

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
EMPLOYEE - *claimant*

CASE NO.
UD760/2009
MN777/2009
WT328/2009

against

EMPLOYER - *respondent*

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. J. O'Connor
Members: Mr. D. Hegarty
Mr. D. McEvoy

heard these claims in Killarney on 28 April 2010 and Tralee on 13 July 2010

Representation:

Claimant:

Mr. H. Pat Barriscale, Holmes O'Malley Sexton, Solicitors,
Bishopsgate, Henry Street, Limerick

Respondent:

Mr. David Gaffney, Coakley Moloney, Solicitors,
49 South Mall, Cork

The determination of the Tribunal was as follows:

It was alleged that the claimant, a sales rep, had been unfairly dismissed, without notice of termination and without any proper procedures being followed, after employment with the respondent from 12 February 2007 to 7 February 2009. A claim was also made under the Organisation of Working Time Act, 1997.

The respondent acknowledged that the claimant had worked as a sales rep selling company product to end users but contended that, regrettably, this part of the business was not viable and the respondent had to let him go with a week's pay in lieu of notice.

In an opening statement the claimant's representative said that the respondent had called to the claimant's home on Saturday 7 February 2009 saying that the claimant's employment was over. By letter dated 23 April 2010 the respondent subsequently sent the claimant a cheque for €363.93 in respect of outstanding notice which the respondent acknowledged to have been due to him on the date it ended his employment on the grounds of redundancy and which it accepted to have been an oversight on the respondent's part not to have paid previously.

The claimant had suffered a road traffic accident and had suffered a fracture to his left wrist. Ten days later, the respondent ended his employment. There was no notice of redundancy. It was alleged that the accident had been used to get rid of him, that no procedures had been applied in the termination of his employment and that fourteen months later the respondent had sent him a minimum notice payment five days before the Tribunal hearing.

In response, the respondent's representative stated that thirty employees of the respondent had gone down to ten. Two others had been terminated on the same day as the claimant. The sales force was made redundant. It was argued that there was no legislation for individual redundancies and that the respondent was not obliged to adhere to any statutory framework when ending the claimant's employment. The claimant was told that he would get one week's notice but a clerk accidentally put in the wrong details. The claimant should have been entitled to redundancy. The respondent had not thought that he had two years' service. A letter from the claimant's solicitor said that it was an unfair dismissal. It was not thought appropriate to pay redundancy when unfair dismissal was claimed. Notice was paid to lessen the work for the Tribunal.

The respondent called to the claimant's Limerick home from Kerry. The claimant's employment was terminated. The respondent was "haemorrhaging" money. It was nothing to do with the claimant's accident. He was not replaced. Another individual was taken on for a different purpose. It was not an unfair dismissal. If the respondent was guilty of not complying with legislation it was submitted that the only claims for the Tribunal to hear pertained to minimum notice and unfair dismissal.

Giving sworn testimony, the respondent's financial controller (hereafter referred to as FC) said that she had been with the respondent since 2000, that she was one of two sisters and two husbands who were equal directors of the respondent and that she was familiar with the claimant.

The respondent started as a plant and tool hire business with only three people. Then it expanded to sales of related items. In 2004 it opened in Kanturk. In May 2007 it opened in Kenmare. The respondent expanded into direct selling. The claimant joined in February 2007. The claimant found customers for the respondent rather than the customers having to come through the door.

The construction boom helped the respondent. Things went well. However, there was a drop in sales from August 2007 on. From 2008 the respondent "saw a huge blip". The claimant's work as a rep involved finding customers and doing direct selling. Another employee was made redundant on the same day.

There was a 26% decline in the respondent's total figures for January-June of 2007 to the same period in 2008 and a 42% decline for July-December of 2007 to the same period in 2008. This second periodic comparison saw a decline in the sales work category (designated as "Quality") of 38%. November and December of 2008 saw a big drop compared to the same months in the previous year.

The respondent persevered with its sales staff. With no turnover there would be no income. Sales staff were the last ones the respondent needed to lose. However, January 2009 sales were also bad. There was no improvement.

The respondent met the sales staff every month. Nobody thought the respondent was “flying”. The Tribunal was referred to a table of the claimant’s sales and costs for November 2008 to January 2009 inclusive. In 2007 the respondent had only had one rep in “quality fixings”. In 2008 it wanted people to get more sales. They now had three people in sales but profit was needed to pay the bills. A small profit on each of three sales reps would be better than from just one. The respondent tried to get any profit it could.

On 1 May 2007 the respondent opened its doors in Kenmare. It got caught at the wrong time. Towards the end of May 2008 the respondent brought in people. From September to December there were two people in sales because one was terminated due to his position not being viable.

For the three months ending with January 2009 the respondent made a loss on the claimant’s salary (and PRSI) of just over six thousand euro. In January the respondent held a sales meeting to make the sales division survive. The respondent had pondered over Xmas. It made a last-ditch effort. It was trying to cling on and wait for the recession to end. It had had a blip before but this downturn got worse and was still doing so. The respondent now had ten employees: five full-time, five part-time and the four directors. It now had no salespeople. In nineteen months it had let twenty people go. Meetings had been held usually in FC’s office. They discussed ways of going forward. They were trying to get sales to increase turnover. They bought a big quantity of pallets of nails but not one sold. They were doing all they could. The employees were as hopeful of selling nails as the directors were. They all hoped to keep the respondent afloat.

There were certain products for which the respondent was not competitive. The respondent’s prices were too high. Suppliers were cutting the respondent out. Prices could not be reduced. FC often did quotations for the claimant. He did his best. In July 2008 she met with him. He sold product to a certain customer but it was a bad debt in the end. Sixty days of credit became like ninety days. The respondent was caught for thousands by people. It had huge bad debts. Some people got away with this. The claimant and others knew ways of making money but FC could not reduce prices to sell at a loss. The claimant worked all over the country. She never stopped him getting a sale.

On 13 February 2009 three sales employees were gone. The claimant and BOS had been the only ones out on the road. The claimant had known about the decline. Regarding Xmas, the claimant had asked about the usual thing of giving gifts to customers and a staff bonus but the respondent could not do it. The respondent used to make sure that all of the claimant’s sales were on the system (so that he would get credit for his work).

The respondent was back after Xmas on 2 January 2009. There was a meeting on 6 January 2009. It was a last-ditch effort to save jobs. The Tribunal was referred to a letter of that date to management and staff from FC detailing sales targets and commission structure. The respondent outlined that recent sales had not been sufficient. The margin was low. The company needed enough sales to make it worthwhile. Price could not be cut too low. They discussed everything. It was a lengthy meeting i.e. it went on for hours. The level of sales was discussed. The level of turnover was the issue. A new wage structure was put in place. Sales reps’ salaries went from over €30k to €20k and commission.

The claimant came to FC the next day about the reduction in salary. He said that he had financial commitments. She welcomed him “to the real world” and said that the directors also had commitments but were no longer taking a salary. She said that she could not pay high wages. Turnover was down. She gave him money when she had it. There was “no magic solution”. They were trying to get sales. Without them there was “no magic answer”. The claimant said that he had a week’s holidays left and that he wanted them at the old rate. The claimant was “employed and paid current”. All others were paid a week in arrears. She gave the order that he be paid at the higher rate for his holidays. Their discussion was about salary and not about commission. The claimant did not refuse to take the salary cut. He knew where her door was if he had any grievance or objection to pay reduction or anything else. The respondent had to have defined sales targets. The lack of money was so critical. The company was striving to get sales. It was cutting costs to increase turnover to get profit.

The Tribunal was now referred to a letter dated 23 April 2010 from a bank confirming that “revised facilities” had been agreed with the respondent after a meeting on 29 January 2009. The letter stated that the respondent’s overdraft facility was halved “with no excesses allowed” and that it had been “highlighted” to the respondent that “they would need to take whatever cost-cutting measures necessary to enable them to work within these restructured facilities going forward”. The letter concluded by saying that the respondent’s directors had accepted these terms and signed relevant documentation to that effect.

FC stated that in 2008 banks had been lenient rather than calling people in but that they had been getting stricter. The respondent had hoped that its bank would leave its overdraft in place. The overdraft was being used for working capital and to pay wages. FC got no extra facilities from the bank. In fact, the respondent’s facilities were cut. The consequence of this was that she had to look at the figures and make decisions about how best to spend money into the future. She had to look at every department regarding staff and creditors. She had to comply with Revenue. Her cost cutting was not just regarding staff. She had to figure out a strategy. She could not afford to close the respondent. There was a farm tied up in the respondent’s business. FC told the Tribunal “it was like watching a video of my funeral”.

On 21 January 2009 the claimant had an accident. He was hit from behind when driving. Someone crashed into a car, which crashed into the claimant.

Asked about Saturday 7 February 2009, FC said that on 6 February 2009 it had been decided to make three employees redundant. The respondent had reps on the road and associated diesel expenses. They were costly to keep on the road. The respondent had to minimise its losses. FC and another director spoke to BOS (the claimant’s fellow travelling sales rep). Two directors drove to the claimant’s house on 7 February. The claimant was paid for the week. The directors had also informed a third employee of being made redundant.

Asked if the claimant’s accident had been the reason for his being made redundant, FC replied that the claimant had not been the only one made redundant and that she would not make two others redundant to “camouflage” the claimant’s redundancy. She had the minimum number of staff left at counters. Quality fixings (the claimant’s department) was the least profitable department because it was direct sales. Hire was more profitable. There was no selection process (because all sales reps were terminated).

It was agreed to drive to the claimant (to tell him of his redundancy). Asked if there was a better way of telling him about losing his job, FC replied that there were “not many better ways than

personally telling him” of his redundancy. She herself did not go because she had four children. Asked how else the claimant could have been told, she replied: “I think we went out of our way in the way we told him.” All the others had been told at work. The claimant had been “under no illusions” as to the respondent’s circumstances. He had been in the respondent’s building once a month. Also, he used to phone FC if he thought COC (director and sales manager) was not giving him a good enough price.

FC acknowledged that the claimant had had two years’ service. Asked why he had not got redundancy, FC replied that MC (the HR manager) who did his wages had genuinely thought that 6 February 2009 was his date of termination. The same date of termination was on all P45s. All the others had less than two years’ service. Redundancy was offered to the claimant. He did not accept it. It had been offered in the past month i.e. two or three weeks before the hearing. Referred to a redundancy calculator printout, FC stated that she now accepted that the claimant had had two years’ service.

Regarding the bringing in of another man (TD) to work for the respondent, FC told the Tribunal that this was done to help the respondent to “improve” i.e. to target a different type of customer. TD had previously worked for another company (OF) and been, in FC’s words, “our most respected rep” who “possessed expert knowledge that we did not possess”. He was taken on to bring in business for the respondent.

Asked what the respondent had done with TD, FC said that the respondent had become “totally uncompetitive” and that she had wanted to do what another company (WR) was doing. She now bought in Taiwan, India and “far-off places”.

Documentation was furnished to the Tribunal as evidence of TD’s ability to source lower product prices for the respondent. FC referred the Tribunal to documents to show that the respondent had previously paid €11.50 each for nailer fuel cells but had subsequently been able to buy them for €2.92 each. She indicated an invoice that showed the respondent being charged €4.00 each for another product and then a sales confirmation sheet showing the respondent subsequently paying €1.63 each for the same item. The respondent was now getting a much better deal on threaded screws also and FC highlighted this in documentation furnished to the Tribunal.

TD sourced all this material for FC. They had discussed, before TD came, what he would do for the respondent. He had worked all his life in this and was bringing “a lifetime of knowledge”.

In good times customers came in to the respondent. The company bought as best it could from suppliers. TD knew what level of quality there was in particular goods and he knew about avoiding bad debts. He went to a trade fair in Stuttgart with two directors of the respondent.

Regarding the respondent’s financial situation, FC said that the respondent was developing its own Internet site when her son (in his late teens) got holidays because the respondent could not afford to pay someone.

TD did purchasing and sales but to a different kind of customer. He sold to the respondent’s equals in that he went around in a suit selling to shops. The respondent had not previously sold to shops. However, TD only sold to shops that he knew would pay up. FC did not suffer a bad debt with any of TD’s customers.

FC referred the Tribunal to customer listings and said that TD's debtors were different to the respondent's old debtors and that TD's shops were "mainly electrical and plumbing". He started with the respondent on 2 March 2009, worked for one year and brought in new business.

Asked when the respondent had started talking to TD, FC replied that this had been "at the back end of 2008". TD had been with the respondent once a month as a rep. On 12 February 2009 he decided to join the respondent. He got a contract on 13 February 2009, started work on 2 March 2009 and worked with the respondent until 2 April 2010.

Resumed hearing 13/07/10

The FC explained that the claimant's position did not remain. They had monthly meetings with the claimant. Also in September 2008 they met the claimant and the two other sales representatives and explained that a person had been made redundant and if they did not achieve their targets then their jobs would go the same way. It was put to the witness that they seized on the fact that the claimant had an accident to let him go. She explained that they had let two other staff go. It was put to her that they unilaterally reduced the claimant's wages in 2009, and she replied that the claimant had an option of increasing his wage by increasing his sales.

It was put to the witness that they made three people redundant on 06th and hired someone (TD) on 13th February; she explained that the person hired did a completely different job.

The Tribunal heard evidence from one of the directors (KH). He was involved in monthly meetings with the claimant. Six to seven months before the redundancies the company was going into a decline. On 31st July 2008 they had a full staff meeting about the decline in business. He outlined to staff how serious the situation was. The claimant was unable to attend that meeting; he was informed of the meeting. The claimant was informed of the next meeting, which was in August 2008. They agree to buy €50, 000.00 of products/nails. However the building sites closed down and they still have most of the nails on their premises.

There was another meeting in September and one of the sales representative s was let go. The other representatives were told that if sales did not increase then their jobs would be at risk.

There was another meeting in September with FC, the claimant and the other sales rep to discuss the sales targets that were not being achieved.

There was no Christmas party as, "We were on our knees and had to cut back". The directors discussed the situation over Christmas. They laid out a structure to keep sales viable. The situation came down to achieving sales.

Regarding the redundancy they went to the claimant's home to tell him personally rather than finding out third hand.

The witness in answering questions from the Tribunal explained that the turnover is down 80% and twelve more people were let go since the claimant was let go.

The Tribunal heard evidence from the claimant. There was a meeting in September 2008 and a person was let go. He was not aware that his job was at risk. The purpose of the meetings was to increase sales and KH said many times that they would have to reduce prices.

Regarding TDs job he himself had made suggestions to improve matters and to this day they did not implement or pursue his suggestions.

There was a meeting on 6th January 2009 and their wages were unilaterally cut. The targets €50 thousand per month were unachievable; at no time, even during the good times was €50k per month achievable.

They call to his house on 7th February to tell him he was redundant.

The claimant gave evidence as to his loss.

Determination:

The claim under the Organisation Of Working Time Act, 1997 was withdrawn during the hearing.

The Tribunal determine that the claimant was dismissed because of redundancy. Accordingly the claim under the Unfair Dismissals Acts 1977 to 2007, fails.

The claim under the Minimum notice and Terms of Employment Acts, 1973 to 2005 is dismissed.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)