

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
EMPLOYEE

- *claimant*

against

EMPLOYER

- *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

CASE NO.
UD411/2007
RP174/2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. P. Clancy
Members: Mr. G. Phelan
Dr. A. Clune

heard this claim at Limerick on 5th November 2008
25th February 2009
and 21st January, 2010

Representation:

Claimant: Mr. Leonard Parker B.L. instructed by Mr. Melvyn Hanley, Melvyn Hanley,
Solicitors, 16 Patrick Street, Limerick

Respondent: Ms. Theresa O'Donoghue, Sweeney McGann, Solicitors, 67 O'Connell
Street, Limerick

At the commencement of the hearing, the claim under the Redundancy Payments Acts, 1967 to 2003 was formally withdrawn. The dismissal of the claimant is in dispute.

Opening statement:

Counsel for the claimant stated that the claimant had been employed by the respondent as a sales executive and had considerable experience in this area. He first met the respondent in December 2004 and commenced employment on 3 January 2005. The role of the claimant was to visit sites and to meet with customers, prepare quotations, create sales, prepare production orders on quotations acceptable to customers and then give same to the respondent. The role was to generate sales only and he was paid 5% on the generated sales. After this stage, the claimant did not have much more follow-up with customers. He was not involved in the generation of invoices. The claimant received 5% commission on sales totalled up for a particular month.

The working relationship worked well until mid-2005. At that stage, a business advisor (

hereinafter referred to as HOD) was employed to re-organise the respondent and during the summer of 2006, he mentioned certain things that caused the claimant to be concerned about his job. In November 2006, a meeting with the claimant, HOD and the respondent was held. The supposed purpose of this meeting had been to deal with sales but it had focused on the area of how sales were being generated. The respondent proposed a change from “commission on sales generated” to a “bonus on new sales generated”. If this new proposal was adopted, the claimant would not receive commission for sales made with existing customers and he would only receive his commission on payment by the customer. The claimant had not agreed to this proposal because it would have had a detrimental effect on his income. The claimant’s health subsequently deteriorated.

The respondent produced his own hand-written list containing twenty-four sales. It was alleged that the claimant had not been entitled to claim commission on these sales. Various other lists were also produced and were based on a trawl of all of the claimant’s sales from January 2005 to December 2006. The claimant was asked for an explanation of all of these sales and he gave same, in detail. However, subsequently the claimant received a letter dated 12 December 2006 from the respondent, which stated therein that he had engaged in fraud by claiming and being overpaid commission. This letter had disturbed the claimant.

The figures vary between the different hand-written lists and the letter to the claimant. However, the claimant’s counsel contended that the issue was that of the accusation of fraud and the figures were immaterial. The respondent had made a complaint to the guards and this was of concern to the claimant.

Following receipt of the letter of 12 December 2006, the claimant had contacted his legal representative. He was advised to attend his doctor, which he did on 19 December 2006. His doctor prescribed tranquilisers for him. The claimant returned to the respondent and submitted a sick certificate on the same day. The claimant also gave the respondent a letter which he had received from his legal representative and which outlined the claimant’s concerns in relation to his position with the respondent. On submitting the sick certificate and letter to the respondent, there was a confrontation in that the respondent demanded the return of the company car, telephone and lap-top. The respondent also attempted to cancel the claimant’s car insurance and contact the claimant’s doctor by telephone. The confrontation continued on to 20 December with the respondent demanding the return of the company car. The claimant’s wife returned the car that day.

The claimant was not paid during the Christmas period nor did he receive sick pay. The respondent purported to set up a disciplinary hearing. By January 2007, the claimant had no car, telephone, lap-top and was not in receipt of wages so reasonably terminated his employment. His employment was terminated by letter dated 9 January 2007 from his legal representative and was done so because of the respondent’s behaviour. By letter dated 1 February 2007, the respondent’s legal representative responded to the effect that the claimant’s resignation was accepted.

The respondent has claimed that the claimant was involved in fraud and the claimant had been interviewed under caution by the Gardai in relation to the allegation. The claimant’s counsel said that the allegation of fraud is a malicious claim.

Since the termination of his employment, the claimant had established his own business. This business made a loss in the first year of operation.

Claimant’s case:

The claimant had been a self-employed sign-writer. The respondent had employed him to promote their business. He was introduced to the respondent's managing director (*hereinafter referred to as JK*) by a silent partner of the respondent and in late 2004, the claimant entered into a contract of employment with JK.

The claimant met customers and established what they needed. He would measure the job and give a quotation for same. If the quotation was accepted by a customer, he would write a production order specifying such things as the size, make, colour, number, etc., of the product. All of the production orders were sent to JK and the claimant claimed 5% of the net value of the sale as commission, claimed monthly. The claimant had no real involvement in the production of the product or in the invoicing of a customer though sometimes he would attempt to get payment from customers if money was not forthcoming. The claimant experienced no difficulty in getting his commission during 2005, which was on sales of €350,000 to €360,000.

In 2005, HOD commenced employment with the respondent. Initially, the claimant had understood that HOD was employed to improve the company. However, following a conversation with HOD, the claimant began to have serious concerns, as it appeared that JK wanted to be rid of him.

A meeting – scheduled as a sales meeting – happened in November 2006 and was attended by the claimant, JK and HOD. JK opened the meeting with the sales figures that had been made by the claimant. During the meeting, JK proposed that the claimant's November commission would not be paid and that all future commission only be paid when payment was received from customers. Because commission had always been calculated on actual sales generated, the claimant had absolutely refused to the proposed change. Payment might not be received from a customer for a number of months and the claimant would not be able to live on such an arrangement.

The situation got progressively worse from that date onwards. The respondent prepared four or five different lists of customers and it was indicated from these lists that the claimant had defrauded the respondent by various amounts of money.

The claimant was examined on the work done by him for the customers named on the lists and he gave an account:

- Ø company who wanted their logo represented exactly. It was difficult to estimate how much time was invested on this customer.
- Ø company who wanted a new logo set in a light-box. A quotation was given, a price agreed and a production order prepared
- Ø a company with one specific order. A site visit was made, the job priced and a production order prepared
- Ø company who wanted a picture on a roller-shutter. A quotation was given and a production order was submitted
- Ø company that purchased a factory floor sign
- Ø company that got a site visit and where photographs were taken. The job was priced and a production order was sent.
- Ø hotel which was visited and where photographs were taken. A quotation was given and a production order was sent
- Ø company that wanted an unusual sign. The site had been visited and a production order was submitted
- Ø company selling high-end house/hotel wear and where a lot of orders were generated. The figure of €7696.00 represented all orders that had been made
- Ø football club where a site visit was done
- Ø hotel that had a requirement for a number of internal and external signs. A quotation was given and a production order prepared

- Ø order for superimposed banners for a building. A site visit had been done
- Ø pharmacy that required three sites visits. The shop front had been photographed and the ideas of the owner had been incorporated. A quotation was given and a production order submitted
- Ø store that required one site visit and which generated a small account for the respondent
- Ø building requiring a backlit steel lettered sign. A quotation was given and a production order submitted
- Ø store that wanted external signs so as to be visible from the street. The owner had been visited a few times by the claimant and JK. A quotation had been accepted for the work and a production order submitted
- Ø visit to a site owner, which had resulted in a quotation and written production order. The sale had been generated but the work had not been completed
- Ø a business in Co. Clare where a number of quotations were given and one was finally accepted and a production order was submitted
- Ø taxis displays where a quotation was given and a production order was submitted

The claimant had also given an explanation of the named customers to JK but considered that his explanation had not been accepted because an alternative/different list of customers had subsequently been produced. One list had shown commission claimed in the amount of €3301.43 and the other list showed a claimed amount of €4026.00. The claimant had tried to explain the customers on the second list to JK as far as he was able. Four lists were definitely produced and the claimant had explained their content to JK, except in the case of the last list, because he felt that his explanations were going nowhere.

On 12 December 2006, the claimant received a letter of the same date from JK. His reaction to this letter was one of annoyance. The letter had been more official than previous correspondence and it had made reference to “summary dismissal”. On finding out the meaning of this term, the claimant had considered that he required legal representation and so had contacted his solicitor. He was not feeling well and knew that he was out of a job.

The claimant attended his doctor on 19 December who prescribed medication for him and issued him with a sick certificate. He returned to work that day with his sick certificate and a letter from his solicitor. When he arrived at the respondent’s premises, JK was not present so the claimant waited for him to return. On JK’s return, the claimant gave him the sick certificate and the solicitor’s letter. On receipt of same, JK got extremely annoyed and wanted the return of the company’s car and telephone. However, the claimant explained that as he had personal stuff in the car, he still needed it. The claimant also had the car personally insured.

While returning from his visit to the respondent, he received a telephone call from his own insurance company informing him the JK had contacted them wanting to cancel the car insurance and instructed that same was not to be renewed in January. The claimant had told the insurance company that the car insurance was not the insurance policy of JK and so could not be cancelled by him. JK had also attempted to make telephone contact with the claimant’s doctor but the doctor had not been available at the time of JK’s call.

The claimant confirmed that he was not paid the commission due to him nor did he receive payment for December. On 20 December, following advice from his solicitor, the claimant returned the company’s car, telephone and blue tooth device to the respondent but without these tools, the claimant could not continue to do his job.

The claimant first saw the respondent's grievance procedures in about mid December 2006. They had come, stapled to a letter that he had received from the respondent. He had never seen them prior to this time, which was almost two years post the commencement of his employment with the respondent.

By way of solicitor's letter dated 9 January 2007, the claimant tendered his resignation to the respondent. The resignation was tendered at the claimant's own volition. He did not feel that he had any other option and could not return to work for the respondent again. Following the termination of employment, the claimant discovered that his contract of employment had not been honoured in respect of his pension, which was supposed to be paid by the respondent at 15% of the claimant's salary.

The claimant denied that he was guilty of fraud or of stealing from the respondent. A Gardai Inspector had contacted him by telephone and invited him to make a statement. The Inspector had said that JK had lodged a complaint. His statement to the guards was made some weeks later, in August 2008. However, nothing had come from same.

The period from December 2006 to January 2007 was not a pleasant time for the claimant. Due to the stress of the situation, he had been on medication for a number of weeks.

The claimant established his loss for the Tribunal. Since the termination of his employment with the respondent, he has formed his own sign company on securing a loan of €50,000. This new company is working well.

In cross-examination, and to the query of his understanding of a sale based on the terms of his contract of employment, the claimant replied that "a sale is a sale", where something is provided and money is exchanged. Commission was due to him when a production order was written. However, he did not always follow-up and check to ensure that the end result of a production order was an actual sale. It was put to the claimant that the commission he had claimed had been paid in good faith. His figures had been taken at face value and it had only been on a routine check by JK's wife in November that it was discovered that commission was being claimed on sales that had never been completed. However, the claimant rejected that there was no agreement that commission would be paid without an actual sale occurring.

The claimant agreed that at a meeting on 28 November 2006, JK had shown him discrepancies in commissions that had been claimed and had asked for explanations for same. The claimant maintained that he had supplied these explanations. At a further meeting on 5 December the claimant was given a document by JK containing twenty-two to twenty-nine queries and he was asked that an explanation be supplied by 12 December. The claimant disagreed that he had only given five explanations by this date but had given answers to all of the accounts that he was familiar with.

The claimant confirmed that he received the respondent's grievance procedures on 12 December. When put to the claimant that because no legitimate explanation had been supplied to the queries, a complete breakdown in trust had occurred, and the respondent had given him the grievance procedures and then requested another meeting to investigate matters further but he had gone sick, the claimant rejected this. The claimant distinguished between "giving an explanation" and "giving an explanation that was unsatisfactory to the respondent".

At the meeting on 28 November, the claimant had been asked for a verbal explanation about discrepancies and anomalies in commissions that he had claimed. The respondent had written to him on 5 December and 12 December seeking a written reply to same. The claimant had been given access to the files so as to assist him in the provision of explanations and no suggestion of fraud had been made at this stage. When asked why he had not replied in writing to these queries, the claimant explained that he had contacted his legal representative. He had only been given a week to answer twenty-nine queries and the files could not be removed from the respondent's premises. He had not asked for more time to go through the queries and provide explanations. It did not matter what he said to JK because his explanations would not have changed JK's mind. It was put to the claimant that this was his assumption.

The claimant accepted that the respondent had a legitimate reason to raise queries but it had been on the advice of his legal representative that he had not given a written reply to same. He had been told how serious the discrepancies and anomalies were. The respondent had instigated an investigation into same and, by letter dated 12 December, had supplied the grievance procedures and advised the claimant that he could be represented at meetings. The claimant agreed that on receipt of the letter of 12 December, he had attended his doctor and had then submitted a sick certificate to the respondent, which had certified him as unfit for work until 9 January 2007. The respondent arranged a meeting for 10 January but prior to this date, the claimant submitted his resignation.

The claimant rejected the suggestion that if he had not resigned prior to the commencement of the disciplinary process and if he had supplied a satisfactory written explanation to the queries, the matter could have been resolved. Two or three verbal explanations had been given to the respondent but they had not been accepted. Because these explanations had not been accepted, there had been no point in giving an explanation in writing. He agreed that on 5 December, he had said that any disputed commission that he had received could be claimed back from his wages.

The claimant resigned on 9 January prior to the disciplinary meeting, which was scheduled for 10 January. It had been on legal advice that he had resigned. It was put to him that he had been given an opportunity to explain the queries, that an investigation meeting had been organised, that he had gone out sick and had taken it on himself to resign. The claimant rejected the suggestion that he could resign and then allege that the behaviour of the respondent in investigating the queries caused his resignation and his claim of constructive dismissal. He had met with JK but JK had chosen not to accept the answers given to the queries.

It had been the claimant's dream to set up his own business. In this regard, he had looked at a van in December 2006. He had done this because the respondent was threatening to fire him and it was obvious that he was out of a job. It was put to the claimant that the letter of 12 December had referred to a grave matter which could result in his summary dismissal but there was no suggestion had he was going to be dismissed. He had offered no explanation to the queries because he could not but had instead gone about setting up his own business. The claimant confirmed that he had not sought alternative employment after the termination of his employment with the respondent because of the shadow that the termination had left over him.

Respondent's case:

The Tribunal heard evidence from one of the co-founders (also know as JK) of the respondent company. The company was founded in 1987. He bought the other persons interest in the company and his wife then became the other director.

In January 2005 the claimant began working with the company. The claimant was employed to

replace another salesman who had retired. An advert was placed on the Internet. The former director interviewed the claimant. The terms and conditions of the claimant's employment evolved over a period of time.

The witness explained the procedure for sales:

The claimant as a sales person usually met the customers on site. The customer showed where the sign was to be placed and the claimant measured the area. The claimant took a digital photo to superimpose onto a template/photograph. The information was brought back to the factory and the work was then priced. Then they sent a price quotation to the customer. The sales commission was 5%. Not all quotes ended in a sale. Ninety-five of business was carried out, "On trust, on word of mouth".

The witness explained the internal paper trail procedure:

The job sheet is a document, and this would generally be accompanied with a freehand sketch, including dimensions and material to be used. This job sheet would be added to a list that he has in his office. There is a weekly work list in his office. The jobs on the work list are then sent to production. The production person could ask for clarification about a job. After the job is completed the job sheet arrives back in a circle to his desk to be invoiced. He then checks the job sheet to see if all is correct, i.e. if there are not any loose ends. When the job is completed he then gives the paperwork to the admin person who sends the invoice to the customer. The job sheet is then filed away.

When they offered the claimant the position of salesman they offered him a generous terms and said that they would pay his commission when the sale was generated; this was against the industry norm. There was no policy in place for commission when quotations were sent.

A discrepancy came to his attention in that an invoice for €16,000.00 had been generated for a customer and the claimant told him that he was there when this was generated. He told the claimant that he was not. There was a discussion with the customer about banners for €800.00. The work in question had not even taken place and there was no transaction between the customer and respondent around the date in question.

Regarding another customer and an amount of €8250.00 they had no record of ever doing any work for that customer; there was no job sheet, no invoice and no record of accounts.

He had a meeting with the claimant and asked the claimant about the discrepancies. He took notes of the claimant's answers to the questions.

He and his wife went over all the commission reports that the claimant had given them over the years they spent hundreds of hours examining these reports and they found 29 anomalies that they couldn't account for.

He then asked the claimant to a meeting in the office for 22nd November. He put the questions to the claimant and the claimant volunteered answers to some of the questions. He took notes of the claimant's answers to the questions. He was not satisfied with many of the answers.

On 01st December the claimant, for some reason, presented him with a claim sheet with one of the claims for €16,000.00 deducted from the total sales amount. He did not know why the claimant did that. The claimant also asked him to remove some sales from his future sales amounts

Determination:

The claim under the Redundancy Payments Acts, 1967 to 2007, is dismissed. The claim under the Unfair Dismissals Acts 1977 to 2007 succeeds. The Tribunal consider that compensation be the most appropriate remedy and awards the claimant the sum of €8,000.00, under the Unfair Dismissals Acts 1977 to 2007.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

**Below is an alternative to the line in italics which is found in paragraph 5, page 3 above
(Please bring both possibilities to the attention of the Division)**