

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYEE

CASE NO.
UD1359/2010

- *claimant*

MN1318/2010
PW191/2010

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

EMPLOYER
- *respondent*

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 PAYMENT OF WAGES ACT, 1991 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. Clancy

Members: Mr. W. O'Carroll
Ms H. Murphy

heard this appeal at Galway on 8th February 2012 and 23rd April 2012

Representation:

Appellant(s) : In Person

Respondent(s) : Mr. Conor Power BL instructed by McCann Fitzgerald, Solicitors, Riverside
One, Sir John Rogerson's Quay, Dublin 2

This case came before the Tribunal by way of an appeal by the employee against recommendation/decision of the Rights Commissioner (r-075387-ud-09) and (r-080359-pw-09) under the Unfair Dismissals Acts 1977 to 2007 and the Payment of Wages Act, 1991.

There was also a direct claim to the Employment Appeals Tribunal under the Minimum Notice and Terms of Employment Acts 1973 to 2005.

Preliminary Point

At the outset of the hearing counsel for the respondent submitted that the Tribunal has no jurisdiction to hear the claim under the Payment of Wages Act as the Rights Commissioner found that he lacked jurisdiction to hear the claim. Accordingly there is nothing for the claimant to appeal to the Tribunal.

Respondent's Case

The vice-president of the respondent's commercial operations gave evidence on behalf of the respondent which is a sales and marketing pharmaceutical company. He is responsible for the sales operations in Ireland and the United Kingdom. The company employed 3 to 5 sales representatives in Ireland including a manager. The claimant was employed as a sales representative and was provided with a company car. The sales representatives sold

pharmaceutical products to doctors throughout Ireland.

In 2007 and 2008 the company invested €1 million to boost sales and hoped to see a substantial growth in sales from this investment. However no increase in sales resulted from this investment with sales figures remaining flat. The board of the company were aware that sales figures had remained flat despite the significant investment and as a result commenced an investigation. The purpose of the investigation was to ascertain if there was a market for their products and to see if their message and products were getting to their customers. They also wanted to see that the sales representatives were performing their duties. As part of the investigation a tracking device known as a (GPS) was installed on the sales representative's cars. This was done without the knowledge of the sales representatives and was viewed by the company as a non-intrusive device.

As part of their duties the sales representatives had to keep an accurate record of appointments carried out. Details of visits and calls made by the sales representatives were submitted to the company's head office along with expense reports on a weekly basis. Following the introduction of the (GPS) system the witness compared the claimant's reports with the location of his car over a 10 day period in November 2008. It transpired that the claimant's activities did not correspond with his diary entries submitted to head office, and the company had evidence to suggest that on some of the occasions over the aforementioned 10 day period, the claimant may have submitted fraudulent mileage and expenses claims. The claimant was informed of this and by way of letter dated 20 November 2008 was invited to attend a formal disciplinary meeting scheduled for 27 November 2008. He was informed in that letter that his actions may result in summary dismissal and he was provided with a summary of the evidence and a copy of the company's disciplinary policies and procedures. He was not provided with actual data from the (GPS) system on the day of the hearing. He was also informed that he was entitled to be accompanied by a work colleague or a trade union representative of his choice. Subsequent correspondence was exchanged between the parties including medical certificates submitted by the claimant and the proposed meeting scheduled for 27 November 2008 did not take place. The claimant attended the company doctor and the disciplinary meeting was re-arranged for 17 December 2008.

The witness, along with the acting H.R. manager met with the claimant at the meeting on 17 December 2008. The claimant was not represented at the meeting. The evidence was put to the claimant, in particular that the location of his car did not correspond with his expense reports for a number of days in November 2008. The claimant's expense reports clearly did not tally with the movements of his car for the periods in question. The claimant did not offer any reasonable explanation in terms of the evidence put to him. He made no comment on any of the days concerned based on the evidence obtained from the (GPS) tracker device. He stated that he had received legal advice and would not comment on anything to do with the evidence from the (GPS) system.

As the claimant could not provide any adequate explanation to the contradictory evidence put to him the witness concluded that he had submitted fraudulent claims. He concluded that the claimant had falsified work records and the bond of trust between employer and employee had been broken. The claimant was informed by way of letter dated 19 December 2008 that the appropriate sanction was summary dismissal in accordance with the company's disciplinary procedure. He was given the right to appeal the decision by 7 January 2009 and he availed of this right on 5 January 2009. An appeal hearing was scheduled for 21 January 2009 and this was subsequently re-arranged for 10 February 2009. The claimant withdrew his decision to

appeal and informed the company by way of letter dated 4 February 2009 that he would be seeking redress through the relevant third party in the Republic of Ireland. His position in the company has not been replaced.

Claimants Case

The claimant (PC) commenced employment with the respondent company in October 2003. He was employed as a sales representative in the pharmaceutical trade which involved him calling to General Practitioners and Medical Centres. He was recognised by his employer as a top performer in his role.

In August 2008 he was asked to attend a meeting which became a disciplinary meeting. At that meeting it was put to him that a tracking device had been attached to his car and that he was not at locations he had said he was at during various times and dates. PC rejects the accuracy of various times and locations provided on the tracker report and was unable to defend his case, as to this day he has not got answers to the validity of the tracker reports and it has never been confirmed to him who supplied and installed the device and who compiled the data.

PC said his administration and paperwork was often sloppy but his key role was always to sell products and generate sales. The respondent company introduced a PDA system to record details of clients visited however replacement visits to clients were often not entered on the PDA system.

He said the company had lost the licence in Ireland to sell a drug which had made up half of the Irish sales and this had left a gap. He believes that the company made a decision to get rid of the position he held avoiding making any redundancy payment to him by instead dismissing him. He told the Tribunal that his position was never filled following dismissal. PC denied that he refused to engage with the respondent at the meeting stating that he refused to answer issues raised concerning the tracker data only. He said the meeting had lasted for one hour forty five minutes and that he was given no opportunity to validate the minutes of that meeting. At that stage he confirmed for the Tribunal that he had no detailed breakdown of the GPS tracker data and this was only made available to him one and a half years later.

With regard to his dismissal he knew going to the meeting that his employment would be terminated and when he received a notice of appeal he felt he would not get a fair hearing and could not face another badgering from company executives.

He told the Tribunal that he was never provided with evidence of a tracker / GPS device being attached to his vehicle and believed that the data was compiled from the PDA device which would in no way be an accurate reflection of his day to day movements. He added that he was refused legal representation at meetings.

Determination

Having carefully considered the evidence adduced by both parties the Tribunal consider that fair procedures and company procedures were not followed. The respondent failed to provide the employee with the full details of the allegations against him in advance of the disciplinary meeting. The respondent therefore did not afford the claimant a reasonable opportunity to defend the allegations.

The Tribunal is not satisfied that the alleged misconduct warranted summary dismissal and no

evidence of alternative sanctions was heard. The fact that the respondent did not consider any of the lesser sanctions in circumstances where there was no evidence of any previous disciplinary matters involving the claimant raised further concern.

The respondent failed to verify and validate the data from the tracking equipment and their own handbook does not make provision for the company to use tracking surveillance equipment. The respondent failed to advise the employee of the installation of the tracking equipment.

The allegation of fraud was not substantiated by the respondent.

The Tribunal finds that the dismissal was unfair. Accordingly, the recommendation of the Rights Commissioner is upset and the Tribunal awards the claimant compensation in the amount of €11,000.00 under the Unfair Dismissals Acts, 1977 to 2007.

No evidence was adduced to refute the findings of the Rights Commissioner in relation to the appeal under the Payment of Wages Act, 1991 being statute barred. Accordingly the said appeal is dismissed and the recommendation/decision of the Rights Commissioner under the Payment of Wages Act 1991 is upheld.

The claimant is further entitled to be paid €4,960.00, this sum being the equivalent of four weeks gross pay under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)