

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.
UD245/2009

EMPLOYEE
claimant RP218/2009

MN238/2009

against

EMPLOYER *-respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. P. McGrath B.L.

Members: Ms. A. Gaule
Ms. M. Maher

heard this claim at Dublin on 17th June 2009
and 12th October 2009

Representation:

Claimant: Mr. Cathal McGreal B.L. instructed by Mr. Greg Ryan, Ryan Smyth & Co,
Solicitors, Park House, Upper Kilmacud Road, Dublin 14

Respondent: Mr. Paraic Lyons B.L. instructed by Noel Smyth & Partners, Solicitors, 22
Fitzwilliam Square, Dublin 2

Background:

The respondent is a car sales company. The claimant worked in various roles in the respondent company. The case is one of constructive dismissal.

Claimant's case:

The Tribunal heard evidence from the claimant. He worked for the respondent in three different roles. He started as a car salesman. And he maintained that towards the end of his employment he held the role of used car sales manager and also carried out the functions of another role and was also selling cars.

His pay consisted of basic pay, commission and a bonus. His commission was 10% on all the cars he sold, his bonus was €150.00 on all cars sold at a profit in excess of €1,400.00. His basic pay as a car salesman had been €20K and as used car sales manager his basic was €30K.

On 4th or 5th May he met with the dealer principal (JT), the financial controller (KB) and a director (MT). They asked him to take a pay cut. He told them that €20K was not enough for the work. They told him that they would close the doors if he did not agree to a pay cut. They did not mention redundancy. He sent an e-mail to JT to say that he did not agree to take a pay cut. There was no agreement that he would take a pay cut or to be made redundant. There was no new contract of employment and they did not suggest that there should be a new contract.

They never spoke to him about his performance. They had told him to reduce (sell or to have sold) the number of cars that were on the forecourt from 140 to 80 and he reduced them to 85.

In May June and July his salary dropped to €20k basic. He had not signed anything to agree to the reduction in his wage. He had mentioned to them numerous times that the pay was not enough. They told him that he had to take the pain for a couple of months.

From July onwards he asked to speak to JT and or KB about his wages. He sat opposite JT in the office. When he asked JT about his wages JT just shrugged his shoulders or laughed.

He met JT and KB on 15th July in KB's office, which was located across the road from the respondent's garage. Notes were not taken at the meeting. He told them that he was being paid below industry norm for a sales manager, both KB and JT told him that he was not and never was a used car sales manager. On the company web site he was listed as a sales manager and also on his business card he was sales manager.

During the period of time in question (three month period), he was extremely busy working from 8.30 am to 6.00 pm. Also he did not turn his work phone off until 7.30 pm.

It was only after he asked for a meeting to speak about his wages did he then get an e-mail about complaints. He had never been given a warning and everything was "rosy" until he asked for a meeting about the money that he had been promised.

He asked them if they wanted to make him redundant or to be rid of him. He was just told, "If you don't like it." and they shrugged their shoulders.

Finally he was called to a meeting with MT and JT. They told him that he had not been doing a good job. He told them that he just wanted to know where he stood. JT then got "a bit ratty" JT called him (expletives not included), and how dare he look for money when they were in the situation that they were in. He said that he was not comfortable with them talking to him that way. MT asked him if he wanted a witness in the meeting and he replied that he did. AOR was called to the meeting and JT explained the situation to AOR.

He spoke again and JT got annoyed again JT called him (expletives not included). He told them that he was not going to listen to that and walked out of the office. JT said to him so you are resigning and he replied that he was being forced to leave.

The claimant told the Tribunal that he felt he could not stay as he had felt undermined that AOR came to him for prices for the cars and had witnessed the situation.

He was asked to return his phone a half hour after he walked out of the last meeting that he had with the respondent.

Respondent's case:

The claimant had been informed that the respondent was in trouble in May 2008 and consequently took a pay cut. This was to be reviewed in July if the situation had improved when the new VRT rates came into force. The claimant was informed that the respondent would not be buying any more cars, the Sales Manager position was redundant so he would have to revert to his original position as a salesman. At that time the respondent was making an eighty thousand euro a month loss.

On the 16th of July 2008 MT recalls receiving a phone call from JT informing him that the claimant had requested a significant pay increase. The Director requested that the owner and the claimant come to his office to "sort it out." The Director asked the claimant if he would like a witness present at that meeting, he accepted this offer and a colleague AOG joined the meeting. The grievance procedure was not enacted at the meeting, as it was an impromptu discussion. MT and JT dispute the severity of the expletives the claimant said were directed at him. The claimant was not undermined by the presence of the witness as they were employed at the same level. There had never been performance issues with the claimant previous to the e-mail JT sent, JT does not think the e-mail regarding his performance was out of place or undermining.

The claimant was informed that there was no position for him as a Sales Manager/buyer; there was only a position as a salesman available. The owner was upset because the claimant had not grasped the severity of the situation the respondent was in. The claimant was told that his position was valued and would not be made redundant and he was not being "sacked." The claimant informed the JT and MT that he was leaving if he did not get what he wanted. The meeting concluded with the claimant resigning.

Determination:

The Tribunal has carefully considered the evidence adduced in the course of this two-day hearing. The onus rests with the claimant to establish that he was constructively dismissed and that means that the claimant has to demonstrate that the respondent has treated him in such a way that he had no alternative other than to resign.

In considering the evidence, the Tribunal must take into account the objective reasonableness of both parties.

The Tribunal accepts that it was frustrating for a hard-working, high earning employee to be told in May of 2008 that his basic salary needed to be reduced by one third. However, events in the marketplace were putting pressure on the respondent and the claimant reluctantly agreed to accept the reduction, albeit on a three month interim basis. The parties have a different view on what was intended at this juncture, the respondent claiming that the claimant's salary could always be reviewed but that they could offer no certainty in a diminishing car sales market.

The Tribunal is critical of the lack of consensus and certainty between the parties, moving forward from May of 2008. It was natural that the claimant would feel aggrieved at the unilateral decision

to cut his salary. Without consent, the respondent had effectively breached the contract of employment and violated the payment of wages legislation. When, however, matters came to a head in July of 2008, the claimant made demands of the respondent, which lacked any understanding of the marketplace in which he worked. The suggestion of a basic pay rise from €20,000 or €30,000 to €50,000 lacked credibility. The Tribunal cannot grasp the motivation behind the inflated pay deal being proposed by the claimant. It was unrealistic and provoked the worstkind of reaction from the respondent, which was evidenced by the letter of 15 July 2008. In this letter, the respondent's managing director went on the defensive by launching a wholesale attack onthe claimant's performance. Having listened to the evidence, the Tribunal is firmly of the view thatthis criticism was unsubstantiated, and even if there was justification for criticising his performance, there were company procedures set out for the monitoring of and warnings againstlazy and/or unproductive work. These had never been used against the claimant. The Tribunalinterprets the respondent's letter of 15 July 2008 as an unreasonable backlash against the adamantsalary demands being made by the claimant.

It was against this backdrop of difficulties that the parties went into a meeting on the 16 July 2008. The Tribunal fully accepts that this was a heated meeting. It was unacceptable for the respondent to use offensive language, however it is universally accepted that the calling for a witness was at the suggestion of the respondent and that tends to suggest that their approach had some semblance of measure.

What is inescapable is the fact that the claimant was not prepared to move from his salary demands and the respondent could not increase the salary from what it was then paying. In these circumstances, was it reasonable for the claimant to terminate his employment? If it was reasonable, then the Tribunal must find that the salary demands being made by the claimant were reasonable too. This the Tribunal cannot do. The uncontroverted evidence was of a car sales market in free fall. All sides accepted this fact. Whilst the meeting of 16 July 2008 may have been heated, the Tribunal accepts that the message being delivered by the respondent was an honest account of the decreased car sales, as realised and anticipated. They were simply not in a position to increase the claimant's salary and they maintained the salary review provided for in the May of 2008 would only ever result in a salary increase if there was improved business.

In the circumstances, the claim under the Unfair Dismissals Acts, 1977 to 2007 fails. Furthermore, as a claim for minimum notice does not arise in a case of constructive dismissal, the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2007 also fails. The claim under the Redundancy Payments Acts, 1967 to 2007 fails, as this was not a redundancy situation.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)