

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO. UD 256/2008

Employee - *Claimant*

against

Employer - *Respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. Quinn BL

Members: Mr. T. Gill
Ms. H. Henry

heard this claim at Galway on 14th November 2008
and at Loughrea on 7th April 2009

Representation:

Claimant(s): Ms. Kara Walsh, IR Consultant, Moy Rd, Kinvara, Galway

Respondent(s): Ms. Kate Kennedy BL,
Instructed by: Ms. Ruth McDonagh, Solicitor
M.G. Ryan & Co., Solicitors, Abbeygate House,
34/36 Upper Abbeygate Street, Galway

The determination of the Tribunal was as follows:-

The Claimant is a very accomplished bus driver who at all material times was employed in that capacity by the Respondent. At all material times, the Respondent operated a bus service in Galway City and surrounds. The Claimant's employment commenced in or about the month of March 2006. To all intents and purposes, he was employed as a driver on the Respondent's Route 37, which encompassed the journey from Galway City Centre to Salthill and *vice versa*.

On the 7th December 2007, the Claimant was notified that he was being made redundant by the Respondent and that his employment with it would end on the 21st December 2007.

In the Form T1A submitted on his behalf to the Tribunal, the Claimant disputed that a

redundancy situation pertained with the Respondent at the time.

It was further contended by the Claimant that the sequence of events leading up to his dismissal were such, that he perceived his dismissal was in consequence of industrial relations agitation by him, for the purposes of improving the terms and conditions of employment with the Respondent, of both himself and his fellow employees and that the imposition of a disciplinary sanction upon him on the 5th December 2007 was an attempt to blacken his record, as a purported justification, the Tribunal presumes, for selecting him for redundancy over anybody else.

The fact of dismissal was not in dispute in this case.

Mr. M. M., an Accountant, engaged in business on his own behalf and a person who provided extensive accountancy services and analyses to the Respondent testified on its behalf before the Tribunal.

As part of his terms of engagement by the Respondent, the Accountant prepares and analyses accounts on a monthly basis and provides snapshots of same to the Directors in the course of monthly meetings which he has with them. To that end, an accounting system was devised whereby all of the takings from each of the bus routes could be monitored individually.

The evidence of this witness and of a director of the Respondent was that following the acquisition of this business in or about the month of March 2006, substantial financial investment was required by the company directors in both 2006 and 2007 to maintain the business.

Whereas at the date of acquisition of the enterprise, five routes were operated by the business, in the initial aftermath of its acquisition, two services, Routes Nos 35 and 36, the Cnoc an Oir and Claddagh to Eyre Square routes respectively, were removed in the month of June 2006, as the maintenance of same was no longer economically viable for the Respondent.

The situation that pertained with Route 37 was that the Respondent's service thereon was in competition with a similar service provided by Bus Eireann. In or about the month of September 2007, the frequency of the competitor's services on this route was increased. The evidence was that as a result of the competition, the financial viability of this route for the Respondent was compromised.

Detailed financial documentation in spreadsheet formation was adduced in evidence before the Tribunal by this witness, demonstrating the amount of daily cash receipts for Route 37 for the period from 1st May 2006 to the 31st December 2007 and the viability, or otherwise, of this Route for the Respondent on an ongoing basis.

It appears that at a meeting in or about the middle of October 2007 and again in November, the financial ramifications of the increased competition on Route 37, coupled with fuel increases was brought to the attention of the Respondent by this witness.

The evidence of this witness from an examination of the income and expenditure

pertaining to the route, was that it was not economically viable for the Respondent, to maintain on an ongoing basis, the level of service as originally provided by it on this route and that this was made known by him to the Directors of the Respondent.

It was the witness' understanding that ultimately a decision was made by the Respondent to halve the service as theretofore provided on this route, in consequence of which, one of the two drivers that was assigned to the route was made redundant, that being the Claimant in this case.

It is important to note that as and from the date of the Claimant's dismissal, only one driver remains assigned to Route 37 by the Respondent. The reduced frequency of its schedule to an hourly service in consequence of the Claimant's dismissal has been maintained and no other person has been employed by the Respondent to work on this route in substitution for the Claimant.

A Director of the Respondent, Mr. G.W. also testified before the Tribunal. The evidence of this witness was that as a result of the professional advice and information imparted to him by the Accountant, Mr. M., it was apparent that the Respondent could no longer sustain the level of service on Route 37 as had theretofore been the case.

The evidence of this witness was that as there were no opportunities available for redeployment within its enterprise at the time, the only course, was a redundancy, for one of its employees. In this regard, he instructed the Respondent's Operations Manager, Mr. G.B. to make enquiries as to the appropriate process of selection for redundancy of an employee.

Mr. G.B. the Respondent's Manager, with day to day responsibility for the overall operation of the business also testified before the Tribunal. He confirmed that as regards the adoption of procedures for the selection of an employee for redundancy, he decided to contact the Employment Rights Section of the Department of Enterprise, Trade and Employment.

This witness testified as to having spoken to a named official about this matter in a telephone conversation in November 2007. This witness testified that he explained to the particular Information Officer, the nature of the Respondent's business, the number of routes in operation and the fact of the imminent changes as regards the Respondent's requirements in relation to Route 37 and requested advice as to the process of selection of an employee for redundancy.

It is appropriate to record that at this time, the Respondent operated Routes 33, 34 and 37 and that two drivers were permanently assigned to each route on a daily basis. In addition, as an alternative to the Claddagh to Eyre Square Route 35, which had been discontinued in June 2006, the Respondent commenced a new Route 35 from Bearna to Eyre Square in September 2007, which had one driver permanently assigned to it on a daily basis from that time. One other person was also employed on a permanent basis on a night time route. Furthermore, the Respondent also employed two part time drivers at the time. These part-time employees primarily worked at weekends and public holidays on Routes 33 and 37 respectively, but also on weekdays when permanent employees were availing of their annual leave.

The testimony of this witness was that it was communicated to him by the relevant official in the Department of Enterprise, Trade and Employment that as the Respondent operated designated routes individual to particular employees and that as a position of work on Route 37 was being removed, it was an employee assigned to Route 37 that ought to be selected for redundancy.

This witness testified that although, he personally had highlighted the position of the driver on the new Bearna to Eyre Square Route 35 to the official concerned, in contemplation of the application of a LIFO criterion by the Respondent, he was dissuaded from pursuing that avenue, upon the advice of the official, who had emphasised that, as it was the requirements of Route 37 that were being altered and that a selection for redundancy, of a driver from a Route, whose requirements had not diminished, would have exposed the Respondent to an undue risk of litigation.

Whilst the Tribunal does not express any concluded view as to of the quality of the advice imparted to Mr. G.B., by the Information Officer in the Department of Enterprise Trade and Employment with whom he had a conversation, the Tribunal, by a majority decision determines, that it was not unreasonable for the Respondent, to have adhered to such advice, having taken the trouble to consult the relevant government department for assistance in the first instance.

G.W. testified that once he was made aware by G.B. of the fact that it had to be an employee assigned to Route 37 that ought to be selected for redundancy, both himself and G.B. evaluated the positions of both the Claimant and his colleague in that regard. G.W. and G.B. both testified that that both of the drivers were excellent employees and that there was no applicable objective criterion for distinguishing between them, apart from their length of service with the Respondent and that ultimately, it was this factor that was the decisive feature in G.W. arriving at the decision in late November 2007 to make the Claimant redundant, as opposed to his colleague.

On the 7th December 2007, having been so instructed by G.W on that date, G.B. informed the Claimant of the decision that his position was being dispensed with for financial considerations. G.B. testified that at this meeting he outlined to the Claimant the advice which he had received from the Department of Trade, Enterprise and Employment and the ultimate method by which the Respondent had arrived at its decision to make him redundant. The Claimant admitted on cross-examination that such were the reasons for his dismissal that were outlined to him by the Respondent at this meeting.

The Claimant was understandably quite upset and angry at this development and by letter dated the 10th December 2007, sought a meeting with the Respondent's Director, Mr. G.W. Ultimately, an *ex gratia* payment of €1,000 was made by the Respondent to the Claimant in late December 2007 as a measure of goodwill towards him and subsequent to representations made on his behalf by Ms. Walsh.

The Tribunal understands that due to the Claimant's length of service with the Respondent, he did not qualify for a payment pursuant to the Redundancy Payments legislation and it is an observation of the Tribunal that the other driver on Route 37 would of course, have been entitled to same, had he been selected for redundancy, in substitution to the Claimant.

In so far as the Claimant perceived that the decision to make him redundant was in consequence of his involvement in the arrangement of and attendance at a trade union meeting at the Glen Oaks Hotel in Ragoon, Galway on the 4th December 2007 concerning pay and conditions of employment for the Respondent's employees, both G.W. and G.B. testified that they were unaware of any such meeting at the time and that no notification of same had ever been provided to them.

Whilst a colleague of the Claimant's, a Mr. B.R., as well as Mr. P.H. and the Claimant himself, all testified that the Claimant was "*The Union Man*" and the point of contact for such activities in the Respondent's enterprise, it was the testimony of both G.W. and G.B. that such an apparent status of the Claimant was not in fact known to them, over and above his presumed membership of the union, as with all of its drivers.

In the course of their evidence, both the Claimant and a witness on his behalf, Mr. P.H., a SIPTU organiser, acknowledged that no notice of this meeting was provided to the Respondent and furthermore, it appears the first occasion on which the issue that was raised at that meeting, was notified to the Respondent, was by way of letter dated 10th December 2007, which would have been generated at a time after the Claimant had already received notice of his dismissal.

In addition, whilst the tenor of Mr. H's testimony was directed towards establishing a hostility on the part of the Respondent towards trade union membership and activities, documentation adduced in evidence before the Tribunal, principally concerned historical issues which had arisen a considerable time previously and which, although having necessitated a reference to the Labour Relations Commission by SIPTU, were resolved with the agreement of the Respondent, as far back as November 2006, which was in excess of one year previous to the material events the subject matter of this claim. Furthermore, there was no evidence of any interaction between SIPTU and the Respondent in the interim up to the letter of the 10th December 2007.

In relation to the background to the disciplinary meeting of the 5th December 2007, G.B. testified that a lady telephoned him in November 2007. It was apparent to him that she was very upset and emotional. She maintained that she had been offended by the Claimant, on an occasion when he was engaged in the course of his employment with the Respondent. G.B. testified that he listened to the lady's complaint and advised her that he would first have to discuss the matter with the Claimant and revert to her.

After having spoken to the Claimant, G.B. then subsequently received a letter from the lady in question dated the 28th November 2007. The lady in question appeared to be a genuine person who was convinced that the Claimant had upset her. G.B. testified that it would not be unique to receive a complaint concerning a driver and that it was his universal practice to approach the driver in question to obtain his version of events. In this instance, having heard the Claimant's version of events, G.B. decided to uphold the complaint made against the Claimant and having convened a meeting on the 5th December 2007 the Claimant was provided with a verbal warning as a disciplinary sanction. On cross-examination, this witness acknowledged that although this hearing almost coincided with the notification to

the Claimant of his dismissal, it was irrelevant to the decision to dispense with his services, which had been taken in late November 2007.

In so far as the Claimant's allegations as set out on his Form T1-A, concerning what transpired at this meeting were concerned, it is noted that the direct evidence of the Claimant to the Tribunal in these respects, was somewhat at variance with what was communicated in the Form T1-A, with the Claimant testifying he had a clear recollection of what the complaint related to, that he was shown a copy of the letter of complaint and afforded an opportunity to respond thereto, which he did by disputing its contents.

Whilst the Tribunal, for the purposes of determining the issues in this case, is neither required to, nor does so, make any finding, as to the reasonableness or otherwise of the Respondent in imposing a disciplinary sanction on the Claimant in respect of the incident concerned, the Tribunal accepts the evidence of the Claimant as regards his considerable popularity with patrons of the Respondent's enterprise and his exemplary record as a driver with it, from both social and safety perspectives.

GW testified that the issue of the disciplinary hearing on the 5th December 2007 and the Claimant's trade union activities were not factors in the decision to dismiss the Claimant from employment and from a consideration of all of the evidence adduced before it, the Tribunal accepts such to be the case.

Conclusion:

In this case, the onus was on the Respondent in the first instance to establish that a genuine redundancy situation existed at the time of the termination of the Claimant's employment by it, or that it would arise in the immediate future. On this issue the Tribunal unanimously determines that on the totality of the evidence adduced, the Respondent discharged that onus and the dismissal of the Claimant from his employment with it was wholly, or mainly for reasons of redundancy.

The Tribunal was satisfied that the nature of developments within the Respondent's business were clearly such that the requirements for the employment of two persons to carry out the work of a bus driver on the route between Galway City Centre and Salthill, were expected to cease and diminish, which in fact occurred. The Respondent intended to cease and in fact ultimately ceased carrying on the business for the purposes of which the Claimant was employed, namely as one of two drivers permanently employed and assigned to its Route 37 between Galway City Centre and Salthill.

The Tribunal unanimously rejects the contention that the dismissal of the Claimant was wholly or mainly attributable to his trade union activities and in this regard, the Tribunal notes that no such allegations were ever made by the Claimant in a letter written by him to Mr. G.W. the Respondent's Director on the 10th December 2007.

In so far as the Tribunal has unanimously determined that a genuine redundancy situation existed within the Respondent's enterprise and which was applied to the Claimant's dismissal, in further considering whether or not the Claimant was unfairly

selected for redundancy by the Respondent, the Tribunal, by a majority decision, (Ms. H. Henry dissenting) determines that on the balance of probabilities, the process of selection deployed by the Respondent, by which it arrived at its decision to select the Claimant for redundancy, was in all of the circumstances of the case, a fair one.

By reason of the foregoing, the Tribunal dismisses the claim for unfair dismissal made herein.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)