

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE **-claimant**

UD1314/2010

against

RP1780/2009

EMPLOYER **-respondent**

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms M. Levey BL

Members: Mr E. Handley
Mr G. Whyte

heard these claim at Dublin on 26 October 2011
and 18&19 January 2012

Representation:

Claimant: Mr Cathal McGreal BL instructed by Ms Maria Lakes,
Paul W. Tracey Solicitors, 24 Marlborough Street, Dublin 1

Respondent: Mr Conor Bowman BL instructed by Mr Joseph Burke,
McCartan & Burke Solicitors, Iceland House,
Smithfield, Dublin 7

The determination of the Tribunal was as follows:

The claimant's case is that he was unfairly dismissed by reason of unfair selection for redundancy. Having received a lump sum payment under the Redundancy Payments Acts on termination in April 2010 based on a starting date of April 2005 the claimant's case is further that, should the Tribunal find that his selection for redundancy was not unfair, this start date is incorrect as there had been a transfer of undertakings from his previous employment such that his employment had been continuous from November 2002.

The respondent business is involved in the supply and installation of fire and security equipment including alarms, fire extinguishers and other related equipment including CCTV cameras. It is now further involved in the supply of static guards. The claimant and the managing director (MD) of the respondent have known each other for over ten years having both been involved in this industry throughout their working lives.

In 2002 the claimant along with two of his brothers and a sister in law established a company (the company) to carry out similar work. At the beginning of 2005 the company, which had around a dozen employees, began to experience trading difficulties and among its creditors was the

respondent. Although the circumstances are disputed between the parties it is common case that in February 2005 the claimant began to work for the respondent. The claimant's position is that he became an employee of the respondent on foot of a transfer of undertakings from the company to the respondent. The respondent's position is that the transfer did not occur until 1 April 2005 when the remainder of the employees of the company apart from the claimant's sister in law were taken on by a newly formed subsidiary of the respondent. The claimant transferred to this subsidiary around October 2005. At its height the respondent's workforce was some 80 strong.

The claimant was a member of the respondent's seven strong sales team and it is common case that he was among the most effective in that team. The employment was uneventful until late 2008 when the economic downturn hit. The claimant at all times achieving his sales targets. There were redundancies in all areas of the respondent's business and the sales team reduced to five without the need for compulsory redundancy.

From the beginning of 2009 the claimant, along with his colleagues, was no longer achieving his sales targets. Whilst still achieving sufficient sales to generate commission payments which kick in at 60% of the target sales the decision was taken in April 2009 to reduce his sales targets from €195k per quarter to €150k per quarter. At the same time a pay cut was imposed. Commission is only payable on monies received within 90 days of invoicing and at this time it was proving increasingly difficult to collect amounts owed.

Collection of outstanding amounts became a priority for the respondent and a policy was introduced whereby sales were not to be made to clients who had not paid within 120 days of invoicing. The respondent's position is that all the sales team were affected by this policy and its effect was that a lot of the claimant's accounts were off limits. The claimant's position is that this policy prevented him from making sales by making him concentrate on collections and restricting his opportunities to sell. From the beginning of 2009 the claimant met none of his quarterly targets save that the monthly target was exceeded in October 2009. Deteriorating business conditions had led to a reduction in the claimant's commission payments because of both reduced sales and reduced collections within 90 days.

While the claimant's position is that he received no commission from June 2009 until his employment ended it is common case that following an approach to both FC and MD he received €2k from MD in the form of a personal cheque. A deduction for this amount was made from the monies received by the claimant on termination. At the respondent's Christmas party it is common case that the claimant said to MD "I hope your kids have a good Christmas because mine won't!" The claimant denies using an expletive to describe MD. The claimant's position is that he telephoned MD the next day to apologise for his conduct at the party. His position is further that from this point MD would not talk to him and effectively froze him out.

MD referred to this incident at a sales meeting on 7 January 2010. Around this time an issue arose over an amount of €10k owing from a major customer as a result of which a solicitor's letter was sent to the customer. The respondent's position is that on visiting the customer it transpired that the claimant had given this amount as an unauthorised discount. The claimant's position is that the amount arose as a result of a downgrade of the specification of the job. On 25 January 2010 the claimant was hospitalised for three days as a result of stress. The respondent's position is that neither FC nor MD was aware the claimant had been hospitalised.

Following a discussion between the financial controller (FC) and MD it was decided that there needed to be a reduction in the sales team from five to four. On 18 March 2010 FC wrote to the

members of the sales team to inform them that there was a risk of a redundancy amongst their number. A matrix was compiled for the respondent by consultants and FC and MD scored the five members of the sales team and then combined their results on 26 March 2010. The two most important categories were sales targets v results achieved and value of existing customer database. While the claimant achieved the joint second best score on the former his score on the latter. The claimant's score was 473 the next lowest scored some 150 higher.

As a result of this the claimant met FC on 30 March 2010 to be given the news of his selection for redundancy. The claimant's position is that he was singled out for redundancy following the events at the Christmas party. The respondent's position is that if that were the case he would have been dismissed at the time of either that incident or the discount issue without the need to make a redundancy payment.

Determination

The Tribunal is satisfied that a redundancy situation pertained within the sales department of the respondent. The Tribunal cannot accept the claimant's contention that the respondent's policy of preventing him making sales to clients who had not paid within 120 days was unfair to him in that it restricted his opportunities to sell. The Tribunal is satisfied that the matrix used in the selection of the candidate was sufficiently objective to justify his selection. Accordingly, the selection of the claimant for redundancy was not unfair and the claim under the Unfair Dismissals Acts, 1977 to 2007 must fail.

The Tribunal is not satisfied that the claimant was not part of the transfer of undertakings which occurred when the company became part of the respondent. For that reason the Tribunal finds that claimant is entitled to a lump sum payment under the Redundancy Payments Acts, 1967 to 2007 based on the following criteria

Date of Birth	9 May 1969
Employment commenced	27 November 2002
Employment ended	30 March 2010
Gross weekly pay	€673-00

This award is made subject to the appellant having been in insurable employment under the Social Welfare Consolidation Act, 2005 during the relevant period. It should be noted that the appellant is now entitled to the difference between the figures arrived at from these criteria and the amount previously received. It should be noted that payments from the social insurance fund are limited to a maximum of €600-00 per week.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)