

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

CASE NO.
- *appellant* PW229/2009

against the recommendation of the Rights Commissioner in the case of:

EMPLOYER

-*respondent*

under

PAYMENT OF WAGES ACT, 1991

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:

Appellant: 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

This case came before the Tribunal by way of an employee appeal against the recommendation of a Rights Commissioner Ref: r-076637-pw-09/EH.

Appellant's Case

The appellant commenced employment with the respondent on the 2nd of January 2008. The appellant was aware that there was a proposal by a large financial institution to purchase the respondent. The income targets were set based on the appellant having access to all the clients in the large financial institution. The appellant did not have an office for the first few months of his employment and could not purchase one as this was not 'up to him'. This was detrimental to the appellant's productivity as the respondent did not have a 'presence' in the area.

The economic climate collapsed and as a result customers were reluctant to purchase any financial products. Furthermore, the appellant's original client base was not familiar with the respondent brand. The income targets set were no longer achievable but the following year could have been achievable but he felt that they could have been achievable the following year. With the news that the large financial institution withdrew from the deal to purchase the respondent, the appellant felt that his position became less of a priority.

The appellant was invited to a meeting on the 5th of November 2008 with the respondent to discuss the future of the business. The appellant was aware that this meeting would be taking place.

he appellant was requested to produce a business plan outlining the structure of his work and outline where any possible future income would be generated. The appellant was aware he was on 'thin ice' following this meeting. The appellant was waiting for the respondent to revert to him regarding a new salary. The appellant 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. Business flow meetings were held every Monday with the respondent. The appellant was under the impression that he had until January 2009 before any further discussions regarding his future would take place.

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

The respondent made an offer of National Minimum Wage plus income share to the appellant. The appellant took two days off to think about the offer but during this time his clients began contacting him informing him that they had heard that his employment had been terminated. As far as the appellant was concerned, the process was over at this stage. The appellant did not receive written notice of termination of his employment.

Respondent's Case

The respondent is a Financial Institution, which specialises in Stock Broking, Wealth Management and Corporate Finance. The Chairman (RR) entered into negotiation with the appellant to hire him in 2007. Following extensive negotiation a draft contract of employment was rejected by the appellant due to the probation requirement. The policy of the respondent is to include six months probation in all contracts for new staff. The appellant had been employed in a similar job for a number of years and felt a probation period was unnecessary. In order to accommodate the appellant, the respondent removed the probation requirement, but replaced it with Performance Targets agreed with the appellant. 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, represent minimum income targets attached in Appendix 11 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."

The appellant was employed as a Director to open and operate a new branch of the respondent in Galway. The income targets for the new branch should have been easily achievable. The appellant agreed that the income targets should be no problem once the branch was up and running. The appellant had an extensive client list from his previous employment in order to meet the targets.

The appellant was in regular contact with RR through phone calls and meetings. The appellant never came close to meeting his targets; the financial products he sold in his previous employment were not selling well. The respondent agreed that the financial market was tough at the time but stated that other staff did not experience the same level of difficulty as the appellant.

The respondent contacted the appellant by phone on the 28th of October 2008 to discuss the lack of progress in fulfilling the income targets. The appellant was not surprised to receive the phone call as he was aware of his performance issues. The respondent requested that the appellant attend a meeting to discuss all the issues on the 5th of November 2008.

At this meeting the appellant made suggestions as to how he could retain his employment without being a direct employee of the respondent, suggesting that the respondent put him in an 'associate' position. The respondent gave the appellant verbal notice at this meeting. The respondent suggested that the appellant take a pay cut in order to save his position and that RR would invest more time to help the appellant do his job. In calculating the appellant's decreased salary the monetary value of his notice, which was €30,000, would be included in his new basic salary. If the appellant wished to avail of this offer he was asked to compose a new business plan and forward it to RR. This process was also undertaken with two other employees in a similar situation.

The respondent was not happy with the business plan the appellant submitted, as it did not include any income targets. The respondent informed the appellant of this, to which the appellant suggested that the respondent should set the targets. The appellant never approached the respondent again regarding the business plan. The respondent investigated the possibility of the appellant becoming an 'associate' with the respondent but this option was not viable. The appellant's employment was terminated by phone on the 27th of January 2009.

Cross Examination

The witness RR stated that as stipulated in the contract the appellant's employment was terminated, as he did not meet the agreed income targets. He refuted the suggestion that the frustration clause in the contract was an attempt to circumvent fair procedures. Rather it was a replacement for the probation period the appellant thought was unnecessary. The difficulties in the financial market were reflected when the respondent felt he gave the appellant a second chance. He reiterated that the appellant's termination was not connected to the fact that a large financial institution did not, as speculated purchase the respondent company.

The appellant was instructed to source office space for the new branch of the respondent. It was his decision when or where to work. The appellant had all the support of the head office he required. The appellant requested the respondent to 'indulge' him for a longer period, in January when his employment was terminated. The branch office was closed after the appellant's dismissal.

Determination

The Tribunal is satisfied that the appellant did not receive his full remuneration under the Payment of Wages Act 1991 and accordingly upsets the recommendation of the Rights Commissioner r-076637-pw-09/EH and awards the appellant the sum of €2019.00 being the equivalent to one weeks pay in lieu of notice.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)