

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE **-Claimant**

UD460/2009

against

MN467/2009

EMPLOYER **-Respondent**

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. K. Buckley

Members: Mr D. Hegarty
Mr J. Flavin

heard these claims at Cork on 17 February
and 15&16 April 2010

Representation:

Claimant:

Mr. David O'Dwyer B.L. instructed by
Ms. Marguerite Ryan, Diarmuid O'Shea & Co. Solicitors,
60 Main Street, Kinsale, Co. Cork

Respondent:

Ms. Pauline Codd B.L. instructed by
Ms. Eirinn McKiernan, Eirinn McKiernan & Co. Solicitors,
11 Ashe Street, Cavan, Co. Cavan

The determination of the Tribunal was as follows: -

Dismissal was in dispute in this case and it fell to the claimant to prove the fact of dismissal

After previously working in fire fighting in both the Naval and Fire services the claimant joined the respondent, which provides fire protection equipment and services, particularly fire extinguishers, in June 1994. The employment was uneventful, indeed the claimant was regarded as a very effective sales and service engineer, with supervisory responsibilities for more junior engineers, until the respondent was taken over in April 2008.

Following this take-over the respondent held meetings with staff at the Cavan, Cork and Dublin offices. The claimant was unable to attend the Cork meeting, held on 24 April 2008, as personal matters required him to be out of the jurisdiction at fairly short notice. A new contract was proffered to employees at the April meetings and on his return the claimant received his contract. The claimant was unhappy with this contract, as it did not accurately reflect the bonus aspect of his remuneration package.

The claimant met the Managing Director (MD) of the respondent and the Managing Director (PD) of the company, which had recently purchased the respondent in Portlaoise on 30 April 2008. Whilst progress was made on the issue of bonus payments, issues arose both in regard to the payment of travelling expenses and in respect of the respondent's desire to install a tracker device on the vehicles driven by staff members on company business. This was a particular problem in the claimant's case as he used his own vehicle for company business.

The claimant met PD again in Cork on 12 June 2008 to discuss the issue of travelling expenses. On 11 July 2008 the claimant registered a business name under which he now trades. On 17 July 2008 the claimant met MD and the Human Resource manager (HR). There is a dispute between the parties as to whether the question of a possible exit package for the claimant was first mentioned at either the June meeting, the claimant's position, or the July meeting, the respondent's position. In any event on 18 July 2008 HR emailed the claimant with a proposed compromise arrangement. The package, which was conditional on the claimant accepting that he would not solicit customers of the respondent for a period of twelve months after leaving the employment, was open for a period of two months until 18 September 2008. Nine other employees among an existing staff of 135 also received exit packages from the respondent. After the threat of disciplinary action was raised at the 17 July 2008 meeting the claimant agreed to trial the tracker system in his vehicle.

On Friday 22 August 2008 the claimant approached the Cork Office Manager (CM) and indicated that he was minded to accept the exit package that he had been offered. CM told the claimant to think about his decision over the weekend and did not tell MD of the claimant's approach to him. On Monday 25 August 2008 the claimant confirmed to CM that he was going to accept the exit package and that he proposed to leave the employment on Friday 29 August 2008. When CM told MD of the claimant's decision MD made a check on the Companies Registration Office and discovered that the claimant had registered the business name on 11 July 2008. MD became concerned that the claimant was setting up in business against the respondent. He sought to speak to the claimant but was unable to arrange this until the following day.

On 26 August 2008 during a telephone conversation MD told the claimant to leave the employment immediately. The respondent's position is that during this conversation the claimant told MD that he intended to take customers from the respondent. MD wrote to the claimant stating that he had been dismissed for gross misconduct in regard to the claimant's solicitation of business from customers of the respondent whilst still in the respondent's employ.

Determination

There was a clear dispute as to whether the Claimant indicated that he intended to solicit existing clients of the Respondent. It was accepted by the Respondent that the Claimant was entitled to set up in business in competition to the Respondent. Indeed the Respondent admitted that it hoped that it could do business with the Claimant after he had set up in business.

The Respondent did not produce any evidence that existing clients had been solicited. The Tribunal was of the view that solicitation of existing clients during the Claimants employment might indeed have been a sufficient breach of the employment contract to allow for summary dismissal. However, no such evidence was forthcoming and clearly the dismissal was effected without the Claimant being afforded any opportunity to answer the allegation of solicitation which the Respondent made against him.

The Respondent might have had reasonable cause for coming to the conclusion that the Claimant intended to solicit existing clients of the Respondent. However, the Compromise and Settlement Agreement provided protection to the Respondent should such an eventuality occur within a period of 12 months of the severance. Due process was not followed

Any solicitation of the Respondent's customers after the dismissal was found not to be relevant because of the context in which the Claimant had been dismissed.

The Tribunal notes that, whilst the claimant had indicated his intention to accept the exit package on offer to him, he had not signed the form of acceptance of the package.

The Tribunal was satisfied that the Claimant had intended to resign from the Company subject to the terms of the severance offer contained in the Respondent's Compromise and Settlement Agreement. The Tribunal did not accept that the Claimant had intended to resign without the benefit of the severance package as had been contended by the Respondent.

In the absence of any, or fair procedure it must follow that the dismissal was unfair. The Tribunal awards €18,463.26 under the Unfair Dismissals Acts, 1977 to 2007.

The Tribunal further awards €3,902.04, being six weeks' pay, under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)