

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
Employee – appellant

CASE NO.
UD872/2008

against

Employer - respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P Hurley

Members: Mr T Gill
Mr T Kennelly

heard this claim at Loughrea on 25th March 2009 and 22nd June 2009

Representation:

Claimant: Mr Alan Ledwith BL, instructed by:
Mr Louis Burke
Brian Lynch & Associates
Solicitors
4 Courthouse Square
Galway

Respondent: Mr. John Brennan
IBEC
West Regional Office
Ross House
Victoria Place
Galway

The determination of the Tribunal was as follows:

The managing director (MD) of the respondent company gave evidence that the claimant commenced his employment as a sales representative in early 2005. In December 2007 MD hired a new commercial director (CD) who became the claimant's line manager. CD had difficulties with the claimant, who insisted on continuing to report to MD.

A few weeks after CD's commencement the claimant requested a large salary increase and for the sales commission element of his pay to be removed. He failed to meet sales targets on an almost continuous basis and was falling down on his sales procedure. The claimant continued to refuse to work with CD.

In July 2007 the claimant told MD that he felt harassed by CD as he kept asking him where he was going and what he was doing. MD told him that was normal, but the claimant believed it was bullying. MD then requested the claimant, via email dated 17th July 2007, to provide details of his bullying complaint in writing, but the claimant never responded.

MD suggested to the claimant that they engage an external person to work through the issues. MD also suggested that the claimant could speak to this person privately and not report back to the company. The claimant refused this offer and told MD that this person would just be a lackey for MD. MD offered the claimant the choice of who to go to but the claimant refused to engage.

The first meeting CD had with the claimant was on 12 January 2007. The claimant requested that his pay was changed from basic, commission and bonus to just a basic salary with an increase of 87%. CD told him that it was unreasonable to expect no performance related pay. The claimant was unwilling to discuss targets or objectives and told CD that he was reviewing his options. CD believed that the claimant meant that he was seeking a different job and might not appear on Monday morning. The claimant refused to co-operate with CD from then on. The claimant was given a written warning in relation to his performance in June 2007.

At a sales meeting of 25 January 2008 it was agreed to implement a new sales strategy. CD emailed the sales staff to prepare to give a short presentation for a February 21 meeting. Twelve customers were identified for the claimant to adopt the new strategy with. CD met the claimant on 5 February 2008. The claimant had met some of the customers on his list, but had not adopted the new strategy and now would not be able to implement the agreed actions by 15 February 2008. The claimant was refusing to make an effort and was uncooperative.

On 6 February 2008 the claimant was notified, by letter of a formal disciplinary meeting to be held on 11 February 2008, in regard to the claimant's performance and that he could bring a colleague with him to the meeting. On Friday 8 February 2008 CD was contacted by his previous employer who told him that the claimant had phoned him seeking information about CD. The claimant had asked for CD's personnel details and whether he had ever been accused of bullying and harassment. CD informed MD by phone call and wrote a letter of complaint against the claimant. MD was very angry when he heard about the phone call, he considered that this was the not the straw but the 'plank that broke the camel's back'.

The disciplinary meeting on Monday 11 February 2008 was held with MD, a finance director of the company and the claimant. MD dealt with the meeting, as relations between the claimant and CD were hostile. The claimant was very agitated during the meeting. MD had the claimant's sales results and call sheets and considered that his sales figures were damning. During the meeting MD raised the telephone call the claimant made to CD's previous employer. The claimant confirmed that he had made the phone call and was happy to describe it. He only denied asking about CD's family.

MD issued a final written warning, dated 11 February 2008, in relation to the claimant's performance issues. MD wrote a second letter on 11 February 2008 indicating that a further disciplinary meeting would be held with the claimant in regard to gross misconduct regarding the phone call. The claimant was suspended with pay.

The disciplinary meeting in regard to gross misconduct was held on 20 February 2008, to which the claimant brought a solicitor. The issue of the phone call was discussed and MD wished to see if there was any contrition on behalf of the claimant. MD adjourned the meeting to discuss the issue with other management in the company, each voted in favour of dismissal. The claimant's employment was terminated that day due to gross misconduct regarding the phone call. There was notification of any appeals process.

Claimant's Case:

The claimant began his employment in 2005 as a sales representative and passed the six-month probationary process. There were two sales representatives covering Ireland until CD hired a third in May 2007 and changed the sales areas.

The claimant agreed that he had received a written warning in 2007 from CD, regarding his performance, and many verbal warnings. He had never received any warnings regarding misconduct, only his performance. The claimant did not accept that the phone call to CD's previous employer amounted to gross misconduct.

The claimant got off to a bad start with CD at the meeting in January 2007, and he contended that he had been unfairly treated by him since then. He had to provide weekly call sheets to CD and phone him daily. The claimant told MD that CD's treatment of him amounted to bullying, but he did not follow up his complaint in writing, as he believed it would have made his position untenable.

The claimant was dismissed for gross misconduct following making a phone call to his line manager's previous employer. The claimant made the phone call on Friday 8th February 2008 after receiving notification of a disciplinary meeting to be held on Monday 11th February 2008.

In hindsight, the claimant agreed that making the phone call was a stupid thing to do, but he was under stress about the meeting on Monday and was trying to save his job. He believed that if he found out something bad about CD he could tell MD and it might save his job, but the previous employer had only good things to say about CD.

Determination:

The claimant was dismissed for his alleged misconduct. The Tribunal feels that, while the claimant admits that his conduct in making the telephone call on 8th February 2008 was imprudent and rash, no disciplinary procedures were invoked by the employer for such conduct. All the evidence points to disciplinary procedures applied in respect of his performance with the employer. In these circumstances, the Tribunal is of the view that the claimant was not afforded fair procedures, and consequently, his dismissal is tainted with unfairness. Accordingly, the Tribunal awards the

claimant €15,000 (fifteen thousand euro) under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)