

## EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE

- claimant

MN172/2010

UD999/2009

against

EMPLOYER

- respondent

under

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

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mrs. M. Quinlan

Members: Mr G. Andrews  
Mr P. Trehy

heard this claim at Dublin on 31st March 2010

Representation:

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Claimant :

Ms Audrey Cohen B.L., instructed by John O'Leary & Co., Solicitors,  
Millennium House, Main Street, Tallaght, Dublin 24

Respondent :

Mr Mark Fitzgibbon, Lavelle Coleman, Solicitors,  
20 On Hatch, Lower Hatch Street, Dublin 2

The determination of the Tribunal was as follows:-

The fact of dismissal was in dispute in this case

#### **Claimant's case:**

The claimant in his evidence told the Tribunal that he commenced his employment as a General Manager in May 2007. There were three separate companies: restaurant, shop and the wholesale company. The claimant was manager over the wholesale company. There were fourteen staff when he started in the company and five when his employment ended. He started on a salary of €50K which increased to €60K. Around the end of 2007 staff were let go in his area. On 23<sup>rd</sup> January

2009 without notice, he was called to the office by the managing director (MD). This meeting lasted about five minutes. The MD said that the company was not doing well and he had to take a €15K pay cut, take it or leave it. The previous November the claimant asked if his job was safe and he was told by the MD that the respondent could not do without him. He was shocked at the suggestion of a pay cut and while a €5K cut may be acceptable but €15K, he could not afford. The claimant said he would let the MD know and he went back to work. He was told that others also had to take pay cuts, but did not say the amount and that all parts of the company were affected, restaurant, shop and factory.

At 6am on the following Monday the claimant started to get the vans and orders ready. He went to the MD's office and said he was refusing to take the pay cut and he was told to leave the keys of factory and the phone. The MD did not look at the claimant, he was on the computer and he kept his head down. The claimant left the keys and phone and the MD did not say anything. The claimant knew what the MD meant, that he was fired. It took just a minute. The accounts department office was next door and the claimant asked J was this it, was he sacked, and the answer was yeah, unfortunately they had to make pay cuts. He asked that his P.45 and wages be posted out to him and he received his P.45 a couple of days later. The claimant shook hands and said goodbye to the staff, who were aware from the Friday that it was either a pay cut or he was sacked. The claimant has a child with special needs and he offered to pay for his mobile phone as he wanted access to his contact numbers. It took eight to ten weeks to get it sorted. He was nine months out of

In cross-examination witness stated that he negotiated a salary increase to €60K in June 2008 when he had been offered another job. Prior to joining the respondent the claimant had worked in the same type of industry for twenty-two years. When the MD spoke to him about the pay cuts he did not ask if he was willing to take a 10% pay cut and that the cuts would not apply to junior staff members and neither did he say that the cuts would be temporary. The MD did not say he personally would be going off the payroll and to take time to think about it. On 26<sup>th</sup>

January 2009 when the claimant went to the office of the MD to say he could not afford the pay cuts he did not say he was leaving. Neither was the claimant asked to give two weeks notice. The accounts person, J told the claimant he was sacked and she signed a form for Social Welfare.

In answer to questions from Tribunal members in relation to the meeting with the MD on 23<sup>rd</sup> January 2009, there was no question of any sort of settlement. The claimant knew that if he did not take the €15K pay cut he was sacked.

### **Respondent's case:**

The Managing Director (MD) in his evidence told the Tribunal that he established the company in Howth in 1996. There are now fifty employees and there were no disputes with any previous employees. It went from a small wholesale business to three companies: restaurant, fishmonger and wholesale between 2007 and 2009. They had €2.5m capital expenditure and the builder went into Liquidation thus creating a lot of pressure on the existing business. The recession also kicked in around the same time. In August 2008 the respondent had a lot of bad debts, they lost trade and there was a downturn in the output. By December 2008 they had lost a significant amount with their debtors not paying on time and the business could not sustain the losses.

The claimant had ten/twelve staff reporting to him. The claimant was punctual, dependable and outgoing. Witness saw the claimant every day in addition to having a sales meeting every Monday.

In June 2008 the claimant approached him and said he had got a better offer. They were in the busy period, they depended on the claimant and they could not afford to lose him. At the end of 2008, in or around 21<sup>st</sup> December, the claimant and another colleague were in the wholesale dispatch office. The respondent had lost two significant accounts and they were talking about the business. The claimant asked was his job safe and the MD's response was that he hoped so but that things were tight. Nothing else was discussed. In January 2009 the respondent knew the company was losing money. Witness took himself off the payroll. Sales had gone down in the shop and restaurant. He went to the head chef who agreed to a pay cut and he stayed on. The restaurant manager also agreed to €10K pay cut plus the assistant manager and administration person also took a pay cut. When he spoke to the claimant on Thursday 23<sup>rd</sup> January 2009 he would have been aware as to what the conversation was going to be about. He told the claimant that the company was losing a significant amount of money and that he was not paying himself. The turnover was down and he had also asked others to take a pay cut. The claimant was asked to take a €10K cut and he said he would think about it and get back to witness. The next day, which was Friday one of the sales personnel told witness that the claimant was out sick and he did not work weekends.

On Monday witness was in at 8am and he met the claimant in or around 10.45am. The claimant did not acknowledge the fact that he was not in on Friday. He stated that he could not afford to take the pay cut and the response from witness was that it was going to be temporary and maybe in six months it would pick up. Some of the people he worked with would be on a lower salary and he did not ask them to take a pay cut. The company was in a serious financial situation at this time when he said he could not afford to take the pay cut and he then said he was leaving. Witness asked could he give him notice and he refused to do so and when he asked him a second time he got the same response. This meeting lasted five/ten minutes. Witness then brought the claimant in to the accounts office and witness told J that the claimant was leaving.

In cross-examination witness stated that another employee took a €10K pay cut and he offered rather than having to be asked to do so. He was not aware of the Social Welfare form and he could not explain why this form stated that the claimant was dismissed while the T2, notice of appearance stated that he had resigned.

In answer to questions from Tribunal members witness stated that the business is still losing money. It was the first time in the business that employees were asked to take a salary reduction. They did not offer redundancy as they wanted to keep the team. Two staff in total offered to take pay cuts as they knew the business was not doing well. The claimant has not been replaced.

The Tribunal also heard evidence from J, the accounts person. At the time that the claimant's employment ended she looked after the payroll and administration. On 26<sup>th</sup> January 2009 the MD and claimant came to her office. The MD said the claimant was leaving and he asked him would he not give him notice and the claimant refused. The MD asked for the keys and phone and the claimant said that it was he sacked and witness replied no, that he was leaving of his own accord. The claimant asked a second time and she gave him the same reply. She was shell-shocked and the claimant left the office. She was aware of cost cutting measures and the people had been asked to take pay cuts.

In cross-examination witness stated that he had no recollection of the Social Welfare form. She processed the P.45

**Determination:**

Having heard the evidence by both parties the Tribunal is of the unanimous view the claimant was unfairly dismissed and his claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds. The Tribunal is also of the view that there was an element of contribution by the claimant in his claim for unfair dismissals. It awards the claimant the sum of €9,000 under the Unfair Dismissals Acts, 1977 to 2007. His claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 is also successful and the claimant is awarded the sum of €2,307.70 under these Acts.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

