

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

Employee
- claimant

CASE NO.

UD949/08
MN883/08

Against

2 Employers
- respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2003

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey BL

Members: Mr. C. McHugh
Ms. C. Byrne

heard this claim at Dublin on 8th December 2008, 4th March 2009 and 5th March 2009.

Representation:

Claimant: Mr. Barra Faughnan BL instructed by Julian Cunningham,
Cunningham McCormack Solicitors, 89 Upper Leeson Street, Dublin 4

Respondent: Mr. Peter Redman, Nortgate Arinso Employer Services,
Unit 10 Newhallhey Business Centre, Newhallhey Road,
Rawstenstall, Rossendale, Lancashire, BB4 6HL

The determination of the Tribunal was as follows:-

Dismissal is not an issue.

Respondent's Case

The VP sales for the UK gave evidence. The same company operated in the UK and Ireland. The claimant conducted all the business in Ireland and reported directly to the board of directors. The invoicing and product management for Ireland was always handled in the UK.

The Irish part of the business always made a paper profit but the company overall lost market share and went from profit to making a loss. A restructure was essential. The

company became a division of the parent company; it was no longer an autonomous entity. The staff was decimated, 60 jobs were lost.

The restructuring started in January 2008. In February 2008, the VP sales started to look at what functions they could do without. If a function was removed, the person went. The VP sales and the HR manager met with the claimant on 4 March 2008 to inform him that his position was potentially redundant. This information was communicated in writing to the claimant on the same day. The VP sales and the HR manager held telephone consultations with the claimant on 18, 20 and 25 March 2008.

The claimant was given until 26 March 2008 to respond to the restructuring proposals. The claimant argued that the Irish operation under his control was profitable. The claimant appealed the decision to make him redundant claiming that the new position of Sales Manager Ireland was practically the same as his job though based in London. The appeal was heard on 4 June 2008. The company President heard the appeal and confirmed the decision to make the claimant redundant.

The new position of Sales Manager Ireland is different from the position held by the claimant. The claimant had managed staff and controlled the profit and loss accounts. These tasks are now done by the UK office.

The HR Manager gave evidence. The claimant had been responsible for all matters in Ireland, namely sales, service, finance and administration. The proposed re-structure indicated that there was no longer a requirement for the General Manager Mobile Entertainment, General Manager, Ireland and the National Independent Sales Manager. Consultations took place on all three redundant roles. Mr. D. was successful in promotion to the new role of Sales Manager Ireland. This new role dealt exclusively with sales and was a more junior role to that of General Manager. It was not a General Manager position. Mr. D. was paid less and reported to General Manager Sales in UK.

The HR Manager managed the redundancy process. Most of the consultations with the claimant were done over the phone and this worked well. The consultation process commenced on 4 March 2008 and the final meeting was on 10 April 2008. At the final meeting the claimant said he would not be applying for any of the vacant positions. The HR Manager explained that he had no alternative but to implement the proposed changes. The claimant was formally notified in writing on 28 April 2008 that he was dismissed for reason of redundancy. The HR Manager said he was unaware that the claimant had health problems prior to the consultation process.

Under cross-examination, the HR Manager said he had glanced over the job description of Sales Manager, Ireland. VP Sales devised the architect restructuring. The HR Manager's job was to implement them. He agreed that there were similar clauses in the new job description compared to the claimant's job description.

He believed if at the appeal stage the claimant had expressed an interest in the role of the Sales Manager, Ireland he would have offered him the position and Mr. D. would have been made redundant.

The HR Assistant Manager gave evidence. She attended the claimant's appeal meeting as witness for the President. She said the position of Sales Manager Ireland

was filled in April 2008 by Mr. D. The claimant could not understand why the company was making his role redundant. He did not concede redundancy. She had worked on the severance package with the HR Manager based on UK law.

The Compliance and Credit Controller gave evidence. While in his role of Company Secretary of XXXX, he had been delegated to set up a distributor for XXXX following the receivership of the company, which was previously the distributor. He spoke to the claimant and arranged that the Financial Director interview the claimant. He was a friend of the claimant. He spoke to the Financial Director and the claimant met with the Financial Director and was offered the role of General Manager XXXX. The claimant liaised with dealers himself. He had a budget. If problems arose with direct debits he liaised with the claimant.

Claimant's case:

The claimant gave evidence. He initially worked as Managing Director for a company for the period 1982 – 1991 who distributed for XXXX products in Ireland. He loved the electronics business and had 16/17 years of wide experience in the industry. In later years he disputed certain activities in that company and left in 1991. He secured a position in another industry for 18 months.

In September 1991 he joined the respondent company, XXXX. They were now distributors for XXXX in Ireland. He developed the company and after some initial difficulties it turned the corner in 1995. He was congratulated for hitting company targets. The company was holding its own. He was responsible for introducing direct debits. The company went from strength to strength and performed extremely well in the period 2000 – 2005. He received bonuses. If the company did well he received extra in his bonus. The bonus was based on 50% profit and 50% sales. In seven years he hit the profit figure. The claimant dealt with the thirty-two counties. He was given a budget, which was always arguable.

In October 2007 the claimant heard verbally and then received a circular that there would be transfers but that nothing would change. XXXX, together with XXXX occupied a new building.

On 4th March 2008 he attended a meeting with the HR Manager and VP Sales. At that meeting he was informed that there was a proposal to make his role redundant together with two other roles and the proposed new structure for the company was discussed also. He was handed a letter and encouraged to apply for two of the jobs. The job description for the Sales Manager Ireland position was to be forwarded to him the following day. He left the meeting in shock. He could not understand the basis for the restructuring. He only received the job description on 11th March 2008. He could not see any differences in the two job descriptions.

He engaged in a consultation process with the company. He disputed the first consultation process and raised concern that the process should end 25th March 2008. He sought extra time and was given seven days. He believed the two jobs were practically identical. Everything in the new job description was padding. He argued why a change was necessary. He was asked to apply for the Sales Manager's job. He believed something was amiss. He decided not to apply for the job as

it was a demotional role and an insult to him. He was disgusted at the way he was treated. He put forward a counter proposal but the company had no recollection of it. The Irish company had been profitable and while sales figures had slipped profits had doubled. The company was living within its means. He believed the company wanted him to leave. The final consultation took place on 10th April 2008. In an e-mail that afternoon he was informed that the company was recruiting a Sales Manager, Ireland position.

By letter dated 28 April 2008 the claimant was formally notified of his dismissal by reason of redundancy and offered a right of appeal. He appealed the decision by letter dated 16th May 2008. His appeal was unsuccessful.

The claimant made significant efforts to secure new employment and established loss for the Tribunal.

Under cross examination the claimant contended that the only difference between his existing job description and the new job description was the absence of the monthly payroll checking and authorisation in the new job description. He had assumed the six counties of Northern Ireland into his existing role. He handled key accounts for Ireland. Unfortunately, two field staff had left in recent years and he had covered their work. Mr. D. replaced one Line Manager in July 2007. He developed new business in Dublin and the claimant continued to travel around the country engaging in business.

The claimant said he only met the landlord of the premises every five years. The claimant explained that Ireland had a different structure. The claimant said he ran a clean ship and he interfaced with customers. He felt that he was entitled to a higher package from the company and that they could have been more generous. The basic fact was that Mr. D. was now performing the same job. He finished working in the company at the end of May 2008 and has not received any money since July 2008.

The Administration Manager gave evidence. He prepared the calculations for the claimant and sourced the figures from the payroll. He sought advice from IBEC and the Department's website. Since the claimant's departure no one had been appointed to sign off on the payroll. It was handled in the UK. He never signed off on the figures but discussed them with the claimant.

Closing Submission on behalf of respondent:

This was a genuine redundancy situation. XXXX turnover had reduced significantly. Employees were reduced to 75. A further redundancy process affected staff in Ireland. End 2007 XXXX was liquidated and decanted to XXXX. Employees were transferred. The overall business was suffering. XXXX was merely a division of XXXX Company. It was naïve to think the Irish business was immune and costs needed to be cut and it had to be restructured. The management was reshaped. Three senior management positions disappeared. The In Car Division too was in profit just like Ireland. There was a new management structure and new reporting system. A new Sales Manager Ireland position was different. The claimant was offered either of the two roles of Manager Key Accounts Ireland or Sales Manager. The claimant did not want either role because he did not accept that the restructuring was necessary.

Clauses 1, 2, 3, 5, 7 and 9 in the claimant's job description have no equivalence to Mr. D's job description because the General Manager position was higher and Mr. D's was a junior position as he was paid considerably less. Mr. D's role was a slight expansion of his former role. Mr. D. had already been a Line Manager and knew the role. The claimant had been very vague in describing his role. The new Sales Manager Ireland does not do the same job as is apparent from the two job descriptions.

The process conducted by the respondent was fair. The consultation process commenced on 4th March 2008 and the final consultation only took place on 10th April 2008. The claimant was provided with the new job description by 11th March 2008 and had ample opportunity to look at the alternatives. The claimant indicated that he continued to report to the Board. The Board of Directors disappeared in November 2007. The claimant was given an opportunity to appeal and the appeal was heard by the President who furnished a written response to the appeal. It was a fair appeal. It was true that the position of Sales Manager Ireland was advertised after the 10th April 2008 meeting as the claimant advised that he did not want the position. If the claimant had acknowledged the role, Mr. D. would have been made redundant. The Key Accounts Manager position was an outside appointment and was not made until 8th July 2008. A redundancy package was offered to the claimant at three times his gross weekly salary. His pension was paid to end of October 2008. He was generously treated. In dismissing the claimant it was a fair selection for redundancy. The claimant has not made real attempts to mitigate his loss.

Closing Submission on behalf of the claimant:

The core issue is whether it is or is not the same job. On the evidence of the VP Sales and the job description it is abundantly clear the two positions had no functional difference. To say Clauses 1, 2,3,5, 7 and 9 in the claimant's job description are not to be found in the new job description is not true. It is a padded out description of the same job. This was a pre-ordained plan to put in a new job. The process was dressed up to be something it was not. The consultation process was flawed. It was always a fait accompli. The claimant's job is comprised in the new role. Beyond doubt the claimant has suffered catastrophic loss and may not secure work for the next three years. While the claimant received replies to only five jobs he had applied for he had his name down with agencies but did not receive replies.

Determination:

The Tribunal accepts that there was a downturn in the business requiring redundancies to be made. The management of the company was reshaped and some senior management positions were lost. It is correct to say that the part of the business situated in Ireland would not be immune to the difficulties the company as a whole was experiencing and the fact that the Irish operation was in profit did not necessarily mean that the Irish company would escape the downsizing that was taking place across the board. Indeed the In Car division was also in profit but it too was affected by the restructure.

Having said that, it appears from the examination of both job descriptions, the old and the new, that there is no significant difference between the two positions. The

inclusion in the second job description of the paragraph headed Responsibilities which refers to “The primary responsibility is to deliver a monthly sales result that meets the company requirement for the Ireland market and also takes daily responsibility for the Ireland office” confirms this in the Tribunal’s view.

While it is the case that the claimant refused to accept that the restructuring was necessary, it seems to the Tribunal that this was in the context of his view that the new role was in effect the same role as he heretofore held. Given that this is also the view of the Tribunal it was not an unreasonable one to hold in all the circumstances. Had the company engaged the claimant in discussions regarding cutting the costs of running the Irish operation, by whatever means, that would be one thing but they effectively engaged in a purported redundancy process. The claimant was asked to apply for the new role, with the resultant loss of status and a lower salary if he was given the job where there was no material difference between the job he held and the new one.

Considering all the circumstances of the case the Tribunal determines that the claimant was unfairly dismissed and awards him €161,420.00, being fourteen months salary, under the Unfair Dismissals Acts, 1977 to 2001. As the claimant was paid his minimum notice, the claim under the Minimum Notice and Terms Acts, 1973 to 2001 is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)