

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

-claimant

CASE NO.
UD318/2011
RP365/2011
MN308/2011
WT92/2011

against

EMPLOYER *-respondent*

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr R. Maguire, B.L.

Members: Ms J. Winters
Mr T. Brady

heard this claim at Trim on 16th October 2012 and 6th February 2013

Representation:

Claimant:

Respondent :

The appeals under the Redundancy Payments Acts, 1967 to 2007 and the Organisation of Working Time Act, 1997 were withdrawn at the outset of this hearing. The issue of dismissal was in dispute in this case.

Claimant's Case

The claimant commenced employment as a sales merchandiser with this manufacturer and distributor of snack products. Despite her requests for a contract of employment she never received such a document from the respondent. The claimant operated in a company-supplied van in the north Leinster area and spent most of her working time in that area promoting the respondent's products. She told the Tribunal she was very happy with her work and was particularly pleased with her strong sales performance. The snack food industry was very competitive and each involved company, including the respondent treated their counterparts as rivals. The

respondent commercial aim was to initially maintain and then grow their market share and sales in this industry.

As part of her work the claimant and regional sales manager met around once a month and discussed sales performances and related matters. In that context she met this manager in a west Leinster town on the first Monday in October 2010, which was the fourth day of the month. Prior to that meeting she had been absent from work for over one week on health grounds. In the course of that meeting the claimant mentioned that she was considering leaving the respondent to take up employment with an unidentified but similar company the following January. The background to that comment lay in an earlier telephone contact she had with a representative from that entity while out sick from the respondent. She proceeded to tell the regional manager that another company were looking at her as a good employee and gave no more details. The claimant told the Tribunal that her rationale in giving that manager this information was to draw attention to her high sales performance record and to gain recognition for her achievements on behalf of the respondent. Furthermore, she told the regional manager she was giving him that information on a confidential basis.

The following day while working in south Ulster the claimant received a telephone call from that regional manager and the two of them again met later that day in that area. At that time the claimant thought the purpose of that meeting was to address an issue she was having a colleague. This however was not the case as the manager raised the issue of her possible departure from the respondent. He then announced that the sales operations manager was to join them for this meeting. The claimant found his presence surprising as he was based elsewhere and seldom travelled specially to meet individual sales merchandisers. This manager whom she described as one of the best then "took the lead" at this meeting. The claimant named the company that she was considering working for at that meeting. That company was a big competitor of the respondent. The claimant had by that day neither received an offer of employment nor agreed to work for it. She certainly had not tendered her resignation to the respondent or stated she was definitely leaving the respondent. She was not told to 'go home and reconsider,' only to return all the respondent's property the following day.

Before that meeting concluded the claimant was informed by the sales operations manager that she could not now be allowed to continue to work for the respondent. When she asked when she was to leave the answer from that manager was tomorrow on 6 October 2010. She was upset at this news and then made her way home. The claimant told the Tribunal that it is not within her character to divulge information she had on the respondent to a competitor and indicated that the respondent's concerns over that were ill-founded and without merit.

The claimant spent up to two hours at the respondent's head office central Leinster on 6 October returning its property. She had no memory of being asked to reconsider leaving and was not asked to sign any document. She never submitted a resignation letter nor was she issued with a letter of termination of employment. While there she exchanged words with receptionist and bid a fond farewell to the sales operations manager. Subsequent to her cessation with the respondent the claimant did not secure employment with that competitor.

Respondent's Case

The regional sales manager for an area he described as the north east said there were twenty five sales merchandisers working for the respondent. He was in regular contact with them and the company's statistics on market share and sales were shared among that group. This was sensitive information to be kept from their competitors. His main role for the company was to ensure sales

and share of the market was to grow especially in this area of operation. This witness was the claimant's supervisor and he described her as a good operator who had "fire in the belly". He confirmed that the claimant was never issued with a contract of employment and accepted that this was an administrative "slip up". The respondent also had a human resource section.

Following the claimant's absence through illness and as part of his routine he met with the claimant in a café on 4 October 2010. There he heard the claimant tell him it was her intention to leave the respondent at the end of that year as she was considering joining "the second biggest food seller" in the world. He had no recollection of being asked by her to keep that information confidential and did not "push her" further on that topic. Based on that verbal interchange the regional sales manager now understood that the claimant was definitely leaving the respondent. Later that day he contacted a colleague who guessed at the identity of that company. That prompted him in turn to call the sales operations' manager and told him of this development. That manager decided to meet the claimant to address this new situation.

That meeting took place on 5 October. The witness told the Tribunal it was human resource meeting. He added that there was nobody from that section was present at the meeting. In giving notice to the claimant of this meeting he did not tell her of its subject matter nor that this senior manager attend. According to the witness that manager had the authority to hire and fire employees and that he was needed at this meeting. At that meeting the claimant was told that it was a serious matter that she was considering going to a competitor. She was asked to reconsider her intention to do that and indicated she was not disposed to do that. The senior manager then told her that another meeting was necessary and "the penny dropped" with the claimant.

The witness described as sleight of hand the claimant's non-disclosure of the company interested in employing her in early 2011. He said it was normal practice for employees who are resigning to submit a letter to the respondent to that effect. No such letter was submitted in this case. The witness also stated that the claimant never used any version of the word resign at the meetings he was present at. He also commented that it would have been better had the claimant never at all mentioned her situation regarding her departure from the respondent.

The sales operations' manager gave evidence that he attended the meeting of 5 October 2010 on foot of a phone call from the regional sales manager the previous day. The regional sales manager informed the witness that the claimant might be leaving her employment to take up employment with a competitor. The witness asked the claimant if she was leaving her employment to which she replied that she was 'going to the biggest company in the world with marvellous opportunities.' The claimant said she had met with the competitor twice and had been offered a position. The witness warned the claimant that there were big changes going on within the competitor. He informed the claimant that she could not continue working for the respondent if she was leaving to work for a competitor and would be put on garden leave, but that she should go home and think about it. He asked the claimant to think about it, to talk to her partner and if she changed her mind that would be ok. The claimant was upset at the conclusion of that meeting as she had had to tell the witness that she was leaving her employment and they'd had 'a great relationship.'

On 6 October the witness again asked the claimant to reconsider her decision; she said she was going to the biggest company in the world and 'I'll get to travel' so she was definitely leaving. The witness promised to secure 4 weeks' pay for the claimant as well as her full bonus, her phone and a lift home. The claimant had a 'side business' which she operated from the respondent premises and she was given permission to continue this. There was no animosity between the respondent and the claimant; when she was leaving the premises it was sad but they were in good

spirits.

The witness attended the meeting on 5 October as he held the claimant in high regard and wanted to find out what was happening. He does not have the power to dismiss anyone but has previously made that decision as part of a disciplinary process. The claimant did not resign at the 5 October meeting and likewise this meeting was not convened to dismiss the claimant. The witness asked the claimant to think about it and officially inform the respondent of her decision the next day. The witness informed the claimant that she was unsuccessful in receiving a promotion as her English needed improvement.

The receptionist at the respondent gave evidence that on 6 October, as the claimant was leaving the premises, she informed her that she was leaving her employment to go to the second biggest company in the world and that she would get the opportunity to travel.

Determination

There was a conflict of evidence in this case that displays the extent of the difference between what both parties understood from the meetings of 5 and 6 October. In circumstances where the company has not lived up to their statutory obligations in relation to the provision of the terms of employment they had an even greater onus than normal to proceed with clarity when at the end of the employment relationship. In circumstances where the claimant's proficiency in English stopped her from being promoted, it is particularly important that the respondent clarify in writing the details surrounding the termination of the employment relationship.

The Tribunal finds that the claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds. However, the Tribunal also considered that the claimant contributed substantially to the confusion in relation to the end of her employment as per Sec 7 (2) (b) of the Act and therefore finds that an award of €14,000 is just and equitable in all the circumstances.

In addition the employee is entitled to two weeks' minimum notice under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, being an amount of €946.12.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)