

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE – claimant

CASE NO.
UD1369/2008

against

EMPLOYER – respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P Hurley

Members: Mr T Gill
Dr A Clune

heard this claim at Loughrea on 17th November 2009 and 18th November 2009

Representation:

Claimant(s): Mr Justin MacCarthy
MacCarthy & Associates
Solicitors,
10 Upper Mount Street, Dublin 2

Respondent(s): Mr Kevin Langford,
Arthur Cox, Solicitors
Earlsfort Centre,
Earlsfort Terrace, Dublin 2

The determination of the Tribunal was as follows:-

Respondent's Case:

The respondent's representative stated that the claimant was an employee of a company which was taken over by the respondent company, a multi-national technology company, in mid 2007. The claimant's role was changed from General Manager and Chief Technical Officer to Sales Manager of the Media Division. The claimant continued in this role until May 2008 when the company decided to make his position redundant. The respondent company disputes the claimant's claim that the redundancy was contrived.

The Vice President of International Responsibilities for outside of the USA (henceforth referred to as VP) gave evidence that part of his role was to seek companies which would add value to the

respondent company's portfolio. The company which the claimant worked for was a voice services company. The respondent identified this company as an asset and completed the takeover in July 2007.

The claimant had commenced his employment with the original company in 1999 as a software development manager and was promoted in 2004 to General Manager and Chief Technical Manager. When the company was acquired the VP identified the role of Sales Manager of the Media Division for the claimant, which made its revenue from phone minutes through classified advertisers. This division had one employee based in the UK who, up to that point, had run the media section and reported to the office in Galway.

The claimant was to report to a Sales and Marketing Consultant who lived in the Netherlands but was based in Dublin for a few days per week. The claimant agreed to take on the new role and signed a new contract on the 18th December 2007. Every staff member was given the option of signing a new contract or remaining on the old one. At the time of the takeover there were no redundancies from the original company.

In August 2007 the VP instructed the Human Resources Department in Los Angeles to open four positions in the Dublin office, one of which was a sales manager position. The sales manager position was to oversee several departments. The position was advertised on the Respondent company website in September 2007 and was filled on April 17th 2008. The VP contended that the claimant would have been aware of the position from the weekly report email sent by the Sales and Marketing Consultant to all managers.

The VP made the decision to make the claimant redundant on April 22nd 2008 in consultation with the Sales and Marketing Consultant and the HR manager. The VP and the Sales and Marketing Consultant went to the claimant's workplace in Galway on May 12th 2008 and informed him that his position had been made redundant.

The VP explained that the media division had not developed as he had hoped and it was decided to reduce resources in that division and to realign it to a maintenance mode, which required reducing the headcount. The cost of the media division was a combination of the two employees' salaries of €137,000 for the claimant and €54,000 to the employee in the UK from 2007 to 2008. There was a drop in revenue to the division in 2007 as a result of a regulatory change in the UK. The respondent company were aware of the change prior to taking over the company and it was incorporated into the assessment of the business.

The VP pays a visit to the Dublin office every six or seven weeks and the Galway staff come to Dublin to meet him. The VP agreed that the claimant had been unable to give his presentation to the CEO at the first quarterly meeting of 2008, as other business in Paris meant the meeting was cut short. He did not understand how the claimant felt ignored by the CEO at the Christmas party on December 20th 2007. As usual, a number of staff were given the opportunity to speak to the group. The claimant was not one of the speakers.

During cross-examination the VP agreed that there was a substantial difference between the illness benefits provided for in the original company contract and in the respondent company contract, which was why staff were given the option to remain on their original contract. The VP was not aware during the period of due diligence that the claimant had suffered a heart attack in October 2006. The VP contended that the claimant could have declined the position of Sales Manager in the Media Division, in which case the VP would have had to re-evaluate the division structure, but this

had not happened as the claimant had accepted the position.

The VP accepted that the Media Division represented a twelfth of the original company's business, but he believed it would expand due to extra resources assigned to it. The claimant was to prove the business in the UK before any expansion into Europe was to be considered. The VP was unaware of any promise made to the claimant of expanding into Europe. The VP agreed that the new Dublin Sales Manager commenced his employment on May 12th 2008, the same day the claimant was made redundant. This was because the VP was in Ireland at the time. The VP considered all internal employees for the new position but none had the qualities sought, such as fluency in another language and experience in senior management and multi-national corporations. The new Sales and Marketing Manager had these qualities.

The VP refuted the claimant's contention that his redundancy was contrived. The VP contended that the non-payment of the claimant's bonus was an error.

The Sales and Marketing Consultant (henceforth referred to as the SMC) gave evidence that as the claimant was so enthusiastic about the media side of the business he believed he was the best person to develop the division. This was discussed at a dinner meeting in Galway in August 2007 with the claimant and another manager from the Dublin office. The SMC contended that no assurances were made to the claimant about developing the European market, he was to develop the UK market first and afterwards they could look at going into Europe. They did not discuss any other options with the claimant as he was being offered the Sales Manager position. He considered that he and other managers had given the claimant their time to help him develop and the claimant had viewed training videos used by the company.

The SMC contended that he is pretty responsive to phone calls, but mainly uses email. The claimant never complained to him about the SMC not returning his phonecalls. Every Friday the SMC receives updates from managers and he collates the information into a weekly email to all team members.

In the fourth quarter of 2007 SMC asked the claimant to build a case for campaign funding. He presented this via video-conferencing and the company agreed to fund his outsourcing campaign.

The SMC did not recall that the claimant was publicly ignored the Christmas party. He described it as an informal event, staff were seated at long tables and everyone was invited to speak up. When the meeting with the CEO had to be cut short due to the Business in Paris the claimant had said it was not a problem.

The claimant's outlook for his division in 2008 was for little or no growth potential which, the SMC considered, was at odds with his optimism during the acquisition. The SMC provided revenue information of the claimant's division for the meeting with the VP and HR Manager on April 22nd 2008. He went to Galway with the VP to tell the claimant that they were making his position redundant. Other options such as telesales or customer service were not considered appropriate for the claimant.

The SMC stated that the non-payment of the claimant's bonus had been a mistake. When the claimant's role had changed the SMC had wanted him to change to a lower salary with commission, but the claimant had the option of remaining on his old salary and he had chosen that. The claimant would not have been entitled to a bonus had he been on a commission based package. The claimant was paid his bonus after his dismissal.

The SMC refused the claimant permission to attend a conference in the Netherlands as he wanted the UK market to be developed.

During cross-examination the SMC stated that the claimant was one of three or four managers who were cancelled from attending and making presentations at the quarterly meeting on March 31st 2008.

The SMC stated that he had read the claimant's report sent to him on 29th February 2008 but he did not recall when.

The SMC agreed that he had not replied to an email in which the claimant stated 'you haven't spoken to me in months'. He disputed the allegation that he had not answered when the claimant phoned him. He was not aware that the claimant believed that one of the purposes for the meeting on the May 12th 2008 was to discuss the lack of communication. He was present when the CEO told the original company employees that there would not be any redundancies. He was satisfied with the claimant's performance in his original role, but he wanted to develop the media side of the business. He was not aware during the acquisition of the company about the claimant's previous health concerns.

The SMC did not recall the claimant asking him at the meeting in Galway in August if he was being forced out. The SMC knew that there would be changes in the UK due to the Regulator, but he did not believe this meant that revenue would go down.

The SMC agreed that an email was circulated announcing that a new manager would be taking over most of the claimant's previous functions. The SMC agreed that some UK companies attended the conference that he refused the claimant funding to attend. He contended that the claimant could visit the companies in the UK directly.

He contended that the claimant was not excluded from attending meetings in Dublin, but rather the two other managers had more complex issues to discuss. He contended he was interested in seeing the media division work. He believed it was more respectful to tell the claimant about his redundancy face to face.

Claimant's Case:

The claimant commenced his employment with the original company in 1999, as the Software Development Manager. It was a small start-up technology company. As the company expanded over time, so did his role. He had responsibility for the technical team, the sales team of six people and the customer service team. He also managed a sales employee working in the UK and dealt with a German contact based in Frankfurt.

The claimant suffered a severe heart attack in October 2006 and was out of work for twelve weeks. In the spring of 2007 he was asked to lead the negotiations for the acquisition of the business. He contended that he clearly told the new company that there was no opportunity in the UK market for growth as they had lost their largest customer when a competitor joined the market and that realistically there were only 10 or 12 customers in the market. The UK market represented a seventh or eighth of the company's revenue.

After the acquisition the claimant reported to the manager in Dublin and then to SMC when he arrived a few weeks later. The claimant met with SMC and the Dublin Manager for a dinner meeting in August 2007 in Galway. The claimant was shocked when SMC said he wanted to place him in the role of Sales Manager of the Media Division. The claimant contended that there had never been a question about media previously. SMC had asked during due diligence if media could be made in-house to customer service and so alarm bells went off in head when this was suggested.

In the claimant's opinion the new company had very little interest in the media area. It was a service they did not provide and they had just asked what it was about. At the dinner the claimant asked them if they were trying to force him out, they said absolutely not, their company did not make people redundant. They said they were planning a Europe wide division and they were going to invest heavily. According to the claimant the company were making a €70,000 loss immediately by assigning him to that division alone, due to his salary. He told them that the competition was all over them in the UK and that they would need to expand into Europe.

The claimant was told that his pay package was set for the year but that he could expect a healthy bonus to carry him over into the New Year. There was no other option given to the claimant and he accepted it on the basis that he would be able to expand the division into Europe.

Later the claimant received an email, which SMC sent to staff, which showed the claimant with responsibility for the UK member of staff and another employee as office manager. When the claimant viewed his new contract he believed it was as a demotion. He queried his title with SMC and was told that the respondent company were not 'title orientated'.

The claimant then went on his honeymoon for three weeks and on his return he produced a strategy document for his division. One of the UK customers wanted to develop into Europe and the claimant viewed this as an opportunity. The claimant sought approval to attend the ICMA (International Classified Media Association) trade fair in Europe and explained the importance of it. It had taken two years to become a member and it was important for networking within the industry. SMC and VP didn't see the value of attending. The claimant considered that this meant the company was not interested in expanding into Europe.

The claimant agreed that he received all the general emails from his manager, however he had a difficulty with direct communication. He contended that SMC never answered his phone calls after he was assigned to the media division. On 6th May 2008 the claimant emailed the SMC about the non-payment of his bonus and stated that 'I am very surprised by these actions and especially considering you haven't spoken to me in months'.

The claimant never got an opportunity to make a presentation to the CEO, which was most important. He did not get an opportunity to travel to Dublin to meet with management, while the other two managers based in Galway went every few weeks. During the last three months of 2007 the claimant met the SMC twice, once for twenty minutes and then at the staff party in Dublin.

On the day of the staff party the claimant was due to meet the CEO, but this did not occur. At the party the claimant felt humiliated. It was a formal affair with assigned seating. The Galway manager who had taken over the claimant's role was seated at the top table with the CEO. The CEO selected people to address the group, but he did not pick the claimant. The claimant felt his career was at a stop. He had run the original company and was the liaison for the takeover.

In the first quarter of 2008 his division exceeded the sales target set in November 2007 by 25%. As

part of the takeover package the original company staff were guaranteed a 10% bonus for the year. During a conference call meeting the SMC insisted that the media division was separate from the rest of the group and that the claimant had underperformed. The SMC said it would be discussed when the VP was there on May 12th 2008. On May 12th the VP agreed that the claimant was entitled to the bonus. The claimant did not accept the SMC's explanation that it was a mistake and rather took it as a signal that he was not wanted in the company.

The claimant believed that the meeting on May 12th 2008 was to discuss his complaint over the lack of communication from the SMC. It was set for 7pm in the boardroom in the Galway office. The claimant had prepared a presentation on the future of his division and to show how the division had exceeded its target in the first quarter of 2008 and was on target to do the same in the second quarter. The media division had acquired a new contract and two other contracts were in the pipeline.

The claimant did not get an opportunity to make his presentation as the VP said he wanted to discuss something else. The VP said that due to losses in another area it was not cost conscious to keep two people in the media division. The claimant was handed a letter stating that he was being made redundant. The claimant cited the assurances that had been given that there would not be any redundancies, but there was no response only that the company could not support two staff in the media division. The claimant was escorted from the building by the SMC and VP and told that it was not advisable that he return.

The claimant was aware that the new sales manager had commenced in Dublin and he was concerned when he saw the list of divisions that would be reporting to the new manager, as media was one of those.

During cross-examination the claimant agreed that there were no redundancies at the time of the takeover. The claimant considered that in the first twelve months after the takeover the process of transfer of knowledge was still ongoing. He didn't agree that the role of general manager was no longer required as there were managers in the new company and pointed out that a new office manager was appointed.

The claimant was initially pleased about becoming Sales Manager of the Media Division, as he believed that he would be expanding operations into Europe. He became concerned when he saw his contract.

The claimant had refused the UK Sales Representative permission to attend the ICMA conference in July 2007 as it was a small part of the business then and it was not the claimant's sole area of responsibility.

The claimant agreed that he sent an email to the SMC the day after the staff Christmas party stating that he had had a good time at the party. He stated that he did this to imply that they weren't getting to him. He did not contact the HR department about his concerns, as this was not done when in management.

The claimant accepted that he was aware, through the weekly email reports, that the Dublin Sales Manager job had been advertised, but he was not aware of the details. The claimant had no issue with the general emails sent around; it was the direct communication with the SMC that he had a difficulty with. The SMC did not answer calls from the claimant and only replied via text or email.

The claimant agreed he did not have all the qualifications sought for the Dublin sales manager role, but contended he had experience in many of the areas specified. He contended that the redundancy situation was contrived and that the company did not get rid of him at the time of the takeover, as he still had a lot of knowledge that the company wanted.

Determination:

Having considered all of the evidence, the Tribunal is of the view that the claimant was dismissed by way of unfair selection for redundancy. The claimant's representations and apprehensions about the new role were not taken into account when the decision to effect a redundancy was made. He was led to believe that his role would involve the promotion of the company's presence in Europe.

The claimant was not kept adequately informed by the respondent company of developments, such as the promotion of another employee to replace him in the role of general manager. Placing the claimant into a division, which was then suffering a loss as a result of his salary, was in the view of the Tribunal a device or contrivance to bring about the claimant's redundancy. The Tribunal would stress the evidence of the claimant that at the time of the takeover it was represented that there would be no redundancies.

The Tribunal is of the view that the claimant justifiably felt himself isolated and that the performance of his role was frustrated and made more difficult. In the circumstances the Tribunal awards the claimant €175,000.00 (one hundred and seventy-five thousand euro) under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)