

## EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:  
EMPLOYEE - claimant

CASE NO.  
UD725/2009  
MN748/2009

against

EMPLOYER - respondent

under

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

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 27 April 2010 and in Tralee on 12 July 2010

#### Representation:

Claimant: Ms. Eliza Kelleher BL instructed by  
Michael C. Ahern, Solicitor,  
Iveragh Road, Killorglin, Co Kerry

Respondent: Mr David Gaffney,  
Coakley Moloney, Solicitors,  
49 South Mall, Cork

The allegation was that the claimant, who had worked for the respondent from June 2007 to February 2009, had his employment as a sales representative terminated in a manner that was an unfair dismissal disguised as a redundancy. Compensation was sought under unfair dismissal and minimum notice legislation.

The defence furnished was: that the claimant had been the last person in to his position selling company products to end users; that, regrettably, his position was not viable; and that he had been let go with one week's pay in lieu of notice.

At the start of the Tribunal hearing the claimant's representative acknowledged that statutory notice had been received and said that the Tribunal could discard this.

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

Giving sworn testimony, the respondent's financial controller (hereafter referred to as FC) said that her husband and her sister's husband had been involved in the respondent since 1996. The business had been bought and FC (who had joined in 2000) was now one of four directors. The respondent was a plant hire and tool hire company. As years passed they started selling tools.

The respondent grew quickly from 2004 on up to July 2007 but then suffered hugely when a downturn came.

The company had gone up to about thirty employees. In 2004 it had opened in Kanturk. In May 2007 it opened in Kenmare when it bought a business. The respondent had a lot of administrative staff. Hire was very labour-intensive and had a huge paper trail. Credit control was a huge aspect.

The respondent now had five full-time employees. There were five part-time people and the four directors.

Business started slowing in August 2007. The respondent had been at a high but carried on to the second half of 2008. July 2007 turnover had been down on 2006 but from mid-2008 all figures were down. FC did not know in 2007 that the downturn was on. They had made a huge commitment to the business.

FC, stating that she was a chartered certified accountant, furnished documentation showing how she analysed the business broken down by departments. Quality was a term, which related to the sales division. The custom could be anywhere. Kenmare was a new aspect. There was a decline in business of more than forty per cent. In the first half of 2008 the respondent knew that there was slippage but they "hoped to buck the trend". In 2002 "a blip passed by".

The respondent had done all it could. They did not want to let staff go. That would hit turnover but the respondent was faced with a downturn.

The respondent's focus was on sales. The target market was the end users i.e. farmers who got tools. People were getting grants but they could do it cheaper now without a grant. The directors "put huge money in". They hoped to get it back but they did not.

The Tribunal was referred to a document regarding the respondent's reduction in employment. It gave names of employees, dates and comments on why their posts ceased to be viable mainly referring to the state of the economy, rapidly declining sales and lack of work. The claimant was described as a "quality fixings sales rep" who was let go on 13 February 2009 because his position was not viable due to rapidly declining sales. He was one of three employees let go on that day who had all done selling. One of them had been a counter assistant who had waited for walk-in trade.

The claimant had worked in stores but had been given a sales job. The claimant had been replaced in stores by an employee who then, became redundant in October 2008. The claimant got four months' more employment than the man who had taken over in stores.

Asked about sales vehicles, FC said that vehicles had been leased but had not been used since the February 2009 redundancies. They were for sale and the respondent had tried to find buyers.

In December 2008 the respondent did not give presents to customers or have a party for staff. The employees were "under no illusion". In January the respondent "had no choice". There was a

meeting on 6 January 2009 with the claimant and the other travelling salesman (MM). The claimant and others were trying as hard as they could. The respondent could not afford their diesel. Hire was a much higher margin than straight sales as done by the claimant. The respondent was losing the end user because it was not competitive.

A table of the claimant's sales figures from October 2008 to January 2009 was furnished to the Tribunal. Only for the month of November 2008 did the claimant's sales surpass his gross salary and employer's PRSI. FC stated that this was contributing nothing to the business and that the directors would have been better off winding up the business if they had not put so much into it. She wondered how long one should "keep flogging a dead horse". In 2008 they put in money to "prop up" wages. They had no further money to put into the business. In October 2008 directors' drawings of gross salaries were less than those of employees.

FC was not blaming the claimant for his sales performance. The claimant was "a nice guy". However, builders returned products to the respondent. The whole economy was "falling apart". The banks "pulled the plug" on the respondent. Traditionally, in a recession hire shops should do well because people could not afford to pay to purchase products, which would have given the respondent a margin of 33.3%.

In January 2009 the respondent met the claimant and MM. The claimant came in asking where he was going wrong in sales. He wondered about what he was wearing. A customer gave the respondent "the door". The respondent could not sell what people did not want and could not afford to buy. The claimant was worried and came in three days a week asking what he could do to improve. The directors could not afford to let the respondent go "belly up". There was a farm secured on the business. They "had to change the situation". The salesmen were on €30k flat salary and commission paid on sales. The respondent could no longer afford to give them flat salaries. The directors had no more money to put into the respondent. FC named the respondent's outside auditor. These two sales posts had to become redundant.

On 6 January 2009 the respondent spoke to the two sales representatives. Only sales would make their posts viable. The claimant's reaction was not adverse. He did not dispute the situation or express any concerns about the respondent. FC was "flabbergasted" that she was now before the Tribunal.

FC stated that the respondent's bank had "pulled the plug" on the respondent's overdraft facility in January 2009. 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 now told the Tribunal that the respondent's overdraft had previously been used as working capital to pay wages and suppliers, that her "hand was in the dog's mouth" and that she had "had no option but to restructure". Again referring to the respondent's auditor (AW), she said that the business "was going up in a puff of smoke" and that she could no longer afford to pay the leases on the respondent's company jeeps. She "had to make hard decisions". The sales representatives got paid in lieu of notice. She could not afford to put jeeps out on the road. She considered herself "guilty of not pulling the plug before then and stated that "the banks were just callous"

Speaking of the three salespeople (one counter-based) made redundant, DC said that she met the claimant and explained the “catastrophic” figures. Despite the 6 January 2009 meeting she now did not have the basis of being able to pay the salesmen. The respondent had no choice. The claimant was very courteous and polite. He thanked the respondent for keeping a “jeep under his a\*\*e” and asked to be let have it for the weekend. He got a week’s pay in lieu of notice. He was not a fool. He knew that he would have been gone in September 2008 if he had stayed in stores rather than moving to sales.

TD was a rep who worked for another company (OF) and who had been coming in to the respondent for fourteen years. He was the respondent’s most valued visiting rep. The respondent was in talks with him. The respondent’s four directors had farms and a non-tools background. They spoke to TD about TD “coming on board”. TD had access to customers in the Far East and much further afield. On 1 March 2009 TD commenced employment with the respondent to change the way the respondent worked. TD sold to shops and attended trade shows. The respondent was buying from Taiwan and from non-Irish suppliers. T brought knowledge. Sadly, the respondent had to let TD go as well.

The Tribunal was referred to documentation about air travel to trade fairs that the claimant could not have done. TD brought “a lifetime of knowledge”. The respondent started selling to electrical contractors.

The respondent sourced products through TD from outside Ireland. He could bring “to the table” shops at which the respondent had previously bought goods. Part of TD’s job specification might look the same (as that of the claimant) but TD gave the respondent access to sell to shops from which the respondent had previously bought.

Saying that she could only pay wages based on results, FC did not dispute that the salesmen had been told in January 2009 that their pay was going to be more performance-related. When it was put to her that the respondent’s sales targets were unrealistic she said that she had had no choice but to make pay depend on performance. She said that there had been no time when the respondent did not listen to the claimant but that the claimant had never said that he would not accept the respondent’s pay structure changes. The other travelling sales rep (MM) had spoken but had never mentioned the claimant who had accepted the pay and had never complained.

Asked if the respondent had consulted with the claimant about saving his job, FC replied that the claimant had been on the phone talking about his job and had asked about his way of dressing and speaking.

It was put to FC that the claimant would say that he had wanted to go nationwide but had been prevented by a director (COC) who had held the post of sales manager. She replied that the claimant “was not confined to anywhere”.

Asked if the claimant had not suggested that the respondent’s prices had been too high, FC accepted that “when reps met customers they heard things” and said that that was why she had taken TD “on board” to lower costs. The claimant and MM had input into the respondent’s catalogue. Neither of the two could give FC information to source bulk discounts. FC denied that she had said that “quality fixings” was being closed down.

It was put to FC that the claimant had thought that his redundancy was genuine but that he then found out about TD being brought in. FC replied that nobody in the respondent had had TD's knowledge. Asked if the respondent should have explained to the claimant about TD coming, FC replied that she had known what the claimant's experience and capabilities had been. The claimant did not give the respondent access to what TD brought on board. The claimant did not tell FC how to get the right prices.

Asked if TD had given the respondent knowledge about purchasing, FC replied that she had "cut out the middleman", that TD's "life experience" was selling to shops and that he had come on board to enable her to sell to shops. Asked why the claimant could not have sold to shops, she replied that the respondent had not been competitive to the end user and that the claimant could not solve her purchasing problem.

Asked what the respondent had done with the claimant's jeep, FC replied that two jeeps had been put up for sale and had gone to a motor company. When it was put to her that a new saloon car had been bought she replied that the claimant had needed a jeep to go to building sites but that TD had used a car and had worn a suit and tie. The new vehicle had been "sorted" with the leasing company.

It was put to FC that TD had taken over the claimant's mobile phone number (and that the claimant had found a TD message on his phone) and that the claimant had had to exceed a sales target to get commission. She replied that she was giving the claimant "every chance to make himself viable" and that he had been "almost self-employed". Asked if the sales target had been totally unrealistic, she replied: "If he could make the sales he'd make his own job."

In re-examination FC said that her door had always been open if the claimant had had a grievance. There had been no other job that she could give him. The stores job was gone i.e. made redundant. Regarding the new vehicle bought for TD, no garage would give her a straight swap (for the claimant's jeep).

The claimant had never come back after the 6 January 2009 meeting and said that he had a problem. He knew the problems that the respondent had. Sales targets were high but realistic. The claimant came to the respondent every day with fears about his job. He tried hard to get sales but they were not achieved. The claimant had not been dismissed for not trying. He was only let go because the respondent was not making money. FC had come back after Xmas 2008 to give sales "one last shot". It was not disputed that MM had got sales over a much wider area but no rep came to FC saying that he area was restricted. The respondent wanted sales even if for "dogs' collars".

Asked what the respondent would have done if TD had said no to joining the respondent, FC said that the others "would still have gone". She only wanted TD because, "of all the reps he impressed us the most" and she had "hoped that he would save my business".

The Tribunal heard evidence from KH who was one of the company directors.

The respondent business is a plant and tool hire business. The business is connected to the building industry. There was a decline in business in July 2007. In 2008 it became obvious that things were serious. To try and maintain the business and to look at potential for growth they put more effort

into sales; the hire area was declining.

The witness gave further extensive evidence as to the business and economic situation and as to the claimant's role.

He was asked about the person who was taken on after the claimant was let go. He explained that TD had contacts in China, TD went to European shows and met contacts and they were happy that he did that, also TD sold to shops and the claimant did not. TD sold to a different market; the building sites were closing down, it was becoming a thing of the past. The witness explained that the reality was, that to help the company to survive they had to source product, and TD brought knowledge to the table that no one else had; TD arrived came in to the company in a totally different position. It was put to him that his wife said that QF was closing down and he replied, "QF was changing direction".

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

The Tribunal heard evidence from the claimant he had worked for 8.5 years in a medical facility and for four years in agricultural auto parts. He had been involved in purchasing in the agri-auto parts area. He commenced work with the respondent in 2007, on a salary of €30,000.00, he sold products to the "End user". He was told that his area was Kerry.

He approached COC when KH was present and asked if he could go to Waterford or Wexford to sell and he was told that he could not as he had to have a minimum of five sales per day and had to do the "Cold calls".

In relation to making suggestions on how to improve business he had told (management or directors) that they were being beaten on price and could they not give customers a better price. He also suggested that they should sell outside of Kerry.

The staff were at a meeting on 06<sup>th</sup> January 2009 and were told what the new wage structure was. He was handed a document and it was a salesman salary and he got confused. It was not explained to him and he was very confused. He was shocked as his salary dropped from €30k to €20k. They were told that if they had any questions to bring them up at the next meeting.

At the next meeting they were told that they were redundant. KH produced figures at the meeting and told him that quality fixings was not viable and was closing down' that unfortunately they would have to let him go and they would appreciate not saying anything to MM as they had to tell him as well. His understood that the "place was closing down".

The company jeep he had been using was spotted in a (car sales place), he ascertained that it had been traded – in and a 2009 had been bought for TD. He was in shock as he thought that quality fixings was closing down and the other part was not. He phoned his old work mobile phone and TD was using it. He went to a solicitor as he felt that he had been lied to; they had told him that quality fixings was closing down. The claimant was asked about selling to shops rather than end users and he replied that, he (TD) had a lot of shops and we were told not to sell to shops to sell to the end users. He felt that he could have been given a chance.

The claimant gave evidence as to his loss.

Cross-examination:

It was put to the witness that he had no purchasing experience and he agreed this was so. It was put to him that TD Had circa 300 customers and he had 4 or 5 and the claimant explained that TD sold nationwide. He agreed that he did not have any of TDs' customers. He was asked what his solutions was as to the price problem and replied that he had no authority to set prices. The claimant agreed that the directors had not taken a wage or salary for three months. He was asked what he did when things were going bad and when he replied "Lissadel" it was said to him "€120.00, this is your solution, the directors did not take a salary and seven people were let go and your solution was €120.00". It was put to him that he did not have the experience, knowledge and could not do what TD did and he replied, "we could have gone nationwide".

In closing the claimant representative contended that it was not a genuine redundancy. That there was a conflict in evidence as to whether to be allowed to go nationwide.

The respondent representative referred to Section 7 (2) 1967 Act and that there was no doubt the dismissal was mainly or wholly due to economic reasons. The claimant himself accepted that he did not have the knowledge or experience. Three employees were let go at the time and seven were let go previously.

**Determination:**

The Tribunal determines that a redundancy situation arose in this case and therefore the dismissal was fair. The person who commenced working with the respondent company after the claimant was fulfilling a different role as to what the claimant did. The claimant's job became redundant by virtue of the fact that the respondent sold to the end user, i.e. the building trade.

The dismissal was justified, as a genuine redundancy situation existed. 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, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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