

**EMPLOYMENT APPEALS TRIBUNAL  
CORRECTING ORDER**

CLAIM(S) OF:  
Employee

CASE NO.  
UD200/2007

against

Employer

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2001**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. M. Levey, B.L.

Members: Mr. J. O'Neill  
Mr S. Mackell

heard this claim at Dublin on 18th July 2007

Representation:

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Claimant(s): Ms. Rosemary Mallon, B.L, instructed by Ms. Sheila Cooney, Patrick Tallan & Co., Solicitors, Main Street, Ashbourne, Co. Meath.

Respondent(s): Mr. Conor Power, B.L., instructed by Eugene F Collins Solicitors, Temple Chambers, 3 Burlington Road, Dublin 4.

The determination of the Tribunal was as follows:-

This Order clarifies the original Order dated 25<sup>th</sup> September 2007 and must be read in conjunction with that Order.

The award made is in addition to the monies received by the applicant when he was made redundant. Under the Unfair Dismissals Act, the Tribunal found that the claimant was entitled to a maximum of two years salary of approximately €68,000. However, he had received approximately €38,500 as a redundancy payment. Given that he was not offered an alternative role, which should have been done in the circumstances, and bearing in mind that he is approaching retirement age and the fact that this makes it all the more difficult to gain future employment, the figure of

17,000 was arrived at by the Tribunal as being fair and reasonable in all the circumstances.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

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

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The determination of the Tribunal was as follows:-

Dismissal as a fact was in dispute.

At the outset, the figures for salary details relating to the claimant were in dispute.

**Respondent's case.**

The first witness for the respondent, **Manager A**, in sworn evidence, confirmed that the company was engaged in the distribution of premium sewing threads, zips, beads and other products. She commenced employment with the respondent circa mid-1990s.

Responsibility for the sales area, which dealt with the retail and manufacturing sectors throughout the United Kingdom and Ireland, was apportioned between five (5) Area Sales Managers, four (4) of whom were based in the United Kingdom and one (1) in Ireland. Circa 1998, following a decline in the market, however, the respondent's business suffered a downturn, which forced the company

to review its staffing levels. The number of Area Sales Managers was reduced from five to three. The claimant was not one of those staff immediately affected by the reduction in staff levels as the Irish market, while it contracted, remained a viable entity within the overall operation. The claimant then assumed responsibility, as Area Sales Manager, for the Republic of Ireland, Northern Ireland and Scotland, while the remaining two (2) Area Sales Managers retained responsibility for, and were based in, the United Kingdom. The witness explained that the company undertook a series of rationalisation programmes from the late 1990s, which included the changeover from a commission-based bonus (CBB) system to the implementation of an Objective Performance Bonus (OPB) scheme for its managers. A Staff Development and Appraisal system formed part of the latter scheme.

Facing increasing levels of competition within the market, the respondent believed that the areas for potential growth and development lay in Scotland and in Northern Ireland, with the company merely maintaining a business presence in the Republic of Ireland. While she said that all of these issues were discussed fully with the claimant when agreeing his year-on-year objectives and targets, she believed that the claimant had failed to achieve his objectives in Scotland.

To address that level of competition, the respondent introduced a range of new product lines from circa 2000 onwards, and staff members were trained on them. However, the respondent's business was not performing as well as anticipated: it undertook a further review of its sales force and during 2006, it focussed its examination on the role of the Area Sales Managers. The respondent believed that the Area Sales Managers needed to take a more pro-active role in the retail area. To achieve that objective, the respondent placed increased emphasis on its sales policy, introducing direct selling, and in promoting its crafts lines to the retail sector, thus the role of the Area Sales Manager changed to the more traditional one of sales representative. This change in work focus meant that the company needed Sales Executives, and **Manager B** (the second witness for the respondent) assumed responsibility for that area. As part of that new focus, the respondent believed that it had failed to reach its targets in the Scottish market. In addition to simply maintaining a presence in the Irish market, the respondent proposed to re-organise its work practice, which meant that responsibility for Northern Ireland and Scotland was managed from a base in the United Kingdom. The company Chairman approved these changes, and as part of that re-structuring, job advertisements were placed in a UK trade journal to 'test the market'. The witness said that the advertisement could not identify the company. The three Area Sales Managers were asked to attend a meeting in London on 7<sup>th</sup> June 2006 to discuss the changes within the company: only two (2) attended, which included the claimant.

The witness said that during the course of the plenary and bilateral meetings with the two Area Sales Managers she explained the proposed new sales set-up to them. She also stated that relations with the claimant, throughout the course of the day's discussions were, at all times, cordial. Both Area Sales Managers were invited to apply for the position of Sales Executive, the salary for which was approximately stg£19k, with an additional Objective Performance bonus of stg£6k. She maintained that she also made it clear to them that the posts were based in the United Kingdom. When questioned about a letter given to the claimant during the course of the discussions on 7<sup>th</sup> June 2006, the witness asserted her belief, based upon previous conversations with him, that he would decline the opportunity to apply for one of the new Sales Executive posts if he had to relocate to the United Kingdom to take up the position. The letter, she maintained, merely reflected her understanding of that fact, and advised him that his position as Area Sales Manager was now redundant. She explained the redundancy package on offer to both managers, and if accepted they could 'go immediately'. The claimant, however,

declined that offer and instead indicated a desire to work out his notice period, which the company accepted. However, she indicated that at no stage, either during those discussions, or after the London meeting, had the claimant expressed interest in the post of Sales Executive. She agreed that the only choice open to the claimant were either to accept redundancy, or for him to apply for one of the new posts. She confirmed that the option of early retirement was also open to the claimant but was not pursued. As the claimant failed to reply to its earlier letter of 7<sup>th</sup> June, the company issued a further letter to him on 19<sup>th</sup> September 2006 following which a second meeting took place between the claimant and the company.

The follow-up meeting took place circa 21<sup>st</sup> September 2006. This meeting was cordial: the witness said that the claimant discussed all issues pertaining to the redundancy, to his pension, as well as asking for a reference. She said he appeared to understand every aspect of his position. In conclusion, when asked, the witness said that the Sales Executive based in Manchester now had responsibility for Ireland.

In cross-examination, the witness agreed that the claimant was both a trustworthy and loyal employee throughout his employment with the respondent. She confirmed that the age profiles of the three (3) Area Sales Managers ranged between fifty + and sixty + years of age. In contrast, the witness confirmed that the Sales Executives were in the thirty + age bracket. She agreed that the redundancies coincided with the introduction of amendments to age discrimination legislation in the United Kingdom but denied it had any bearing on the respondent's decision to effect redundancies. She agreed that the company's prior advertisement for the positions of Sales Executive, with a closing date of 9<sup>th</sup> June 2006, coincided with the respondent's decision to effect, and give notification of his redundancy, to the claimant, some two days previously, that is, on 7<sup>th</sup> June 2006. She disagreed that the duties of the Sales Executive were, essentially, those undertaken by an Area Sales Manager, stating that the respondent had decided to place greater emphasis on direct sales. The witness did not reply to the allegation, when it was put to her, that the respondent used redundancy as a means of covering age discrimination, stating only that she was not aware of the potential job market or employment opportunities, for an individual in their early sixties, in Ireland.

When questioned, the witness agreed that the respondent's letter of 7<sup>th</sup> June 2006, to the claimant, contained no reference to the opportunity to apply for the post of Sales Executive, an invitation that was extended to his two colleagues. She disagreed that the claimant was shocked to discover he was being made redundant. She accepted that the respondent had also failed to make pension contributions for the claimant during his notice period. She also agreed that the claimant's pension was 'capped' at his age at redundancy, that is, sixty-one years of age, which reduced his pension entitlements by four years. However, she believed that he could obtain other employment. When questioned as to why the respondent failed to file the appropriate forms in compliance with Irish redundancy legislation, she said that she only became aware of the necessity to do so after the event. Similarly, when questioned, she could not explain the respondent's position in holding that the redundancy was governed by UK legislation, yet the claimant's entitlement to a redundancy payment was calculated by reference to the Irish system. In conclusion, she stated that the respondent did not have to make payment of an ex-gratia amount of €2k to the claimant, and disputed the contention that the redundancy was a convenient way to remove the claimant from his position within the company.

In reply to questions from the Tribunal, the witness gave a brief outline of the procedures that operated within the United Kingdom when advising an employee of a redundancy. She repeated her belief that the claimant was not interested in the new position of Sales Executive if it required

relocating to the United Kingdom.

In sworn evidence, **Manager B** outlined her role and responsibilities within the sales area in the company. She supported the first witness's account of the decline in the respondent's market share in Ireland, as well as outlining the potential for development and growth in Scotland. She explained how the company's bonus scheme fitted into the overall business plan, and internal sales restructuring programme, in that it changed from a commission-based bonus (CBB) to an Objective Performance Bonus (OPB) system, which particularly impacted on the Area Sales Managers. The respondent implemented the change in its belief that a target-driven sales system would stimulate and motivate its sales team. She conducted the claimant's appraisals, in his capacity as Area Sales Manager (responsible for the Republic of Ireland, Northern Ireland and Scotland), with him, for years 2004 and 2005. Part of this process involved the setting of objectives and targets against which the claimant's performance would merit payment of a bonus.

Following a review of sales figures it became apparent that the respondent was under-performing in that area, and it set out to improve its market share with particular emphasis on the North of England and in the Scottish region. The witness said that she believed the claimant did not spend enough time in the Scottish region to make inroads into that market, and that this issue was raised with him on a number of occasions, particularly during his appraisal on 16<sup>th</sup> March 2006. Following those discussions, she accepted that she had agreed with the claimant's assessment and apportionment of twenty-five per cent (25%) of his work-time to the region, undertaken from his Irish base. She indicated that she, personally, had sympathy for the claimant's position, and that she was happy with his work. In the circumstances, while she was prepared to concede on the reduction in time-spent in Scotland, she was not prepared to do so on the quality of the sales-related aspect of the work.

The witness also attended the meeting held on 7<sup>th</sup> June 2006, at which the respondent's position was explained to the two Area Sales Managers in attendance. As the proposed changes held a significant impact in terms of a change in territorial responsibility for the claimant, his bilateral meeting took place first. She said that **Manager A** outlined the situation to the claimant. **Manager B** said that it became apparent early in the meeting that she (Manager A) had made an assumption that the claimant would be unlikely to move from his base in Ireland and relocate either to Scotland or the North of England, an assumption that she was quick to correct once she realised her mistake. The witness supported the evidence of Manager A, in stating that the opportunity to apply for the post of Sales Executive was offered to the claimant at that meeting, but that he did not want to relocate to the United Kingdom. She said he could have raised this issue again at a later stage had he chose to do so. She confirmed that the second Area Sales Manager was given a copy of the job offer at the meeting held on 7<sup>th</sup> June 2006, together with details of the redundancy. She agreed that the letter given to the claimant made no reference to the post of Sales Executive. She concluded her evidence by saying that the respondent wanted its sales team to become more proactive, not only in seeking new sales opportunities but also in the introduction and the sale of new product lines, as well as the promotion and sale of its range of craft products.

In cross-examination, Manager B said that she could not recall if the posts of Sales Executive were advertised on more than one occasion. She confirmed that the first appointment was made in mid-August 2006 but that the candidate did not take up the position. The second successful candidate took up a position in late August 2006. She confirmed that that person was assigned to areas then covered by the claimant, and agreed that that appointment overlapped with the claimant's continued employment with the company as he was working

his notice period. She repeated that the claimant was simply offered an opportunity to apply for one of the Sales Executive posts only, not a position per se at the meeting held on 7<sup>th</sup> June 2006. The witness accepted that she had agreed to the claimant working twenty-five percent (25%) of his time in Scotland at his appraisal meeting on 16<sup>th</sup> March 2006 but suggested that he failed to meet even that figure. She agreed that the claimant had little time to address any concerns around his objectives between the date of the appraisal, on 16<sup>th</sup> March 2006 and the date of the formal notification of his redundancy, on 7<sup>th</sup> June 2006. She explained that this occurred against a decline in sales between January and May 2006, with little apparent likelihood of improvement. She repeated that while she had raised the issue of time spent in Scotland with the claimant, she declined to 'go down the heavy route' to deal with the matter. When questioned why the respondent advertised for three Sales Executives, at a time when it experienced a decline in sales, she explained that the business emphasis had, by May 2006, shifted from a reactive to a proactive approach to its sales strategy. She agreed that the Sales Executives, who were all in the thirty+ age bracket, replaced the three long-serving Area Sales Managers, who were all in the fifty + age bracket.

She maintained that a true redundancy situation existed at the time the claimant was made redundant the reason for which, she indicated, was that the sales area had significantly reviewed and altered its objectives to meet the needs of the market.

In reply to questions from the Tribunal, the witness said that the claimant was an excellent employee in all respects, with long service and an unblemished record with the respondent. She declined using the disciplinary route for that reason and, instead, stated that she preferred to discuss issues directly with him. She accepted that she had agreed to his working twenty-five per cent of his work time in Scotland, indicating that she monitored that situation between the date of his formal appraisal on 16<sup>th</sup> March, and May 2006. Events, however, such as the continuing decline in sales, had overtaken the company by June 2006, she said. In reply to further questions from the Tribunal, she admitted that the claimant had not received a copy of her minutes of the meeting of 16<sup>th</sup> March 2006. She had no input into the calculation of the claimant's redundancy payment.

In sworn evidence, **Manager C** said she also attended the plenary and bilateral meetings held with the two Area Sales Managers on 7<sup>th</sup> June 2006. She supported the evidence of the previous two witnesses in asserting that the claimant was invited to apply for the post of Sales Executive. She said that she formed the impression that he would not apply for the position. She confirmed she calculated his entitlement to redundancy by reference to the Redundancy Calculator available on the website for the Department of Enterprise, Trade and Employment. She indicated that that payment was more beneficial, in monetary terms, to the claimant than if she had used the calculation model in use in the United Kingdom. She could not recall receiving correspondence from the claimant in relation to his redundancy, or any reply to the respondent's letters to him dated 7<sup>th</sup> and 9<sup>th</sup> June 2006 respectively. She stated, however, while she would not always have sight of every piece of correspondence it would come to her attention eventually when due for filing on an individual's personnel file. .

She stated that she also attended a meeting held on 21<sup>st</sup> September 2006 when, in a range of issues, the claimant, who appeared anxious, serious but pleasant, discussed his pension entitlements. She denied he expressed either shock or surprise concerning the advertisement placed for Sales Executives or, indeed, to being made redundant. She believed that the claimant was working part-time. The witness stated that an offer of employment, as a Sales Executive, was made to a female candidate in the fifty + age bracket: she did not take up the position.

In cross-examination, the witness stated that the respondent advertised the posts of Sales Executive in May 2006 to gauge the level of interest in the position and, in defence, suggested that the company did not have to proceed to recruit and appoint someone to the position. She agreed, however, that the advertisement appeared before the three Area Sales Managers were made redundant. When questioned about Manager A's statement that the claimant had, in fact, refused to apply for one of the available positions, the witness repeated that it was her 'impression' only that she would not apply. When questioned why the letter of 7<sup>th</sup> June 2006, to the claimant, contained no reference to, or invitation to apply for one of the posts, she repeated that she had formed her impression that the claimant would not apply for a post from her colleagues.

When questioned on the failure to submit the relevant Redundancy Forms, to comply with Irish redundancy legislation, the witness said that she was unaware of that necessity, as there was no requirement to do so under the UK system.

In reply to questions from the Tribunal, the witness said that the decision to make the claimant redundant was taken during May and June 2006. She repeated that the decision to advertise was undertaken to gauge the level of interest in the posts, and to see if any of the three affected Area Sales Managers applied. When questioned, she stated that apart from placing an advertisement, there was no definite decision taken to recruit new staff. However, she examined Curriculum Vitae (CV) sent in response to their advertising for Sales Executives, which were received in mid-June 2006. She compared the applicants' skills base against the skills of existing staff, given the respondent's changed emphasis on sales. She stated that she looked at the CVs only after the meeting of 7<sup>th</sup> June 2006.

The witness could not recall any reference to Redundancy Forms on the website already referred to above, as she concentrated on the calculation of the amount due to the claimant. She was not aware that the respondent could claim a Rebate in respect of payment of statutory redundancy. She stated that the purpose of the meeting of 7<sup>th</sup> June 2006 was to advise and consult the claimant regarding the redundancy, and that she took advice on that issue from the respondent's lawyers, who are based in the United Kingdom.

The witness said that the claimant was paid pension, but that the non-payment of the claimant's pension contributions for the period from June to September 2006 was, she thought, a matter for Manager A and the Pension Trustees. She was unsure of this.

### **Claimant's case.**

The claimant started working for the respondent in March 1975 as Area Sales Manager with responsibility for the Republic of Ireland and Northern Ireland. His duties included contacting retailers and wholesalers in the areas for which he had responsibility, to speak with them on any issues relating to the business of the respondent. He assumed responsibility for Scotland and stated he spent one week in four in that area. He denied ever refusing to work in Scotland. When it was pointed out that his expense claims did not reflect that twenty-five per cent (25%) of his time was spent in Scotland, he disagreed. He understood the meeting with Manager B in London on 7<sup>th</sup> June 2006 was to discuss bonuses, etc., and when he was informed he was being made redundant, he was shocked. He could not recall being offered the position of Sales Executive or an opportunity to apply for one of the posts. As he was sixty-one years of age, he said he would have considered it, had it had been offered to him. A colleague, who sent him a copy of the advertisement, made him



aware of the Sales Executive position ten days after he received notification of his redundancy.

As the age profile of the Area Sales Managers was in the fifties and sixties, he believed he was made redundant because the respondent wished to replace him with younger staff. In his opinion, the position of Sales Executive was not new, the only difference was a change of title. He reiterated that if he had been offered the opportunity to apply for the new position, he would have considered moving. He indicated that one of the newly recruited Sales Executives assumed responsibility for his area while he (the claimant) was still working his notice period.

The claimant earned €31k net in 2005 and €32k in 2006. He presented copies of emails that reflected his attempts to obtain other employment. He believed that there were different reasons he had not been successful in obtaining employment, but the main one was because of his age. He felt he had not rallied since losing his position with the respondent. Although he felt his prospects for getting another job were slight, he remained hopeful. He had obtained a temporary three-month contract. He was based in Ashbourne, but covering the Munster area. He was anxious that he preserved his entitlement to pension. He confirmed that he was paid in lieu of pension contributions for the period between July and September 2006.

In cross-examination, the claimant said he did not consider himself retired, he was actively seeking employment and would consider anything. He agreed that he had accepted the appointment as Area Sales Manager from 1998. He accepted that his Staff Development and Appraisal Form (dated September 1998), indicated that he should spend thirty-seven point five per cent (37.5%) of his working time in Scotland. However, he stated that he reached agreement that twenty-five per cent (25%) of his working time would be spent there. Asked to explain why he failed to reply to the respondent's letter dated 23<sup>rd</sup> March 2006, he said that as far as he was concerned the issue had been successfully resolved at a meeting with Manager A. The claimant could not explain why so much emphasis was placed on that specific issue. The claimant disagreed with the respondent's representative that the person appointed to the post of Sales Executive now spends little time in Ireland.

With regard to the bonus issue, the claimant said he raised the issue with Manager A in Scotland. He had not raised the matter previously with Manager B on 16<sup>th</sup> March 2006 as he felt the new bonus structure was a deterrent to going out to work. Asked if he felt the letter from Manager B concerning a meeting on 7<sup>th</sup> June 2006 was an invitation to discuss bonuses, the claimant agreed that that was his belief, based on his earlier discussions with Manager A, which he again said took place in Scotland.

The claimant disagreed with the interpretation offered by the legal representative for the respondent that his sales contacts and enquiries were passive in nature, insisting that any enquiries on sales were in addition to his normal manner of generating sales. He disagreed that there was any significant difference in the duties undertaken by the Sales Executive viz. Area Sales Manager, considering them one and the same role. He maintained that he would have considered any job opportunity and offer made by the respondent. He was not aware where, if appointed to the role of Sales Executive, he would be based, considering it superfluous as no offer was put to him. He disagreed that he could have discussed his concerns at a social function organised by the respondent, held in August 2006, stating that he felt it was not an appropriate time or venue to raise the matter. He said that he was so shocked when informed of his redundancy that he made no comment about it at the meeting held on 7<sup>th</sup> June 2006. He felt he wasn't wanted and, given his long years of service with the respondent, agreed that he asked to work out his notice period as he felt honour bound to do so. He also felt hurt that, unlike his two other colleagues, he was

ot offered an opportunity to apply for the advertised posts.

In redirect evidence, the claimant confirmed that the reason he was given for his dismissal was redundancy, and that Scotland was not raised in that context. He confirmed he became aware after the fact that his two colleagues were offered an opportunity to apply for the newly advertised positions. He claimed that he would have considered any option, including relocation, had it been put to him.

In reply to question from the Tribunal, the claimant repeated that on the day he was notified of his redundancy, 7<sup>th</sup> June 2006, he was so shocked that he could not believe it was happening to him. He said he went into denial about the situation, tried to continue as normal, telling his family of his changed circumstances that evening. He explained that the reason why he failed to reply to letters sent by the respondent was due to his continuing denial of his redundancy as he hoped 'it would go away'.

When asked, the claimant said that he had not brought details of his time spent in Scotland to refute the respondent's case as he did not consider it an issue or problem, or relevant. He claimed he was proactive in seeking sales in that region and again refuted the respondent's stance that he spent little time there. He disagreed that his dismissal was redundancy related, and repeated that the duties of the Area Sales Managers were essentially those carried out by the Sales Executives. He maintained that time spent away from his base was never an issue for him.

## **Determination.**

The Tribunal does not accept that discrimination on age-related grounds was proven. The Tribunal finds that the respondent was in financial difficulty, and that its sales were fairly static. The respondent was dominant in Ireland, but faced competition in Scotland. Its market was mature, but substantial effort needed to be made in Scotland.

The Tribunal finds that the respondent needed someone based near Scotland, and that it required a sales person to take a proactive role in the re-structuring situation to deal with the new proactive sales approach being taken by the respondent.

The Tribunal finds that there were no prior consultations beforehand with the claimant. It finds that no alternative employment was offered to him, although the Tribunal believes that he would not have taken it. Having said that, the Tribunal finds that no opportunity was given to the claimant to have an input into the process of selection in the sense that his views on the issue were not canvassed or considered before reaching a final decision. It was an issue of vital interest to the claimant. It is not for the Tribunal to judge whether or not his input would have made any difference or, indeed, whether if offered an alternative role he would have taken it. Its denial is a denial of his natural and constitutional right to defend himself, which is not at the gift of the employer or this Tribunal but is vested in each and every citizen, no less in an inquiry which might affect their continued employment, than when the enquiry might affect their liberty.

However, while the employer clearly breached his rights, it did so in the context of believing that

he would not, in fact, take up a post outside Ireland and not in an effort to simply exclude him from the process.

For those reasons, the Tribunal is of the view that the claimant was unfairly dismissed and awards the claimant €17,000.00 in compensation under the Unfair Dismissals Acts, 1977-2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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