

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

EMPLOYEE

- claimant

against

EMPLOYER

- respondent

under

CASE NO.

UD381/09

RP393/09

REDUNDANCY PAYMENTS ACTS, 1967 TO 2007 UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan

Members: Mr M. Noone
Ms. N. Greene

heard this claim at Naas on 11th November 2009 and 19th January 2010.

Representation:

Claimant : Ms Niamh McHugh B.L. instructed by Mr Kevin Martin, Malone & Martin,
Solicitors, Market Street, Trim, Co. Meath

Respondent: Ms Sinead Mullins, IBEC, 84/86 Lower Baggot Street, Dublin 2

At the outset of the hearing the claim under the Redundancy Payments Acts, 1967 to 2007 was withdrawn.

The determination of the Tribunal was as follows:-

Background:

The claimant contends that she was unfairly dismissed by virtue of unfair selection for redundancy and that the selection was made in breach of fair procedures. She was informed of her redundancy during her maternity leave.

The respondent contends that the claimant's employment was terminated fairly by reason of redundancy. The respondent asserts that the redundancy of the position is genuine and the decision was based on objective grounds and carried out in accordance with relevant legislation. The respondent refutes the allegation that the claimant was informed of the decision during her

maternity leave.

Respondent's Case:

The Managing Director (MD) gave evidence. The company manufactures industrial and decorative paints. They have four stores.

The claimant used the company's paint products. She felt she could offer something to the company and communicated this to them. She was subsequently employed as Marketing Manager. At that time GD was Director of Marketing/Retail and WS worked in Sales and Marketing Support. The company was rebranding and extending the business from four to seven shops.

At the end of 2007 there was a loss of a contract with a large contractor and concurrent with that there was a drop off in demand with the respondent's major customers. The business dropped thirty per cent in two years. An outside consultant was hired. Costs, operations and overheads were reviewed. In 2008 the respondent employed 82 employees and that has reduced to 65 employees.

Staff on a salary up to €25,000 took a pay cut of 2.5% and staff on a salary over €25,000 took a pay cut of 5%. Bonuses were cancelled. Staff who left were not replaced. Unpaid leave was taken during the Christmas break. In the year the claimant was made redundant the company had a 30% reduction in sales.

The claimant commenced her maternity leave in February 2008. In July 2008 she asked to meet the company to discuss coming back to work following her maternity leave. She attended a meeting with the witness and GD on 30th July 2008. She expressed the wish to take an additional two weeks off and to return to work on 15th September 2008. She also proposed to return to work on a 3-day week basis. They told the claimant that her request would have to be considered and also that there would have to be a review of personnel issues at a board meeting scheduled for 6th August 2008.

At that meeting the board discussed costs and considered the role of Marketing Manager. They decided higher roles were not needed and the rebranding project was concluded. A decision was taken that the role of Marketing Manager (the claimant's job) was not needed given the market downturn. Other positions were to be reviewed.

Both MD and GD met with the claimant on 25th August 2008 to inform of the Board's decision to make her position redundant. They told her that the Board had decided to make her position redundant. The claimant said it was not the end of the world and suggested they try and reach a win-win situation. MD explained that he did not wish to issue the claimant with formal notification of her redundancy as she was still within her maternity leave. The claimant enquired about working for the respondent on a contract basis. They told her that they would look at the redundancy issue first and then the sub contract issue. The claimant said that when she returned for the second scheduled meeting she would discuss rates and hours for the contract work.

They decided that they no longer needed any of the higher roles. Their re-branding project had concluded. Expansion of stores and planned advertisements were cancelled. These fell under the brief of the Marketing Manager. The claimant's role was split between GD and WS. A temporary replacement was hired for WS's role during the claimant's maternity leave.

The witness was surprised to receive a letter dated 28th August 2008 from the claimant in which she referred to the company's intention to make her redundant. Before the claimant was appointed as Marketing Manager the company had lower level functions. It was the higher-level activities that were being curtailed and it was determined that the position of Marketing Manager was no longer a requirement of the company. It was felt that duties carried out by the Marketing Manager could and would henceforth be carried out by the Retail and Marketing Director or by the Sales and Marketing Assistant.

The witness contended that the functions such as rebranding and the shop expansion were cancelled and were no longer required and that these had been attributed to the claimant. The possibility of the claimant working part-time had been considered.

By letter dated 30th October 2008 the claimant was formally notified that her employment would terminate by reason of redundancy on 13th November 2008. An RP50 was enclosed for this purpose. The claimant did not sign the RP50 form.

Under cross-examination the witness said that the option of job sharing was not discussed with the claimant nor was a pay cut. Consideration was given to any other alternative to redundancy at the Board meeting but no alternative was feasible. The claimant did not appeal the decision to make her redundant. They were surprised that the claimant was not shocked to learn of her position being made redundant at the meeting on 25th August 2008. The meeting scheduled for 2nd September 2008 did not take place. There was no alternative position available to offer to the claimant. The witness said that the company downsized in retail and could not re-deploy the claimant to that area. At the moment the witness said that he could not envisage expanding the business.

The Retail and Marketing Director (GD) gave evidence. He oversaw the marketing department, which had four retail stores and four managers. The respondent sells to 100 stockists.

In the early 2000s the company experienced good sales. The respondent's look was dated and needed to be modernised. They had no advertising plan, had no strong presence with the press and needed to rebrand.

A letter had been received from the claimant expressing an interest in working for the company. The claimant's skillset fitted well into the marketing and publicity the company had scheduled. She was subsequently employed and brought good skills and new direction to the company. A job description was drawn up for her. The activities included the implementation of a new brand in the job description, something that had never been undertaken before. The claimant engaged with designers and launched press events.

In early 2008 the company lost a €1m contract with their biggest customer. At Board meetings all Directors had to look at cost savings. The company needed savings in the region of €800,000. A three-day week was discussed. Overheads, cost of sales and operational efficiencies were looked at. Advertising was not proceeding. These had a serious impact on the marketing department. Three new stores were axed, advertising and rebranding were shelved.

The meeting held on 30th July 2008 at the claimant's request was cordial. He was surprised to hear that the claimant proposed to return to work on a three-day basis. At the quarterly board meeting held on 6th August 2008 the claimant's position was discussed. It was contended that there was no justification for the position of Marketing Manager and the position was redundant.

At the meeting held with the claimant on 25th August 2008 notifying her of her position being made redundant it was his understanding that the claimant fully understood the decision to make her redundant and it was verbally outlined to her the reasons for the decision. Subsequently, he was somewhat taken aback when the claimant wrote to the company on 28th August 2008 stating that her redundancy was being considered and her wish to postpone the proposed meeting for 2nd September 2008.

Prior to the claimant's employment with the company he had carried out the marketing functions. With the boom in the economy they had decided to spend but with the downturn they had to retrench and revert to the activities carried out in 2000.

The claimant was invited to attend a rescheduled meeting on 15th September 2008 but this did not proceed. The respondent then asked the claimant to contact them to discuss a mutually agreeable time and date to meet. In a further letter dated 8th October 2008 to the claimant the respondent suggested a meeting on 22nd October 2008. The purpose of the meeting was to sign the RP50 form and discuss other matters.

The respondent has retained the services of a consultant AR who is a sales representative to interior designers. In 2009 she was paid €2900.00 for work she carried out for the marketing department. She works 2 days a week. She reports to JC in the Sales Department. She is paid a daily rate.

The witness contended that there was a huge difference between sales and marketing. Marketing involves promoting the brand image, advertising and liaising with the press. The role carried out by the claimant was not a sales role. She never worked in sales.

Under cross-examination GD said that the claimant instigated the meeting that took place on 30th July 2008. He contended that all options were considered prior to the claimant's position being made redundant. As the claimant would not engage with the respondent after 25th August 2008 as notified through her solicitors she was formally issued with notice that her employment would terminate by reason of redundancy on 13th November 2008.

Claimant's case:

The claimant gave evidence. She contacted GD with a view to discussing taking a further two weeks leave following her maternity leave and proposed working a 3-day week. She met MD and GD on 30th July 2008. As the marketing manager had never been a part-time position consideration had to be given to it at the next Board meeting. Her salary was not discussed. There was no mention of redundancy. In her absence on maternity WS carried out her work and was Acting Marketing Manager.

At the meeting on 25th August 2008 attended by MD and GD she was informed that her position in the company was being made redundant. She said it was not the end of the world but that perhaps she could work on a contractual basis. MD said that "it was music to our ears" and enquired if she had any idea of a fee structure. She was given a two-week notice period which was from 1st to 15th September 2008 and she enquired if she was to return to work for this notice period. She was told not to return. MD wanted to schedule another meeting and proposed 2nd September 2008 with a view to signing the RP50 form, holiday money owed to her and to furnish her with her cheque. She was 100% clear that her position was made redundant on 25th August 2008. Following the meeting on 25th August 2008 GD escorted her to her car and exchanged a few words. She felt unfairly treated at that meeting and subsequently sought legal advice. She had not been paid since that date

nor had she returned to the company.

The claimant contended that she worked closely with JC in Sales. Together they visited stockists. She trained stockists to sell colour to customers. She promoted new packaging and sold new colour. She formed a wood care team with another colleague and became a project leader.

During her employment AR was devine products specialist and had little involvement in sales. Her role was to get the company's name out there to small high-end stores. The claimant's understanding now is that AR had taken over colour selling and educating stockists on how to sell colour. JC does the hard-core selling.

The claimant has a diploma from the Institute of Design. She would have accepted firstly AR's role had she been offered it or alternatively and if necessary would have taken the executive role in the company.

Under cross-examination the claimant said that she did not accept that there was no longer a role of Marketing Manager in the company. She met stockists and promoted the company and worked closely in sales. JC and she were part of the sales team. She sold colortrend. She did not engage with the company after 25th August 2008 as she felt she had been treated in an unfair manner at that meeting. She felt she could not represent herself properly at subsequent meetings. She absolutely refuted the fact that the company had no other role for her.

In response to questions from the Tribunal the claimant confirmed that she did not attend meetings with the company which had been arranged as she did not want to meet them on her own such was her disappointment with the way the company handled the meeting of 25th August 2008. She further confirmed that she had not requested a meeting with the company in the presence of her solicitor.

Determination:

The Tribunal carefully considered the evidence adduced at this two-day hearing. It is clear that the claimant believed that she had been unfairly selected for redundancy. Due to the difficult trading environment the respondent's requirements for the activities in the area of marketing had significantly diminished and a decision had to be taken to make the position of marketing manager redundant. Other redundancies followed with those leaving the company not being replaced and the respondent had to introduce other cost reductions such as a 3 day week, overtime ban, pay cuts, staff taking unpaid leave, the stoppage of pension contributions and staff related bonuses were removed.

The Tribunal notes that a cheque in respect of the claimant's redundancy entitlement was made, and still is, available to her.

The Tribunal finds that the claimant was not unfairly dismissed nor unfairly selected for, what was a genuine and unfortunate redundancy, and dismisses her claim under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)