

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

Employee

UD903/2006

Against

2 Employers
under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P. Hurley BL

Members: Mr G. Phelan
Mr. T. Kennelly

heard this claim at Limerick on 9th November 2007
and 2nd July 2008

Representation:

Claimant(s): Ms. Elizabeth Enright, Lees, Solicitors, Lord Edward
Street, Kilmallock, Co. Limerick

Respondent(s): Sweeney McGann, Solicitors, 67 O'Connell Street, Limerick

The determination of the Tribunal was as follows:-

Respondent's Case

HL told the Tribunal that the respondent traded in 1983 in third party trading in dairy products and is still operating. In 2003 the manufacturing company was established to process cheeses for the US market. Two companies operated for fifteen to sixteen years. He was the paid managing director of the trading company and the unpaid managing director for the manufacturing company. The general manager was responsible for the manufacturing business and the director had hands off role. He knew the claimant and PK the previous general manager hired him. The claimant was employed as a production manager. The production manager was responsible for the production, hygiene and selection of raw material and he directed operatives and undertook day-to-day quality issues. The claimant had no involvement with the trading company. Up to 2001 the respondent sustained a loss of €350,000 of investment. The respondent had discussed redundancy in 2005 and considered the claimant's position. It cut costs as much as possible and spoke to an employee JI and the claimant on 7 April 2005. The respondent had four other operatives and production was at fifteen per cent and it needed the four employees.

The role of general manager was different than the role of production manager and the respondent considered the claimant for the role of general manager and decided that he was not suited to the post. The general manager had overall responsibility for costs. The two roles of production manager and general manager were completely different. The previous general manager left in February 2005 but remained until December 2005. The claimant never expressed an interest in the role of factory manager. POS had excellent technical skills for the role of general manager. The production manager was never replaced.

In cross-examination asked if the claimant had a contract of employment he replied that he could not answer that and staffing matters were dealt with by PK who in turn reported to him. He discussed the claimant's position with PK in 2003 before the move. The claimant was considered for the post of general manager but it was not viable. Asked why not ask for the contract of employment at that point he replied that the claimant's elevation was discussed generally and he did not call for a contract of employment. The claimant's salary was reduced as a result of the loss of a US contract. He could not recall if he directed the general manager to put a contract of employment in place. He was not sure how many employees were employed.

He accepted that the salary paid to the claimant came from separate audited accounts. A letter issued to the claimant on 7 April 2006. He was aware that the claimant reported for work on 10 April 2006. An attempt was made to break into the premises on 8 April 2006 and the respondent decided to change the locks and this had nothing to do with the claimant. The claimant was told to take a week off and he was told that the claimant was seeking advice. The respondent was very worried, as the industry has to ensure safety of products. The claimant was placed on garden leave, which meant when employment was terminated that the employee got paid and did not have to report for work. He was very surprised when the claimant returned for work on 10 April 2006.

A second letter was given to the claimant on 10 April as he requested it. There was no job for the production manager and he had no further dealings with the claimant.

A product, which the respondent made Vita, was subjected to regulation by the Department of Agriculture. This product would yield one to two per cent of income. He thought that he asked PK to give the claimant an oral warning. He did not know if PK issued the warning to the claimant and PK was a very good friend of the claimant. Asked if there were any other issues to warrant a warning he replied over five years there were very few issues. The claimant's function was to direct staff and produce product and he was responsible for hygiene. He had not seen a job specification for a production manager. He did not know if there was a grievance procedure in place.

In answer to questions from the Tribunal he stated that the claimant was a trusted employee. He was put on garden leave due to the risk of disgruntlement. Locks were changed on 8 April 2006. Seven staff were employed when the claimant was there. There was no other job available for the claimant and no one replaced the claimant.

At the resumed hearing on 2 July 2008 asked if he was aware of the claimant's experience in the cheese industry before hiring him in July 2001 he replied that PK recommended the claimant. The claimant's employment was predominately without blemish. It was not his recollection that when PK left the respondent that the claimant took on his role. He asked PG commercial manager to assume the duties that PK undertook. PG reported for work early in the morning and spent a considerable amount of time in the factory. Asked if the claimant assumed any of PK's roles he replied that the production manager would not order ingredients or undertake stocktaking. He may

have looked at stock. Asked if the respondent advertised for the position of general manager he replied that he believed it placed an advertisement in university sites. He was not sure if the advertisement was placed in local newspapers. He interviewed POS but was unsure when this occurred. As far as he could recall he thought he interviewed two to three applicants for the position

The first discussion regarding redundancy took place the previous October. POS had the qualifications and expertise to operate the area. POS did an excellent job, he was head hunted and left the respondent. HL hired the best people to do the job and third level education was a huge advantage. He made the decision to make the claimant redundant with the assistance of other directors. He would have said in March 2006 that the claimant was not suitable for the position of general manager. Asked if there were any parts of the job that the claimant was incapable of doing he replied yes many of them. He did not think that the claimant was proficient in PC and he did not consider that the claimant had numeric and accounting skills but he did write reports. He thought that he was a very good production manager but not suitable for the general manager role and that was still the situation. A discussion took place regarding the claimant's suitability and it was decided that the claimant was not suitable. The claimant was not interviewed for the position. He acknowledged that the claimant was in a very precarious position. What the claimant produced was fifteen per cent of product and the claimant did everything that was asked of him. After the claimant left POS undertook his work.

PG the second witness for the respondent told the Tribunal that he was commercial director and an accountant and was employed for thirteen years with the respondent. He was responsible for accounting and legal agreements. In 2005 HL asked him to get involved in manufacturing to develop new product. When he first started the respondent produced two kinds of cheese. He was in charge of logistics and stock control for both companies and he did not have any dealings with the claimant. He was involved in the replacement of PK. It was not true that the claimant and the general manager undertook the same job but there was very little difference in their salaries. POS was a mechanical engineer and brought expertise to the area and could reduce maintenance costs. POS was also an experienced project manager and dealt with new product development and POS was head hunted and he left in July 2007. When the claimant was made redundant PG along with the other operatives undertook his work. The role of production manager was assigned to general manager. He undertook the role of general manager until another employee was hired.

In cross-examination he stated that it was not true that a new project was live at the end of 2005. He first became aware of this in May/June 2006. Asked if the claimant was requested to prepare a unit in anticipation of the project he replied that he first became aware of this in June 2006. Asked if he was aware that the claimant was never given a job description he replied he was not involved at the time. He arrived on the factory floor around 2005 and was present at every production run. The respondent spent approximately one day a week producing liquid cheese. Asked if he was not familiar with the claimant's day-to-day role he replied that was not the case. Asked if he ever supervised the claimant in his role as production manager he replied he was there, as an onlooker and he did not have the authority to supervise the claimant. Asked if he acquainted himself with the claimant's role as production manager he replied that he involved himself in production. He would have given the claimant instructions. He did not receive additional salary when the claimant was made redundant. He spent time trying to develop new trading area with the new business development manager in Germany. At the time HL asked him if he could develop new product and he did. He first looked at the role of production manager in October 2005. The role of general manager could not be disbanded with. Asked that from October 2005 to March 2006 that there was no general manager he replied that PK was there three to four days a week. When POS left in July

2007 he assumed the role of general manager as well as commercial director. At the moment the respondent is on twenty four per cent production but does not have a production manager. The general manager had ultimate responsibility for the production manager's role.

BS the third witness for the respondent told the Tribunal he was financial director since August 1995. In October 2005 the respondent was in serious financial difficulty. The general manager earned €38,000 or €39,000 per annum and had a company car in 2001. The claimant was made redundant in April 2006 as well as JI. He did not have contact with the claimant and he had no role in the production of cheese.

In cross-examination he stated that the new project came to his attention in May 2006. He checked his records and was clear on this matter. He did not have any comment to make that the claimant was aware of a possible contract in late 2005. He was the financial director and he did not know about the claimant's function.

Claimant's Case

The claimant told the Tribunal that he had twelve years experience in cheese making prior to commencing with the respondent. As production manager he produced cheese and operated on the floor and did everything regarding the production of cheese. In 2001 he took a week off and spent a week on the respondent's premises to acquaint himself with the functions that it undertook.

He was offered the position of production manager and he did whatever needed to be done. He was happy enough to do what was requested. He got on well and did not encounter any problems. He had a good relationship with PK. There was a problem with cheese for the US and up until this he had a fairly good relationship with XX. After this an amount of €5,000 was deducted from the claimant's salary. He endeavoured to retrieve this money but was unable to do so. In October 2005 HL asked him if he would take on PK's role and keep the work going and he replied that he would consider it if he returned his €5,000. PK was responsible for selling cheese. The claimant undertook quality control and he was never approached to apply for the position of general manager and he did not know if the position was advertised in the newspapers.

He knew PS was appointed general manager and PK told him before he left. He was happy to work with the new general manager. On 7 April 2006 he received a formal warning. He was summoned to a meeting with POS, PG and BS. He was informed that he was no longer required BS asked him if he had any questions and he replied no. He asked for everything in writing. BS told him to seek legal advice and that he would pay €300 to €400 for a solicitor. The claimant reported for work on Monday and he was unable to gain access to the respondent's premises. POS arrived and opened the door. PG summoned the claimant to his office and told him that he did not expect to see him in work. The claimant told PG that he was going to work and PG told the claimant that BS told him to take a week off, the claimant requested him to document this in writing and he replied no problem. Fifteen minutes later PG told him that HL was on the way and that he would get the documents he required. The claimant was asked to go to the canteen. At approximately 9.45 a.m. PG gave the claimant the documents. The claimant asked could he return to work and he was told no. The claimant then left and he was in a state of shock as this occurred out of the blue. The claimant had no job and after a month he obtained alternative employment as a general labourer. He was employed for seventeen years in cheese making. He has recently taken up employment as a postman and prior to this he never worked at anything else apart from the cheese business.

In cross-examination he stated that he undertook the job of production manager four days on the

floor. POS was doing the same work as him and six people were doing the same job. When PK was general manager he worked on the floor as well. Six staff worked on the production line. POS called him three weeks before he was selected for redundancy and he asked him if he had any objection to doing paperwork. He undertook fifteen per cent of production one day a week. As well as undertaking the work of a production manager he did general operative work. Asked if the role of factory manager and the role of operations on the floor were different and that he was in charge he replied yes. Asked if it was usual that colleagues deputised for each other while on holidays he replied that he agreed. He did not apply for the position of general manager. Asked if POS was more qualified and experienced than he was he replied that POS came to him regularly as his experience with cheese was very limited. The claimant told him that he would help him

Determination

Having heard all the evidence the Tribunal is of the view that although the dispute between the parties centred around a proposed redundancy situation and the selection process the question of unfair selection is central and as there was no claim put forward by the claimant for redundancy and minimum notice the Tribunal's sole function is to determine or not if there was unfair selection for redundancy. Having heard all the evidence the Tribunal cannot support the proposition that there was an unfair selection. The claim under the Unfair Dismissals Acts, 1977 to 2001 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

