

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

EMPLOYEE

UD500/2009

against

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mrs. M. Quinlan

Members: Mr G. Mc Auliffe
Ms. N. Greene

heard this claim at Dublin on 4th November 2009
and 8th December 2009

Representation:

Claimant(s): Ms Ailbhe Rice, Rice Jones, Solicitors, Castleview House,
22 Sandymount Green, Dublin 4

Respondent(s): Mr. Liam Bell BL instructed by Sean Meaney & Co., Solicitors, Riverdale House,
139 Lower Drumcondra Road, Dublin 9

The determination of the Tribunal was as follows:-

Claimant's Case

The claimant told the Tribunal that he was made redundant from his previous employment in November 2006. He contacted the MD of the respondent in December 2006 who told him that he was looking for staff. The MD outlined to the claimant the work that the respondent undertook. The claimant had experience in selling in a multi national environment. The respondent employed eight to nine employees and had an annual turnover of €4m. The respondent did not have a business plan. The claimant outlined the various projects he undertook. He had access to monthliesales figures on top line staff and in Summer/Autumn 08 he knew that the respondent performed better than most companies. In early October 2008 there was no downturn in sales but towards the end of October 2008 sales had decreased by €60,000 and that was negligible. Up to October 2008 he received his contract salary.

On 28 October 2008 the MD telephoned him and told him that he was dissatisfied with the company's performance in Northern Ireland and the sales representative in NI, RH was told his contract was being terminated. The claimant was presented with something he was not expecting. His salary was €15,000 less, he was given no explanation as to why and he was stunned. He was careful not to say that he was not accepting a new contract. He requested a meeting with the MD, he was being railroaded into a position, he could not understand the reason why and he refused to accept the reduction in salary. He raised the fact that his salary was reduced by thirty per cent and there was no explanation as to why the respondent did this. He never accepted what was being outlined to him when he accepted the position in NI. After he left the meeting with the MD on 4 November 2008 he remained in work. He had not received anything in writing and all he wanted to do was meet the clients in NI and to get an understanding of what the job was. He believed that he was going to NI to sell product.

At the meeting on 4 November 2008 with the MD he was of the understanding that it was take it or leave it. He tried to resolve the matter and he did not have anything new to discuss with the MD that would help the situation. On 25 November 2008 he was presented with a document and he felt that he was being set up for dismissal. The objectives and targets were completely unacceptable to him.

He believed that he received a letter by hand from the respondent dated 28 November 2008 and he did not speak to the MD after this. His relationship with the MD did not change and the MD told him that there were no more projects. Following receipt of the MD's letter on 9 December 2008 a P45 was delivered to his house and there was no more communication with the respondent. The respondent was still trading well. Regarding an allegation that he misused a company credit card he stated that he was not someone who spent money on the respondent's behalf. He was completely stunned and mystified as to what was going on and there was no indication of dissatisfaction with his work. He found alternative short-term employment in January 2009 until 10 April 2009. He has been job-hunting ever since and he is in receipt of a job seekers allowance.

In cross-examination he stated that he had been on the road since 1994. He agreed that there was a falling off in sales and a reduction of €60,000. The respondent sold product for the manufacturing industry. He was provided with a car, he did not want a car and he would have preferred a mileage allowance. He was happy to do what he could for the respondent and he was enthusiastic about the job in Northern Ireland. At a meeting on 28 October 2008 he was informed that there was going to be a commission structure put in place if he managed to increase sales. On 3 November 2008 different issues were discussed and the salary for the position was going to be €35,000. He met GW at the meeting on 3 November 2008 and he was presented with a new contract. There was a reduction in the number of sales and it was his understanding that the sales job was another project for him to do. He did not receive details of what happened on a daily basis at the meeting on 4 November 2008. He was informed verbally that if the sales figures did not improve that his position would have to be reviewed. This added to his sense of foreboding and there was no way that he was going to be able to make improvements to the respondent's business. On 10 November 2008 he met the MD as part of his introduction to the job. The first time he was given anything in writing was on 25 November 2008. He submitted his letter of resignation on 28 November 2008 and this was very traumatic. He could not recall if the MD told him that he wished to discuss the matter. He was informed that his project was finished. A company credit card was not of benefit to him, it was a tool of the trade. He returned the company car.

In answer to questions from the Tribunal he stated that he was happy to remain in NI and he had to earn a living. He thought that he invoked the grievance procedure. On 28 October 2008 the

question of his salary was not raised, all he was told was that a commission structure would be put in place. He thought that he was going to earn the same salary in November 2008 as he had earned previously and he had no reason to think otherwise. He contended that his commission made up the bulk of his salary. When asked if there was debate on this he replied there probably was, he was vague on what it might have been and there was considerable discussion during his employment. He could not recollect if he had a discussion with the MD about commission.

Respondent's Case

The MD told the Tribunal that the respondent supplied the construction industry with seal and waterproofing systems and had been in business for twenty years. In November 2008 turnover decreased by eleven per cent. The respondent had three categories of customers, top customer, middle customer and orphan accounts, which warranted checking, and these accounts had huge potential to expand. The claimant undertook telesales in 4 April 2008 until the end of October 2008.

Prior to 3 November 2008 RH undertook sales work in NI and this did not work out. The claimant expressed an interest in selling and going on the road. The claimant had worked in NI and he knew the business. On 3 November 2008 the MD had a meeting with GW, sales manager and the claimant. The claimant agreed to go on the road selling and a salary was agreed. He compiled a letter for the claimant to sign on 4 November 2008. It was agreed that the claimant would have the use of a company car, a telephone and business cards. The claimant's job was to sell product to customers and expand the customer base. The claimant would remain in NI one or two days a week and this was not a problem for him. The respondent had spent a number of years analysing the market. He told the claimant that he had confidence in him that he could do the job and the claimant had no quibble regarding his terms and conditions of employment. The claimant would get a higher wage than RH and commission of 5% on sales between €30,000 to €60,000. The claimant was given a company car, an expense account, a toll card and business cards. On 4 November 2008 the claimant asked him if he would consider subsidising him for three months to make up his wages and he refused. There was potential to increase sales. The telesales that the claimant undertook did not work out and he made €14,900 in six months.

He did not want to let the claimant go and he had no official meetings with the claimant after the 4 November 2008. He prepared a letter for the claimant on 3 November 2008. The claimant told him that he was very busy and he did not sign the letter. A week later the claimant gave in his notice. It was the first time that he had heard of the grievance procedure and he did not know what it was. He had no experience of termination of employment. The claimant never stated that he wanted to return to a job in Dublin and RH introduced the claimant to new customers over a period of three weeks. On the 28 November 2008 he was in his office and he was informed that the claimant was in the premises. The claimant refused to go to the MD's office and the MD went to meet the claimant. He knew there was something wrong and they went to the conference room. The claimant told him that he was not having any discussion, he placed an envelope on the table and told the MD that we will settle with the solicitor or see you in court. He did not see the claimant after that. He told the claimant that he would subsidise his wages for three months and that is what they did. He pleaded with the claimant to try and discuss the situation.

He always had a good relationship with the claimant and he thought that the claimant was getting on with his job. The claimant had a great opportunity and had not even discussed it. He could not understand how the claimant had taken the job for three weeks. The claimant reported to GW who was sales manager and there was never a complaint. It was a shock when the claimant resigned and

there were no negative discussions. There was a fall in the sales figures in the orphan accounts and the respondent would have been justified in letting the claimant go. He endeavoured to maintain the claimant's dignity in the respondent. The claimant's job was held open until 16 December 2008.

In cross-examination he stated that from 2006 to 2008 two staff were employed in NI. One was good and the other did not have the experience that the claimant had. He thought that the claimant might be the better person to undertake the job. The claimant had years experience in selling and RH did not and the claimant knew NI very well. At the meeting on 3 November 2008, which the claimant, GW and the witness attended, they agreed a commission of 5% verbally. When they left the building the claimant asked him about an element of subsidy and a letter was completed that day. The witness and GW sales manager knew before 3 November what they were going to pay the claimant. There was a change in the business and the respondent needed to bring in more sales and that was the claimant's job. The claimant had six months to improve sales in the orphan accounts but this did not work out. He had a meeting with GW, the sales manager every week.

The claimant asked him about an extra subsidy and he told him that this would be reviewed. A three-month subsidy was given to the claimant. The commission was agreed at the meeting on 3 November 2008. To provide a sales representative on the road was expensive He could not remember if he telephoned the claimant after 28 November 2008. There was no doubt in his mind that he left it open to the claimant to call him.

In re-examination he stated that the claimant accepted his new position and it was a great opportunity for him.

GW told the Tribunal that he was sales manager with the respondent. On 3 November 2008 he had a meeting with the claimant and the MD regarding the figures in NI. They discussed with the claimant the possibility of going on the road and the claimant gave the impression that he was interested in sales in NI. The claimant felt he could make more money for the respondent and he assured the claimant that he saw potential to make commission. RH had previously worked in NI and he briefed the claimant on clients. At a meeting on 3 November 2008 he took a note regarding basic salary that the claimant would be paid and he would be paid commission. The claimant had no problem with the commission structure and he was to be given a basic salary of €35,000. He had no involvement in the grievance procedure. The claimant did not inform him that he did not want to do a job.

In cross examination he stated that he had a meeting with the MD and RH the sales representative in NI in October 2008 and the writing was on the wall for RH who worked in NI. He had to change the sales representative in NI at the end of October and early November. He and the MD got positive feed back from the claimant that he was interested in going on the road. In advance of the meeting of 3 November 2008 he and the MD decided that the claimant was going to take responsibility for sales in NI. GW did not believe he knew in advance the salary that was going to be offered to the claimant.

Determination

The claim before the Tribunal was one of constructive dismissal and the onus is on the claimant to prove that his decision to resign from his employment was reasonable in all the circumstances. In considering all the relevant evidence pertaining to the claimant's decision to resign, the Tribunal cannot accept that the claimant acted reasonably and his claim under the Unfair Dismissals Acts,

1977 to 2007 fails accordingly.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

