

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

Employee

**claimant**

UD1289/20 08

RP1101/2008

MN1192/2008

WT523/2008

against

Employer

**respondent**

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005  
ORGANISATION OF WORKING TIME ACT, 1997  
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007  
UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mrs. M. Quinlan

Members: Mr C. McHugh  
Mr. J. Dorney

heard this claim at Dublin on 27th April 2009 and 29 September 2009

Representation:

Claimant(s): Ms. Mairead McKenna BL on 27 April 2009 and Aaron Shearer BL on 29 September 2009 instructed by Lawlor Partners, 4/5 Arran Square, Arran Quay, Dublin 7

Respondent(s): Mr. Oisín Quinn SC instructed by Smith Foy & Partners, Solicitors, 59 Fitzwilliam Square, Dublin 2

The determination of the Tribunal was as follows:-

### **Respondent's Case**

EC told the Tribunal that the company was established in 1979. In 2006 it had a staff of over eighty, twenty-five undertook work in fittings and forty-five worked on the floor in manufacturing and delivery. Ten to twelve were employed in sales. The floor space had a capacity of five thousand square foot and it was designed for interior designers and architects. The majority of work that the respondent undertook was contract work on housing schemes and hotels and the

domestic side of the business (private householders) accounted for approximately five per cent turnover. In 2006 the respondent had a turnover of twenty million. A fitter worked on commission and a price was agreed. Employees worked on the factory floor ten to twelve hours a day and they did not have a difficulty with this, as they wanted to earn extra money. Sales staff received a basic salary, commission on sales and a company car.

The claimant commenced employment in March 2004 as a junior sales person. She had worked in a similar role for the previous six months. The respondent hired her in a temporary capacity for six months and her salary was €20,000 plus 2½% commission. A previous senior sales manager MS left the respondent in December and EC asked the claimant if she was interested in his job. He pointed out the positive aspects of the job to the claimant, he had a good team in place that could assist her and he could not give her a written guarantee that it would work out. In December 2004 the claimant was a senior sales representative in the domestic area. The previous senior sales representative MS worked every second Saturday from 9a.m. until 1p.m, he earned €25,000 per annum and he received commission of five per cent.

It was important for sales personnel to meet householders and they did so after 5.30p.m. The claimant's basic salary at that stage was €25,000 with a commission of five per cent. The claimant agreed to work every second Saturday from 9a.m. until 1p.m. and she could be detained with a customer until 1.30p.m. In 2006 she earned commission of €44,692.61, in 2007 commission of €42,468.60 and in 2008 she earned commission of €19,082.96 as well as a salary of €25,000. The arrangement worked very well. The general manager completed the rosters.

A management meeting took place in May 2008 and the respondent decided to implement cost cutting. It had to increase domestic sales and decrease purchasing and energy costs. Staff were made redundant, the workforce of eighty was reduced to thirty-one. All contract work had ceased and all remaining staff agreed that they would forfeit all bonuses. DS a senior sales manager of twenty-five years forfeited all commission for a year. Employees were quite happy as long as they could retain their jobs. The respondent had a huge advertising campaign and it was the only market open to them.

On 27 June 2008 the claimant agreed to a three per cent commission. There was a question of one or two jobs at one and a half per cent commission for an in house customer of long standing and this work was carried out at a much lower rate. On 30 June the claimant requested a meeting. The claimant felt that she was entitled to 5% on €75,000 for an in house job and he told her when the company got paid for the job that he would pay her 2 to 2½% and he could not offer her 5%. On Wednesday there was an issue with the general manager. The claimant was scheduled to work on Saturday 5 July 2008. The claimant told the general manager that she would not work on Saturday unless she got paid. It was agreed when the claimant commenced employment that she would work every second Saturday. He was one hundred per cent certain that everyone was happy and that there were no issues.

The claimant did not report for work in the showroom on Saturday 5 July 2008 and the general manager was unable to contact her. Two members of staff tried to contact the claimant but were unable to do so. The general manager had to assign an employee from the factory floor to talk to customers, as there was no sales person on duty. This was a very embarrassing situation, which had never occurred previously. Another employee was contacted at short notice and came to the showrooms. The claimant spoke to the general manager on the telephone and eventually she reported for work. EC was on holiday in Italy, the general manager contacted him and he told the general manager to meet the claimant on Monday and establish what the problem was. The

claimant was adamant that she wanted an extra €100 for undertaking work on Saturday. She was informed that her wages were not being increased due to cost cutting in the respondent. The general manager spoke to the claimant on 11 July 2008. The claimant wanted more money for her bonuses and she was told that she would get time off in lieu. The claimant would not agree to this. The respondent was left in a very awkward situation as the claimant had a number of customers whose jobs were not finalised.

The respondent felt that it could not afford to let the claimant go. She had built up contacts in the respondent but it could not afford to pay her more. The respondent tried to be fair to the claimant. It had to keep the showrooms open on Saturday to obtain whatever business it could. The respondent was happy with the claimant's work but the alternative was if she did not want to work on Saturday there was no position for the claimant in the respondent. At 5p.m. the claimant told him that she was out of there. He gave an instruction to the general manager that the claimant should work her two weeks notice and Friday 11 July 2008, which was the claimant's last day in work. He had no further discussion with the claimant. He hoped that the claimant would change her mind and return to work. The following week a letter from the respondent issued to the claimant requesting her to return company property, which she did. The claimant was paid her minimum notice.

In cross-examination he stated that the claimant sent a text to the office manager stating that she would not talk to anyone in the company. He did not speak to the claimant at this time as he was out of the country but he telephoned the office manager and told her to talk to the claimant. For years the matter of the claimant working on Saturday was never an issue. The respondent gave the claimant an opportunity to prove herself. The claimant was not furnished with a written contract of employment on joining the respondent and he was of the opinion that if she was given a written contract she would not have been able to live up to it. He told her that he would give her 2 to 2½% commission for in house customers when the respondent was paid. The claimant told him that she would think about it. He reiterated that all commission was paid when the respondent was paid. The claimant worked from 8.30a.m. until 5.30p.m. Monday to Thursday, on Friday from 8.30a.m. to 5p.m. and on Saturday from 9a.m. until 1p.m.

P O'D told the Tribunal he was general manager for twenty-nine years. He attended a management meeting in May 2008. He spoke to the claimant on 27 June and she requested to speak to EC. A meeting was arranged for the following Monday. The general manager organised the rosters, which were located in his office. The claimant agreed a three per cent commission with EC. He spoke to the claimant on Wednesday 2 July 2008 and the claimant told him she was not going to work Saturdays unless she was paid. He reminded her of her conditions and he told her that it was part of her job. The office manager agreed to speak to the claimant and she told him that the matter was resolved. The claimant was rostered to work on the following Saturday and he was not in work on that day. He received a call from the production manager that there was no sales person in the showroom and customers were waiting to be served. The claimant could not be contacted. At 11a.m. the claimant telephoned him and he asked her about the Saturday roster, she told him that she was not working on Saturdays unless she was paid for them. The claimant reported for work some time later and he told the claimant that he would speak to her on the following Monday 7 July 2008. On 10 July 2008 the claimant spoke to him and they discussed payment for Saturday. He told her he would revert to her the next day. The respondent decided that the claimant would be given a half day off in lieu of Saturday work. He tried to appeal to her but she would not agree to this arrangement. He offered her two weeks notice and she told him she was leaving. He could not give an increase to one member of staff and take it from everyone else.

In cross examination he stated that on 2 July 2008 he spoke to the claimant and he told her that working every second Saturday was part of her job. He told her that she could work her two weeks notice or leave.

In re-examination he stated he offered her time off in lieu of notice.

The office manager told the Tribunal she was employed with the respondent for twenty-seven years. She was responsible for wages and accounts. The claimant worked every second Saturday. On 2 July 2008 the claimant spoke to her about Saturday work. She told the claimant that she got time off for working on Saturday and she did not deduct money from the claimant's wages. The claimant was happy to work on and take time off in lieu of Saturday work. The office manager did not work Saturdays. On Friday 11 July 2008 she met the claimant and the claimant told her it was nice knowing her. She went to the claimant's house and told her to return to work and that they could discuss the matter. She sent the claimant a text on 12 July 2008 and the claimant replied that the respondent dismissed her. She was disappointed that the claimant would not return to work with the respondent.

MMcK told the Tribunal that she was employed for four and a half years as a sales representative in the showroom and she also undertook site work. The respondent has now a staff of twenty-five. She received a basic salary and commission for domestic sales at the rate of three per cent. She worked every second Saturday from 9am until 1p.m. The claimant worked pursuant to that arrangement in June/July 2007. She was aware that cuts were being introduced as the business was slowing down. Her commission was reduced from 4% to 3%. In June 2008 the claimant did not seem too happy in work, the claimant told her she was not happy in work and her father had work for her. On Saturday 5 July 2008 while she was doing her shopping she received a call to report to work. She reported for work and the claimant arrived late. She asked the claimant where she was and she responded that she was not going to come in to work. She told the claimant that she would be in trouble and the claimant responded that she did not care that she wanted out of there.

In cross-examination she stated that the claimant's father was a farmer and he had property, which he rented. She did not volunteer information to EC and it was general knowledge that the claimant was taking a case against the respondent. She received a wage for working in the showroom and for piecework from the site and it was part of her package that she worked every second Saturday. She received a wage the same as everyone else and the claimant always worked in the showroom. She did not know whether the hours she worked were documented on her wage slip and her wages varied weekly. The claimant told her that she was not working on Saturday for nothing anymore. She told the claimant that she would have to get on with her job.

In answer to questions from the Tribunal she stated that she did not know what the claimant earned. She always had a contract of employment and it was updated after the claimant was dismissed. She received a contract when she started in the showroom, which was approximately eighteen months after she commenced employment. She did not sign the first contract that she received. The contract indicated that she had to work Saturdays in the showroom.

### **Claimant's Case**

The claimant told the Tribunal that in March 2004 she commenced employment with the respondent as a sales assistant. She earned €20,000 per annum plus 3% commission. EC told her that she would have to work on Saturdays and this would be sorted out when she had settled into the job. In December 2004 she became senior sales representative and earned

€25,000 per annum plus 4% commission and she had the use of a company car. The senior sales person was responsible for private clients and received 4% commission and had a six-month review. When she started she requested her job and salary to be reviewed. EC told her to see if she could do the job. EC would not increase her salary and her commission increased to 5% in June 2005. She frequently had discussions about working on Saturday, she asked to be paid for Saturday and she could not take time off in lieu of working on Saturday. She gave the job one hundred and fifty percent commitment and she frequently worked until 9p.m.

In March 2008 she attended an interview with another company, she was offered the job but did not accept it. Her father is a farmer, she was not interested in farming and her father did not own property. In June 2008 she was summoned to a meeting and her commission was reduced to 3%. In June 2008 she undertook a project valued at €100,000 for a private client, she should have received €3,500 commission for this but she was informed that she was not going to get the full amount of commission due to the downturn in the respondent. She discussed the matter with EC and she told him that they had agreed on the commission structure being reduced but not on the project for €100,000. On 30 June EC told her to revert to him. She wanted to be paid for the work that she undertook. She received a wage slip every week, which indicated that she worked 39.5 hours. She worked Monday to Thursday from 8.30am until 5.30p.m. and on Friday from 8.30a.m. until 5p.m. Her two colleagues were paid for the Saturdays that they worked.

On the 2<sup>nd</sup> July 2008 she attended a meeting with the general manager and he told her if she was not happy with her terms and conditions that she could leave. She did not hear further from him or EC.

The following Saturday she did not report for work. She received a call from the general manager that the respondent had no cover. She told him that no one had reverted to her regarding Saturday work. She then went to work and her colleague was there. On 10 July 2008 she discussed the situation with the general manager. He was not willing to pay her for working on Saturdays. On Friday July 11 2008 he called her to a meeting regarding Saturday work and commission. She told him that she should be paid the full amount of commission and he told her that EC was not willing to pay this. The general manager told her that EC was willing to give her a half-day off in lieu of working on Saturday. She spent two days working out of the office and three in the office.

The general manager telephoned EC who instructed him to tell the claimant if she could not agree to the arrangement that she could leave now and she could work her two weeks notice and that she would receive two weeks pay. He was not going to give her what he owed her. The general manager told her to return the company car. When she left the car park she met the office manager.

She was very upset and she asked the office manager to return the company car but she declined. She asked another colleague to return the car and he did. She received a text message from the office manager who enquired about her well-being. She applied for numerous jobs since her dismissal and it took her ten months to find an alternative job.

In cross examination she stated that in 2008 staff were let go and staff were put on a three day week. A number of customers who wanted to make changes to their houses came to the showroom at the weekend. Saturday work was not the most important part of the business but she agreed that she could secure commission by working on Saturday. She spent a considerable amount of time working with the clients whose project totalled €100,000. The reason that EC would not give her the commission of €3,500 for the project was his excuse not to pay her.

She stated that she spoke to the office manager who told her that everything would be sorted out. She did not report for work on Saturday 5 July 2008, she had never done this before and she was reluctant to do it. She felt it was time that she stood up for herself and she was tired of being fobbed off. She was willing to take a reduction in commission but she felt that she should have

been paid for all the hours that she worked. When she wanted a half-day off she could never take it. Even though she was offered a half day off in lieu of working on Saturday she refused. The general manager had delivered a letter and requested her to return company property.

### **Determination**

Having heard the evidence it was a condition in the contract of employment that the claimant would be requested to work every second Saturday in the showroom which she did for a period of time. Although the claimant had no formal contract of employment from the evidence before the Tribunal it is satisfied that the practice was well known to the claimant. In or about 2008 the respondent indicated that because of the downturn in the economy generally and changes in the rate of commission that other changes were going to be implemented in order to keep the business viable. Discussions took place between the claimant and respondent in relation to working in the showroom every second Saturday. The claimant indicated that she was not prepared to do this and would not accept an alternative offer of time off in lieu and she failed in fact to report for work on Saturday 5 July 2008.

It is a well established principle that where an employee refuses to obey a fundamental order the employer is entitled to dismiss forthwith and her claim under the Unfair Dismissals Acts, 1977 to 2007 fails. The claimant received the notice that she was entitled to and is therefore not entitled to compensation under the Minimum Notice and Terms of Employment Acts, 1973 to 2005. The claim under the Organisation of Working Time Act, 1997 was withdrawn during the hearing and no award is being made under this Act. No award is being made under the Redundancy Payments Acts 1967 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

