

EMPLOYMENT APPEALS TRIBUNAL

Claim Of:
Employee

Case No.
UD541/2008

WT230/2008

against
Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001 ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. E. Murray

Members: Mr. M. Forde
Mr. D. McEvoy

heard this claim at Clonmel on 2nd December 2008

Representation:

Claimant: Mr. Padraic Lyons B.L. instructed by Ms. Jane O'Sullivan, Daniel Spring & Co,
Solicitors, 50 Fitzwilliam Square, Dublin 2

Respondent: Ms. Helen Barry, IBEC, Waterford Business Park, Cork Road, Waterford

The determination of the Tribunal was as follows:

The proprietor/director of the Respondent Company ("The Company") told the Tribunal that he and his partner set up the Company in 2001 and in 2005 it was sold to ISS Limited, a facilities management company. He continued to work for approximately one year to facilitate the handover and ultimately left the Company in January 2007. There was difficulty integrating the Company into ISS and ultimately in July 2007 himself and his partner bought the Company back. In or around that time he met with the entire staff of about 180 persons. This was a considerably larger staff complement than had been there when he sold the company. He realised that re-organisation would be necessary.

The Claimant had joined the Company while it was in the ownership of ISS in the capacity of Quantity Surveyor ("Q.S") and was primarily engaged with work being carried out by the Company in the Dublin region. This is the busiest region as far as the Company was concerned and the witness said that he would have considered the Claimant to be a significant loss to the Company at that time because of his in-depth knowledge of the Dublin business. The Claimant

had come to him saying that he intended to leave the Company and join a competitor. The Company did not want this and consequently made an offer to the Claimant of an increased salary, higher grade Company car and a bonus of €5000.00 in order to induce him to stay. He also agreed with the Claimant that he would be trained to do estimating work which he had previously not been engaged in. They realised that the Company was in a less healthy state than they had originally thought. In September 2007 they appointed Mr. JL to be the Managing Director for the Dublin region with a role of identifying liabilities in the Dublin area and to plan the best way forward for the Company in that region. He said that they discovered that the incomplete work would require much larger investment than they had originally anticipated in order to have outstanding fees released. They made significant cutbacks and over the next number of months there were 59 redundancies. The Company is still losing money. During the Christmas holidays of 2007 they appointed JL to be the General Manager of the Company and decided that further rationalisations were necessary. It was in this context that the Claimant was made redundant after the Christmas holidays in 2007.

He said that he never had any personal difficulty with the Claimant.

They have not employed a Q.S. or Estimator since his dismissal.

He conceded that he had discussed the application of a bonus scheme of .5% of revenue brought into the business by the Claimant once he had been trained to do estimating work. The Claimant came to him in or around November of 2007 indicating that he was having personal difficulties with JL in Dublin. He spoke to JL and was reassured by JL that there was no such difficulties. He told the Claimant that he had no reason to worry about any issues regarding JL. As time went on they realised that they had to stop aggressively chasing new work and concentrate on fixing incomplete works so that they could release revenue into the company. The Company employed an Engineer I.G., he thought in June or July 2008 and that this individual managed a specific muck-shifting job in Cork. He did not consider the Claimant for this job.

The General Manager JL gave evidence on behalf of the company. He was appointed General Manager in early 2008. He had discussions with the Directors about what rationalisations were necessary. The Company had lost 2 million euro in six months. Initially he was asked to go to Dublin to look after the jobs that required fixing in order to release funds. He indicated that an estimator's role was to win work whereas a Q.S role was to make applications for payments in respect of ongoing work. They had to make hard decisions to save the Company either by cutting costs or increasing revenue or both. He said that the full extent of the problems of the Company were not known for sometime after the purchase in July 2007. It took about 3 months for them to discover what the true situation was. He was asked in September to take over the role of General Manager in Dublin, by December when he saw what the situation was he felt that the Company had to make radical changes. Overall there were 30 redundancies in Dublin including the Claimant.

He described how he met the Claimant on Monday the 7th of January and explained to him that the situation had radically changed and explained that they were not looking for new work and gave him one month's pay in lieu of notice and told him that he should leave immediately and look for a new job. He said that Mr. I.G. who was employed sometime after the Claimant was made redundant was doing a specific site management job in Cork. He said that I.G. had been engaged in 3 jobs in Cork and he believed that those jobs were contracted for between December 07 and May 08. He said that all applications were now made by either himself or the two other Directors and that the QS job was redundant and that the estimating job is not being done at all. With regard to I.G. he said that he had been working with ILS and that he approached the Company looking for

work and they had work available for him at the time. They sent him to Cork to manage specific projects in Cork. They never considered the Claimant for these jobs.

He denied that there was any personality difference between himself and the Claimant. He recalled the previous witness raising this issue with him but he reassured him that he had no personal difficulty with the Claimant and had no difficulty with his work.

He conceded that on the day of the dismissal he telephoned the Claimant to travel to Dublin from Cahir. He said that they spoke for about 2 hours about ongoing work and at the end of the 2 hour period he advised him that he was now dismissing him and requested his computer, mobile phone and car keys. The Claimant had to specifically request the use of the car to get home, as he had no other way of travelling home on that evening and the witness permitted him to hold onto the car for a further 2 weeks.

The Claimant gave evidence that he intended leaving the Company when the current Directors purchased it in July. He told them at that time that it would cost between 1 and 2 million euro and take about 12 months to finish out all the current work in the Dublin area. He had intended to move to ILS Limited but the two new Directors persuaded him to stay offering a bonus, improved car, salary increase and ultimately a job as an estimator in the company. This would also carry with it a bonus scheme of .5 % of the value of the work won by the Claimant for the company. They agreed a provisional start for the estimating work of the 1st of October 2007. In November 2007 he said that he went to Cahir for a week and did some estimating work there. If he had thought his job was not tenable he would not have agreed to accept the incentives that the Company offered to him to stay on.

He described his relationship with JL as “frosty”. He asked JL if he had a personal problem with him and JL responded “you have a job to do, finish your work as a QS and start estimating”. The Claimant said that he felt JL needed the Claimant out of his way in Dublin. The estimating job would be based in Cahir. He said that JL’s telephone style was brusque and that he had hung up the phone on him a number of times. He expressed his concerns to the Proprietor/Director because he had been given a “heads up” by another colleague with regard to JL’s attitude to him. On the 7th of January he received a phone call to attend a meeting in Dublin with JL. They sat down at lunchtime and worked through various projects that were on hand and it was a great surprise at the end of the meeting when JL said to him that his role was no longer needed and demanded his telephone, lap top and car keys from him. When he explained to JL that he had no way of getting home he was allowed to hold on to the car and did so for a further 2 weeks.

He was given no opportunity to take on any other role within the business and said that he could easily have taken on the role that I.G. subsequently filled. Indeed he and I.G. had worked together within the Company previously and he had the exact same qualifications as I.G. After his dismissal he took up the job that he was going to take up in ILS at a salary of €10,000.00 a year less. He has since left ILS and is now working with his father’s Company where he earns €5000.00 a year less than what he was earning with the Company.

The Tribunal was advised that I.G. had commenced work with the Company on the 1st of April 2008 and at a salary of €40,000.00 per annum.

Determination

In this case the Tribunal has to determine whether or not the Claimant’s position was genuinely

redundant and if the dismissal was for redundancy then it must determine whether or not the Claimant was fairly selected.

The Company went to considerable lengths to procure the services of the Claimant some six months prior to his dismissal. The Claimant gave evidence that if he thought his job was in any way tenuous he would not have taken up the employment.

The Company had no difficulty with the Claimant's work and had promised him an opportunity to become an estimator. This had never in fact occurred.

No consideration whatsoever was given to the possibility of redeploying the Claimant in any other role. The evidence in the case is that a new employee namely I.G. who had identical qualifications as the Claimant, was employed by the Company within a few weeks of the Claimant's dismissal and that individual is still employed by the company.

In all the circumstances the Tribunal is not satisfied that a legitimate redundancy situation arose in the Company insofar as the Claimant's position was concerned. No consideration of any kind was given to the possibility that he might be suitable for re-deployment elsewhere notwithstanding the fact that there was a clear need for a Site Supervisor in the Cork area. The Tribunal is satisfied that this is work that the Claimant could have done.

In all the circumstances the Tribunal finds that as no legitimate redundancy situation arose, that the Claimant was unfairly dismissed.

The Claimant has suffered loss by virtue of the differential in pay that he suffered in his subsequent employment.

We are also urged to consider the loss that he may have suffered in not being able to avail of the commission scheme that was proposed. We find it difficult however to go this far. Nonetheless the Tribunal is satisfied that the Claimant suffered loss and that damages are the most appropriate remedy and make an award in the sum of €17,500.00 under the Unfair Dismissals Acts, 1977 to 2001.

As there was no evidence adduced at the hearing in relation to the claim under the Organisation of Working Time Act, 1997, the claim fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)