

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

EMPLOYEE

claimant

RP1459/2011

UD1107/2011

MN1201/2011

against

EMPLOYER

respondent

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. O'Leary B L

Members: Mr D. Peakin
Mr M. O'Reilly

heard this claim at Dublin on 25th October 2012

Representation:

Claimant(s): Mr. Hugh B. Byrne BL instructed by Ms. Fran Coote, Hopkins & Co, Solicitors,
10 Eastmoreland Place, Ballsbridge, Dublin 4

Respondent(s): Mr. John Barry, Management Support Services (Ireland)
Limited, The Courtyard, Hill Street, Dublin 1

The determination of the Tribunal was as follows:-

Respondent's Case

RG, a director and sales manager told the Tribunal that the respondent manufactured roller shutters and installed doors in shops and industrial premises. The claimant fitted and helped to install doors. The claimant was issued with terms and conditions of employment. The claimant interacted with customers and was familiar with certain aspects of payments. He spoke to the claimant a couple of days prior to a meeting on the 18th January 2011. The claimant was in work, he had a ford transit van and he undertook work after hours on call. He observed materials in the claimant's van which were not the respondent's, the materials were a competitors.

The respondent did not have a difficulty if employees wanted to undertake the respondent's

work outside of office hours for family/friends provided they asked for permission. Two days later he received a call from a supplier who informed him that the claimant had asked this supplier for a price on work dockets. He then contacted a competitor who was a customer to establish if the claimant had undertaken a transaction with them.

After that he telephoned the claimant and arranged to meet with him. The claimant did not deny that he contacted this company. The claimant told him that he was going to establish his own business and that he was planning for his future. He wanted to speak to the claimant's work colleague but the claimant's colleague did not want to get involved in the situation. He had further discussions with the claimant.

RG needed to talk to management and he told the claimant that they needed time apart. The claimant told him that there was no need for this as he had no plans in place. He told the claimant that he was suspended with pay. The claimant told him that he would leave in approximately four weeks. He told the claimant that it was going to be very uncomfortable for the respondent when dealing with customers. He contacted the claimant on Friday 24th November 2010. He told the claimant that the meeting was important and he asked the claimant if he wanted to bring representation and the claimant told him he wanted to continue the discussion.

He asked the claimant if he purchased material from one of the respondent's suppliers and he did not deny that he did. The claimant told him that he was going to work for himself. This was a very difficult situation for the respondent. It was noted that the claimant had made plans for the future and that this was imminent. The claimant told him that he would not resign and that he would report for work on Monday. The respondent felt that it could not have the claimant interacting with the respondent's customers. He spoke with the MD and had a discussion. They met with the claimant and the meeting was calm and polite. Subsequent to that the claimant established his own business.

The MD told the Tribunal that he purchased the respondent business over thirty years ago. It was accepted that employees could undertake some work outside of business hours but not for profit. This policy was not documented in writing. RG, the director and sales manager asked the MD on the 18th/19th January 2011 if it was correct to suspend the claimant and he told him that he could be suspended with pay. He did not meet the claimant on a daily basis. He spoke to RG as he needed to establish the facts and the claimant was invited back to a meeting. Both he and RG had authority to dismiss.

He told the claimant that he could have a representative at the meeting. The claimant attended the meeting on his own and he suggested that the claimant bring someone. He asked him if he was planning to go out on his own and the claimant replied that was his plan but that he was not resigning. He considered his employees ambassadors for the customers and he could not have the claimant interacting with customers. The claimant told him he was not ready at that point to establish his own business and he requested the respondent to retain him for another while. He made the decision to dismiss the claimant after the meeting.

Claimant's Case

The claimant told the Tribunal that he joined the respondent in 2002 and undertook work in the work shop until 2005. After three years he dealt with customers. During 2010 he worked a week on week off. He told RG that if he needed a van that he (the claimant) could use his own

van. He used his own van to undertake work on some occasions and the respondent repaid him for diesel. On the 18th January 2011 he met with RG who asked him if he had been in in discussion with a printing company and he replied that he had. The claimant wanted to find out the price of leaflets and he had taken steps to establish his own business. He was suspended and two days later he was informed that he was going to be let go. He attended a meeting with the MD and RG and he was informed that the respondent could not have him dealing with customers and staff. He told them he was not ready to leave and that he was ready to go to work. Five days later he contacted the CRO, he bought leaflets and labels and tried to get some work. Business was not great for approximately six months and he was on a back to workscheme. He had to obtain a loan to buy equipment and he earned approximately €30.000.00 in 2011. At one point during his employment with the respondent when he was working a week on week off he asked the respondent if he could return to work full time and this arrangement was facilitated.

Determination

Based on the evidence adduced and the oral submissions provided the Tribunal finds that the claimant was in the process of establishing his own business which would be in competition with the respondent and had made enquiries from the respondent's suppliers regarding the costs of printing and supplies. It was not unreasonable for the respondent in such circumstances to dismiss the claimant. The claimant gave evidence that he had earned more in 2011 while undertaking work for himself than he had earned with the respondent. The claimant was not unfairly dismissed and his claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

The Tribunal finds that the claimant is entitled to four weeks gross pay under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 in the amount of €2,071.80 (€517.95 per week).

The claim under the Redundancy Payments Acts, 1967 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)