

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:  
EMPLOYEE

CASE NO.  
UD1007/2010

against

EMPLOYER

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr K. Buckley

Members: Mr P. Casey  
Mr J. Flavin

heard this claim at Cork on 23rd November 2011 and 4th April 2012

### **Representatives**

Claimant : Frank Nyhan & Associates, Solicitors, 11 Market Square,  
(Opposite Courthouse), Mallow, Co Cork

Respondent : Kinsella Heffernan Foskin, Solicitors, Otteran House,  
South Parade, Waterford

The determination of the Tribunal was as follows:

### **Claimant's Case**

The Claimant commenced employment with the respondent as an experienced sales representative in April 2008. He had previous experience as a Sales Representative with a large confectionary company. His position with the respondent was as a sales representative serving the Cork and West Limerick areas. The Respondent's business is mainly in the supply of tiles, silicone and sealants to the hardware trade. The Claimant described his work situation as satisfactory up to 2009. He began to have difficulties in February 2009, when he phoned the company's sales manager to advise him that he would be out of work as he had a pain in his back. The sales manager was absent and he subsequently spoke to the Managing Director. He gave evidence that the Managing Director was abusive and that he was told that if he valued his job he should stay on the road and furthermore that if he lost some weight that it might help his back.

The Claimant said in 2009/2010, the Managing Director, put a friend “in the car with me”. The Claimant gave evidence that he had to collect this individual who was a former Managing Director of a large building supply company and bring him on his rounds every day. He said that this made his work situation difficult for him as it caused friction with some customers. His sales manager reacted indifferently when he tried to have the situation changed.

He gave evidence that the economic situation took a turn for the worse and that even though by 2010 the market had collapsed that he was still maintaining his sales. A number of customers went into liquidation. He was aware of and tried to act on the Respondent’s credit control policy.

The Claimant’s main grievances were against the company’s managing director. According to him the Managing Director was abusive and threatening towards him and his hostile attitude and approach took the form of swearing, roaring and regularly shouting at him. The witness cited a number of examples when such behaviour occurred. Most of the abuse was linked to the collection and control of payments from customers to the company.

The Claimant gave evidence of a number of meetings where he said that he was verbally abused and belittled. This verbal abuse included the use of strong language. He gave evidence that this abuse took place in front of other members of staff.

The Claimant gave evidence that in April of 2010 his wife was expecting a baby and was rushed to hospital with a Garda escort. The Claimant requested a week off work from his sales manager who was agreeable to the request. The sales manager rang the following day to say that he had been instructed by the Managing Director to advise that the Claimant should return to work on the following day to meet a prominent client. Meanwhile the Claimant gave evidence that his wife was in Intensive Care at Cork University Hospital. He also gave evidence that there were issues when he subsequently sought two days paternity leave.

The Claimant gave evidence in relation to the payment of his wages which were made by bank transfer. The Claimant stated that these were “never on time”. He said that as a result that his Mortgage was returned on a couple of occasions.

The Claimant gave evidence that he raised complaints about the treatment that he was getting on several occasions and was basically told that if he didn’t like it that he knew where he could go.

Evidence was given of various emails and correspondence that passed between the Claimant and the Respondent Company and in particular a communication of the 24<sup>th</sup> of February 2010 which the Claimant considered to be a formal written warning.

Events came to a head on the 30<sup>th</sup> of April 2010 at a general staff meeting wherein an issue arose in relation to stock cards. He also stated that there was no instruction to him to bring stock cards to meetings. The Managing Director was not satisfied with the way that these had been completed. The Claimant gave evidence that the Managing Director verbally abused him and roared and shouted at him in the presence of the sales manager. The Claimant stated that the Managing Director made derogatory comments about him while continuing with the roaring and shouting. The Claimant gave evidence that he decided to gather his things and that the meeting concluded. He stated that after that meeting he left work and that he cried in the car while driving home. At this stage he felt that his health had deteriorated and he had been at the doctor on several occasions between January and May.

After this incident he went to his own doctor, who put him off work on stress. He notified the company and provided a medical certificate. His sales manager subsequently advised him that the Managing Director gave instructions that he was to be paid for three days only while out sick. The Claimant gave evidence that he went back to work after a week and that the phone calls and emails started again. The harassment, shouting and screaming continued and at that stage he decided to seek advice from his Solicitor and Doctor and left the job.

The Claimant said that he left his job for three reasons:-

1. The Claimant felt that his health was being adversely affected.
2. He felt that the ongoing difficulties in his employment were impacting on his marriage.
3. The stress that he felt that he was under from the company's Managing Director.

After leaving his position, the Claimant stated that he took time out for a few weeks. He subsequently got a phone call from a competitor company and was invited to work for them for approximately two weeks. Thereafter he looked for a full time job and ultimately got a job in November 2010. He gave evidence that his salary was exactly the same as he had been paid at the Respondent Company.

In cross examination it was put to the Claimant that he had left without notice and was asked about various pieces of correspondence. It was put to him that the Claimant's principal issues at work arose out of his dealing with debtors and that there was no criticism of his sales performance. The Claimant was also brought through a number of meetings that he had with the Managing Director, the sales manager and others. The Claimant was questioned in detail about the filling out of stock cards and it was suggested to him that these were pre-printed and prepared in a particular way for completion. It was put to the Claimant that he consistently neglected to complete the stock cards in a way required by the respondent company.

An issue was also raised in cross examination about the return of the company car and there was a dispute between the parties as to how the company car was handed back at the end of the Claimant's employment.

The Claimant was also asked about the deletion of records from his mobile phone. It was suggested on behalf of the Respondent that the deletion of this information made it difficult for the respondent company to follow up on orders and customer's queries after the Claimant had departed his employment.

## **Respondent's Case**

The Respondents primary business is in the building and do-it-yourself trade. Among its staff are sales representatives who generally cover a defined geographical area. The Managing Director confirmed the Claimant's date of commencement as April 2008 in the role of a sales representative. His signed contract of employment stated *inter alia* that the collection of customer accounts was the primary responsibility of a sales representative. In that same contract under the heading of Grievance And Disciplinary Procedure the following was written: *In the interest of fairness and justice, and to ensure the proper conduct of business, certain provisions to deal with matters of grievance and discipline are necessary, as follows:* That contract then addressed notice and disciplinary procedures but was silent on grievance procedures.

While it was a prime function of a sales representative to source, secure and safeguard orders for the company the credit controller had the ultimate decision on how, if at all, to act on those orders. That decision could be influenced by the customer's records and by the comments and inputs of a sales representative who were given certain "tools" to do their job. Those tools included a company car, a mobile phone and what was called "a stock card". The Respondent neither conducted a medical on the Claimant nor asked him to fill in a medical questionnaire prior to the commencement of his employment. Within a short period of that commencement however the Claimant declared he had a pain in his back and that the company car did not suit him. At some cost the respondent changed the model and make of the car to adjust to the Claimant's condition.

By 2009 the Respondent's sales and revenue and turnover were in decline compared with earlier years. In January of that year the sales manager notified some staff including the Claimant of a proposed new credit control policy and emphasised the importance of payment collection. During a meeting with Claimant on 15 February 2010 the Managing Director became somewhat alarmed at the approach and attitude portrayed by the Claimant. The Claimant was dismissive of the stock cards and displayed a relaxed stance on his current debtors. The managing director told the Tribunal that the Claimant had about one hundred and twenty active customers, eight of whom were causing payment problems for the company. As a result of that meeting the witness wrote to the Claimant expressing his concern and displeasure at the Claimant's handling of those debtors. He denied that this letter amounted to a written warning to the Claimant or that his behaviour towards him was improper. The sales performance of the Claimant was not an issue. It was the manner in which he adopted towards the stock cards and debtors that were causing friction.

The Claimant's reply to that letter confirmed to the witness that the message about the debtors was still not getting through to him as the purpose of that meeting was for the Claimant "to up his game". He was not happy with Claimant's response. Following a further meeting between the managing director and the Claimant on 30 April the former gave a verbal warning to the latter but never confirmed it in writing to him. The ongoing issues regarding stock cards and debtors remained unresolved. The witness again rejected the allegation that he used threatening and abusive language and behaviour towards him. By that time the debtor situation with the Claimant's customers was improving. That was in contrast with the condition of his back as his recurring pain disabled him around that time. Further issues with the Claimant about debtors and journey times emerged in May and this was reflected in emails sent by the sales and Managing Director to him. The Managing Director definitely became aware of the Claimant's decision to cease his employment with respondent as he received a letter from the Claimant's representative dated 2 June 2010 stating that news. There might have been a slight delay in one credit transfer of the Claimant's salary and he had no involvement in a leave decision affecting the Claimant. The Managing Director added that it was untrue that he was a bullying boss.

A credit controller who commenced in March 2009 said it was her decision on how to act on orders and that the sales team were to follow the credit control policy. This witness who reported to the Managing Director commented that this behaviour at meetings was never unacceptable. The current sales manager and a sales representative echoed the policy that it was the responsibility of a sales representative to collect payments from customers. It was also the practice of the Managing Director to only use a mobile phone to call sales representatives.

## **Determination**

The Tribunal were unanimously of the view that this was a difficult case. There was significant and at times, complete conflict in relation to the evidence presented by the respective parties. It was however abundantly clear to the Tribunal that the relationship between the Claimant and the Respondent's Managing Director was fractious.

The Tribunal was of the view that the placing of the former Managing Director of the competitor company with the Claimant was unusual and could see why it might raise difficulties for the Claimant.

The Tribunal accepted that there were issues in relation to the completion of stock cards. The Tribunal was of the view that the Claimant's efforts in relation to the completion of the stock cards were slipshod at best.

The Tribunal was of the view that the Claimant's Contract of Employment provided no adequate grievance procedure as it did not set out any procedure that could be followed. This left the Claimant at a significant disadvantage.

The Tribunal considered that there was little in the Claimant's complaint in relation to payment of wages and was satisfied on the balance of probabilities that his wages were largely paid on time, though it accepted that there was at least one occasion where his wages may have been paid late.

The Tribunal accepted that the Respondent Company did not ignore the Claimant's problems with his back, going as far as purchasing a specific vehicle to assist with his condition.

The Tribunal considered the Booklets of Correspondence presented at the hearing. Particular emphasis had been made to a letter of the 24<sup>th</sup> of February 2010 written by the Respondent's Managing Director to the Claimant. The Claimant took the letter as a formal written warning. The Respondent's Managing Director disagreed. The Tribunal considered that the letter could reasonably be interpreted as a formal written warning.

The Claimant concluded his evidence on the first day of the hearing. A significant plank of the Claimant's case was that he was verbally abused in a manner that would be regarded as most unacceptable on any reasonable interpretation. The Respondent's Managing Director vehemently denied this allegation. In the view of the Tribunal, the allegations of this behaviour could have been quite simply refuted if witnesses stated to have been at the meetings had been brought along to the resumed hearing. The Respondent Company for its own reasons decided not to call such evidence. Some of these witnesses were abroad but at least one was in Ireland. The evidence could either have been corroborated or contradicted by the evidence of third parties. For some reason these third parties were not called or asked to appear. All of these third parties were former employees of the Respondent Company and their absence or failure to appear at the resumed hearing, led the members to form a particular conclusion.

The Tribunal is of the view that given the verbal warnings, and the contents of the letter of the 24<sup>th</sup> of February 2010, that it was not unreasonable for the Claimant to anticipate that the next step would be dismissal given the procedures set out in the Claimant's Contract of Employment.

On balance, the Tribunal finds the Claimant proved the case that he had been constructively dismissed, notwithstanding the fact that the Claimant, by his actions, may have contributed to some degree to the position in which he found himself.

The Claimant gave evidence that he was out of work from the 31<sup>st</sup> of May 2010 until he obtained a job in November 2010. He admitted that he had obtained work for a two week period in the interim where he earned €2,000.00. Apart from this oral evidence no further documentation or evidence was submitted.

In all of the circumstances of the case the Tribunal allows the claim under the Unfair Dismissals Acts, 1977 to 2007 and awards the sum of €7,500.00 by way of compensation to the Claimant.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)

