

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE

UD2003/2009

WT1103/2009

MN2419/2009

against

EMPLOYER

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. N. O'Carroll-Kelly B.L.

Members: Mr. D. Winston

Mr. T. Brady

heard this claim at Dublin on 24th November 2010 and 10th May 2011 and 11th May 2011

Representation:

Claimant: Ms. Anne O'Connell, William Fry, Solicitors, Fitzwilton House, Wilton Place, Dublin 2

Respondent: Marcus Lynch, Solicitors, 12 Lower Ormond Quay, Dublin 1

Claimant's case

The claimant sold his business to the respondent and part of the deal was that the claimant was to remain with the company as Forwarding Manager on a salary of €60,000.00 per annum plus commission. There was a dispute between the parties as to when this employment commenced. The claimant maintained that it was 7th January 2008 but the respondent maintained that it was 1st June 2007. The claimant was paid two separate tranches of €40,000.00 and €30,000.00.

In January 2009 a 20% pay cut was imposed upon all employees but the claimant was not happy with this and was also unhappy that he had not received any commission at that point. Subsequently the claimant heard that certain other employees were receiving cash payments and he confronted a director (PT) of the respondent about this. PT denied that there had been any such cash payments and wanted to know who was the source of this accusation. However at a subsequent meeting told PT told the claimant that there had in fact been a cash payment made in respect of overtime carried out by employees in exceptional circumstances.

A meeting was convened between the claimant, PT and another director (AT) on 26th June 2009 and at the outset AT told the claimant that he was not to address PT directly and that AT would speak on PT's behalf. The claimant was requested to stop calling PT a liar and told

that if he continued to do so disciplinary action may be considered. The claimant told AT that he could get a job elsewhere if he so wished. However AT advised the claimant to check his contract in respect of a clause that prevented him from doing the same work for any other company for a period of time should he leave the respondent and advised him to take legal advice.

The claimant returned to his office and rang his solicitor and made an appointment for 4pm that afternoon. However shortly after he finished this call another manager (MT) called to the claimant's office and informed him that PT wanted him off the premises and requested that he leave the company's mobile phone and lap-top behind. MT then walked the claimant to his car and watched him leave the premises. The claimant took this to mean he had been dismissed and therefore maintains that he was un-fairly dismissed. He acknowledged that he subsequently received a letter from the respondent offering him his job back. However the claimant did not consider this a genuine offer and did not pursue it.

Respondent's case

The respondent's case was that the claimant was never dismissed but that he had left of his own volition.

The commencement date of employment according to the respondent was 7th January 2008, which differed from that given by the claimant.

PT stated that the claimant had agreed to a 20% pay cut in January 2009 and he had done so in order to reduce the overheads of the company in the face of difficult financial circumstances. The claimant had stated at the time "do whatever it takes". However the claimant subsequently accused the respondent of making cash payments to other employees. PT consistently denied this but the claimant persisted in these accusations. The matter was culminated in a meeting between the claimant, PT and AT on 26th June 2009.

At this meeting the claimant said "he had had enough" and was "out of here" and left the premises. The claimant left his lap-top behind but took the company mobile phone with him. The respondent took this to mean that the claimant had resigned. However a letter was subsequently sent to the claimant offering the job back to him and no reply was received.

Determination

The tribunal have carefully considered all of the evidence adduced over the two and a half day hearing together with the documents submitted by both parties.

There was a complete conflict in all of the evidence. The dismissal itself was also in dispute. The burden of proof in the circumstances lay with the claimant to show that he was dismissed and that his dismissal was unfair.

The claimant stated that his employment was terminated on the 25th June 2009, without notice. He was "frog marched" from the Respondent's premises having had his mobile phone, laptop and security key taken off him. There seems to have been a good working relationship between the claimant and the respondent up until his pay was reduced by 20% in January 2009. The claimant is adamant that he did not consent to any such reduction. The claimant stated that shortly after the pay cuts were introduced he had been informed that certain members of staff were in receipt of cash payments in addition to their salary. This annoyed him

especially in circumstances where he had not consented to the reduction and was owed money by way of commission by the respondent. He took the matter to PT but upon questioning by PT refused to disclose who his informant was thus causing PT distress and upset. Several requests were made of the claimant to divulge the information but he refused to. He stated that it was his failure to disclose the information that led to the termination of his contract. He accepted the respondent had offered him his job back but stated that the offer was not genuine and that it was only made for the purpose of these proceedings. The claimant stated that he commenced looking for employment after his family vacation but ran into difficulties due to the restraint of trade clause in his contract. His evidence was that he started with I.G. Ltd in August 2010 and was made a director in September 2010.

The respondent stated that the claimant resigned his employment in order to start up a new business with RD, which said business was in direct competition with the respondent. Evidence in the form of e-mails was adduced to demonstrate that the claimant was actively involved in I.G. Ltd. No credible explanation was given by either the claimant or RD as to why the claimant was named in I.G. company e-mails and as to why an e-mail address had been set up in his name.

The tribunal heard evidence from three individuals on behalf of the respondent, BMcG, MC and MR. Their evidence attempted to corroborate the respondent's evidence that the claimant left to set up I.G. Ltd in direct competition with them. The tribunal attaches little weight to that evidence but finds that even if it were to exclude it altogether the documentary evidence against the claimant in this regard is overwhelming.

Much was made about the issue of the claimant's mobile phone. Again there was a conflict in the evidence. The respondent produced documentary evidence, which corroborated a significant portion of their evidence. The claimant did not produce any corroborating evidence. The tribunal preferred the respondent's evidence and finds that it is more likely that the claimant's mobile phone was not taken off him by the respondent.

Having considered all of the evidence and documentation the Tribunal finds that the claimant resigned his position and therefore his claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

Furthermore as the claimant resigned without giving notice to the respondent he is not entitled to notice or payment in lieu of this and his claim under the Minimum Notice And Terms Of Employment Acts, 1973 to 2005 fails.

No evidence was adduced in relation to a claim under the Organisation Of Working Time Act, 1997 and therefore this claim is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

