

## EMPLOYMENT APPEALS TRIBUNAL

### CLAIM(S) OF:

Employee

- claimant

### CASE NO.

UD886/2007

against

Employer

- respondent

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr M. Gilvarry

Members: Mr. D. Morrison  
Mr M. McGarry

heard this claim at Castlebar on 27th June 2008  
and 5th September 2008

### Representation:

Claimant(s): Mr. Bob McArdle, Patrick J. Durcan & Co, Solicitors, Westport, Co. Mayo

Respondent(s): Mr. Ronnie Lawless, IBEC, West Regional Office, Ross House,  
Victoria Place, Galway

The determination of the Tribunal was as follows: -

### Claimant's Case:

On the first day of the hearing the claimant gave evidence. He commenced employment with the respondent as a Sales Manager and was later promoted to the position of Sales Director reporting to the Managing Director. His role was to increase sales and administration.

He explained that when he commenced employment, sales within the company were declining but with hard work he acquired new accounts and retrieved an old customer account for the respondent.

On July 6<sup>th</sup> 2007 he attended a meeting and was sent a letter from the Managing Director, dated July 6<sup>th</sup>, regarding the meeting. The letter was read into evidence. It stated that the company would re-structure due to poor results. From July 23<sup>rd</sup> the claimant was to report to the person who now had responsibility for overall sales. He was also informed that he was to relocate from Mayo to Dublin and was to submit bi-weekly reports to new overall Sales Director, which he stated was a demotion to him. He was no longer to negotiate any deals for the company. His salary would remain the same but his bonus and commission would cease. The claimant said that he was shocked and asked for legal advice.

On July 9<sup>th</sup> 2007 he attended work and made an appointment to see his solicitor the following day. He emailed the Managing Director that evening to inform him of the appointment. He left work and went to his doctor to pick up a family prescription. The doctor found that the claimant was highly stressed and signed him off work. He emailed the Managing Director and the new overall the following day to inform them he was off sick and would submit a medical certificate. He went to his solicitor that day who wrote to the respondent on July 18<sup>th</sup> 2007 stating that the “*material variation*” by the respondent of the claimant’s position which was an unreasonable breach of his contract caused him considerable anxiety and exacerbated his existing medical condition of which they were already aware and this meant that he had been “*unfairly constructively dismissed*”.

The claimant told the Tribunal that the rest of his case was dealt with in correspondence between his solicitor and the respondent. When asked, he said he had approved the letters written by his solicitor. The letters were all read into evidence. The respondent’s position was that they said the claimant was still an employee and when they received satisfactory clarification of the claimant’s issues they would deal with any employment or related matters. The claimant’s position was that the respondent would not deal with the issues raised in their letter of July 18<sup>th</sup> 2007.

The respondent’s letter of August 8<sup>th</sup> 2007 explained the company restructure which was why the claimant’s role was to change. His salary would remain the same but there would be a different commission basis. They also mentioned a registered letter of July 18<sup>th</sup> 2007 to the claimant that had been returned and the fact that he had been paid his salary for July and that the respondent wanted the social welfare cheques he received during this time forwarded to them. The respondent suggested they all met.

When asked the claimant stated that he had not received the respondent’s letter dated July 18<sup>th</sup> 2007. A postal slip had been left at his home to collect the letter but it did not refer him to a location to collect it.

The claimant gave evidence of loss stating he had applied for countless positions and finally set up his own business but was receiving no money from it.

On cross-examination he questioned about the mitigation of his loss. When asked, he accepted that a meeting had taken place on November 15<sup>th</sup> 2006 where there had been a discussion about new bonus targets in the “interest of business survival”. He also recalled a meeting on April 11<sup>th</sup> 2007. When asked did he remember meeting with Managing Director on July 3<sup>rd</sup> 2007, he replied that he could not. When asked what was asked at the management meetings, he replied that they discussed that there would be changes in the business but not with him. He said that he offered to purchase the company if it was liquidated. When put to him that he was to meet with the Managing Director on the afternoon of Tuesday July 11<sup>th</sup> 2007, he replied that he had until July 23<sup>rd</sup> 2007 to get back to the Managing Director.

When asked did he not think he should have met with the Managing Director, he replied that he thought it was a “fate a compli”. When he asked why he had not appealed the decision to demote him and move to Dublin, he replied that he could not as he would have had to appeal to the Managing Director and RC. He told the Tribunal that he did have a blood pressure problem and the respondent was aware of it.

When asked by the Tribunal if he was aware of the company’s financial position, he replied yes but that his individual position had not been discussed before July 6<sup>th</sup> 2007. When asked why he had

not returned to discuss the matter with the Managing Director after he had sought legal advice and negotiate a deal, he replied that he felt that he should leave it to his solicitor.

### **Respondent's Case**

On the second day of the hearing the Managing Director gave evidence on behalf of the respondent. The company was formed in 1991 and had concentrated on consumer products since 1998. The profit and loss accounts were produced in to evidence to show that the company had traded at a loss in 2006. The respondent had to look at the business to make savings, and increase margins, this was bought up at the claimants review on the 15<sup>th</sup> November 2006 where new bonus targets were agreed in the interest of business survival. He said the tone of this meeting with the claimant was cordial and its main theme was driving price to increase margins and selling higher value products.

On the 11<sup>th</sup> April the Managing Director met with the claimant and confirmed his margin commission would remain the same as of 15<sup>th</sup> November 2006.

On the 6<sup>th</sup> July 2007 he met with the claimant at this stage a total review of the company was being carried out, turnover was moving and margins diminishing. As a result of this meeting he wrote to the claimant on the same date and this was referred to in the course of the hearing. The mood at the meeting was fine, he had laid all the cards on the table and the claimant was aware of everything happening in the company and the need to get the company back on track. The letter outlined the changes in the claimant's role.

He received an email from the claimant on the 9<sup>th</sup> July 2007 informing him that the claimant was taking advice and had an appointment the following day and would not be in till the afternoon. He explained that this had been discussed at the meeting, and he felt it was par for the course and was okay. The following day he received another email from the claimant saying that he had been called to his doctor who had deemed him unfit for work, a medical cert was received in the company stating that the claimant was suffering from stress related illness.

On receipt of this medical cert he wrote to the claimant on the 12<sup>th</sup> July 2007, which was read in to evidence. Within this letter he said he found it difficult to reconcile that there was no indication of this illness before this and if the condition continued they would have to have the claimant medically assessed by a doctor nominated by the company. The company received another followup cert. He was not aware of the claimant's medical condition. He wrote to the claimant by registered post on the 18<sup>th</sup> July 2007, acknowledging receipt of this cert and informing him that he had told agents and sales personnel of the changes in reporting structure. This letter was sent back to the company undelivered

On the 18<sup>th</sup> July 2007 the claimant's solicitors wrote to him, stating that they had examined the claimants Terms and Conditions of Employment and that the changes being made to his position were in breach of his contract. Within this letter it refers to the claimant being previously offered the position of Managing Director by him, he said that his was not true. He explained after an initial period of the claimant working for the respondent, the claimant was performing well and he did mention that going forward he could be considered as Managing Director.

He responded by letter to the claimant's solicitor stating that the claimant was still an employee of the company and seeking written confirmation from the claimant that the solicitor was acting on his behalf. He received a response on the 25<sup>th</sup> July 2007, in which it states that members of staff in the

company were told that the claimant would not be returning to work. He denied that staff were told this, as they were still awaiting a reply from their letter of the 18<sup>th</sup> July to the claimant.

On the 8<sup>th</sup> of August 2007 he wrote to the claimant's solicitor in which he asked if he could clarify if the claimant had resigned from the company as he was still on their payroll, also asking that if both parties could meet to finalise issues. He said at the time of writing this letter he was still awaiting the claimant's opinion in respect of the company's restructuring. The claimant's solicitor replied on the 16<sup>th</sup> August asking what was the purpose of the proposed meeting and seeking proposals in respect of the claimant's role and position going forward. The letter put the respondent on notice that if they persisted in refusing to give clear answers to the queries raised that the claimant would deem himself to be constructively dismissed. On the same day the respondent wrote to the claimant and his solicitor seeking an urgent meeting as they were not prepared to let the matter continue. This correspondence between both parties crossed.

On the 21<sup>st</sup> he replied to the claimant's solicitor by letter confirming that the claimant's new role was unchanged and they needed his decision in respect of this role or alternatively as there was not other suitable position within the company they would have to make him redundant. He explained that the purpose of the meeting was to meet with the claimant and explain the difficulties being experienced by the company.

On the 28<sup>th</sup> August the claimant's solicitor wrote to him telling him that his client was deeming himself to be constructively dismissed and seeking his P45.

He confirmed that he had no verbal contact with the claimant since 6<sup>th</sup> July 2007. The claimant was not the only employee affected by restructuring.

Under cross examination he confirmed that when he put the proposal put to the claimant on the 6<sup>th</sup> July 2007 he was waiting for him to accept the position or alternatively to come back with another idea to address the issues the company were having. He did not recall if the claimant had told about his high blood pressure and was not aware of this condition. He knew that the claimant attended a physiotherapist on Fridays. He reiterated that the claimant was aware that restructuring was going to take place and that the person he would be reporting to as a result of this restructuring was a director.

He could not have put a plan B in place for the claimant, as the claimant had never given him a decision on the original proposal. He had sent his letter of the 18<sup>th</sup> July 2007 by registered post, as he wanted to make sure the claimant received it, this letter was returned undelivered. In relation to informing agents and sales personnel of the new structures, he felt he could not wait around for the claimant's decision.

In reply to questions from the Tribunal he confirmed that another director was doing the claimant's job and commuting to Dublin. The meeting on the 6<sup>th</sup> July 2007 was brief and there was no objection raised at this to the proposal, however the claimant had said he would be seeking advice. He assumed the claimant was not pleased but the claimant did not engage with him at this meeting.

## Determination

The claimant's claim in this case is for unfair dismissal. The respondent disputes dismissal, and says that the claimant effectively resigned. Therefore the onus of proof is on the claimant to convince the Tribunal that pursuant to Section 1 of the Unfair Dismissals Act, 1977, "because of the conduct of the employer, it was or would have been reasonable for the employee to terminate the Contract of Employment without giving prior notice of the termination to the employer".

The question to be answered is therefore whether the conduct of the employer was such that it was reasonable for the claimant to terminate his contract without notice.

Each case before the Tribunal depends on its own particular nexus of facts and in each case the circumstances must be examined and each case will stand or depending on the evidence adduced in that particular case. In particular one of the factors a Tribunal often takes in to account is whether an employee in these circumstances has him or herself acted reasonably.

In this particular case there are far more areas of agreement between the parties as to the facts of the matter and to the events that transpired than there are disagreements. The claimant was a senior management figure in the respondent's company and had been brought in to the company for his expertise and to assist the company's growth. The Tribunal accepts that the claimant contributed towards increasing the company's turnover and no question has ever been raised about performance or capability for his job. However despite the best efforts of all in the company it is clear from company accounts as furnished that there was a considerable decline in profitability, despite the increase in turnover and losses were being made. The claimant as one of the senior management team was aware of the situation and ultimately in July 2007 a meeting was arranged to discuss what changes would be needed to be made to the company structure so as to bring the company back to profitability. The proposals particularly affected the claimant and would lead to very significant changes in his role. The managing director, by way of letter of the same date specified that these changes were to take place with effect from the 23<sup>rd</sup> July, 2007 and finished off the letter by inviting the claimant to contact him if any further clarification was required. The Tribunal accepts from the evidence given that this proposal being made by the respondent to the claimant and that the claimant was invited at the meeting of the 6<sup>th</sup> July, 2007 to put forward any counter proposals in relation to his role. This view is supported by the claimant's own email to sent to VC with a copy thereof to RC whereby he states, "when we met on Friday you confirmed that you were alright with me taking advice following our discussion". Unfortunately the claimant was diagnosed with an illness on the 9<sup>th</sup> July, and this illness prevented him returning to work and instead the matter was dealt with by way of correspondence. The respondents' managing director was justifiably criticised at the hearing of the case for doubting in correspondence whether the claimant's solicitor had authority to act on behalf of the claimant. However it is very clear from the correspondence that as of the date of the claimant's solicitor's letter of the 18<sup>th</sup> July, 2007 it is clearly stated that the claimant's position is that he has been "summarily and unfairly dismissed". And it is contended that the date of dismissal was the 6<sup>th</sup> of July. Earlier in the letter he is referred to as having been "unfairly constructively dismissed". The rest of the correspondence between the parties consists of the respondent insisting on getting some response to the "proposals", and the claimant effectively refusing to do so, and instead requiring the respondent to come up with different proposals.

In these cases as we say the onus of proof is on the claimant to satisfy the Tribunal, and in view of the fact that the claimant had deemed himself dismissed as of the 6<sup>th</sup> of July, 2007, this being the

case the Tribunal finds that the claimant did not make reasonable efforts to engage with the Respondent prior to terminating his own employment without notice, and it was not reasonable for him to terminate his employment.

In the circumstances the Tribunal dismisses the claimant's case.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

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