

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE - *claimant*

CASE NO.
UD1074/2009

against

EMPLOYER - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr M Gilvarry

Members: Mr D Morrison
Ms R Kerrigan

heard this claim at Sligo on 25th May 2010 and 24th August 2010

Representation:

Claimant(s): Mr John Duggan
Callan Tansey, Solicitors
Crescent House, Boyle, Co. Roscommon

Respondent(s): Mr Owen Carty
Orla Cummins Solicitor
Epworth Hall, Northgate Street, Athlone, Co Westmeath

The determination of the Tribunal was as follows:

As the dismissal was in dispute the claimant put his case first.

Claimant's Case:

The claimant commenced his employment with the respondent company, an electronics retailer, in September 2007. Initially he worked in various stores in the west of the country. He was asked to work at new premises in Sligo and he agreed as long as he received travelling expenses. He was experiencing difficulties in receiving payment for his travel expenses. He travelled more than others to cover stores in the region. The Area Manager had assured him that he would be paid expenses but the Managing Director (MD) told him that he would not. The claimant decided to move to Sligo in September 2008 as the Area Manager told him that it was likely that he would be

kept there.

The Sligo store is in a shopping centre and as the claimant was often alone he had to close the shop to take a toilet break. One day a colleague phoned him and asked what she should do as she wished to take a toilet break but she was alone in the store. He told her to close the shop for five minutes. The MD's wife rang the claimant an hour later and called him a monkey and said he was to do as he was told. The claimant explained the situation but she told him that he did not have the authority to close the shop.

On Wednesday October 29th 2008 the Area Manager asked the claimant to attend the meeting with the MD the next day in Killeshandra, Co Cavan at 9am. The claimant asked what the meeting was about but she did not know. At the meeting the MD told him that he couldn't afford to keep him in the Sligo shop and that from Monday he would like the claimant to work in his new telesales business in Killeshandra. The claimant believed he wasn't being given a choice and asked to think about it. The Managing Director said there wasn't much to think about. The MD introduced him to an employee whom he said was experienced in telesales, but she later told the claimant that she had applied for a job in a shop and had no experience.

The claimant emailed the MD the following day, Friday 31st November 2008, stating that he considered Killeshandra too great a distance to commute and that it constituted a change to his job description. He also requested that the 'grievance clause' in his contract be explained to him. He asked to discuss it with the MD before Monday. The MD replied that the claimant would be working in Killeshandra as per his contract and contended that the claimant had agreed to it. The MD stated that if the claimant did not go to work in Killeshandra there would be no other work for him. The MD stated that the company would make a payment toward the claimant's travelling expenses.

The claimant responded on November 3rd 2008 refuting the MD's contention that he had agreed to the move. He stated that he did not wish to work in Killeshandra. If that meant he was being dismissed he asked to be notified of it. If he was being kept on in Sligo he asked to be notified of his hours as his name was not on the roster for the following week. He requested that the MD correspond by email as he found the phone calls he received from him that Friday to have been intimidating. He went to the shop in Sligo on Monday to show that he was prepared to work. The claimant discovered that a full-time replacement had been hired for the Sligo shop. The claimant sought advice from a friend who was a solicitor. The claimant continued to be paid his wages.

There were a number of emails about when to meet to discuss the situation and what type of meeting it would be. The MD stated that the claimant was still an employee and the meeting was not going to be a disciplinary one. The claimant held a provisional licence and was unable to drive unaccompanied to Cavan. The claimant missed the first meeting arranged for November 24th 2008 as he missed the bus. They met on November 26th 2008 in Cavan.

When the claimant arrived at the hotel he met the Area Manager. She had a pen and paper and said that she was not going to be involved. When the MD arrived to meet him the Area Manager came with them. The claimant asked why she was there, as he believed it was to be between him and the MD. The MD said she was there to take notes. The claimant said he had asked previously if the MD was bringing someone with him. If he had known he would have brought someone. He asked to meet the MD alone, but he refused. The claimant said he didn't need the stress and showed the MD his shaking hands. The MD grabbed his arm and said 'I pay your wages. You do what I tell

you to do!’ The claimant felt that he was being bullied and said he couldn’t proceed unless they were meeting alone. He said he had taken legal advice and he believed it was not in his best interest to meet without a witness. The claimant believed that the Area Manager would not take an accurate record. The claimant apologised and left.

The claimant received an email from the MD dated November 27th 2008. The MD expressed his shock at the claimant’s behaviour at the meeting. The meeting was not disciplinary in nature. The email stated that the claimant had to attend work the following morning at the Carrick-on-Shannon store. The claimant did not receive the email until the morning of Friday November 28th 2008. He phoned the store to apologise for not being there. The Manager in the store said that they had enough staff there. He spoke to her again later and she told him that the Area Manager had called in to check if he had come in.

The MD emailed the claimant on the morning of October 28th 2008 stating that the non-payment of his wages was an error and that his wages would be available for collection at the Carrick-on-Shannon store that day. He emailed again on the evening of October 28th 2008 to initiate disciplinary proceedings against the claimant for failure to report for work at the Carrick-on-Shannon branch. The claimant felt that he had had enough and that he was being pushed out the door. He emailed his resignation letter on December 1st 2008.

Under cross-examination the claimant confirmed that his date of dismissal was 5 December 2008. He obtained alternative employment within one week of his dismissal. He continued working in this employment until the end of March 2009. He obtained further alternative employment in April 2009 and continued working with this employer until December 2009. He was in receipt of illness benefit for a period of time in 2010 and was unavailable for work for approximately 4-5 months. He is available for work at present and is in receipt of job seekers allowance.

He confirmed that he does not hold a full driving license and drove illegally on occasions while working for the respondent. He held a provisional driving license at that time and drove unaccompanied by a qualified driver. He agreed that he worked in a number of the respondent’s shops. He was flexible in regard to his work location, as he wanted to develop a good relationship with his employer. After a period of time he moved to the Sligo store and understood this to be a permanent position. He did not receive travel expenses when his location of work changed even though he was told he would receive expenses. He became worried about driving without a full license and this was of concern to him when he was asked to re-locate to the telesales position in Killeshandra. He agreed that he did not inform the respondent at interview stage that he did not hold a full driving license but he was not asked if he held a full driving license.

He accepted that the respondent confirmed to him that work was available in Carrick-on-Shannon or Sligo following his refusal to accept the telesales position in Killeshandra but he did not believe the respondent as his name was never put on a rota. He wanted to meet with the MD in Sligo but the MD refused to meet with him in Sligo. He agreed that he had missed 2 or 3 scheduled meetings with the MD. He did not engage in the disciplinary process and decided to resign after taking legal advice.

Respondent’s Case

The MD’s wife gave evidence that she works at the respondent company’s headquarters in Killeshandra. She has responsibility for general administration work and telesales. She was familiar with the claimant and had no issues with his work performance. She told the Tribunal that

the company has two shops in Sligo and on one occasion in autumn 2008 she was unable to make contact with one of the shops. She contacted the claimant who was working at the other shop and enquired as to why she was unable to make contact with the shop at Johnson's Court. The claimant informed her that they were short staffed and had to close the Johnson's Court premises for a short period of time. She did not call the claimant a monkey at any stage during the conversation.

The next witness gave evidence that she was employed as an area manager for the respondent company. She has responsibility for staff training, merchandising and administration work. She had no input into the selection of staff for the telesales office in Killeshandra. She told the Tribunal that the company had approximately 35 employees. The claimant was a good employee who was more than capable of doing his job. He was one of 12 employees who moved from store to store working for the respondent. Expenses are not paid to employees when they are asked to re-locate to a different store.

She was aware that there had been some difficulties between the claimant and the MD and she was requested by the MD to attend a meeting in a Cavan hotel. She understood the purpose of the meeting was to resolve those difficulties and her presence at that meeting was to take the minutes of the meeting. When the claimant arrived for the meeting he refused to take part in the meeting because of her presence. The MD explained the reason for her presence to the claimant but the claimant became very agitated, asked the MD for his solicitor's details and walked out of the meeting.

The MD gave evidence that he is the owner of the business. The company headquarters is based in Killeshandra and operates 9 shops in the midlands and North West of the country. He is involved in the day to day operation of the business. In autumn 2008, due to economic circumstances the company had to change strategy as sales the shops had decreased significantly. The company decided that it had to initiate contact with its customers and as part of that process a telesales unit was put in place. This unit was based in Killeshandra and the claimant was identified as a possible employee for the telesales unit as he was good at his job and had a good relationship with customers.

The MD invited the claimant to a meeting in Killeshandra on 30 October 2008 and asked him if he was interested in becoming part of the telesales team. The witness understood from that meeting that the claimant agreed to accept the position in telesales and he was due to commence work in Killeshandra the following Monday after the meeting. It was also agreed that the claimant would receive expenses as part of his re-location to Killeshandra. On Friday 31 October 2008 he received an e-mail from the claimant informing him that he (the claimant) had changed his position and did not want to join the telesales team in Killeshandra. The MD told the Tribunal that he probably over reacted when he received this communication and contacted the claimant to inform him that if he did not accept the position in Killeshandra he no longer had a job with the company. He was unaware that the claimant did not hold a full driving license which would have made it difficult for him to travel to Killeshandra daily.

He attempted to organise a number of meetings with the claimant to resolve the difficulties that had arisen and eventually met with the claimant on 26 November 2008. The claimant had not worked for the company in the interim but the company continued to pay his wages. The area manager was present at that meeting in her capacity to take the minutes of the meeting. The claimant refused to participate in the meeting in the presence of the area manager and walked out of the meeting. The witness told the Tribunal that he made a mistake when he told the claimant that he no longer had a job if he did not accept the telesales position in Killeshandra. He apologised to the claimant for that

statement. Through a series of e-mails he offered the claimant his job back either in Carrick-on-Shannon or Sligo whichever was his preference. He did this prior to the scheduled meeting on 26 November 2008. He did so as he was anxious to retain the claimant in employment as he was a good employee. He received no confirmation from the claimant stating that he was willing to accept this offer.

The final witness told the Tribunal that she was employed as a retail manager with the respondent for 2 years. She interviewed the claimant for his position with the company in August 2007. She gave evidence that the claimant told her during the course of the interview that he held a full clean driving license.

Determination

The Tribunal carefully considered the evidence adduced and the submissions made.

Dismissal was in dispute in this case and it fell to the claimant to prove his case on the balance of probabilities that the respondent's conduct was such that it was reasonable for him to resign.

The claimant was aggrieved by the respondents MD requiring him to move to Killeshandra and change from a retail job to a job involving telesales. This was compounded by the MD telling him he would be dismissed if he did not agree to the move. However the Tribunal accepts the MD's evidence that this threat was withdrawn and apologised for. Subsequently the claimant in the Tribunal's view, effectively refused to engage with the respondent. The claimant stated that he felt the offer of a return to work in either Sligo or Carrick on Shannon was not genuine, as he was not put on the roster, and therefore he did not report for work. When the respondent initiated disciplinary proceedings over his failure to return to work he then resigned.

The initial actions of the MD were not best practise in assuming the claimant's consent to the move and change of job description, and he acted wrongly in threatening the claimant with dismissal. However thereafter the respondent acted reasonably towards the claimant by withdrawing the threat of dismissal and attempting to meet the claimant to resolve the situation, and by offering the claimant a return to work in Sligo or Carrick on Shannon. The Tribunal determines that the claimant has not shown that in all the circumstances it was reasonable for him to resign.

The Tribunal therefore dismisses the claim under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)