeable future.

In the final medical examination conducted by PM on 6 February 2007, the claimant had said that she had the assistance of a baby-sitter but was getting up early in the morning to attend to her children. In her opinion, she felt that she was still unable to return to her job to do a full days work. PM had agreed with the claimant's opinion.

In cross-examination, PM confirmed that in the medical examination of May 2006, the claimant had said that she was unfit to return to work at that stage due to the long periods of driving involved in doing her job. He agreed that it would have been even more dangerous to have the claimant directed to drive even longer journeys to Connaught and that he would not have recommended it. He agreed that other mothers returned to work after having children but the claimant differed to other mothers due to the nature of the work that she did; driving long journeys and suffering from chronic sleep deprivation. He confirmed that he had discussed with the respondent, the possibility of the claimant taking a leave of absence but same had not been available. Because of the nature of the work of the claimant as a sales representative, the possibility of working reduced hours had not been discussed.

In his sworn evidence, the health and safety officer for Ireland and the UK (*hereinafter referred to as PH*) said that the nature of the business of the respondent is to sell chemicals, but they do not manufacture these chemicals. The company had three locations in Ireland, Belfast, Limerick and Dublin. The claimant had been employed as a sales representative on the road. In a re-organisation of the company, the Belfast location was closed and the work that had been done there was transferred to Dublin. The company location in Limerick had been used as a storage/distribution centre but when this location was closed, all deliveries were subsequently done from Dublin. However, as far as PH was aware, sales representatives that had been based on the road had been made redundant. The claimant's position continued to exist.

PH agreed that all employees occasionally have to go to London for training, as training is part of the job. He also said that though sales representatives normally stay at home, being away overnight from their homes would have been part of their job.

In cross-examination, PH admitted that training in London was a new departure for the company and before the re-structuring and closing of the Limerick location, the claimant had never gone to London for training. External sales representatives were sales representatives based on the road while internal sales representatives were sales people based in the office and working on telephones. PH did not know if the claimant had ever been offered office-based work.

Despite signing a contract to be based in Limerick, sharing an office at the company's location in Herbertstown, covering areas in Munster and having young children, the proposed changes to increase her sales region to cover areas in Connaught and having to go to London for training were, in the view of PH, not sufficiently different to what the claimant had done prior to 2005. While agreeing that it would appear to be a pointless exercise to have the fitness of the claimant assessed to return to a job that no longer existed, he said that such a query was hypothetical as the claimant's job continued to exist.

The claimant and another person worked in external sales in Limerick. Except for the external

sales force, everyone else in Limerick had been made redundant and their functions had been transferred to the office in Dublin where new people had been recruited. Ultimately, the location in Limerick had been sold.

PH confirmed that training had occurred about once a year, in the past but it had been done in Dublin. Sales techniques and selling approaches was the purpose of the training.

In re-examination, PH stated that the claimant had not been considered redundant, as the company wanted sales people on the road.

The sales manager (*hereinafter referred to as MT*) commenced employment with the respondent in October 2005 and worked in the Dublin office. Seven external sale representatives and eight internal sales representatives reported to him. In the re-organisation of the company, the distribution element was closed but the sales element was strengthened.

In a letter dated 17 May 2005 to the respondent, the claimant had indicated that her return to work date from maternity leave would be 4 November 2005. When MT commenced employment, the claimant was on maternity leave and the first contact he had with her was by his letter dated 21 October 2005. He had not met the claimant personally at that time. On 19 November, the respondent received an unsolicited sick certificate from the claimant. MT wrote again to the claimant on 25 November 2005 and in same, he referred to getting the claimant back working within “our newly defined team”. MT explained that this term was meant to convey a determination that the company wanted to grow and get into markets of greatest return, and get employees into a mind-frame to do this. Reference was also made in this letter to the respondent’s re-structuring and the closure of the Limerick depot.

In February 2006, MT, a representative from the respondent, the claimant and the claimant’s union representative had a meeting and the details from this meeting were sent to the claimant by letter dated 20 February 2006. In the last paragraph of that letter, the claimant was invited to arrange a further meeting at her convenience, if she required any further advice or understanding of the implementation of the sales role. However, MT could not recall the claimant or her union representative seeking further clarification of the role, subsequent to the February meeting.

The claimant’s absence from work was causing considerable difficulty. MT wrote to her on 10 March 2006 and enquired, among other things, about a date for her intended return to work. He wrote again to the claimant on 5 May 2006.

MT’s next letter to the claimant was on 11 September 2006 and the claimant acknowledged receipt of same on 20 September 2006. Within MT’s letter of 18 October 2006, receipt of the claimant’s medical report was acknowledged and she was invited to a meeting in November. MT described the meeting with the claimant as positive. It had been about getting to know the individual and building a relationship. It had not at all been aggressive. By this stage, the claimant had been out of work for about a year post the date she had been meant to return from her maternity leave.

The discussions of the November meeting were outlined in letter dated 29 November 2006 to the claimant. Within this, reference was made that if the claimant’s was unable to return to work by 1 March 2007, a decision would have to be made about filling her position and her employment would be terminated with effect from that date. Reference was also made within the letter to her role as external accounts manager operating in Munster and Connaught, if she did return to work.

MT’s understanding was that the sales representatives based in Limerick looked after the customers

in Munster and Galway. There were less than six customers in Connaught, based in Galway and did not require much visiting. Sales representatives planned their own sales area so as to have to travel the least amount of time and be able to visit four or five customers in a day. If customers were located close to each other, even more visits could be achieved in a day.

Following the medical report of 6 February 2007 and meeting on 26 February 2007, the next letter to the claimant was on 5 March 2007. This letter served the claimant with four weeks notice and confirmed the termination of her contract of employment with the respondent effective 29 March 2007. The termination of the contract of employment had been given orally to the claimant at the meeting on 26 February 2007 and she had indicated her acceptance of same. At the meeting, the claimant had made no reference to an entitlement to redundancy due to the closure of the Limerick depot. Following the meeting, the claimant and MT had a leisurely lunch and had a social conversation. The comment about having more children had been in the context of a social conversation and had nothing to do with the claimant's dismissal. The termination of her employment had already been communicated to the claimant at the meeting so there was no connection to the subsequent comment about having more children and the termination of her employment.

MT denied absolutely that the claimant's position had been made redundant. The respondent had wanted to grow their sale therefore the closure of the Limerick depot had no impact on the claimant's role. While absent on sick leave, her job had continued to exist and her job would have been available to her had she returned to work. Her absence from work had been difficult because of the extra workload created and the loss of the good relationship that she had with her customers. To cover the claimant's workload, a person in the office had dealt with the customers who had not required regular visits, while those on the road had juggled things to cover for the claimant's absence. An employee in the Leinster region had been asked to cover the claimant's customers in Connaught.

In relation to the Connaught region, the respondent had customers in Galway and one customer in Sligo. It had not been envisaged by the respondent that the claimant would visit all of Connaught as well as Munster.

In cross-examination, MT confirmed that the meetings with the claimant in February 2006, November 2006 and February 2007 had been informal and no notes had been made of the content of same for the personnel record of the claimant. The only notes of these meetings were made in the diary of MT and they formed the basis of the letters that were subsequently sent to the claimant.

MT had not written to the claimant in relation to the job that she would be returning to. However, he contended that it was a role of visiting customers and she had being employed in this role for the previous nine years. She was aware that the respondent had customers in Connaught and she was being asked to deal with a small number of these customers in Galway. The claimant had not been told how much time she would have to spend in Connaught or how many customers she would have to visit there because she was a sales representative and was used to planning her own visits to customers.

The closure of the depot in Herbertstown had happened prior to the commencement of MT's employment with the respondent. However, the loss of the claimant's office at the Herbertstown's depot had not been a fundamental change for her because, as a sales representative on the road, her office was her car. Two other employees had also had offices in the Belfast and Limerick depots respectively, and these offices had also gone with the closure of these depots.

MT described the term “newly defined team” as a building of relationships and the instilling of a new confidence in, and to re-energise and refresh employees. It was a culture which was geared to building the business. This had not been explained to the claimant but neither had she asked about it.

The details about the restructuring of the business and the closure of the depot in Limerick had been communicated to all employees in Ireland, including the claimant, as an enclosure with the letter of 25 November 2005. However, the changes in the business had no implications for the claimant and her job had remained exactly the same. Despite the changes not effecting the claimant, the communication had been sent to her so as she would be aware of the changes that were happening. The changes had nothing to do with the sales representatives but only those employees who were leaving the company. As the claimant was not leaving the company, she was not affected by the changes. All the communications with the claimant had indicated a wish to get her back to work and if she had any concerns that the changes would affect her role, the onus had been on her to check.

MT did not accept that there had been any change in the claimant’s role as a sales representative. Her role was to deal with customers and the administration side was not an essential part of the role. The purpose of the training, to be conducted in the UK, would have been to assist sales representatives and the claimant had not raised any concerns about it.

The claimant’s first contract of employment and job specification had stated her role as a sales representative based in Herbertstown, Co. Limerick. A new job specification that had been given to the claimant, differed in some ways to the first one and specified no job location for the claimant, but MT described these differences as semantic. When put to MT that the claimant had been required to sign the new job specification because of the significant changes it contained in relation to her role, he explained that he could not recall asking her to sign the document and that he would have gone through the details of its contents with her had she returned to work.

The depot in Limerick had served the customers of Munster and Connaught, and there had only been a few customers in Galway. MT confirmed that he never explained the Connaught territory to the claimant but he denied that he had imposed Connaught on her. Everything that he had done with the claimant had been collaborative and consultative. The role of a sale representative was not to stay in an office. Any paperwork that had to be dealt with was done by the sales service staff who dealt with orders.

Despite not signing the new job specification, new business cards had been made for the claimant. While the new cards described the claimant as an accounts manager, and differed from the old cards which described the claimant as a sales representative, MT described this difference as only semantic. This semantic job title change was not explained to the claimant.

Claimant’s case:

In her sworn evidence, the claimant confirmed that she was married with three children aged between four years and eight months. Her home was a distance of ten minutes from the Herbertstown depot and her office.

She had worked with a colleague as a sales representative for the respondent before going on maternity leave. Initially she had been employed as a sales representative based in the office. Subsequently she became a sales representative based on the road. She had been given a list of customers in the Munster region, which she had to deal with, and she also had to win new

customers. Her customer list gradually grew as she got to know the job. Initially, her customers had been in Limerick, Shannon and a small part of Cork. A customer in Donegal had been dealt with by way of telephone contact. She had never visited Donegal and had no customers in Galway. Munster had always been her base. If she had had to go to Connaught, the distance to travel would have been much greater and would have been much harder to do as a mother with young children.

All meetings had been conducted in the depot in Herbertstown on Fridays and MT had mentioned the training in England during their meetings. As the office was so close, the claimant spent a day to one and a half days per week there. Despite others being in the office, she felt that she had a responsibility to her customers to ensure that the orders placed by them were carried through from A to Z and in doing this, she built up a relationship with them. There was always paperwork to be done in relation to customers.

In April 2005, the claimant had gone on maternity leave and had been due back in November 2005. Since November 2005, the claimant had been on continuous sick leave.

The claimant maintained that there had been a change in her role from sales representative to accounts manager. As a sales representative, she had been based in Herbertstown dealing with the staff located there and dealing with the customers in the Munster region. Herbertstown was like a family site with fifteen or sixteen people working there and everyone got on well together. Stock had been based in Herbertstown so it was easy to ensure that it was available when ordered by customers. Day-to-day business had done well.

Travelling to Connaught had never been explained to the claimant. She had never been there before as part of her job and with young children, this change would have made her job more difficult. She would not have taken a sales position in Connaught or a job that required travel to Connaught.

The claimant's job specification of 2003 had described her job as a sales representative based in Herbertstown while the job specification of 2005 had simply given her job as accounts manager. She had signed the first job specification. She had been asked to sign to second one but had not done so. The second job specification had never been explained to her. She had also received new business cards but had never used them.

At the meeting in February 2006, Connaught had been mentioned and the claimant had been told that Mayo and Sligo was being added to her list of customers. Up to that time, Shannon had been the greatest distance travelled by her. Travelling to Sligo would have resulted in a three-hour journey each way.

The letter of 25 November 2005 from TG to the claimant had referred to "newly defined teams" but this term was never explained to the claimant. The letter of 29 November 2006 to the claimant referred to her new position as accounts manager. She had first heard of this new position in January 2005. In this letter, reference was also made to working as "accounts manager operating in ...Connaught" but the percentage of time that she would be required to work in Connaught was never explained to the claimant. Up to the time that the claimant left on maternity leave, the sales area that she covered was Limerick, Shannon and Cork and there had been no changes to this assigned territory.

In cross-examination, the claimant confirmed that from April 2005 to November 2008, she had been in receipt of maternity benefit, disability benefit – while being on certified sick leave – and social welfare benefit respectively. She had not sought alternative employment during that time but has done childcare training. Another child had been born in February 2008.

The claimant commenced employment with the respondent, working in internal sales and became an external sales representative in January 2003. At that time, she was provided with a company car and two days of training. The first customer list that she received at that time contained the names of customers based in Shannon, Limerick and one in Cork. It took the claimant one and a half hours to travel to Cork. The claimant received a second customer list some six months later. Customers on this list came from various places in Clare, Tipperary, Limerick, Cork and Waterford. The number of customers visited each day depended on the amount of time spent with them and the amount of time required to travel to them. The daily start and finish time depended on the meeting of a customer. Sales representatives managed their own travel and diary and the claimant never expressed concern to the respondent at having to leave too early in a morning.

The claimant confirmed that the journey time from Herbertstown to Galway was two hours. She thought that the journey time to Waterford would be an hour. The respondent had never asked her to do anything that was dangerous, nor would she herself have done something that was dangerous.

It had been MT who had told the claimant that the territory of Sligo and Mayo was being added to her customer list. Her union representative had responded that such an addition was unacceptable for a mother with young children. MT had made no reply to this except that they would look at things on the claimant's return to work. He had said that there was still a job for her in Limerick but the claimant maintained that this position was gone. The depot in Limerick was closed, the respondent had amalgamated and the claimant had concerns as to where her job would be based. There had been no consultation. She had signed on to work from Limerick and that was where her colleagues had been.

The claimant had never said that she was not returning to work. It had been the doctor who had not allowed her to return. In his medical report of 6 February 2007, he had given his impression that she would not be fit to combine looking after two small children and doing her normal job and this position was unlikely to change until her children were bigger and not as reliant on her. When put to her if there were any aspects of his impression that she disputed, the claimant confirmed that she agreed with this impression. Being self-employed, her husband was not always available to assist with caring for the children.

The claimant's job had been kept open for eighteen months. The doctor's impression had been that because of the demands of motherhood, the claimant would not be available to return to work for the foreseeable future. The claimant stated that all personnel in Herbertstown had been made redundant but it was pointed out to her that all personnel except sales representatives had been made redundant. While accepting she would not be based in Dublin - because of the closure of the Herbertstown depot - but would be serviced from Dublin, the claimant said that this change meant that meeting and training would also be from Dublin. Also, her business card had been changed.

The claimant maintained that there was always paperwork involved in her job. If a customer placed an order with her for a product, she telephoned the office staff with that order. However, she also kept her own sales order forms and, despite passing an order on to the office staff for processing, she always called to the office herself to ensure that the order was processed. Such a practice ensured good customer relations. When put to her that all she had to do was visit customers and that this could have been done without the need of an office and, her other colleague/sales representatives operated without an office, the claimant replied that her office had been in Herbertstown and if she were to return to her job, her office no longer existed.

The claimant had contacted her legal representative because she had wanted to know her position

and if she was being made redundant. She would have been available to return to work whenever the doctor would have certified her as fit to return. While saying that she had wanted to return to work, the claimant confirmed that she had never returned. She agreed that the respondent had been entitled to re-organise the sales teams and she had never been asked to drive excessive hours or work excessive hours.

In re-examination, the claimant confirmed that she had been her own boss in getting her work done. She had never been assigned new customers from outside the Munster area and such customers would have been assigned to others. The loss of base at the depot in Herbertstown was her greatest concern.

When queried by the Tribunal in relation to the claim under the Organisation of Working Time Act, 1997, the claimant said that she thought that her holidays had been paid up-to-date but she was not fully sure.

Closing statements:

Counsel for the claimant told the Tribunal that there had been a definite restructuring of the respondent's business. Their place of business in Herbertstown, Co. Limerick which had been ten minutes distance from the claimant's home and where the claimant had spend a day and a half each week at work had closed. The claimant had been employed as a sales representative and not an accounts manager for the Munster region only and not outside this area. The claimant had given evidence that if she had been obliged to work in Connaught, she would not have taken the job.

The job specification from 2003 and which the claimant had signed was significantly different to the job specification of January 2005. Also, the claimant had not signed the job specification of 2005. No mention had been made in the second job specification of the location where the claimant would be based.

The claimant's job in Munster ceased to exist and this had not been explained to the claimant. She had not known what the respondent had intended for her and it was not for her to ascertain what the changes meant. The written announcements about the respondent's restructuring had not made her any wiser about the changes. At this time, there had been a mention of redundancy. After the respondent's restructuring, the claimant's job no longer existed but this had not become immediately clear to the claimant, as she had been on sick leave.

Counsel for the respondent highlighted that the closing statement made by the claimant's Counsel had been based on redundancy and no comment had been made about dismissal.

The respondent accepted that they had dismissed the claimant. Tribunals have always accepted that if a person is not competent to do their job, it is fair to dismiss such a person. Such a decision to dismiss must not be taken lightly. The claimant had agreed with the findings of her doctor and she had been put on advanced notice by the respondent that if she did not return to work, she would be dismissed, thus in this instance there was no case of unfair dismissals.

The real issue of this case was one of redundancy. The claimant's contention was that she was being asked to do a job that no longer existed. The respondent had decided that the positions of sales representative were not being made redundant. The change in job title to accounts manager and the absence of a named location in the job specification of 2005 made no real difference to the job done by the claimant. Also, she had not returned to work to check if the changes were unreasonable. It was accepted that the claimant would no longer have an office in Herbertstown.

However, most sales representatives now work from their cars. The respondent had never asked the claimant to do anything which was unreasonable. The vast majority of the claimant's colleagues in Herbertstown had received an enhanced redundancy package with the closure of the depot and she had also wanted to avail of this redundancy package. However, her job had continued to exist but the claimant had decided that it no longer suited her.

Determination:

Having carefully considered all of the evidence adduced, the Tribunal unanimous find that the claims under the Unfair Dismissals Acts, 1977 to 2001 and the Redundancy Payments Acts, 1967 to 2003 fail. The respondent conceded that the claimant had been due six weeks notice of the termination of her employment but had only received four weeks, thus was entitled to a further two weeks. Accordingly the Tribunal awards the claimant €1143.10 under the Minimum Notice and Terms of Employment Acts, 1973 to 2001, this being the equivalent of two weeks notice. As no evidence was adduced in relation to the claim under the Organisation of Working Time Act, 1997, this claim is also dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)