

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:  
EMPLOYEE

- *claimant*

CASE NO.  
UD683/2009

Against

EMPLOYER

- *respondent*

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms C. Egan B.L.

Members: Mr T. Gill  
Ms H. Henry

heard this claim at Loughrea on 9th March 2010

#### **Representation:**

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Claimant: Mr David McCarroll, RDJ Glynn, Solicitors, Aengus House, Long Walk, Galway

Respondent: Ms M.P. Guinness B.L. instructed by Eversheds O'Donnell Sweeney, 1 Earlsfort Centre, Earlsfort Terrace, Dublin 2

The determination of the Tribunal was as follows: -

#### **Respondent's Case**

The respondent is a Financial Institution, which specialises in Stock Broking, Wealth Management and Corporate Finance. The witness, (RR) chairman of the respondent company, gave evidence. In 2007 he entered into negotiation with the claimant to hire him as a director and to open and operate a new branch of the respondent company in Galway. Following extensive negotiation, a draft contract of employment was rejected by the claimant due to the inclusion of the respondent company's standard six month probationary period in all contracts for new staff. The policy of the respondent is to include six months probation in all contracts for new staff. The claimant had previously been employed in an alternative Bank and felt a probation period was unnecessary. In order to accommodate the claimant, the witness removed the probation requirement, but replaced it with performance targets agreed with the claimant. The contract of employment also required 3 months notice of termination to be given. The contract of employment includes the following instead of the probation period:

*"While it is agreed between the parties that there shall be no probation period it is agreed*

*that the 'base' income targets attached Appendix 11, represent minimum income targets expected of the employee in the event of the non achievement of same the company will be entitled to treat this agreement as frustrated and accordingly terminated."*

It was agreed that the income targets for the new branch should have been easily achievable. The claimant agreed that the income targets should be no problem once the branch was up and running. The claimant had an extensive client list from his previous employment in order to meet the targets. The claimant was in regular contact with RR through phone calls and meetings. The witness, RR stated that the claimant never came close to meeting his targets. The financial products that he had sold in his previous employment were not selling well. The witness, RR, agreed the financial market was tough at the time, but that other staff did not have the level of difficulty the claimant had. The witness went on to state that the claimant would have received support from the Dublin branch's compliance team and wealth management sales group.

The witness contacted the claimant by phone on the 28<sup>th</sup> of October 2008 to discuss the lack of progress in fulfilling the income targets. The claimant was not surprised to receive the phone call, as he was aware of his performance issues. The witness requested the claimant attend a meeting on the 5<sup>th</sup> November 2008, to discuss all the issues.

At this meeting the claimant made suggestions as to how he could retain his employment without being a direct employee of the respondent. He suggested that the respondent put him in an 'associate' position. The witness stated that he told the claimant that he would have to put him on notice. The witness RR, suggested that the claimant take a pay cut in order to save his position and that he, RR would invest more time to help the claimant do his job. In calculating the claimant's decreased salary the monetary value of his notice, which was €30,000, would be included in his new basic salary. If the claimant wished to avail of this offer he was asked to compose a new business plan and forward to RR. This process was also undertaken with two other employees in a similar situation. The claimant subsequently submitted a business plan dated 9<sup>th</sup> November 2008. The witness stated that he was not happy with the business plan the claimant submitted, because it did not include any specific income targets. The witness informed the claimant of this, to which the claimant suggested the respondent should set the targets. The claimant never approached the respondent again regarding the business plan. The witness investigated the possibility of the claimant becoming an 'associate' with the respondent but this option was not viable. The claimant's employment was terminated by phone on the 27<sup>th</sup> of January 2009.

### *Cross Examination*

On cross examination, the witness, RR, stated that if the claimant had produced a reasonable business plan, including income targets, the respondent would have retained the claimant employed. He reiterated, that as stipulated in the contract of employment, the claimant's contract was terminated, because he did not meet the agreed income targets. The frustration clause in the contract was not an attempt to circumvent fair procedures; it was a replacement for the probation period the claimant thought was unnecessary. The difficulties in the financial market were reflected when the respondent gave the claimant a second chance instead of terminating his employment without consultation. The claimant's termination of employment was not connected to the fact that a large financial institution did not, as speculated, purchase the respondent company.

The claimant was instructed to source office space for the respondent's new branch. It was his decision when and where to work. The claimant had all the support of the head office he required.

In January, when his employment was terminated, the claimant requested the respondent, to 'indulge' him for a longer period. The branch office was closed after the claimant's termination of employment.

### **Claimant's Case**

The claimant commenced employment with the respondent on the 2<sup>nd</sup> of January 2008. He had been employed by a Bank in Galway. Through colleagues, in late 2007, he heard that the respondent company was seeking a presence in Galway. The claimant was aware that there was a proposal by a large financial institution to purchase the respondent. The income targets were set based on the claimant having access to all the clients in the large financial institution. The claimant did not have an office for the first few months of his employment and could not purchase one as this was not 'upto him'. This situation was detrimental to the claimant's productivity, as the respondent did not have a 'presence' in the area.

In March 2008 the economic climate deteriorated and the market for financial products collapsed. The claimant's original client base was not familiar with the respondent brand and reluctant to purchase any of the financial products. The income targets set were no longer achievable, but the following year could have been achievable. With the news that the large financial institution withdrew from the deal to purchase the respondent the overall situation worsened.

The claimant had a meeting on the 5<sup>th</sup> of November 2008, with RR to discuss the future of the business. The claimant stated that he was requested to submit a business plan immediately, and outline where any possible future income would be generated from. The claimant stated that he was aware he was on 'thin ice' following this meeting. The claimant was waiting for RR to revert to him regarding a new salary. The claimant has no recollection of a phone call requesting targets to match the business plan that he had submitted. There was no further discussion regarding the business plan until January 2009. Meetings, by way of conference calls, were held every Monday with RR. The claimant was under the impression he had until January before any further discussions regarding his future would take place.

In January 2009 the claimant received a phone call dismissing him. RR informed him that there was no more money for the Galway office. The claimant asked RR to 'indulge' him, meaning he wanted to continue to operate the Galway office.

### *Cross-Examination*

In cross examination it was put to the claimant that the possible purchase of the respondent by the large financial institution was not in the contract of employment. The claimant had suggested a number of alternatives to his dismissal but the respondent found these not to be viable. The claimant stated the reason that he did not include targets in the business plan as he was waiting for the respondent to revert to him with a new salary. It was acknowledged that the respondent made an offer of National Minimum Wage, plus income share to the claimant. The claimant took two days off to think about the offer, but during this time, his clients had begun contacting him, informing him that they had heard his employment had been terminated. As far as the claimant was concerned, the process was over at this stage. The claimant did not receive written notice of termination of his employment.

## Determination

The Tribunal considered all the evidence, both oral and written and the legal submissions.

The Tribunal considered carefully the doctrine of frustration and its application to the facts of this case. The claimant was informed verbally on the 5<sup>th</sup> of November 2008 that he was on notice. However, his contract of employment remained in existence until he was dismissed on the 27<sup>th</sup> of January 2009. In that interval the claimant continued to work for the respondent and, inter alia, submitted a business plan to the respondent. Furthermore, there were ongoing discussions as regards his terms of remuneration into the future. The claimant had clear contractual rights, which were not expressly taken away from him.

In the case *Herman v Owners of the SS Vica* (1942) IR305, it was held that “frustration depends on the terms of the contract and the surrounding circumstances of each case, as some kinds of impossibility may not discharge the contract at all. The event which frustrates the contract must be unexpected and not within the parties contemplation.”

In *Zuphen v Kelly Technical Services IRL Ltd.* (2000) ELR 277, Murphy J warned of the dangers of applying the doctrine without caution in cases involving employment contracts.

In the unreported 1977 Supreme Court case of *Re the Trusts of the Will of Simon Sheil*, Kenny J stated “The event on which reliance is placed as terminating the contract must be unanticipated by the parties and so not mentioned in the contract. If it is dealt with in the contract, then it was within the contemplation of the parties and the doctrine cannot apply.”

Clause 10.1 of the contract of employment stipulates: “Any notice or other communication given under this Agreement shall be in writing and may be delivered to the relevant party or sent by pre-paid registered post to the address of that party specified in the Agreement.” It is a matter of fact that written notice of the termination of the claimant's employment was not given by the respondent when the claimant was dismissed by telephonic communication on the 27<sup>th</sup> of January 2009. A notice to terminate will be construed strictly against the employer and the “contra preferendum” rule will apply, that is, any ambiguity will be resolved in favour of the employee (*Straff v Shaftesbury Society* (1982) IRLR 326 (CA)).

By reason of the foregoing, the Tribunal, by unanimous decision, is satisfied that the claimant's contract of employment was not frustrated. We find that his dismissal was not fair and in breach of fair procedures. The Tribunal awards the claimant €30,625.00, as compensation under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

(CHAIRMAN)