

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:
EMPLOYEE

-appellant

CASE NO.
UD783/2011

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

EMPLOYER *-respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms J McGovern B.L.

Members: Mr D Moore
Mr P Trehy

heard this appeal at Dublin on 13th September 2012
and 4th December 2012
and 10th April 2013

Representation:

Appellant:
Respondent:

This case came before the Tribunal by way of an employee appealing the recommendation of a Rights Commissioner **ref: r-095146-ud-10/DI** under the Unfair Dismissals Acts, 1977 to 2007.

Background

The claimant was employed as a Technical Sales Engineer by the respondent company from December 2005 until December 2009. He was dismissed for poor performance.

Respondent's Case

The Managing Director of the respondent company gave evidence. The respondent company provides and services ventilation equipment. The parent company hired the claimant initially the claimant's duties included office administration and some sales work. There was no difficulty with his performance. In January 2009 the company hired a Management Accountant as they required someone with more credit control experience. The claimant's job description was re-issued. He was expected to focus on sales only and particularly outdoor sales. In addition there was an office based sales person and the MD also conducted sales. Other non-sales staff occasionally made sales as well. The claimant was provided with a company car.

In March 2009 the MD was of the opinion that the claimant was not embracing the outdoor sales role. He considered that the claimant was not dressing in an appropriate fashion for making sales calls to customer's premises. He spoke to the claimant about his sales technique and the claimant said he required more training. The MD created a sales manual for the claimant and gave it to him in April 2009. He considered that someone with an engineering background, such as the claimant, would have no difficulty understanding the technical parts of the document. He also created a document to assist the staff in making quotes to customers.

He invited the claimant to a disciplinary meeting to address his performance on 9 June 2009. He was advised that he could bring a colleague. The issues to be addressed at the meeting were:

1. Outdoor calls not made to clients.
2. Lack of attention to detail on orders prepared.
3. Procedure on sales orders not adhered to.
4. Handbook not read and letter to confirm not received.
5. Contact/appointments not made with top 5 customers as requested.

In April and May of 2009 the MD gave evidence that the claimant had made errors with three client's orders which resulted in financial loss to the company. The claimant contended that in one of the cases it was the client who had made the error. The claimant did not have time to read the manual and he considered that his sales presentation was not polished enough to make the required sales calls.

The agreed actions as a result of the meeting were that the claimant was to:

- Read the handbook by 12 June 2009.
- Prepare a sales presentation by 17 June 2009.
- Make appointments with the top 5 companies by 29 June 2009.
- Commence sales calls by 16 June 2009.
- Provide a doctor's certificate stating that the claimant was fit to work.

The claimant was issued with a verbal warning on foot of the meeting. A review meeting was planned for 14 July 2009. Fortnightly sales meetings were also held. The claimant was on sick leave in 2008 in order to have stents implanted. The claimant was on paid sick leave. His medical cert stated that he was fit to resume office work. At the first disciplinary meeting in June 2009 the MD sought a cert that would indicate that the claimant was fit for site work. As this was not forthcoming the MD arranged for a company doctor to assess the claimant. This doctor provided the required 'fit to work' certificate.

After the disciplinary meeting the MD organised one-on-one role play sessions with the claimant to develop his sales technique. There were two sessions in June and one in September.

At the sales meeting on 30 June 2009 the claimant had no potential orders to report. At the sales meeting on 8 July the MD was concerned as the claimant had no appreciable orders to report.

The disciplinary review meeting was held on 24 July 2009. It was agreed that the plan was being implemented, but deadlines were not being adhered to. The claimant's performance was still weak. The claimant's call register indicated that he was still not making calls in person. He was not gathering essential information on who he was talking to and what projects the

companies were involved with.

The percentage breakdown of sales for June and July:

Salesperson	June	July
Claimant	11%	20%
Managing Director	49%	45%
Office based salesperson	37%	34%

The MD invited the claimant to another disciplinary meeting on 30 July 2009 to discuss performance issues. The claimant asked to meet the MD privately before the meeting. He accused the MD of being unfair to him. The MD felt that the claimant was unfamiliar with the disciplinary procedure. He advised the claimant that he could appeal to someone else under the dignity and respect at work policy if he felt he was being mistreated. The claimant accused him of being unsympathetic about his illness the previous year. The MD called a colleague to come and explain that the disciplinary process allowed the MD to address performance issues. He pointed out that the claimant had been paid while on sick leave the previous year. Sick pay was discretionary.

At the disciplinary meeting they discussed the claimant's sales calls. He had made 8 calls in the previous 37 working days. They discussed how the claimant could increase the number of calls. They discussed the quote register, which contained all the information about quotes given to customers and from which the claimant could organise calls. The MD wanted the claimant to achieve 15 calls per week in August. A written warning was issued on foot of this meeting on 13 August 2009.

A disciplinary review meeting was held on 11 September 2009. The MD considered that there had been some improvement but the number of sales calls had not improved. He invited the claimant to another role play session to improve his sales pitch. This was held on 21 September 2009. The claimant's sales had improved, but mainly due to one large order. He felt that the claimant could have reached his sales target for the month if had made more of an effort.

Sales percentage sales figures for August and September:

Salesperson	August	September
Claimant	45%	16%
Managing Director	9%	1%
Office based salesperson	43%	73%

The MD believed that the claimant was still not making enough sales calls and so invited the claimant to a further disciplinary meeting on 23 September 2009. The claimant was issued with a final written warning on 28 September 2009. He was given an action plan, including a sales target of €50k to be met by the end of October.

A disciplinary review meeting was held on 21 October 2009. The MD was unhappy as the claimant had been back from holidays for a week before he entered a quote on the quote register. The last quote he had entered prior to the meeting was 16 October 2009. He felt that the claimant was unhappy in the outdoor sales role. The claimant provided call sheets, but the last one was not in chronological order and the MD believed that the claimant had produced them to cover himself.

The claimant was invited to a further disciplinary meeting on 2 November 2009. The claimant had made 31 callouts in the previous five months which the MD considered unacceptable. He believed that the claimant had lost interest in his career. He considered it inevitable that he had to dismiss the claimant. The claimant was dismissed by letter dated 2 November 2009 and paid one month in lieu of notice. He was advised of his right to appeal, but no appeal was lodged. The claimant was not replaced. A business development manager was hired who was also qualified as an engineer. He carries out sales also.

During cross-examination the MD denied that the office based salesperson had refused to make outdoor calls. He had not asked her to. He could not say if she had secured contracts from the 'top 5' companies. They had had previous business from the top 5 companies before and MD wanted to secure repeat business. The company had not secured business with the top 5 companies since the claimant's dismissal.

He expected the claimant to have a certain level of training when he commenced with the company. His background was in building fans and so he should have had good product knowledge. It became evident that the claimant was unwilling to adapt to the new role. The company had had to restructure due to the business climate. The claimant had never indicated that he didn't want to do the job. He understood that the revised job description was issued to the claimant in January 2009. The notes from the meeting of 3 April 2009 referred to the new job description.

He sought the extra medical fit cert in June 2009 as he realised when he looked at the claimant's file that the one previously submitted had only referred to office work. The job occasionally called for servicing of equipment.

On one occasion on 23 July 2009 the MD had to make site calls to Sligo and Cork due to an error by the claimant. He may not have included this incident in the disciplinary process. He agreed that he did not ask the claimant to go to Cork on this occasion. In answer to where he had asked the claimant about the errors made with three clients he contended that he had notes regarding the errors in his preparatory documents for the disciplinary hearings. In the notes from the disciplinary meeting on 9 June 2009 the claimant refers to one of the clients in question having made a mistake. The claimant was aware of the mistakes. No one had hit the sales targets, but the comparative sales figures were a concern.

He expected the claimant to work in the office on Mondays and Fridays settings up sales calls and then Tuesday, Wednesday and Thursday on the road making three sales calls in the morning and two calls in the afternoon plus any servicing that was required. He had told the claimant informally that his performance had to improve and that his appearance should be better. He spoke to him once on the stairs in the building and twice more in the office. He hinted that his performance must improve.

He was informed by letter that he could bring a colleague to the disciplinary meeting on 9 June 2009. When queried about who the claimant could have brought the MD stated that this did not necessarily need to be a colleague.

He did not present the documents to the claimant in relation to the mistakes he contended that he had made in relation to orders. He accepted that he did not say to the claimant that he did not accept his version of events in relation to one of the mistaken orders. He disputed that he

discouraged the claimant from making outdoor sales calls. He produced a sales training manual for the claimant. The claimant had worked in an open plan office with other salespeople for three years and so could not have helped but overhear other colleagues. The claimant did sometimes deliver products to customers but this was not his primary function. While he detailed the heavy lifting involved in the claimant's service work this was typical but not standard work for him.

The claimant requested a meeting with him two days before the second disciplinary meeting on 28 July 2009. The claimant accused the MD of favouring the indoor salesperson and of being 'out to get him'. If this was the case he told the claimant he could complain under the dignity at work policy.

In regard to pricelist the MD stated that the company had an A4 binder of pricelists. The claimant could have photocopied the relevant pages. Prices were available except for bespoke items which had to be converted from sterling. The claimant asked during a meeting for a pricelist and the MD told him to produce a token list.

He agreed that the claimant was on leave for part of September 2009. The issue of whether or not a third party, Mr. R, interviewed for the claimant's job while he was still working with the respondent arose. MD contended that the first time Mr R was interviewed for the position was November 2009 and not two weeks before the claimant was dismissed. He agreed that the letter of 30 October 2009 inviting the claimant to a disciplinary meeting did not state that the claimant could be dismissed on foot of the meeting. The claimant was dismissed in the afternoon of that day after a pre-lunch meeting. He recalled walking the claimant to the car park and asking for his building keys and mobile phone. He did not recall a colleague denying the claimant access to his PC. The claimant was paid one month in lieu of notice. He was allowed the use of the company car for a further month as well. He denied that after asking for the claimant's keys and phone the claimant asked "does that mean I'm sacked?" and that he had replied "what do you think?"

The MD indicated that he had made the decision to dismiss over the lunchtime. He consulted the parent company in the UK. He made the decision alone. The person he spoke to was the person who would hear any appeal brought. The claimant was not advised of his right to appeal in the letter of dismissal.

During re-examination the MD confirmed that in his view it was not possible that the claimant was unaware of his changed role after the restructuring. The claimant received copies of meeting notes and action plans. He did not challenge them. He did not complain that he was too busy with other functions to pursue the sales role. He did not appeal any warnings or the dismissal or lodge a grievance.

The internal salesperson gave evidence. They discussed the restructuring of the company in December 2008 and January 2009. She was to do internal sales and estimations and the claimant was to work two days in the office and three days out of the office. The claimant was not happy with the change. She discussed with the claimant what outdoor sales entailed as she had done this in a previous employment. All employees carried out other functions as required due to the small size of the company. She did not have a company car. She had no involvement in the claimant's dismissal.

Regarding the pricelist, she had provided the list to customers if required. Most products were

quoted in Euros but non-standard items were in sterling. There was never any issue with the pricelist in her opinion.

During cross examination the witness stated that the change of contracts was discussed many times during December and January 08/09. She was required to do all quotations, estimations and more sales. The claimant was unsure about his role as he had not done sales before. She was not asked to do the outdoor sales role. She had enjoyed outdoor sales in a previous employment but she did not wish to do it at that time. She considered the roles to be equal in difficulty. She disputed that she was given leads. She agreed that she asked the claimant to make deliveries for her if she could not get a courier. She only became aware of Mr R the day before he started in December 2009. She did not receive any formal warnings. She normally had her work done.

Claimant's Case

The claimant gave evidence. He was hired by the respondent company in 2005 as a technical sales engineer. He explained at the interview that his background was manufacturing and that he did not have sales experience. He was told that he should not worry and that sales training would be provided.

His role entailed completing sales orders for clients, processing orders, account work, store work, driving a forklift and general office work. This continued up to January 2009. A part-time employee also worked on accounts but as the company got busier this became a bigger role for him. Another sales representative was hired at the same time as he was. There was no issue with his performance prior to the new role in January 2009. He understood that the indoor salesperson was unwilling to do outdoor sales.

He did not recall discussions in December 2008 regarding the new role. He did not have any choice in the matter. He did not receive a change of job description but the training manual was provided to him. He was to learn the manual and conduct various role plays with the MD in the office. The MD told him that he wasn't polished enough and that he was to tailor the presentation for the individual client. No matter what the appellant did it was always wrong. He did not receive sales targets until later in 2009. He did not believe the manual was an effective tool to assist him in developing his sales technique.

He was instructed to pursue sales meetings with the "big 5" companies in order to attract new business. He did achieve meetings with them but it was difficult and on their terms. He also followed up on quotes to various customers and he input those on the quotes register. He found out what companies had contracts and sought to get their business. He spoke to anyone they had done business with previously. Clients asked him to stop calling. He also serviced previously installed units and repaired items and this took up a considerable amount of his time. He used his time as best as he could to get new sales and keep previous customers happy.

He wasn't given an opportunity to improve his sales within the timelines. The recession made it more difficult. He did not agree or argue with the MD about the sales targets as there was nothing he could do. He felt they were impossible to achieve. He believed that the MD gave sales leads to the indoor salesperson to make him look bad. He found that he quoted for sales with particular companies but somehow the sales went to the MD or indoor salesperson. He was being distracted on a daily basis with other business which had to be done.

The MD did not refer to the three order mistakes during the disciplinary proceedings. He became aware of it around the time of dismissal. There was no investigation into it. He maintained that he was meticulous in his ordering and only what was specified on the purchase order was what was ordered. Other employees made mistakes as well. He was surprised that the MD sought a further fit to work certificate from him in June 2009 for his illness the previous year. He felt that the MD was trying to put every hurdle in front of him to make out that he could not do the job. He felt this was the first step in the dismissal.

He was invited to bring a colleague to the disciplinary meeting on 8 June 2009, the indoor salesperson was the only person available to him. He asked to bring a tape recorder. He understood any appeal went to the MD. He was not advised that he could go higher with it.

At the disciplinary meeting of 24 July 2009 he felt that he had achieved what was asked of him by making appointments with the “big 5” even though it was not within the timeline. He was criticised by the MD many times for his appearance. He considered that he was dressed appropriately for work. He had a jacket in his car if required, but he wore a fleece in the office as he had to stay warm with the heart medication he was on. He bought two new suits and shirts but even when he looked well and had the presentation mastered the MD was still not happy. The MD always found fault with him. He felt that he was being pressurised to get sales but that there were obstacles put in his way. He complained to the MD on 26 July 2009 about his heavy handed approach.

Regarding the pricelist, the claimant did not feel that he could hand it out as the prices were not clear. The MD encouraged him to delay giving it out because of currency fluctuations. One of the “big 5” told him that without the full binder of prices the company would not be included for quotes. The “big 5” wanted heavy duty equipment which was non-standard and therefore not in the Euro pricelist. He didn’t have the authority to decide on the pricing structure. He asked for it but he was told to give a “token pricelist”. The price was set by a larger company in the UK. The lack of clarity concerning the price list was a further obstacle in obtaining new customers.

He understood that the disciplinary meeting on 2 November 2009 was to discuss his sales only. There was no mention of possible dismissal in the invitation letter. They discussed sales at the meeting. A colleague took notes. He believed that they were uncompetitive on price. The MD said the next step was dismissal and he stated that he was aware of it. He did not realise that the MD meant that day.

After lunch the MD called him into his office. The MD said he was sorry but he asked for the claimant’s building keys and work mobile phone. He was shocked and asked if that meant he was dismissed. The MD said “what do you think?” He returned to his desk and a colleague took the computer mouse off him and logged him off the system. He took his belongings. He was allowed to keep the company car for a month. He was paid one month in lieu of notice.

He did not appeal as he did not believe any appeal would be conducted in a manner fair to him. He believed they were getting rid of him and replacing him and it was all orchestrated by the MD. A few weeks prior to his dismissal he came across a letter on a colleague’s desk which outlined a sales position with the company.

The appellant gave evidence of his loss and his attempts to mitigate his loss.

During cross-examination the appellant accepted that the respondent underwent a restructure, although he was not notified of this process. He accepts that his role included external sales but he was never informed that he had to exclusively do external sales.

The appellant confirmed that he was promised on many occasions that he would be provided with full sales training. The training provided was far from adequate; the training manual had been 'around' before he commenced employment. Although he accepts that he had the technical knowledge to understand that part of the manual (compiled by the MD who provides training for the Engineering Institute), he did not have the skills to utilise the sales tips in the manual and for it to be beneficial to him. The sales presentation included in the manual is subjective and will not work for everyone. As a result of the disciplinary meetings the appellant tried to learn off the sales presentation and perfect it. The MD always found fault with him during the role-play sessions. He did accompany the MD on a sales call in July to watch the presentation in practise.

The appellant made every effort to improve. He maintains that the measure of 8 sales calls in 37 days or the other measure of 31 sales calls in 104 working days does not reflect the amount of effort he put in. It was a given that he was doing other work so he did not need to raise that issue in the disciplinary meetings. It was impossible to be out of the office for the agreed 3 days per week with all the administration work he was required to do.

The appellant did not appeal any of the disciplinary decisions as he understood he would be appealing to the MD which would render the process pointless. The MD might have suggested he could appeal to another manager but he did not see the point after he had been dismissed.

Determination

There was a restructure within the respondent company in 2009 to manage the downturn in business as a result of the recession. As part of this restructure greater emphasis was placed on the sales element of the appellant's role as a Technical Sales Engineer in order to meet the challenges in the market at that time. While the appellant maintained at all stages that he had no sales experience and required training in that area the Tribunal are satisfied that a fair and reasonable approach to training the claimant in sales was taken by the respondent.

The Tribunal is further satisfied that adequate disciplinary procedures were adopted in relation to the appellant. The Tribunal further believes that the letters issued inviting the appellant to the meetings and the minutes of the meetings (compiled by the respondent) highlight the increasing seriousness of the situation. On foot of these meetings the appellant was given the opportunity to improve his performance in relation to his sales targets and 'call-outs' but did not achieve any consistent or sustained improvement.

During the course of the disciplinary procedure both verbal and written warnings were issued to the appellant, none of which were appealed. Based on the evidence adduced there was a wider management structure available to which the appellant was aware and could have appealed to. Furthermore no formal grievance was ever raised by the appellant.

The Tribunal finds that in all the circumstances the dismissal was fair. The Tribunal upholds the Recommendation of the Rights Commissioner **ref: r-095146-ud-10/DI**, consequently the

claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)