

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
Employee - claimant

CASE NO.
UD1143/2008

Against

Employer - respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr D Hayes BL

Members: Mr D Winston
Mr B Byrne

heard this claim at Dublin on 12th January 2009 and 21st May 2009

Representation:

Claimant: Ms Kiwana Ennis BL instructed by
Ms Cara Walsh, SOR Mullany Walsh,
74 Pembroke Road
Dublin 4

Respondent: In person

The determination of the Tribunal was as follows:-

The respondent is a public relations consultancy. It was established in 2005. It is a small business. By the end of 2006 the business was doing well and it was decided to hire someone in a senior role. The claimant was interviewed in early January 2007. He was offered the job. He commenced employment on 18th January 2007 and was dismissed, purportedly by reason of redundancy, on 1st July 2008. He brings this claim pursuant to the provisions of the Unfair Dismissals Acts, 1977 to 2007.

The Tribunal was told that, between February and September 2007, a good working relationship developed with the claimant. However, after October 2007, problems began to develop with the claimant's performance and relationship with clients.

The Tribunal heard that two of the claimant's clients dispensed with the respondent's services

because of the claimant's performance. It was the claimant's case that they left because of the downturn in the economy. In cross-examination, the managing director (MD) accepted that the termination was because of financial issues. MD also accepted that Client B, a company engaged in the property market, did not engage another public relations consultant.

The Tribunal also heard that a third client had difficulties with the claimant and wanted him removed from the account. The difficulties arose from a promotional event organised by the claimant. The principal difficulty seemed to be that, in the client's eyes, the date chosen for the event militated against its success. The claimant's evidence was that the date was chosen in consultation with MD and the client. This promotional event took place in late October 2007.

In January 2008 MD had an informal discussion with the claimant. She followed this up with a letter in which she pointed out her concerns with his performance. This was the first that the claimant knew of such concerns.

MD engaged a consultant in April 2008. The consultant held a series of meetings with the claimant to discuss his performance. On 21st April, MD sent an email to the claimant in which she noted that none of the matters identified in January had been addressed and that improvements were required. Following further meetings with the consultant, a set of "key performance indicators" were agreed. On foot of this, MD sent an email, dated 1st May 2008, to the claimant. It concluded:

"Regarding the Disciplinary Procedures, these are the agency's legal requirement, and whilst previous discussions may have some bearing on them, these procedures will consider your performance from now and in the future." (sic).

Throughout June 2008, the consultant held meetings and corresponded with the claimant. The consultant was dissatisfied that any progress was being made and a verbal warning was issued on 13th June 2008.

During June another client from the claimant's division dispensed with the respondent's services. This meant, the Tribunal was told, that there was now no income coming into the claimant's division. A decision was taken to close the division. The respondent considered that there was no other position that could be offered to the claimant and, accordingly, he was dismissed on grounds of redundancy.

MD accepted that a disciplinary process had commenced in relation the claimant's performance. That was, she said, overtaken by events and was unrelated to the claimant's dismissal.

An email sent by the consultant to MD, dated 15th April 2008, was produced by the claimant and put to MD in cross-examination. It said:

*"Hi ...[MD],
My views on ...[the claimant] to pre-empt tomorrow:*

DISMISSAL

** dismissal requires procedures which quite simply ... [the respondent] does not have in place. I know that job descriptions, contracts and letter describes much of what's required but there needs be a stated procedure that is communicated to staff and reference to dismissal or misconduct needs to be explicit*

** (so I suggest the ISME notes & a clear list of what is deemed to be misconduct or incompetence – using ...[the claimant] as a test case – are put into a draft/holding office manual that is communicated to all by the end of the month – see end of –email comments)*

** also dismissal and misconduct procedures have several stages which even at best attempts could not realistically be met by the communication with ...[the claimant] thus far*

REDUNDANCY

** Attached are some brief notes on the basics of redundancy FYI*

** Crucially, 2 reasons for ...[the claimant] to be made redundant are:*

1. An employer has decided to let work be done in a different manner in future and the employee is not sufficiently qualified or trained to do the work in a different way.

2. An employer has decided that an employees work will in future be done by another person who can do other work as well and the employee is not sufficiently qualified or trained to do that other work.

** Could we therefore justify these reasons as:*

a) The agency is now at a stage where growth is the focus and in order to grow we need managers that can genuinely manage executives to help them develop and progress and groom them towards promotion and greater delivery for the agency. ...[the claimant] has shown himself to be independent and adverse to complying with important admin procedures such as filing & timesheets so is unlikely to be able to fulfill this role

b) Also and in line with this, the agency's direction and growth means that MD needs to be able to rely on managers to lead accounts and both ...[the claimant's] inability to maintain status reports and most importantly his demonstrable inability to engender client trust as per MD's letter and client comments, are clear indicators that he won't be realistically able to step up to this challenge

** whatever reasons are given they must be clearly stated and the language must be in line with and reflect the 2 above conditions" (sic)*

The Tribunal was surprised by the contents of this email. While MD did attempt to put it into a benign context, the Tribunal does not accept that there was anything benign about it. Interestingly, its author, the consultant, was not called to give evidence either about the email or about any of her dealings with the claimant.

The Tribunal is satisfied that the meaning of this email is clear. The respondent did not have the necessary procedures in place to deal with the perceived performance issues. Accordingly, it would not be able to fairly dismiss the claimant. On that basis, it intended to manufacture a dismissal by reason of redundancy.

On the assumption that there was a genuine redundancy at that time, which is by no means clear,

the Tribunal is not, in any event, satisfied that any consideration was given to the selection of an employee other than the claimant or that any consideration was given to the redeployment of the claimant.

The Tribunal is satisfied that the dismissal of the claimant by reason of redundancy was a sham used to circumvent the disciplinary procedure. The Tribunal makes no decision as to whether the use of the disciplinary procedure would have been merited. This is neither relevant nor necessary.

The Tribunal is satisfied that the claimant was unfairly dismissed. This is not to say that an employer cannot dismiss for redundancy an employee who is, or is likely to be, subject to a disciplinary procedure for issues of performance. Such an employer should, obviously, take care to ensure that the two processes remain distinct. That was not the case in this instance.

The respondent now has no employees other than MD, its principal. This has been the case since November 2008. The claimant secured new employment in April 2009. The preferred remedy of both parties is compensation. The Tribunal's view is that compensation is the appropriate remedy.

The Tribunal must take into account that, had the claimant not been dismissed in July 2008, he would have been dismissed by reason of redundancy by November 2008 at the latest.

In the circumstances, pursuant to the claim under the Unfair Dismissals Acts, 1977 to 2007, the Tribunal awards to the claimant compensation in the amount of €14,500.00 (fourteen thousand, five hundred euro) as being just and equitable in the circumstances.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)