

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:

CASE NO.
UD752/2009
PW81/2009

EMPLOYER

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

EMPLOYEE

v

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 PAYMENT OF WAGES ACT, 1991

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P Hurley

Members: Mr T Gill
Ms H Henry

heard this appeal at Loughrea on 15th October 2009, 3rd December 2009 and 4th December 2009

Representation:

Appellant(s): Mr Alan Ledwith BL, instructed by:
Ms Susan McLoughlin
Corcoran McLoughlin, Solicitors
3 Merchant's Gate, Merchant's Road, Galway

Sales manager(s): Mr Adrian Twomey
Advokat Compliance Limited
Dun Barra, Dunaanore, Bree, Enniscorthy, Co Wexford

These cases came before the Tribunal by way of an employer appealing a recommendation of a Rights Commissioner ref: r-068580-ud-08, and a decision of a Rights Commissioner ref: r-068579-pw-08.

The determination of the Tribunal was as follows:

Appellant's Case

The appellant company, an advertising free newspaper hired the respondent employee (henceforth referred to as the Sales Manager) in August 2006, as a sales manager. The sales manager was to manage a sales team of five staff. The CEO of the company gave evidence that the sales manager's

starting salary was €55,000, but that he was seeking €70,000 or €75,000. It was agreed that his salary would increase to €65,000 after a year.

The CEO was initially satisfied with the sales manager's performance and he was given a pay increase when he was reviewed after six months, but stated that this was not part of his employment agreement. The CEO and the Co-Director had concerns about the Sales Manager's ability to manage his staff and when they met him in November 2007 the CEO suggested that he change his role from Sales Manager to Sales Rep and stay on the same salary. The Sales Manager was adamant that he wished to remain on as manager. The meeting was held in November, because it was a critical time for securing advertising for the following year. It was not a disciplinary process.

From January 2008 the CEO and Co-Director were involved in selling a Limerick newspaper associated with the company, and were required to spend a lot of time away from the Galway office. The CEO attended a sales meeting with the Galway staff to decide on the week's features, longer term features, and sales targets were set. It was up to the Sales Manager to implement the weekly plan. The Sales Manager had a five-minute progress meeting every morning with staff in the office. The CEO had daily calls with the Sales Manager to see how sales were progressing.

In February 2008 a senior salesperson asked the CEO where the Sales Manager went during the day in the absence of the CEO. He told the CEO that the Sales Manager was gone a lot. The following week another staff member suggested to the CEO that he spend more time in the Galway office, as the Sales Manager wasn't there all the time. In mid-February the senior salesperson said the situation was still not satisfactory and that the Sales Manager would leave at 9.30am and return at lunchtime and then sometimes leave in the afternoon. This alarmed the CEO, as the morning was the most important time in his business. He assumed the Sales Manager was out making sales calls, but he was not seeing the results reflected in his sales.

The CEO did not confront the Sales Manager, but rather set him specific tasks to carry out during the day which would take a few hours to complete and which required him to be in the office. The CEO went to the Galway office first to set tasks for the Sales Manager and then went to Limerick. On Monday 25th February 2008, he asked the senior sales person to let him know if the Sales Manager left the office. Fifteen minutes later the CEO received a text message stating that the Sales Manager had left the office. He was gone until lunchtime.

The following Friday 29th February 2008 the CEO was in Galway. He received a call from the salesperson who told him that the Sales Manager had left the office at 9.27am. The CEO could pass the Sales Manager's house on his way to work so he took that route and saw that the Sales Manager's car was outside his house at 9.37am. The CEO went to the Galway office and the Sales Manager came back at 12.20pm.

If a staff member was owed hours they could request time off in lieu, as no overtime was paid. Staff were asked to take the time within the same week. This situation occurred more often with the designers of the paper who had to work late on print nights.

The CEO decided to stay in Galway the following week, without telling the Sales Manager, to observe what he was doing. On Monday morning 3rd March 2008 the CEO gave the Sales Manager his instructions for the day and then left the office at 9.20am. He received a call from the office five minutes later to say that the Sales Manager had left the office. The CEO couldn't reach his car quickly enough to follow him in his car, but saw that he had travelled west. He believed he might have gone to see clients, but it wasn't what they had agreed for the day's activities.

The next day, Tuesday, the CEO set more specific activities for the Sales Manager and left the office to wait and see if he left the office. The claimant left the office shortly afterwards and the CEO followed him to his house where he remained until 10.40am. He then left and drove slowly back to town. The CEO phoned him and said he had come back from Limerick early and asked him where he was. The Sales Manager later said he had been at a meeting in Galway Airport, and at a college in town and at a motor dealership. The motor dealership was on his way home, but he had not stopped there. He said he was having trouble contacting the manager of the dealership.

On the Wednesday the CEO stayed in the office most of the day and there was no issue. On Thursday the CEO and Co-Director were both in the office and told the Sales Manager there was a lot of work to do to reach the targets. They left the office at 9.28am. The Sales Manager left fifteen minutes later and drove straight to his house. They parked near his house. The Co-Director phoned him while they waited and asked the Sales Manager where he was. He said he was at a meeting with a travel agency. The Sales Manager left the house at 12.55pm and returned to the office at 1.10pm.

The CEO phoned the Sales Manager after lunch and asked for the grid position on sales, which a Sales Manager should always know, but he had no idea and said he had been at meetings all morning. The CEO and Co-Director decided to monitor the Sales Manager again on Friday. They left at 9.30am and the Sales Manager left at 10.54am and went home. He stayed there until 12pm and then returned to the office. Again they phoned him and asked where he was. The Sales Manager said he was at meetings and would be going to Salthill later. The CEO asked him about the grid for the Easter feature and the Sales Manager did not know what the situation was. He told the CEO that every stone was being turned and that he wasn't giving up on it yet. He didn't know that the sales were actually going well.

The CEO and Co-Director returned to the office and discussed the situation. They were hugely disappointed and felt there was a breakdown in trust. They decided to ask the Sales Manager to explain himself that afternoon. They called the Sales Manager into their office and asked where he had been that morning. He gave them same locations as he had mentioned earlier. The CEO asked him where he was on Monday, Tuesday and Thursday. The Sales Manager said he had been out with clients and at the airport. The CEO told him that they knew he wasn't where he said he was and that they had stayed in Galway all week. The Sales Manager put his hands in the air and then on the table and said 'what can I say?' He said he was a 'basket case' for the previous few months and couldn't explain why he went home. He had never previously told them of any personal problems. He said he was sorry that he had let them down and that 'the game was up' or words to that effect.

The CEO and Co-Director told the Sales Manager that they were suspending him for a week with pay while they investigated the situation. The Sales Manager agreed to this. He did not say that he had been taking time in lieu. They thought about it over the weekend and on Tuesday 11th March 2008 the Co-Director phoned the Sales Manager and during that phone call the Sales Manager was dismissed. The Sales Manager was dismissed for misconduct.

During cross-examination the CEO confirmed that the Sales Manager was not dismissed for performance issues. They had worked through the issues. The issue was the Sales Manager's absences and his deception and dishonesty.

The CEO had taken notes of the Sales Manager's absences in his diary and he read these out at the

meeting with the Sales Manager. He had not given the Sales Manager a copy of the document prior to the meeting, nor had he told him what the meeting was about. He disputed the assertion that the Sales Manager had asked for a copy of the document. He had not intended it to be a disciplinary meeting; he had only intended to find out what was going on. The Sales Manager was not warned that he could be dismissed as a result of the meeting or that he could bring a representative with him. The CEO did not tell the Sales Manager who had told him about his absences.

There were no written disciplinary or grievance procedures. There was no further meeting with the Sales Manager. It had not been decided between the Directors prior to the phone call that the Sales Manager would be dismissed.

The Sales Manager was entitled to take time off in lieu. He was contracted to work 39 hours and managed his own hours, but did not work weekends. The CEO agreed that the Sales Manager sometimes opened the building and was normally in when he arrived at 8.45am. Office hours were 9am until 5.30pm. The Sales Manager normally worked until 5.30pm, possibly 6 or 7pm on Mondays and Tuesday, if busy, as Tuesday is print day. The CEO denied that any sales staff were in the office until 10 or 11pm, as the print deadline is 8pm. The CEO agreed that the company had not kept a record of hours at that time.

The CEO contended that it wasn't necessary for the Sales Manager to come in at 8am, as there was nothing to do then. It may have suited him to come in early, but it was not expected. The CEO disputed the assertion that the Sales Manager worked a 60-hour week. On one occasion the Sales Manager asked if he could leave early, at 3pm, and the CEO told him to leave discreetly, but that was not the norm. The Sales Manager did not say he was taking time in lieu and he did not have that amount of time to take every day.

On Friday 29th February the CEO agreed that he only saw the Sales Manager's car and not the Sales Manager. He had never seen him driving his wife's car and he had arrived back at the office in his own car.

On the second day of the hearing the Co Director of the company gave evidence. He had been part of the interview process when they recruited the sales manager. He described the week that led up to the meeting with the sales manager on the 7th March 2008. The sales manager was absenting himself from the office with no explanation. On Tuesday 4th March 2008 with the CEO, he followed the sales manager to his house, where he parked up for a number of hours. On the Thursday he followed him on his own. On the Tuesday, Thursday and Friday when they rang the sales manager he told them he was with clients, but his car was parked at his house. He had checked afterwards with one of the clients the sales manager had mentioned, this client informed him that the sales manager was not there.

On the Friday they felt it was necessary to talk to the sales manager. This witness, CEO and the sales manager were in attendance at the meeting. They informed the Sales Manager that they needed to discuss his whereabouts on the Tuesday, Thursday and the Friday of that week; the sales manager told them he was with clients. They told him that they had observed his movements on these days and eventually the Sales Manager admitted he had been at his house. His manner changed then and he apologised profusely, accepted that he had lied, and said he had been a basket case for the last few months. The sales manager could not explain why he was at home or why he had lied. It was a bombshell they had trusted the sales manager and his admission was their worst fear. They informed the sales manager of the seriousness of the situation and that they would revert back to him when they had time to think about his actions. They also informed him that it might

lead to his dismissal.

He and the CEO had discussed it afterwards and decided to take the weekend to think about it. During the weekend they had discussed it with each other and considered the facts. They were concerned that the trust had been broken between them as the employer and the sales manager as the employee. They also considered other options that may remedy the situation but when Monday went by it was clear their only option was to dismiss the sales manager. He rang the sales manager and informed him that they had considered everything including his admission of not being at work, and told him they had no other option to dismiss him. He referred to their letter to the sales manager of the 11th March 2008 where he invited the sales manager if he wished to respond to their decision to end his contract, to contact him. He had mentioned this during the course of his telephone call to the sales manager but the sales manager had reacted by saying he did not think there was anymore to talk about. He informed the sales manager that he would have to return his keys and phone. He wanted to hold on to his phone number so there were forms to be signed to change the phone to his name. Eventually the phone number was sorted out and they issued the sales manager with his final cheque in May.

Under cross-examination he was referred to the T1B form that they submitted to appeal the rights commissioner decision, specifically to “the conduct and performance of the claimant”. He explained that the performance of the sales manager had not been an issue till the week he was dismissed. It was put to him that the CEO had stated that he had concerns with the sales manager’s performance before this week, the witness explained that they had discussed his performance with him in the previous November/December but this had concluded by then. Also from time to time the sales manager’s performance was a matter of concern to them. He was referred to his notes of the meeting they had, had with sales manager on the 15th November 06, he agreed they were positive overall but some points needed improvement. He was then referred to the sales manager’s staff review sheet of the 12th November 2007 specifically to “performance has slipped 1. not achieving required growth 2. No planning 3. Not motivating staff” and also to a footnote that mentions that the sales manager was allowed to stay in his current position. He explained that the question at the time related to the sales manager’s ability to plan and to motivate staff, they had discussed this with him, that is whether he could do this role. One option they looked at was changing his position to sales executive they understood this may have been difficult for him to do but he would have retained his salary and benefits. They were trying to find a way that he could retain his job but be happier in his work. It resulted in him retaining the position of sales manager and that was the end of it. They asked him to stay with the company and focus on sales. They had no concerns in respect of the sales manager in early 2008, they had set aside the previous November and the sales manager had assured them he wanted to make it a success. In a competitive environment there are always concerns in respect of sales targets, targets were raised regularly at sales meetings.

The meeting of 7th March 2008 was called to investigate the movements of the sales manager during the week, they were hoping for a logical explanation when the sales manager admitted what he was doing it went from an investigation to a disciplinary meeting. He accepted that the sales manager had been called to the meeting not knowing what it was about, however they had told him they needed to discuss some issues with him. They had no written disciplinary procedures in place. Within their contracts of employment the reasons for dismissal are listed. During the course of the meeting the sales manager had admitted that he was not with clients when he said he was but he was at home. He followed the sales manager on the Tuesday and Thursday. When he followed the sales manager he had parked in a hotel car park across the way. He was given a photograph to examine, the area in the photo was not the area he was in, and he was in an

elevated position. Before he parked up in the hotel car park he drove by the sales manager's house and saw his car there, then took up his position to see when his car emerged from the estate, he explained there is only one exit from the sales manager's estate.

They had called the sales manager while he was at his house to ask where he was and he told them that he was with specific clients. He had checked with one of the clients mentioned and this client confirmed that the sales manager was not with at the time he said was. He did not contact the other clients as he did not want to damage their or the sales managers reputation. During the periods he was at home the sales manager had told them he was with clients and this was not acceptable. It was not their clients' responsibility to verify the whereabouts of their sales manager.

He explained that they had standing arrangements in place for the production staff to take time in lieu but it is an understood practise that anyone taking time in lieu, should clear it with their supervisor. This had been the custom and practice since they established the company nine years ago. He would have expected the sales manager to inform him if he was taking time in lieu especially because he was a senior manager. To say that the sales manager was on time in lieu on four days during core hours was not realistic.

When asked should they have not stopped the meeting and allowed the sales manager to get a representative. He responded a senior manager was telling them he had been lying to them; in hindsight maybe they should have stopped and advised him that it had turned in to a serious situation. He had referred to a note of the sales manager's movement during the week at this meeting, he could not recall if the sales manager had asked for a copy of this during the meeting. He denied that they had prejudged the matter or they would have decided to dismiss him while observing the sales managers house.

Another colleague RT had made a report to the CEO regarding the sales manager's attendance and they were aware of comments made by other staff about his absenteeism. They could not rely on hearsay hence they had carried out the investigation. The complaint from RT was not raised at the meeting.

Respondent's Case

The sales manager gave direct sworn evidence. He was employed as the advertising sales manager; his duties included managing the sales team, to increase revenue and to ensure advertisements were being sold at the correct rate. His weekly working hours were 39 hours, he was to work 9 to 5.30 Monday to Friday. Tuesday evening was the exception as the final proof of the paper was put together and sent to the printers and he would have to ensure that all the advertisements were correct. The appellant's two witnesses along with a colleague (PF) had informed him that this could be an onerous task. On Tuesdays he would have to wait for the pages to come to his screen so he could check them. Print time was to be 19.30 but he could be there till 23.00 some evenings. The week he was dismissed he did not finish till midnight on the Tuesday.

His typical working day was 9.00am to 18.30, as he had to take control of the keys. The CEO gave him the set of keys. The CEO would sometimes want to talk to him in the evenings, and on these evenings he would have to wait around until 18.30 or 19.00 for the CEO to leave so he could lock up. Time in lieu was in his contract and had been discussed with him when he commenced. The time in lieu only became an issue when the paper got busier and revenues increase. He mentioned

this to the two appellants' witness in respect of the late nights on Tuesday and the early staff meetings on Wednesday. Initially when he commenced employment he was made to feel like a senior manager, the CEO told him in respect of his time in lieu to take an hour here and there discreetly. He had approached the CEO about taking off a few hours one Friday, as he was not returning to the office. On another occasion the CEO told him to take his time in lieu when he could, as he did not want him working 60 hours per week.

The sales manager was asked about the custom of time in lieu policy. He responded that he had inherited a sales team that did whatever they wanted; one staff member would disappear every Wednesday afternoon and leave early on a Friday with no permission from him. He approached the CEO about this and was told to leave it. When he commenced with the company he was told that one staff member always left on a Friday early, he was asked to tighten up on their hours and to get them to work during the core hours. He could take time in lieu as and when he thought it was appropriate.

There were ongoing discussions in reaching sales targets, both the appellants' witnesses wanted to increase revenue and wanted to secure more advertisements for the newspaper. The first major discussion in relation to this was in November. The evening before this discussion the CEO had come in to his office, he told the CEO that he was not happy with things that were happening. The reporting mechanism had changed, two weeks previously there had been changes in the entertainment section and his sales team had told him about these changes. He felt the CEO was undermining his position. The next morning the two appellants' witnesses told him that he had not gained the respect of the sales team and that they wanted him to step aside to the position of sales executive. He had responded by telling them that wanting him to step aside amounted to constructive dismissal, during the course of this meeting he offered his resignation three times. He had done nothing to warrant this demotion and had not received any formal warnings in relation to his performance.

He was referred to a document that the CEO prepared based on his actual diary entries of the week that he was dismissed. He stated he had never seen this document before he was dismissed. This notes that on the Tuesday the time he left and returned to the office and the period he spent at home, it also notes the allocations he told the CEO he was at during this period. He responded that he had called the motor company and went back later in the day, he also visited another client and then went to another client which was close to where he lived so he called home. The Friday was also raised with him, he said he called to a client who was not going to place an advertisement but was thinking of doing a feature as they were moving premises, he then called to a number of potential advertisers. He then went home as he was entitled to six and half hours after the late finish on the Tuesday. He had attended the office for the full day on the Wednesday 5th March. During the course of his employment he was not required to clock in or keep timesheets.

A photograph was produced in to evidence, this showed the view from the claimant's front door, and the sales manager maintained that his house could not be seen from the hotel car park that the appellants had parked in while observing his movements. He never hid the fact that he would take time and go home.

He was asked to recall the lead up to and the meeting of Friday the 7th March 2008 with the CEO and the co- director. He recalled that week that advertising revenue was down; the property market had disappeared so revenue from this sector had reduced from €20,000.00 to €3000.00, and he was under a lot of pressure to increase sales. That Friday he had a meeting and arrived in to work at around lunchtime, the co director rang him to meet him in his office. He went to the

co-director's office. The co-director asked him where he had been during the day, he told him, but the co-director told him to cut the "bullshit" and informed him he was not where he had said but at home.

He disagreed with the co-director and told him that if they had followed him they would have seen him going to a client that was just beyond his house on the main road. The co-director told him that they had evidence, he asked the co-director twice for this evidence and he told him he would get the evidence in the correct form. He was then informed that he had let them down, lied and could not be trusted. He was being suspended with immediate effect and was asked to hand back his keys and phone. He had used the term basket case this was in respect that the team he had been employed to manage constantly by passed him and went to the directors. He had previously raised this back door reporting with the directors, he felt that this back door reporting made it look like he did not know what was happening, he was also under pressure in relation to the revenue from advertising. He was under a huge amount of pressure and stress. He felt he was under attack at all times and was feeling very vulnerable. He denied that he had admitted lying to them during the course of meeting, he had told them where he was at all times including at home. He was informed that they had received a number of complaints regarding his attendance; the witness said the first time he had heard this was on the first day of this hearing. The co-director had said in his evidence that this meeting had started off as an investigation meeting but had developed in to a disciplinary one. The witness confirmed he had not been told in advance the contents of the meeting nor had he been offered representation. At the end of the meeting he was informed he was suspended with pay till the following Tuesday and that he could be looking at dismissal.

The co-director rang him on the following Tuesday and informed him that they had decided to dismiss him, that he would receive any money owed to him. He wanted to keep his phone so the co-director said he would send out documentation to allow him to do this. The co-director told him he could appeal their decision and he asked him "to what end" the co-director replied "exactly".

He gave evidence as to his loss.

Under cross examination he was referred to his contract of employment to the specific term "The employee's employment may be terminated without notice for serious misconduct or failure to carry out such duties as may be assigned to the employee by the employer from time to time". He accepted that he had signed up to the contract. He was asked to recall again the week that led up to his dismissal. He left the office on the Tuesday at 9.40am he may have gone home for a short time, he denied that the CEO telephoned him in his house; the CEO rang while he was meeting a client. He also saw a client in another location, it was put to him that the co-director had checked with this client and he confirmed that he had not seen the sales manager that day. He had spent Wednesday in the office. On Thursday when he was asked where he was he said he was with a particular client, but he had been in his house, he denied this. In respect of any phone calls he received if he said he was on the way to a meeting he was. While he was in his house, he was not working he was taking his time in lieu during core hours.

When asked if he was then on time in lieu from 9.40am to 11.20 am on the Tuesday, he responded that he was not, saying that he was in his house all that time, he reiterated that the CEO had given him the discretion to take his time in lieu discreetly. He did not know why they followed him he was in and out of the office discreetly and the idea was to create an atmosphere for the sales team so they would not know when he would be due back.

In relation to the meeting on Friday 7th March he denied he had said the game was up. He had said

he was a basket case and this was due to the backdoor reporting mechanisms, he had met the CEO the night before and had told him that he could not continue with the production department not being efficient e.g. not having the ads ready. At the meeting the CEO had said nothing, the co-director told him they would be in contact with him on the following Tuesday and that the issues could lead to dismissal. He agreed it was put to him that mutual trust and confidence had broken down between the company and him, he had debated this issue and told them that he had not lied to them. The co-director had told him of his right to appeal after he requested that they put his dismissal in writing. He did not appeal the decision as who could he appeal to, when the co-director had mentioned the appeal to him, he had said to him “to what end”, the co-director responded “exactly”. He denied that the cheque that issued to him on his termination included his holiday pay. He had placed his trust in his employer who had told him to take his time in lieu when he could; he felt that his employer took this opportunity to clear the books.

In reply to questions from the Tribunal he explained that RT was once the sales manager and was only subordinate to him in name, because RT had invested in the company so therefore was afforded different rights. When asked why he had agreed to work the 60hrs a week he responded that he knew what he was doing was a great opportunity for him, however he had complain constantly and was tired all the time. He had sat down with the CEO and told him that they would have to get the production department to put the ads together. He had constant conversations with Co-Director and the CEO about the 60 hours and he was told to take his time in lieu discreetly. The editorial and the production teams had Wednesday off.

Determination

The deficiencies and non-performance of the respondent relate to one week only. The Tribunal is of the view that the Sales Manager’s conduct in taking prolonged periods of absence without clear and effective communication to the two directors can only be viewed as a factor in contribution to his dismissal. These matters necessarily relate to the Sales Manager’s performance of his functions and are evidence of misconduct. In this respect the Tribunal is persuaded by the compelling evidence of the two witnesses for the employer. On a precise consideration, procedural formalities were not strictly observed in effecting the dismissal. Accordingly the Tribunal varies the recommendation of the Rights Commissioner and awards the respondent €2,500.00.

As there was insufficient evidence heard to alter the decision in respect of the appeal under the Payment of Wages Act 1991, the decision of the Rights Commissioner is upheld.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)