

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
Employee

CASE NO.
UD660/2008

against
Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr M. O'Connell B.L.

Members: Mr. J. O'Neill

Mr J. Maher

heard this claim at Dublin on 14th November 2008
and 19th February 2009

Representation:

Claimant: Ms Marguerite Bolger BL instructed by Beauchamps,
Solicitors, Riverside Two, Sir John Rogerson's Quay, Dublin 2

Respondent: Mr. Tom Mallon BL instructed by Mr. Michael Kennedy
Solicitor, Bcm Hanby Wallace, Solicitors, 88 Harcourt Street, Dublin 2

The respondent company was involved in the property market. The respondent's MD gave evidence to the Tribunal. He explained that there were three main players in the company, himself the financial controller (CD) and a director shareholder (GMcG); they had bought the company from a previous owner.

The claimant's main duties were site acquisition. They had a problem with a site that was not owned by the respondent company. The site in question was owned by himself, CD, GMcG, and the claimant.

During cross-examination the representative for the claimant contended that the claimant was not dismissed because of redundancy but for two reasons; one was because of performance related issues and secondly because of a dispute between the claimant and the company about profit sharing payments. The representative for the respondent response to that was that the matter regarding profit sharing was compromised and ruled in the High Court and it was improper to re-litigate.

The witness explained that they felt the claimant was de-motivated. They set out to assist the claimant to achieve his and their goals. However at a later time the company faced financial difficulties. The witness gave extensive evidence as to the downturn in the business and the difficulties the company faced. They had employed 57 people and by the present date they employed 12 and 6 of these are part time workers. He and CD and GMcG are not taking a salary

from the company.

On 9th October he and CD asked GMcG to speak to the claimant to consider his position and to discuss a pay cut. They had asked GMcG to speak to the claimant because the claimant was the costliest to the respondent because of his salary etc. On 10th October they gave the claimant formal notice he was to be let go. They did not consider alternative roles for the claimant, as it was clear to them that there were no alternative roles. They did not consider moving the claimant to another company as Mr. A was already in that company and Mr. A had been in that company in the UK for twenty years.

He and CD and GMcG had a meeting in September 2007 but the meeting was a shareholders meeting and was not to discuss the claimant's position.

GMcG gave evidence. He explained that he met the claimant in September, after the shareholders meeting. He explained to the claimant that the market was declining and the company was in a tight position. He was asked by the MD and CD to meet the claimant and to explain that they had no more money to pursue deals or to pursue commercial property anymore. He was to find out the claimant thoughts on the situation / his situation. He met the claimant on 9th October and discussed the situation.

The witness told the Tribunal that the claimant, "kind of said oh you are making me redundant, I will leave today". He did not tell the claimant about seeking another role in the company he said to the claimant to, "kind of leave in a right way". He was telling the claimant that they could not afford to keep him on; he did not want to tell the claimant at the time that his position was being made redundant.

The claimant position was not replaced. They have not acquired sites since. There were no new planning applications since. Therefore if the claimant had not been made redundant there would be no work for him after that time.

In reply to questions from the Tribunal he explained that he did not discuss with the claimant the possibility of taking a pay cut.

The Tribunal heard evidence from the claimant. He explained that he had worked for a large multinational chain store as a property director. Whilst there he was head hunted by the respondent and then joined the respondent company. He was not told that his role was primarily site acquisitions. He worked at all matters to do with commercial property in the respondent. In July 2007 the company were seeking to acquire property in north Dublin and tendered 11million euro for another site in north Dublin.

On 9th October it was the first he heard about his position being in peril. GMcG told him that "It is not working out"; GMcG told him to look for a job elsewhere. GMcG told him that he could remain on until Christmas or maybe a bit longer. GMcG told him that he was a big overhead. The claimant explained that he was shocked and felt like a train had hit him.

The claimant told the Tribunal that he would have taken a pay cut or he would have taken Mr. A's job in the UK. He would have done any work that was there to keep his job.

In cross-examination the claimant was asked when he first noticed a downturn / less property being developed in the market and the claimant answered that it was probably in October 2008 it was put to the claimant that he or GMcG had made a reference to a downturn in June 2007, and the claimant replied that he could not recall. When put to the claimant that the property market has been decimated the claimant replied that the property market is not in good shape. The claimant replied that he was an optimist when asked if he accepted that the job he was hired for has disappeared.

Determination:

The Tribunal, having carefully considered the evidence and the submissions, dismisses the Claimant's claim and for the following reasons:

1)The Claimant was hired in 2004 for the specific purposes of site acquisition and development. However in 2007, it became neither financially prudent to invest in commercial property nor possible to raise the funds. Heavy losses were recorded for the Respondent in the year ending July, 2007 and continued, as projected, into 2008. It is clear that the Claimant's position became redundant against this gloomy backdrop.

2)The Tribunal examined the procedures used to effect the redundancy and concluded that they were not unfair. Given the relatively small size of the Respondent company and the market conditions, there was no other suitable role for the Claimant. A pay cut could not have made any significant difference as there was no appropriate work for him to do. The Tribunal notes that the Claimant made no meaningful proposal on how the Respondent could make the savings required to deal with the grave problems with which it was confronted.

3)The Claimant was notified of the concerns of the Respondent after its directors had discussed the crisis facing them. They delegated a senior director to discuss the matter with the Claimant. The meeting, though informal, was in keeping with the tenor of the communications which existed at a senior level in the company. There was conflicting evidence regarding what was said during the meeting. But it is common case that that the meeting ended with an understanding on the part of the Claimant that his employment was to be terminated due to redundancy.

The Tribunal sympathises with the Claimant in this case. He is a person of acknowledged ability who was head-hunted by the Respondent. Due to circumstances which were outside his control, his position became redundant. The Tribunal determine that the claim under the Unfair Dismissals Acts, 1977 to 2007, must fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)