

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

EMPLOYEE – *claimant*

against
WT490/2008

CASE NO.

UD1201/2008
MN1107/2008

EMPLOYER - *respondent*

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. L. Ó Catháin

Members: Mr. B. O'Carroll
Mr. T. Kennelly

heard this claim at Limerick on 24th June, 7th and 8th October 2009

Representation:

Claimant: Mr. Michael Purtill B.L. instructed by
Twomey Scott & Company, Solicitors, 80 O'Connell Street, Limerick

Respondent: Mr. Edmond J. Dillon, Micheál Glynn & Company, Solicitors,
98 O'Connell Street, Limerick

The determination of the Tribunal was as follows:

Respondent's case:

This company supplies information systems, software solutions, and engineering services to the European Space agency. Its parent company is based in Denmark where it was established in 1992. The respondent retains some autonomy over its affairs but is subject to some authority and control from its parent company. A member of the parent company's board of directors was also one of the respondent's directors. Apart from employing several engineers the respondent also engaged the services of office staff. The respondent's financial year commenced on 1 July.

The first item on the agenda of the group's board meeting in Lyngby, Denmark on 29 March 2008 was a proposal for savings in overall costs. Under this heading it was stated that the claimant's

(position) would be terminated. The respondent's director justified that decision on the grounds that their Irish branch did not need nor could afford an office administrator. At the time that office contained two staff. The witness insisted that these staff performed distinct and separate roles. The claimant dealt with secretarial office work including human resources and general administration. A colleague and fellow part-time employee attended solely to the book keeping and accounting functions.

He described the decision to terminate the claimant's employment as totally obvious. His reasoning was that the respondent could not abandon its statutory book keeping tasks but could discontinue and indeed disperse the functions of an office administrator. The witness added that the respondent did not recruit the retained employee as an assistant to the claimant. Besides the claimant had previously announced that she had no interest in undertaking accounting duties and the witness did not accept that there was a lot of overlap in the work done by these two female colleagues and friends.

In sworn evidence, the CEO Denmark said that he founded the parent company in 1992. At that time, he was its CEO and subsequently, he became Chairman of the Board of Management. The role of Chairman had been a very active one where 50% of his time had been spent working. The witness was the company's biggest shareholder with 30% of its stock. When the company ran into financial difficulty, the then CEO resigned, and the witness returned as its CEO in March 2008. At that time, the whole Group was facing bankruptcy. In March, he analysed what could be done to save the Group. In analysing the books, a number of simulations were created. He concluded that administration costs in Denmark and Ireland were too high and would have to be reduced significantly. The laying off of engineers was not a feasible proposal as they were income earners for the Group. After thoroughly analysing all of the administrative positions, the witness saw that a number of positions in Denmark and Ireland were not required. Accordingly, he made a proposal to reduce some of the administrative staff numbers.

Growth had been expected in Ireland. From his analysis, the witness concluded that one position in administration in Ireland could be saved. The role of H.R. could be done without and accordingly, a proposal was made to the Group Board of Management that this position in Ireland be done without. On 31 March, the Chairman confirmed that this action would be taken, and the position of H.R in Ireland, together with a number of positions in Denmark would be discontinued. The decision that the administration position in Ireland was to be made redundant was taken and announced in Denmark on 31 March 2008. The employment of five other employees in Denmark was also terminated on that date. When considering redundancies, consideration had been given to the 30% cost of administration. The survival of the Group could only happen by making everyone who was not instrumental to it redundant.

The witness did not inform the relevant employee – the claimant – in Ireland about her termination as it was not his business, but waited for the senior project engineer to come to Denmark. It was only on the following week when this person arrived that he was told about the redundancy decision affecting Ireland.

In cross-examination, the witness confirmed that the group's turnover was €8 to €9 million. He had been in Ireland four or five times since the respondent's foundation.

The function of the other office person in the Irish administration was that of accounting administrator. The claimant had been the respondent's H.R. manager. When put to the witness that the first mention that the claimant was in H.R. was in 2008, he replied that he knew

the overall situation. Most meetings had occurred in Denmark. When put again to the witness that the claimant had not only been in a H.R. position, he confirmed that she was H.R. as the senior project engineer and the contemporary chief executive officer had told him that there was one person in H.R.

The witness agreed that he had thoroughly analysed the administration functions throughout the Group and this analysis would have resulted in paperwork. The paperwork exercises had been simulations. If the situation had continued where expenditure had exceeded income, the Group would not have survived. Savings could not be made on the engineer side of the company so they had to be affected on the administration side.

The witness confirmed that he was CEO of the company in Denmark. The redundancy decisions had been made on 31 March 2008 and five employees in Denmark had been made redundant. He stated that he did not take executive decisions at a local level. The reason the claimant had not been officially informed about her redundancy until mid July was because that was a function to be done at the Irish level.

Though the claimant's employment commenced in 2006 and the employment of the other office staff commenced in 2007, it was absolutely not the case that both office employees did the same duties. The witness knew that this other person's employment had started subsequent to the claimant's. However as only ten people were employed in Ireland, only one administration person was needed. The respondent no longer had a H.R. position, and managers now conducted H.R. functions. No one individual now had that one function to do.

The witness did not see exactly what duties the claimant had done for the respondent but he knew what functions she did not do. Simulations had been made on the financial position of the Group to establish what could be done without. The respondent could not do without an accounts person.

When asked if he had been aware that the claimant had been on sick leave, the witness replied that the Group deals ethically with its sick employees. He did not dismiss the claimant either because she had a period of sick leave or because she became pregnant. He had analysed functions within the Group and had decided on which functions he could propose to discontinue. He had decided that the respondent could not do without the function of accounts in Ireland but they could do without the position of H.R. He had not known who was in these roles. His function had been to analyse the positions through functional analysis. He had heard that the claimant had been on sick leave but he had been unaware of the details of her sickness.

The selection process for redundancies had been extraordinary because he had been given only one month to do it. The Group did not have a written procedure on making people redundant. The witness did not know who had done the accounts function prior to the recruitment of the second office person. He agreed that it could have been the claimant but added that two people could not have been retained to do the same job. He understood that the claimant's friend had not been recruited to assist the claimant as she had previously announced her disinterest in undertaking bookkeeping tasks. Besides he did not accept there was a lot of overlap in their duties.

Replying to the Tribunal, the witness confirmed that the redundancy situation had not been announced to the stock exchange because it had not been necessary. He thought that the employees in Ireland would have known the occurrence of redundancies in Denmark because people talk within the company. He had summoned the employees in Denmark and explained to them that redundancies were happening because of the Group's financial position.

The second office employee had the specific accounting function in Ireland, which the respondent had to retain. This function could not be transferred to Denmark. It was a mandatory function in Ireland and so could not be considered for redundancy.

In his sworn evidence, the senior project engineer said that he commenced employment with the respondent in that position in July 2006. By the spring of 2008, his roles and responsibilities expanded up to the point where he had “full visibility” on the company. He was hired by then Irish chief executive officer and held several roles within the company. His background had been in the automotive industry and he had spent ten years in Germany.

In September 2006, the respondent’s hope had been to develop and establish a skills set in the space industry community and the automotive sector in Ireland. The initial expectation was that thirty people would be employed in Ireland by the respondent by September 2008. The witness was in a lead project role for the respondent, had a complete overview of the company and visited the Denmark office often. He had worked closely with the contemporary chief executive officer in trying to secure projects with the European Space Agency. The Group had wanted to grow a successful company in Ireland but same did not happen as initially expected.

In September 2007, the respondent had ten employees in Ireland, eight in engineering roles – including the contemporary chief executive officer and this witness – and two in administrative roles. There were different levels within the engineering section and all were directly involved in project work, in trying to win and execute projects. Prior to the employment of the claimant’s colleague, only nine people had been employed, the claimant being the only one in administration.

Per her contract of employment, the claimant commenced employment with the respondent on 8 November 2006 as an office administrator. She had also assisted the contemporary chief executive officer and had done all financial work.

Acting on the claimant’s request that she did not want to work in finance, a decision was made to split the role of administration into two parts, the financial and non-financial. The witness was certain that this was done at the claimant’s request as she wanted to focus on the non-financial role. Accordingly, a second office employee had been hired. If the respondent’s expectation of hiring more people had materialised, this would have meant a lot more work for a non-financial role. At that time in the respondent’s development, the splitting of the administration role made sense. However, claimant did not have H.R. experience but applied to do H.R. courses in college, same which were paid for by the respondent. The respondent also subscribed to H.R. magazines on behalf of the claimant.

This second office employee was hired by the respondent to do financial administration and this is what she started on the first day of her employment. Subsequent to this person being hired, the claimant only did non-financial duties and H.R. The financial administrator from Denmark initially went through the job with this new employee, and the Group’s Chief Financial Officer helped her set up the link to the central financial database in Denmark. This new employee took over all responsibility in the financial role from the claimant in September 2007. The only difficulty at that time had been the setting up of on-line banking for her so this function had not transferred to her. The contemporary chief executive officer had exclusive access to the on-line banking and he had done most of the on-line payments. The witness and the new employee made repeated requests to the contemporary chief executive officer for access to this facility. It was in March 2008 that they were finally given access to the facility.

In April 2008, the first witness asked this witness to become the respondent's chief executive officer in Ireland and the contemporary chief executive officer had been asked to remain in Denmark. Following negotiations, the witness accepted this offer. In the same month, he learned about the proposed redundancies. He was told that the respondent's financial position was disastrous. All of the respondent's employees would have known about the group's financial position. As a small company, the respondent's situation was discussed by its employees, and the question being asked was if the company would stay afloat. There was communication back and forth between the Danish and Irish office, there was the existence of the Group intranet and Danish colleagues were employed in Ireland so everyone would have known about the Group's financial situation.

The witness went to Denmark on 1/2 April and met with senior management. He was representing the Irish company there. At that meeting, they "went over the corrective action" that was required. This witness did not attend the meeting in Denmark when it was decided to cease with the services of the claimant. The witness disagreed that the claimant had been personally targeted. When he met the first witness, they "went over" the functions of employees. For the respondent to survive engineers were required but roles outside of this area were expendable.

Up to March 2008, the function of the second office employee had been financial administrator in Ireland with complete responsibility for financial reporting to Denmark. The claimant had a non-financial role, and was involved in H.R. and was executive administrator to the contemporary chief executive officer, but had no direct contact with Denmark.

The claimant was paid during her sick leave period. There had been various illness related reasons for this absence. The redundancy decision was taken on 31 March and this witness learned of same when he went to Denmark in April. The claimant was on sick leave at that time so communicating the decision to her had been difficult. She and the witness had developed a friendship and because of the scares surrounding her illness, he had delayed in informing her of that decision for compassionate reasons. At that time, the witness did not see it as humane to inform the claimant that her position was being made redundant.

By letter dated 23 June 2008, the witness wrote to the claimant wherein he informed her of the respondent's internal restructuring due to its financial difficulties and inviting her to a meeting, proposing a date of "27th June at 11:00" in the office to discuss these matters. In same, he stated, "As you may or may not be aware (*the Group*) is in financial difficulty". The claimant replied by her letter dated 24 June 2008 and highlighted that, as he was aware, she was on certified sick leave until 2 July 2008 and that she hoped to be fit to return to work after that date, that it was her intention to return to work on 7 July and that she was looking forward to returning. She also stated therein that, as she had previously informed him, she was now pregnant and that she would furnish all appropriate dates in due course. Referring to his statement that "you now say that the group is in financial difficulty" and the meeting in relation to the proposed internal restructuring, the claimant went on to state "I do not know how this could affect me. What is this meeting about? I trust that we can arrange to hold this meeting, if necessary, as soon as you respond to this request, at some stage after my return to work".

The witness confirmed that he and the claimant were friends and that they had contact during her sick leave. He believed that it was in June during this sick leave that she told him on the telephone that she was pregnant. The claimant's baby was born on 20 January 2009.

The respondent received a letter dated 8 July 2008 from the claimant's legal representative wherein they challenged the claimant's redundancy. Following other exchanged correspondence, the witness wrote to the claimant's legal representative on 6 November 2008. In same was stated in part "As you must be aware your client was not made redundant, her position was. Essentially the company is a very small one with, at that time, just eight employees in total. There were six software engineers i.e. fee earners whose work generated income for the company and two administrative staff – [*the second office employee*] and your client. [*The second office employee's*] role was finance, payroll, invoicing, suppliers, utilising Navision and similar roles. Your client was responsible for Human Resources and as well as a back up to [*the second office employee*] or assistant to [*contemporarily chief executive officer*], as required. Indeed it ought to be pointed out that this very organisational structure was put in place by your own client some years ago. Indeed it was your client who wished to, and indeed did, organise her own move into the general area of Human Resources within the Company. There were therefore just two, what might be termed, administrative staff, your client and [*the second office employee*]. It was she herself who placed [*the second office employee*] in her present role and divided the duties up between them at the time. There can therefore be no question, as appears to be suggested, that the company somehow manipulated the roles of employees within the company to disadvantage your client. Your client could just as easily have stayed in her original role in the company at the time of an earlier re-organisation".

The witness maintained that the respondent had treated the claimant well during her employment. She had been paid during her extended sick leave, as had her mobile telephone bills and she had not been required to be on stand-by for the respondent during that time. She had requested to move to a H.R. role and this had been allowed. Her H.R. course at university had been paid for by the respondent, as had H.R. manuals. The witness believed that the respondent had been compassionate to the claimant in its delay in informing her of the redundancy decision.

The witness had no knowledge that a new contract of employment had been given to the claimant subsequent to the commencement of her colleague's employment. However, the claimant had taken on a H.R. role. The witness was certain that claimant and her colleague's tasks were differentiated to the extent that they performed separate roles for the company.

According to this new employee the claimant sought and was given assistance by her in May 2007 to replace her in the office for a month while she was away. In September this witness again accepted an offer from the claimant and the contemporary chief executive officer to work in the office. At that time the respondent was in the process of replacing their software financial and accounting system from Sage to Navision. This was being done to allow the Irish and Danish head office to have a similar system. The witness understood that she was being asked to deal exclusively with accounts and the fact that she, and not the claimant, was trained in the operation of the new system reinforced that perception. Besides, the witness was not getting involved in either human resource or personal assistant matters, as these were areas dealt with by the claimant.

Due to the claimant's absence from work for several weeks from September 2007 the witness then undertook all the office administration work. That resulted in not only extending her workload but also increasing her weekly working hours to around twenty from the initial eight. She maintained those hours when the claimant returned to work. Initially in September the witness reported to the claimant but was later told to report to the finance and administration manager in Denmark. She was also told initially by the contemporary chief executive officer that the plan was to have interchangeably between herself and the claimant in the office. Indeed the other employees assumed she was doing the same tasks as the claimant. The witness however stated that this was not the case as she was there solely and exclusively to handle the accounts. She first heard of restructuring within the respondent when the senior project engineer returned from a trip to Denmark in April 2008. That person told her of the decision to make the claimant redundant. She then relayed that news to her friend the claimant.

A current design and software engineer said he only approached the claimant on holiday and human resource issues. In contrast he only dealt with her the new employee on financial matters.

Claimant's Case:

According to the claimant's terms and conditions of employment she commenced work with the respondent as an office administrator on 8 November 2006. That document however never explicitly identified her precise roles and functions regarding that title. In practice her duties consisted of general office tasks, which included dealing with finance, attending to her colleagues staffing issues and acting as a personal secretary to the contemporary chief executive officer. She reported both to him and a finance and administration manager who was based in Denmark. The claimant's letter of appointment stated her position was part time and that her standard working week would be sixteen hours. The claimant said, however, that in practice she worked twenty-four hours a week over a three-day period.

Up to May 2007 she was the only employee undertaking all the administration duties in the office. Among those duties were tasks related to finance and accounting. The other eight or so employees were engaged in software and management work. That month the claimant was absent from work attending a training course. She managed to secure the services of her friend to replace her in the office for that period. In September both the claimant and the former chief executive officer were instrumental in recruiting that friend for two mornings per week. This was done in order to assist the claimant in reducing and then eliminating a backlog of work involving invoices. That friend's terms and conditions of employment stated she was employed primarily as an accounts administrator- again without specific details attached to that title.

Shortly after that appointment the claimant fell ill and was absent from work for up to eight weeks on health grounds. As a consequence of that absence her friend and co-employee covered the

claimant's workload. By that time another software programme related to finance was being considered for use by the respondent. The claimant was not involved in the training or introduction of that system. When the claimant returned to the office both she and her friend shared its general administration including its financial aspects. Several emails and other documentation in the early months of 2008 were cited and produced to show that the claimant still had an input into the financial operations of this company. By that time her friend who had increased her working hours was exclusively attending to matters connected to the latest software financial system.

By late winter 2008 the senior project engineer asked the claimant to hand over some office tasks to her friend. The claimant expressed her objections to that request both to that person and the contemporary chief executive officer. In March 2008 the claimant became aware that a form of restructuring was taking place and from then on was uncertain as to whom she was now reporting to. She maintained that two separate roles within the office and between her and her friend was not created by the respondent. Apart from the new software system her tasks including spending time on financial operations had not changed. There was an almost complete interchangeably in the office roles performed by her and her friend.

By early April 2008 the claimant again found herself absent from work on medical grounds. Shortly into that absence the claimant received a phone call from her friend and colleague stating that she heard from the incoming chief executive officer (ie the senior project engineer) that the claimant was to be made redundant. The caller who was upset at relaying that news added that she was the one instead of the claimant who should lose her job. In turn the claimant contacted the outgoing chief executive officer and was reassured by him when he told her not to worry about that, as this termination would not happen. Around that time that chief executive officer's employment ceased with the respondent.

When the claimant returned to work on 7 July she was presented with the news that the respondent was discontinuing her employment as her position had become redundant. The following month she received a payslip and cheque covering her salary and holiday pay. It was her contention that she was selected for redundancy as a result of her sick leave. The claimant added that she was capable of undertaking all the duties done by her friend and colleague.

It was the view of a former software engineer that there was interchangeably in the work roles played both by the claimant and her friend in the office. This witness approached the claimant regarding his pay and pensions. He also formed the impression from the incoming chief executive officer's gestures that he did not believe that the claimant was absent from work through illness.

Determination:

Having carefully considered the evidence the Tribunal finds that the claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds. The application, methodology, and approach adopted by the respondent in selecting the claimant for redundancy lacked sufficient transparency and consultation and therefore rendered its procedures flawed. Accordingly, the Tribunal awards the claimant €3,500.00 under the above Acts.

The appeal under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 is allowed and the appellant is awarded €500.00 under the above Acts.

The appeal under the Organisation of Working Time Act, 1997 falls for want of prosecution.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)