

**EMPLOYMENT APPEALS TRIBUNAL**

**CLAIM OF:**

Employee  
MN104/2008

**CASE NO.**

UD100/2008  
WT65/2008

against

Employer

under

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

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. R. O'Flynn BL

Members: Mr. G. Phelan  
Mr. J. McDonnell

heard these claims in Limerick on 26 September and 24 November 2008

Representation:  
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Claimant(s) :

Ms. Fiona Manning instructed by Mr. Pat Barriscale, Holmes O'Malley Sexton, Solicitors,  
Bishopsgate, Henry Street, Limerick

Respondent(s) :

Ms. Sonya Morrissy-Murphy, Connolly Sellors Geraghty, Solicitors, 6 & 7 Glentworth  
Street, Limerick

The determination of the Tribunal was as follows:-

The Chief Executive Officer of the company gave evidence on behalf of the Respondent. At the time of the claimant's dismissal he was the General Manager. The Respondent is a wholesalers building providers. The claimant's first role when she commenced employment with the Respondent was to cover maternity leave as the Personal Assistant to the Managing Director. When this role came to an end they tried to facilitate the claimants background in marketing. At this time they were opening new showrooms the claimant's new role was retail manager and her responsibilities were over the shop counter and showroom sales area.

A contract was drawn up setting the claimant targets for cash accounts in February 2007. There are two types of cash accounts “cash” customers walking off the street and “Trade cash”. He explained that this was the first time the company had a showroom, this enabled them to cut out the middleman and increase their own margins hence there was a 20% increase in turnover expected in relation to 2006. They also encouraged marketing initiatives through brochures and a company website. He explained the responsibility of the cash and trade cash were that of the retail manager the claimant in this case. The claimant had two counter assistants and there was a kitchen designer employed to work in the showrooms. The claimant had not raise any objections to the contract however had some reservations on the sales side and had taken on the role as she had seen it as a great opportunity. It was an opportunity for the claimant and it was an exciting time for the company.

They had employed a member of staff with kitchen design experience, at the time they had asked the claimant if she was interested in this role but she was not.

He explained that the bonuses built in to the claimant contract was based on the profit made through sales, that in November when the claimant was dismissed that these targets had not been met for the year, also included in calculating the profit were the bad debts incurred. There was a significant decline in sales in 2007 for example March “cash” was down over €50,000 plus.

Things were not working out, there were a number of informal meetings with the claimant to discuss various ways of addressing issues, there was weekly if not daily checks with the claimant as to what was going on. He would have spoken with her about the performance of staff beneath her and encouraged her.

In September the claimant was six months in the position and he felt that the company needed to restate her role to the claimant. He drew up an email on the 27<sup>th</sup> September given to the number of management listing the claimant’s responsibilities; this email was given to the claimant. He explained he would have met with the claimant afterwards to discuss her role.

He had previously sent the claimant an email on the 4<sup>th</sup> of September 2007 raising a few observations he had made, the issues raised in this email he would have discussed with the claimant on a daily basis. He confirmed that he had no contact with the claimant after she left the company.

Under cross-examination he suggested that competency would have been a lot of the reason as to why the claimant was let go. There is no disciplinary or grievance procedure in writing in place in the company. He did not accept that the claimant had contributed hugely to the opening of the new showrooms. There was never a retail manager before the claimant; there was a domestic role, which catered for Limerick sales.

In relation to the informal chats he had with the claimant over the course of the employment, these covered all issues, also reminding her of her role but they were not disciplinarian in any shape or form. He had composed the email of the 27<sup>th</sup> September as verbally he was not having an impact on her performance so had decided to put it on paper and had given her a copy of this on the same day. He said all of management felt that the claimant was not working out in her role. When asked if he had ever said to her that if things did not improve that she would be out the door, he replied yes, but not as strongly as that.

He was not at the meeting of the 9<sup>th</sup> November 2007 at which the claimant was dismissed; he knew before the meeting that the claimant would be dismissed from the 1<sup>st</sup> January 2008. In relation to

the discussions he had with the claimant over the course of her employment, he would have followed them up by email but had lost his laptop in June 2007 so these emails were not available. He explained that they have monthly sales meetings that are minuted and these issues would have been raised at these.

In relation to the figures produced for “cash” sales, he confirmed that they included kitchens. The claimant would not have reached the targets set to achieve her bonus, as there were very little kitchen sales in November and December, and trade peaks in October. The claimant was given the opportunity to work till the end of the year. The kitchen designer did not get a bonus in 2007; the two counter hands received two weeks pay at Christmas.

The decision to dismiss the claimant was a joint decision made between three members of management

Next to give evidence on behalf of the respondent was the general manager, at the time of the claimants employment he was the timber manager. He had daily interaction with the claimant; she would query pricing, delivery and discounts with him.

He and the financial controller had met with the claimant on the 9<sup>th</sup> November 2008. They told her that her role was no longer feasible and outlined the two options to her: -

“1. Continue working in *company* until 31 December 2007 while at the same time the company would give you any time off to attend interviews etc”

2. Cease employment in *company* on Friday 9<sup>th</sup> November 2007 with full payment up to 31<sup>st</sup> December 2007”

It was an awkward meeting, at it they asked her if she could she herself working in her role in twelve months time, she had replied no. He said the claimant had told him she did not like sales and had been looking for another job in the summer.

They had not paid the holiday pay outstanding to the claimant at the time, but this had been a mistake. He confirmed that the claimant had not contacted him in respect of a reference. The claimant rang him on the following Sunday evening and advised him she would not be returning to work.

Under cross-examination he said she was surprised at the outcome of the meeting, the decision had been made so there was no right to appeal. He said a right to appeal would go to the Managing Director, but there was nothing in writing in relation to this.

Next to give evidence was the Timber Sales Manager at the time of the claimant’s dismissal, he would have ranked slightly above the claimant. He explained it was a small company and had contact with her on a daily basis, and would have provided her with guidance and motivation. He had attended a meeting with the claimant along with two other colleagues round September/October during which he outlined the claimant’s responsibilities to her. The meeting was amicable, and he felt they both understood what was required of her.

The claimant had contacted him seeking a reference, however he explained he would have been more than willing to provide her with one, but she should have contacted senior management to obtain a reference.

Under cross-examination he explained he had previously had a number of responsibilities and some of the claimant's duties had previously been done by him, and there was some overlap. He did not explain to the claimant at the meeting of the 27<sup>th</sup> September that her job was on the line, if she did not meet the requirements outlined.

### **Claimant's Case**

The claimant gave evidence that she commenced employment with the company in May 2006, covering maternity leave as PA to the managing Director. In December 2006 the managing director suggested the retail role to her and she had qualifications in marketing.

Her new role was Retail Manager, she had to get the showrooms up and running, which included organising the kitchen displays, fielding questions, dealing with deliveries, daily reporting on deliveries and cash reports. As she was just starting her new role she felt she had to give it her full effort, she also did PA work for another while. She had received no complaints in relation to her work, and there were no serious issues raised with her.

On the 9<sup>th</sup> November 2007 she was asked to attend a meeting with the general manager and the financial controller. At this meeting they told her that she was going to be let go, she was shocked. She asked them why and what could she do to change the situation, they told her that the decision had been made. They outlined the two options to her.

She explained that the company had never suggested to her that her position was in jeopardy. She had received the document listing her responsibilities in October, and she felt that she had most of this in hand. At this time a Sales Representative was told he would be given a chance to improve his performance, she could not understand why she was not given a chance.

After this meeting, she felt too embarrassed to continue working out her notice with the company so she chose option number two given to her.

2. Cease employment in *company* on Friday 9<sup>th</sup> November 2007 with full payment up to 31<sup>st</sup> December 2007"

She did not receive her P45 or final payment from the respondent till March 2008.

She outlined her lost to the Tribunal and produced documentation in relation to her attempts to find employment.

On the second hearing day it was agreed at the outset that the sum of €636.98 was owed to the claimant in connection with her claim under the Organisation of Working Time Act, 1997.

The claimant retook the oath and said that she had sought new employment over the internet and through recruitment agencies. Her first interview was in early December 2007. On 1 April 2008 she started a new job for twenty-eight thousand euro per annum. The claimant told the Tribunal that there was "potential to review" this but that it had not happened. It could possibly increase to thirty thousand in 2009 but work was "now quieter". The claimant had got thirty-one thousand per year from the respondent and the respondent had paid her up to 31 December 2007. From

January 2008 to end March 2008 the claimant had been out of work waiting for her new employment to begin.

The claimant told the Tribunal that on 9 November 2007 she had been told that she was being dismissed but that she could stay until December. In March 2008 she received payment up to 31 December 2007. Asked if she had been told in advance what the last meeting was for, the claimant replied that she had not and that she had been passing that office. The Tribunal was told that the respondent had had no written procedures.

Asked about bonus payment, the claimant replied that sales had been her main focus, that the showroom facility “had to be got up and running” and that bonuses were to be at the discretion of management. The Tribunal was now referred to a 20 February 2007 document from the respondent which proposed a certain bonus structure for 2007. The claimant said that nine thousand euro was the bonus towards which she had been working.

The claimant stated that, as well as working hard on getting the showrooms going, she had been asked to do the job of PA to the respondent’s MD. This had been the claimant’s part-time role. When the previous occupant of the post came back from maternity leave she worked a couple of months and then left.

The claimant worked at least two Saturdays per month in the showrooms and more Saturdays if there were not enough staff. The claimant worked very hard and covered the PA role. She got no extra time off for that. She told the Tribunal that she would have seen information about bonuses and that she knew “the majority of bonus” was paid to others although targets had not been reached.

Under cross-examination, the claimant said that she had been taken on for someone’s maternity leave and that, when that leave had ended, the claimant had been offered the retail sales role.

The claimant acknowledged that she had not objected to the targets in the respondent’s 20 February 2007 document and that the document referred to “contribution targets” as being “profit achieved less any bad debts which may occur during the year”. The claimant pointed out that it was decided that another employee was doing the website.

Regarding Saturdays, the claimant said that she had been told that she would do two hours on Saturdays but that it had been more than two hours in that she “would start at 8.30 a.m. and be there till nearly lunchtime”.

It was put to the claimant that working with the MD would bring her closer to the workings of the respondent. She accepted this but said that she had done it before, that it had been “more of a secretarial role” and that “a lot of it” would not be with regard to the running of the respondent.

When it was put to the claimant that no-one had been dedicated to sales before, she replied that a gentleman (hereafter referred to as McG) had been a retail sales manager and had held the title of retail manager.

It was put to the claimant that she had been given monthly figures at meetings. She replied that she had not been at monthly meetings. When it was put to her that she had been given figures, she said that she did not recall this.

When it was put to the claimant that MC, the respondent's general manager (now the chief executive), had given her a chance to develop her role in 2007, she replied: "This was part of my job." She did not deny that she had indicated that she did not like sales. When it was put to her that no new sales initiatives had been brought in by her, she said that she could not recall. Subsequently asked to agree the same point, she said: "I disagree."

Asked to agree with the respondent that she had failed, the claimant said that all periodic (weekly or monthly) reports had been sent to the respondent's MD and that every day she "cced" others. She added that prices had been updated when needed and that she had not dealt with account customers.

Invited to agree that it had been her job to "go out and sell" the respondent, the claimant said: "Literature was given to customers in the shop. I was not let advertise in the papers because management felt that it would interfere with trade customers." Asked who had told her that, she replied that "it was known in the company" and that it had been explained by MC as well. Asked to agree that there had been discussions about improvements she could make, she accepted that a document had been given to her with suggested improvements and that matters had been dealt with in detail but said that she could not recall being told that sales targets were not being met and that she did not think that it had happened. Invited to accept that this had been e-mailed to her, she said that she did not recall getting this.

Invited to agree that a comparison of stated figures indicated a decline, the claimant replied that a kitchen-related figure did not seem to have been included although this had been one of the claimant's areas. When it was put to her that someone else (MR) was for kitchens, she replied: "I'd been told that was to be in my figures. He was coming in to replace a sales manager." It was put to the claimant that this was in dispute, that business had not been targeted taking into account bad debts and that, as a consequence, no bonus was payable. The claimant said that she disagreed because she did not see all the retail and kitchen figures.

Cross-examined about the financial loss she had incurred since her employment with the respondent, the claimant said that a lot of her applications had been done on-line, that she had registered on a well-known website, that she had no documents about this and that she had not kept copies of refusals.

It was put to the claimant that, if, in January 2008, she accepted a post starting in April 2008, she was unavailable for work from January 2008 and it was put to her that she had not applied for any employment after she got this offer. The claimant replied that she had not wanted to jeopardise her job.

When it was put to the claimant that she had no applications for higher posts than the one she got, she replied: "I had a mortgage to pay. Why would I live on savings and have nothing left?" Again asked for documentation, she said: "It was all done on-line."

The claimant confirmed that she had said that someone had been paid a bonus on a pro rata basis. She said that, having typed all the MD's e-mails and letters, she thought that a manager (McG) had been paid a bonus.

Asked if she had given the respondent feedback, the claimant said that she had e-mailed three people in the respondent and that this would include daily sales figures.

In re-examination, the claimant said that she had been promoted to retail manager. She denied that she had been told that she could be facing dismissal or that anything was said to her about consequences if she did not pick up in some way.

Asked why she had not started her new job until April 2008, the claimant said that it would be normal to have a four-week wait and that her new employer was a new company which had just been set up around that time. The claimant added that she had sent e-mails to try to start sooner.

Questioned by the Tribunal, the claimant said that she had not been told sales figures until MR came on board. Asked why she had not accepted an ancillary role from the MD, she said that she had just started as retail manager and had not wanted to fail in that. She added that the PA role had been a full-time role for twenty years.

### **Respondent's Case (Resumed)**

MC (the respondent's general manager at end of the claimant's employment and now the respondent's chief executive) was recalled to give sworn testimony. It was put to him that the claimant was saying that kitchen sales figures should have been included and he was asked if the respondent accepted this. MC replied that €154,000.00 would be the claimant's figure. He added that this had been brought in by MR for kitchen sales. Asked about 2006 when all was together, MC replied that there had been no showrooms then but that it was miscellaneous which was then moved to a retail cash account.

It was then put to MC that the bonus would not have been reached with the addition of MR's figures. MC agreed with this.

MC added that figures would be pulled down and put into accounts and made available to all managers including the claimant and MC himself. He told the Tribunal that the claimant was still on the mailing list even weeks "after she was gone from us".

### **Determination:**

Having regard to the claim pursuant to the unfair dismissal legislation, and having heard the evidence adduced by the Claimant and the Respondent, the Tribunal is satisfied that proper procedures were not in place, and, that adequate procedures were not adhered to by the Respondent. The Tribunal is satisfied that the Respondent did not have regard to the Code of Practice on Grievance and Disciplinary Procedures, Statutory Instrument 146/2000.

Accordingly, the Tribunal is satisfied that the Claimant was unfairly dismissed, and deems it just and equitable to order that the Respondent pay compensation to the Claimant in the sum of €9,500.00 [in addition to any payments made to her heretofore in connection with the termination of employment].

Having heard the evidence adduced, the Tribunal finds that there was no breach of the Minimum Notice and Terms of Employment Acts, 1973 to 2001. Accordingly, the claim lodged under

aforementioned legislation fails.

Further, the Tribunal awards the claimant the sum of €636.98 (being the sum agreed by the parties at hearing, as being the sum outstanding in respect of holiday entitlements) pursuant to the Organisation of Working Time Act, 1997.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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