

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
EMPLOYEE

-claimant

CASE NO.
UD74/2010
RP127/2010

Against

EMPLOYER

-respondent

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. N. Russell

Members: Mr J. Hennessy
Mr F. Dorgan

heard this claim at Clonmel on 5th July 2011
and 6th October 2011

Representation:

Claimant: Mr. Denis Hynes, SIPTU, 18 Lower Patrick Street, Kilkenny

Respondent: Mr. Kieran Boland, Boland & Co., Solicitors, Patricks Court,
Patrick Street, Kilkenny

The claim under the Redundancy Payments Acts 1967 to 2007 was withdrawn.

Respondent's Case

The first Director KR gave evidence that he was aware of the claimant's activities but does not recall if he asked if his service was exclusive to the respondent. The Director (GB) gave evidence that he and his partner took over the business from MB in early 2009. GB initially met with all the staff when he took over and further regular staff meetings. GB did not personally meet with the claimant but informed all the staff at the meetings that if there were any problems to come to him directly.

The respondent was aware that the claimant provided services in his own time for the respondent; this work was invoiced to the respondent by the claimant. The claimant owned a routing machine for 3D sign work; if the claimant did not provide this service it would have had to be outsourced. The respondent was aware that the claimant had a workshop where he completed his work.

GB was out canvassing for work in Kilkenny when he came across a new restaurant that was opening. He made contact with the owner and provided quotations and sent prices for the new signage. GB rang the business owner the next day and was informed that his brother had got a cheaper quote for the sign so they would not need the respondent's services. Sometime later GB was passing the new business and on inspection of the sign saw that the details of the claimant's company (MP) were on a sticker on the sign. GB was in shock as the claimant was a direct employee and had taken work from the respondent.

GB and the other director called a disciplinary meeting and invited the claimant to attend by letter of Monday the 8th of June 2009. This letter informed the claimant that he was suspended pending an investigation and also outlined the accusations made against the claimant. The claimant replied to the accusations by letter of Tuesday the 9th of June 2009. The minutes of the meeting held on the 9th of June include the claimant's responses to the accusations. The claimant admitted he ran an external business and had done so for the previous two years with the knowledge of the previous owner. The claimant was informed that the respondent was told by the previous owner that he had no knowledge of the claimant's business activities outside of working hours.

The respondent gave the claimant a letter dated Wednesday the 10th of June 2009 requesting that he attend a meeting on Thursday the 11th of June to be informed of the outcome of the disciplinary meeting on the 9th of June. At the meeting on the 11th of June 2011 the claimant was informed and issued a letter stating that the respondent *'was left with no option but to dismiss you with immediate effect.'* The claimant was dismissed for Breach of Trust and Fidelity.

Claimant's case

The claimant commenced employment with the first owner (MB) of the respondent on the 20th of June 2006. He never received a contract. The claimant saw an opportunity in the market to provide 3D lettering and with the consent of the first owner (after his refusal to purchase the machine) the claimant purchased the routing machine. The claimant did work for outside companies as well as the respondent. As the machine was located on the respondent premises the claimant reduced the price charged to the first owner by 30%. The claimant discovered that the first owner was receiving a 50% discount for the use of his premises, so moved the machine to a rented workshop in the first owner's home and charged the first owner full price. The rented premises was a workshop in the first owner's garden so he was very well aware that the work was being carried out.

The claimant was aware that the company was being sold and when the new owners commenced the claimant requested a meeting with them to discuss his working situation. The previous owner told the claimant that he disclosed all information regarding the claimant to the new owners. Only after the dismissal the claimant suspected the original owner had not disclosed all the information regarding his company's activities and the connection to the respondent.

The claimant only did small jobs for his own company. The job he was dismissed over was worth €300.00. 80% of the claimant's company's business came from the respondent and this continued when the new owners took over. As a result of his dismissal the claimant's company closed as the majority of his work came from the respondent. The claimant was aware of what

jobs the respondent was quoting for so he did not compete for them. The claimant had offered to sell his machines to the respondent in order for them to expand therefore increasing the claimant's job prospects.

The claimant gave evidence of his Loss and his attempts to mitigate his Loss.

Determination

The Tribunal heard conflicting evidence as to the timing and content of a discussion between the claimant and LY, however, it was unnecessary for the Tribunal to consider this evidence further as information in relation to this exchange was not in the possession of the Respondent Company when the decision to dismiss was made.

The Respondent Company acquired the going concern "AG", and the Transfer of Undertaking Regulations applied and the business contractual obligations passed to the Respondent Company.

The Claimant's Contract of Employment was verbal until reduced to a written contract on the 9th January just prior to the transfer of ownership advised to the Employees on the 12th January 2009. He also had a verbal contract for the provision of services to his employer via his business "MP". Both contracts fell to be honoured by the Respondent Company.

The Respondent Company's position was that the Claimant breached the terms of the Agreement between "MP" and the Company and, in so doing breached his fiduciary duty to his Employer under his Contract of Employment. The question, accordingly, was whether the Claimant had gone beyond the terms of the verbal contract for the provision of services by "MP" and, if he did, whether this constituted gross misconduct entitling the Respondent Company to dismiss him.

The Claimant was clear in his evidence as to the nature of the Agreement between MB, trading as the respondent, and the Claimant trading as "MP". The respondent was not in a position to produce 3D Lettering. The Claimant had his own machine and provided rough 3D lettering and some other services to include provision of bent flexi signs to the respondent and to others. He also informed the Tribunal that he was entitled to provide other minor signage services to others under low value contracts which were of no interest to the respondent. He gave evidence that 80% of his contract business came from the respondent.

In his evidence he was adamant that he was not competing with the respondent. As regard the "new business" contract, he was unaware that the respondent was tendering for the contract. He simply provided the finished 3D lettering to make up the name for the "new business" for € 300.00 having received a referral for this job from a Client in Castlecomer for whom he had provided a similar service.

It was clear to the Tribunal that the Respondent Company on acquiring the business from MB had failed to establish precisely the nature of the contract between the respondent and "M P". In his direct evidence to the Tribunal, KR, Director of the Respondent Company, indicated that MB had advised him that one of the Employees was supplying parts into the respondent but could not remember if he, KR, enquired as to whether the arrangement was an exclusive one. The evidence of GB, Co-Director, to the Tribunal was less than clear. Having initially indicated in evidence that he had "no problem with him (viz the Claimant) doing his own

business which he understood to be 3D lettering, he subsequently qualified this to indicate that he was referring to the provision of rough (not finished) 3D lettering and later in his evidence claimed there to be an exclusive arrangement with the respondent.

Regrettably, the evidence of MB who negotiated the terms of the Agreement between the respondent and "MP" was not available to the Tribunal. Because of the latter's residence outside of the Jurisdiction it was not within the power of either party to the proceedings to ensure his attendance by way of subpoena.

The question for the Tribunal is whether the Respondent Company met the onus placed on it under the Unfair Dismissal Acts 1977 to 2007, to act fairly which obligation extends to the manner in which an issue is investigated and a Disciplinary Process is conducted.

The Tribunal is of the opinion that the Respondent Company has failed to meet this onus and, further, that the entire process was rushed.

There is little if any evidence of a meaningful investigation by the Respondent Company in this matter.

The evidence of GB, Director of the Respondent Company, was that, on seeing the new business sign, which clearly indicated that it had been produced by "MP" (with Web Address provided) he immediately visited the website on the 5th June 2009 which was a Friday. The Claimant was suspended on full pay on Monday the 8th June. This is a step normally taken in such circumstances in advance of a full investigation.

In this instance, there was no such investigation with the letter of the 8th June, not only suspending the Claimant but calling him to a Disciplinary Hearing on Tuesday the 9th June. By Wednesday the 10th June, the decision to dismiss the Claimant had been made and this was communicated to him on Thursday the 11th of June 2009.

The Tribunal is concerned that the letter of suspension of the 8th of June and pre-prepared questions for the meeting of the 9th June indicate a pre-judgement of the issue by GB who purported to conduct a Disciplinary Hearing and who issued the letter of termination of the 11th of June 2009.

There was an issue here that warranted thorough investigation. Any reasonable Employer would have given weight to the circumstantial evidence that supported the Claimant's contention and would have had due regard to the fact that there was nothing covert about the Claimant's activities. The Respondent Employer was not in possession of any information to suggest that the Claimant was aware that his Employer was tendering for the "new business" contract for 3D Lettering and accordingly, knew or ought to have known that he was competing with his Employer. Indeed, JR a witness for the Respondent Company, gave evidence to the Tribunal to the effect that he didn't think that the Claimant made any enquiry with him about the "new business" job, price or otherwise.

The Tribunal is dissatisfied that a phone call alleged to have been made by GB to MB between the 9th June and 10th June was sufficient to meet the onus on the Respondent Company to thoroughly investigate. The contents of any such call were not put to the Claimant nor had he any opportunity to engage with MB. The call was simply referenced by GB in the letter of Dismissal issued to the Claimant.

On the issue of mitigation of loss, the Claimant produced evidence of unsuccessful efforts to secure a position in both Ireland and in the UK in the sign writing and sign production industries. Following a move to London, the Claimant secured some sporadic classical sign writing there while residing with his brother. Ultimately he returned to Poland but has been unable to work recently due to a hand injury.

Considering all matters, the Tribunal finds that the Claimant was unfairly dismissed and awards him the sum of €35,000

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)