

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE

UD849/2008

against

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr D. Mahon BL

Members: Mr J. Goulding
Ms K. Garvey

heard this claim at Wicklow on 11th February 2009
and 16th June 2009

Representation:

Claimant :

In Person

Respondent :

Mr. Paul Marren, Martin E. Marren, Solicitors,
10 Northumberland Road, Dublin 4

The determination of the Tribunal was as follows:-

The fact of dismissal was in dispute in this case

Claimant's case:

The claimant in his evidence told the Tribunal that he commenced his employment with the respondent in August 1996. He had been in the trade selling children's confectionery. He had a well-received reputation nationwide and could be described as a veteran in the trade having been twenty years in the business. His brief in 1996 was to develop a customer base

outside of Dublin. At that time it was a small company and has since expanded. The respondent imports, exports and distributes confectionery products. The claimant travelled extensively all over the country except Wexford and Wicklow building up the business. He did five weekly cycles to provide a service to the customers. He found that many times when he went back an order would not have been delivered and he would then check with the office to rectify the matter. In 1998 he was told by the respondent that his journey was being arranged for him and he objected when the respondent wanted to appoint a junior sales representative in the West to take over his customers. His income was generated by sales therefore his salary was being reduced. He was stripped of 20% of his sales. The managing director (MD) wanted the junior sales rep to call to existing customers and get sales but it was not as easy to get new customers and sales. There were at least six companies selling similar products. Sometimes products were not sold and as the respondent did not have the same credit facilities and service as compared to the competitors, it was a running battle between the claimant and his employer. There was a comment from the respondent that the claimant was so well organised and that he the claimant expected his employer to be organised like him.

In November 2006 he was asked to move from the Galway area despite the fact that it was he who got all the customers in that area. The claimant said to the MD that he had procured the business and they now wanted a junior sales rep to take over on a lower income, and then expected the claimant to get other new customers "cold calling". The witness said that the problems started when the company was probably trying to lower costs and the harassment started in earnest. There was one last territory to be opened, Co. Donegal and the claimant got in or around twenty-five customers and then his usefulness ended. He said there was a campaign of non-support and sabotage. When the claimant raised issues in relation to different prices being quoted to customers with the MD he was told it would not happen too often. The claimant's response was, once was too often. The claimant received telephone calls from disgruntled customers in respect of the respondent's service to them. The customer holds the rep responsible if a delivery is left short or unchecked. Products were being added to his order that had not been ordered. On one particular occasion when a courier was rude to a customer in Cork the claimant was held responsible. This was a major customer of the respondent and their reaction was not pleasant.

In 2007 the MD wrote letters stating the claimant's figures were down. This was due to the fact that he had handed over 20% of his sales to the junior sales rep. The claimant did a calculation from his diary which indicated a large deficit over a period of a year. The claimant sought a meeting on 23rd November 2007. MD presented the claimant with a letter of the same date advising that his sales were down. The claimant felt that if the MD was concerned about his sales figures he would expect him to say what could be done about the figures. In this letter the MD also asked for explanations in relation to a customer in Clonmel who complained that he had not received a service call from the company since the beginning of the year. While he would welcome a call from a company representative he did not want the claimant to call. The customer also mentioned that he had bought products independently from the claimant from the boot of his car which were not respondent products and he had an issue with the quality of one such product. The claimant felt that he was not wanted and that the company could not wait to see the back of him. The respondent was insisting that he work more hours than were contracted.

The claimant stated that on a Monday he met his first customer at 9/9.15am and that could be in Donegal. His last call that day was 7pm. He also called to van wholesalers at 8pm and some would ask him to call at 10pm. By Wednesday he would have exceeded his 37 hours and yet the respondent told him he was not working enough hours. He was told his sales were dropping and yet

the respondent refused to admit that his customers were going to junior reps. The claimant had a brief meeting with the MD on the 4th January 2008 and he was handed a letter of the same date. One of the allegations in this letter was of particular concern to the claimant and this related to his alleged engagement in third party commercial activities contrary to his contract and the commercial interest of the company. In this letter the claimant was asked to attend a disciplinary meeting on 11th January 2008. The claimant was convinced the respondent wanted to let him go. He had learned that the respondent had opened an account with a major retailer during the previous two years and this had been kept a secret from the claimant while one of the junior reps had been told to go to a major retailer in Tralee without telling the claimant. The claimant also discovered that the Kilnamanagh branch of that retailer also had respondent products on trial without his knowledge. He felt they did not tell him about the business with the major retailer as they did not want him to achieve his targets and he was costing too much. His customers were now going to commission agents in some areas. He felt he would not get justice at the meeting but he did not tell this to the respondent. He told the respondent he was giving a months notice and he was told to write a letter of resignation and go immediately and that the MD would pay a months salary in lieu. The claimant said he would seek advice which he did in the following couple of days. The letter of resignation was dated 7th January 2008.

In answer to questions from Tribunal members the witness stated that most of his time was spent getting new business and then servicing those customers. As he lost these customers to a junior rep he was offered nothing in return. His journeys were re-arranged, a junior rep was appointed and his earnings were reduced. His customers were being sold products at a cheaper rate than he could sell. He was losing credibility with his customers. When he started with the respondent there were two other sales representatives. The year 2004 was the best year for him in sales and by 2008 his earnings were reduced considerably.

In cross-examination witness agreed that he had previously written a letter of resignation on 22nd February 2002 and he was going into his own business venture. An issue had arisen in January 2002 when he had called to a new wholesale customer in Dublin and sold him respondent product. At the same time he also bought products for his home without realising this customer had received stolen goods. There was a garda investigation and the claimant was called as a witness. The claimant stated that he had not sold non-company products. Cleaning products were exhibited at this hearing.

However the claimant denied ever selling such products. It was stated that the junior sales rep was given non-company products by the claimant to sell and one such product, pink bubble gum was shown during the hearing but the claimant said that the only place he had seen this product was in the cash and carry. He also denied that he had ever sold toothbrushes.

He denied that he was engaged in his own venture while working with the respondent. In relation to the customer in Clonmel the claimant stated that every time he called there was something wrong or he would return products he could not sell. Therefore the claimant decided to close this account as it was a waste of time. The claimant returned to work the day after his first resignation and by letter dated 15th March 2002 his contract of employment highlighted the fact that he was prohibited from selling non-company products. The claimant did not work for anyone else however he agreed that the respondent would be entitled to invoke the disciplinary process if he or anyone else sold non-company stock. The claimant also felt that it was trumped up as a reason to get rid of him.

He also denied that he told TO'S, sales rep that the way to do business was to sell third party products and he never gave him these products to sell. Samples of these products, dustpan, batteries

and lighters were exhibited to the Tribunal and the claimant said he did not recognise any of these as being products he sold. Other sales reps were introduced in different areas which meant his customers base was being eroded one by one.

The claimant is now self-employed as an agent for a company dealing in similar type products to that of the respondent. His income is lower.

Respondent's case:

The Tribunal heard evidence from a Clonmel shopkeeper who was a customer of the respondent for three years. He dealt with the rep TO'S in the beginning and then the claimant and back to TO'S again. The claimant called to the witness at the end of 2006 or the beginning of 2007. On the first occasion the claimant introduced him to the respondent catalogue and he placed orders. The claimant then suggested he might have extra stuff, not from the respondent such as lighters and sweets. He paid in cash and on subsequent visits he did the same at a special offer. It would not be unusual to return out of date products, e.g. lucky bags. It took the claimant a number of weeks to take them away and when he mentioned other out of date products the claimant was not very happy.

In answer to questions from Tribunal members witness stated that some of the non-respondent products which he bought from the claimant did not sell and they are still in his shop. He suggested to the respondent that he did not want the claimant calling to his shop as he did not feel comfortable dealing with him. While the claimant was an excellent rep he could introduce products not belonging to the respondent and some of which were out of date. The claimant was not the first rep to call selling products not on the catalogue. He found TO'S excellent as a rep and he could always reach agreement with him and this he could not do with the claimant as he always wanted to push products that he wanted to sell.

TO'S also gave evidence to the Tribunal. He commenced working with the respondent in May 2003 as a merchandiser to help the claimant. He spent the first week with the claimant in the Munster region. He met the claimant and they went to West Cork. Witness was introduced as the new employee to merchandise products. The claimant showed him products in the boot of his car which he referred to as duty free. The claimant said that customers liked to see him coming in to their shops. Witness was told these goods were sold for cash and there was a high margin. The claimant stated that these goods were for witness to do the same but witness said he did not want to get involved in selling third party products. The claimant was his boss and they would meet on the road and the claimant would tell him where to go. He only met the MD two or three times a year. The products which the claimant offered him from the boot of his car were lighters, batteries and dustpan. Witness took batteries and lighters to use himself as he was conscious of his contract prohibiting him from dealing in third party products. He and the claimant swapped customer base. The claimant wanted witness to take the third party products as he was in the "circle" and would not tell the respondent. He stated that the claimant was telling lies. The claimant had a notebook in his car for cash sales. He and the claimant got on well and it is of no advantage for witness to make up lies.

The Tribunal also heard evidence from the MD. He had previously worked with a company distributing confectionery and after it closed he was a sole trader. He formed the respondent company in 1987 and started with one sales rep and by 1993 he had three reps. In August 1996 he received a telephone call from the claimant looking for a job. The claimant was a well-known sales person and he had previously worked for a competitor therefore he had a lot of contacts. He put forward a business plan and having agreed terms, he commenced his employment on 20th August

1996 on a six-month trial. The claimant utilised his contacts, brought a good turnover and his performance was satisfactory. The claimant would phone each evening and relay the number of boxes sold plus new accounts opened. He was paid an annual salary plus commission and was given a free hand to bring in new business. In March 1997 he had his first review and was offered a full time post.

While the witness was pleased with his performance the claimant had not achieved his annual sales target and too much stock was being given away to secure the business. The objective was to reduce the amount of free stock and there would therefore be more profit for the company. It was also agreed that this target was not fixed for all time. All of these points were outlined in letter to the claimant dated 7th March 1997. Following a meeting in August 1997 turnover was discussed and the claimant suggested he could also get seasonal business. If a higher target was not fixed witness would have expected the previous years target to be achieved and this was the case for all sales reps.

The claimant resigned on 22nd February 2002 and re-commenced in March 2002 following a meeting with witness. The claimant gave his notice and explained he was going into a business venture for himself. Witness was disappointed he was leaving but wished him well. Two weeks later on 8th March witness received a telephone call from the claimant asking if he would consider taking him back. It was in the company's interest to re-employ him. A meeting was arranged for the following Friday and a new journey plan was put in place and was accepted by the claimant on 15th March 2002. They now needed cover in the West and they were agents for a range of jellies. The suppliers were based in Spain and they were pre-packed. The claimant suggested he would need back-up and he suggested that witness interview GW who was employed as a sales merchandiser in September 2000 to assist the claimant. He covered the West both before and after the claimant's resignation in 2002. When the claimant returned after his resignation it was made clear that the journeys needed to be covered in a particular order. The details of these journeys were outlined in the aforementioned letter of 15th March 2002 and the claimant agreed to accept these changes.

By letter dated 25th January 2002 witness brought the claimant's attention to an involvement in the movement of stolen goods from a customer in Waterford. While gardai visited the respondent's premises they assured the witness that the claimant was unaware that these were stolen goods. The claimant was told that he could not handle third party goods. He accepted the claimant's explanation at the time. Witness also mentioned a telephone call from a Londis area manager stating that one of his customers would not buy from the respondent as the claimant had been offering him Cadbury Crème Eggs for sale from the boot of his car. It was again highlighted to the claimant that witness would not tolerate any staff member selling products other than those supplied by the respondent. In 2007 witness received a telephone call from a customer in Clonmel requesting a service call from a sales rep, however he did not want to deal with the claimant anymore. He stated that he had bought goods, toothbrushes and lighters, for cash from the claimant. When he asked the claimant to explain he stated he was in a Co. Cork town with a supplier named "George". When asked for clarification the claimant said he had given an explanation at the meeting of 23rd November 2007 and would not dignify this situation with any further remarks. A number of issues were also discussed in relation to key accounts. Witness refutes that he harassed the claimant. A lot of the meetings and area changes were at his behest. The sales reps are representing the company and it is necessary to provide as much back up as possible. The witness did not ignore the claimant in this regard. Various issues can arise in relation to orders and deliveries and all reps would encounter the same issues.

The company requires sales and orders to prosper and it would not be in the company's interest to withhold orders. The claimant's areas were worked with him rather than against him. In relation to Donegal, witness had set exclusive distribution arrangements which was known as "Snax Sales" in latter years and while the claimant had said he would like to cover the area, witness told him it was not possible as the distribution was already in place. A list of leads was given to the claimant in order to structure his journey. It was not in the respondent's interest not to support an employee. The claimant choose to cover Donegal in three nights although the original agreement was four nights. In relation to the major retailer's house accounts these sales are not generated through sales reps and no commission is paid. The contract was to sell and merchandise the product in ten stores in May 2006. However in September 2007 this product was withdrawn by the major retailer and they discontinued the product.

By letter dated 4th January 2008 the claimant was asked to attend a disciplinary meeting on 11th January when a number of issues were to be discussed. The claimant's response was that he was not interested in all the legal stuff and asked if the witness would accept his resignation. He stated that he would put his resignation in writing and he walked out of the office. The letter of resignation was dated 7th January 2008.

In cross-examination witness would not accept that the customer in Clonmel had an intense dislike for the claimant. He would not humiliate employees by searching their vehicles if he was suspicious one was dealing in third party products. Witness received an explanation from the shopkeeper in Clonmel. The claimant was not forced to give away customers. Witness would not accept that the company decreased the claimant's income. He did not mention the major retailer account as he had hired contractors and the merchandising would take two to three hours. He did not ask the claimant to go self-employed in December 2007.

In answer to questions from Tribunal members witness stated that after the claimant's resignation in 2002 witness took him back as he accepted his explanation.

Determination:

The members of the Tribunal very carefully considered all the evidence adduced, documents presented and statements made during this two-day hearing. The claimant joined the respondent business in 1996 as an experienced member of the trade with an enviable reputation and track record. He was a valued member of the sales team and it is acknowledged that he contributed to the expansion of the respondent business. The Tribunal heard that over time tension developed due to work related problems and as a result the claimant felt that there were a number of unresolved issues. As relationships were strained the respondent made a number of reasonable efforts to address these issues which were not successful. Subsequently at a specifically convened meeting on 4th January 2008 an attempt was made by the respondent to approach the problems by way of arranging a disciplinary meeting to take place on 11th January 2008. This initiative was frustrated due to the fact that the claimant was reluctant to co-operate and verbally offered his resignation. This resignation was confirmed in writing on 7th January 2008.

It is the clear view of the members of the Tribunal that the claimant did not reasonable explore the opportunities and possibilities available to him. In the circumstances resignation was not a reasonable option in that the claimant did not meaningfully use or exhaust the procedures available.

It is the finding of the Tribunal that a dismissal did not occur even in a constructive fashion.

Therefore the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

