EMPLOYMENT APPEALS TRIBUNAL

Claims Of: Case No:
Employee UD213/2007

against
Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. E. Daly B.L.

Members: Mr. J. Goulding
Ms. M. Mulcahy

heard this claim at Dublin on 5th July 2007 and 5th October 2007

Representation:

Claimant: Mr. Colm Casey B.L. instructed by Ms. Catherine Cassidy, William Fleming & Partners, Solicitors, Belmont House, Belmont, Kilkenny Road, Carlow

Respondent: Ms. Claire Hellen, IBEC, Confederation House, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

Respondent's Case:

The Operations Manager (hereafter referred to as OM) stated that the respondent is a warehousing distribution company. At the time of December 2006 the company had five contracts, these were a mixture of short-term and long-term contracts. The claimant commenced employment with the company for a second time in September 2004. The claimant worked as a forklift driver on a number of contracts. The claimant worked shift and his hours were 07.00am to 15.00pm one week and 15.00pm to 23.00pm the next week.

In December 2006 the claimant raised a grievance to OM about the Warehouse Manager. The claimant told OM that he felt unfairly treated by the Warehouse Manager. A copy of the company's grievance procedures was opened to the Tribunal. There was a delay in holding a meeting about the grievance, as December 2006 was very busy. A meeting was held on the 16 January 2007 between the claimant, the Warehouse Manager and OM. The claimant's grievance related to a force majeure issue. The claimant stated that the Warehouse Manager had not enquired about the health of his wife who had been ill. OM felt that the Warehouse Manager did not have to give an apology and he told the claimant this.

In December 2006 OM was made aware that the company had lost a contract. The company lost a

further contract in January 2007. As a result OM made the decision to make a number of staff redundant. The claimant was one of the people selected for redundancy. The respondent previously made the claimant redundant in 2003. OM used the last in first out process when making his decision to select employees for redundancy.

There was an agency person working in the warehouse. When OM informed the claimant that he was being made redundant, he offered the claimant two alternatives. One of which was that the claimant could continue the work of the agency person and the services of the agency person would be terminated. The work the agency person was doing did not involve a shift premium. The claimant had been getting a shift premium and this constituted 50% of the claimant's rate. The other offer of alternative work was for work in the chilled division. The claimant's hours would be the same but he would receive less money. The claimant did not accept either of the alternatives offered. The claimant did not appeal the decision of the company. The claimant was paid in lieu of his notice as he had become disgruntled.

In September 2006 OM had given the claimant a loan of money. The claimant had agreed a repayment plan with OM at the time. OM withdrew payment of the claimant's redundancy, as there was an amount of outstanding on the loan.

The company was successful in getting a new contract in May 2007 and has employed forklift drivers since it got this contract. OM stated that he would re-employ the claimant but there was a breakdown of communication as the redundancy meeting had become heated.

During cross-examination it was put to OM that the claimant had worked on one of the larger contracts that was retained by the company. OM replied that the claimant had worked on the larger contract but some of his work was on the smaller contracts that the company lost in December 2006. It was put to OM that only one offer of alternative work was made to the claimant. OM denied this. OM disputed that the claimant's selection for redundancy was in any way connected with the grievance he had aired.

OM confirmed that both the claimant's grievance and his selection for redundancy were discussed on the 16 January 2007. OM stated it was unfortunate that both matters had been addressed the same day.

OM confirmed that while he discussed staffing levels with the Warehouse Manager, OM was the person who made the decision regarding the redundancies.

Answering questions from the Tribunal OM stated that the claimant had told him about his grievance in December 2006 but it was not until the claimant spoke to OM about it again on the 15 January 2007 that a meeting was organised.

At the meeting on the 16 January 2007 OM told the claimant the reason he was being made redundant. The offers of alternative positions had been offered to the claimant on the 10 January 2007. The claimant did not ask OM if the matter of his grievance and his redundancy were linked.

The Warehouse Manager (hereafter referred to as WM) gave evidence to the Tribunal. His duties involve overseeing the warehouse staff including the forklift drivers but he does not have daily interaction with them, as this is part of the supervisors' role.

The claimant applied for unpaid leave for the 29 and 30 November 2006 as his wife was ill. The

claimant applied for the leave through his supervisor and WM approved it. The offer was put to the claimant that he could use his annual leave for these dates but he declined, as he wanted to keep his annual leave for the Christmas period.

The claimant did not return to work on the 1 December 2006. The claimant's colleague telephoned the claimant who informed him that he would not be returning to work that day. He asked his colleague to give a message to WM.

On the 4 December 2006 WM received a telephone call from the claimant. The claimant said he would not be returning to work yet. Prior to this telephone call the accounts staff had told WM that the claimant was looking for force majeure leave. WM told the claimant he was not entitled to force majeure leave. The claimant did not say much except that he would telephone later in the week about his return to work. WM did not believe there was any atmosphere between them during the course of the telephone call. WM was aware that the claimant had been given force majeure leave the previous year. WM wanted to make sure that the claimant knew he was not entitled to force majeure leave this time. WM knew the claimant had not received a reply to his query from the accounts staff and he wanted to ensure that the claimant knew he did not have an entitlement to it.

Subsequent to this telephone call, the claimant telephoned WM on the 6 December 2006 stating that he would be returning to work on the following Monday, 11 December 2006. WM did not have an issue with this. WM told the claimant again that he could use his annual leave rather than take unpaid leave if he wished. The claimant refused this offer.

When the claimant lodged the grievance in December 2006 there was no change in communication between them. WM stated he had very little communication with the claimant anyway as it was usually the supervisors who reported to WM.

In early January 2007 a memorandum issued to all staff stating that:

"In future all holidays must be used during the year with none being kept for the week between Christmas and the New Year. Christmas 2006 was busy with very high volumes, with huge orders placed……. This trend is going to continue and in order to service our customer requirements the company needs all staff working these 3 days."

At the grievance meeting on the 16 January 2007 the claimant stated that WM was not compassionate enough. WM told the claimant at the meeting that he does not approach employees about matters but he is approachable if they wish to discuss something with him. WM did not feel the claimant's grievance would be an issue between them going forward.

WM was not present at the meeting when OM told the claimant he was selected for redundancy. The claimant would be familiar with the last in first out process as that was the process used when he was selected for redundancy in 2003

During cross-examination WM accepted that he had raised the issue of force majeure leave during his telephone conversation with the claimant on the 4 December 2006. He raised the matter to ensure the claimant was aware he was not entitled to force majeure. WM denied that he was irate during the course of the telephone call.

WM had to be present at the grievance meeting to hear what the claimant had to say. However, he

did not feel that he had done anything wrong. He felt the claimant's complaint was unjustified but this did not affect his working relationship with the claimant.

WM became aware of the redundancy situation in the company in early January 2007. WM had no input into the redundancies except to discuss staffing levels with OM. WM did not think it was unusual that the claimant's redundancy was discussed the same day as the grievance meeting. OM made it clear beforehand that the claimant had been selected on a last in first out basis.

After the meeting on the 16 January 2007 it was reported to WM by the supervisors that the claimant was disgruntled. WM reported this to OM who paid the claimant his notice.

Answering questions from the Tribunal WM stated that he would consult with OM before making a decision on an employee's application for force majeure leave.

Claimant's Case:

The claimant applied for and was granted two days unpaid leave for the 29 and 30 November 2006. His wife was hospitalised on the 1 December 2006. The claimant telephoned a colleague and explained he had to take care of his children. He asked his colleague to give a message to WM that he would contact him on Monday, 4 December 2006.

The claimant requested an application form for force majeure leave from the accounts staff. The claimant spoke to WM that week to update him that the situation was still the same but that he hoped his wife would be out of hospital soon. WM told the claimant he was not entitled to force majeure leave. WM became irate about the matter and told the claimant he had already taken days off and that the company was busy. WM kept pressing that the claimant was not entitled to force majeure leave. In another telephone conversation that week WM again told the claimant that he was not entitled to force majeure leave. The claimant told the Tribunal that he had applied for force majeure leave the previous year but had not actually claimed it.

The claimant returned to work on 11 December 2006. The claimant lodged a grievance with OM about WM. As WM was not at work that day OM said they would hold a meeting when he returned. A meeting was not held when WM returned to work. WM would not speak to or acknowledge the claimant.

The claimant spoke to OM again on the 15 January 2007 as nothing had been done about his grievance. A grievance meeting was arranged for the 16 January 2007. The claimant outlined his grievance at this meeting. WM did not offer an apology. The claimant thought he would have to accept this and continue with his job.

The claimant was about to leave the meeting when he was asked to remain in the room as they had bad news for him. The claimant was told he had been selected for redundancy. The claimant was surprised as there had never been a redundancy situation in the section he was working in. The claimant believed this discussion to be a continuation of the grievance meeting as WM was still present in the room when the claimant was told he had been selected for redundancy.

The claimant was not offered alternative work until the following week. Only one offer of alternative work was made to the claimant. The offer of alternative work was all night-work and the claimant would be earning less money as the work offered was in the chilled section.

The contracts lost were small contracts and constituted a small part of the claimant's overall duties. One person could carry out the work involved within two hours. There was not a full-time driver on these contracts because the workload was so small.

The claimant established his loss.

During cross-examination the claimant stated that once he lodged the grievance WM would not speak to him. WM avoided the claimant and would not converse with him. The claimant believes if he had not raised a grievance he would not have been made redundant. It was put to the claimant that he had not raised this with OM on the 23 January 2007 when he was being offered alternative work. The claimant did not think it would make a difference as the decision had been made.

The claimant denied that he had been given redundancy notice prior to the 16 January 2007. The claimant accepted that the alternative work offered was not specifically stated to be all night work but the claimant had calculated that was the only work that came close to the amount he had been earning. It was put to the claimant that he had been offered work in another section of the warehouse other than the chilled section. The claimant denied this.

Answering questions from the Tribunal the claimant confirmed he did not work in the area in which the contract was lost. He worked mainly on another contract. Occasionally, he would have helped out on the other contract if they were short-staffed. The claimant stated that in mid-December 2006 there was an impression throughout the warehouse that the stock levels for the contracts that were ultimately lost, were dropping. There had never been a full-time forklift driver on these contracts because there was not enough work in the contract to warrant a full-time forklift driver. The claimant stated that he was the second longest serving forklift driver but he accepted that other employees had longer service over him.

The claimant stated that if the company were re-structuring he would have transferred to any section within the company as long as it was the same wage he had been earning. The claimant's job was not vacated and was filled by someone who had longer service than him.

The claimant was shocked after the meeting of the 16 January 2007 as he went to attend a grievance meeting and emerged having been made redundant. At the last meeting the claimant had with OM he was told that he would not receive his redundancy unless he paid back the outstanding loan.

Determination:

The Tribunal received submissions from both parties in relation to an outstanding loan between them. The Tribunal cannot award a loan offset against compensation, as only matters concerning the circumstances surrounding the dismissal can be determined. The jurisdiction of the Tribunal is confined to loss arising from a dismissal only and the Tribunal finds that the definition does not include losses arising from a debt or a loan.

The Tribunal accepts there was a redundancy situation and therefore grounds to make staff redundant. The Tribunal does not accept that the grievance that was legitimately raised by the claimant was related to the decision to make him redundant. The company operated a last in first out policy in relation to the selection for redundancy and this is an accepted policy.

The claimant's submission that he was not the last person employed in his capacity is not accepted because last in first out is applied throughout the business and relates to the commencement of employment date, not the commencement of employment within that capacity.

The argument in relation to the agency worker was a compelling submission but the company's evidence was that the claimant would have been given preference over the agency worker if he had accepted the position.

The Tribunal notes the manner in which the grievance was handled by the respondent. This may have contributed to the claimant's belief that he was selected unfairly. The claimant was a good employee, under immense personal pressure at the time but the company's behaviour in imparting the information that he was being made redundant, immediately after a grievance meeting, clearly contributed to the claimant's belief that he was unfairly selected for redundancy.

However, the Tribunal must apply objective criteria, which is the last in first out policy that is in operation in the company. The Tribunal finds that the claimant was fairly selected for redundancy. Therefore, his claim under the Unfair Dismissals Acts, 1977 to 2001, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)