

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE
- *appellant*

CASE NO.
UD322/2009

against

EMPLOYER
- *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr M. Gilvarry

Members: Mr. D. Morrison
Mr P. Clarke

heard this claim at Sligo on 2nd September 2009

Representation:

Claimant: In person

Respondent: Mr. Stephen Sands, Construction Industry Federation, Construction House,
Canal Road, Dublin 6

The determination of the Tribunal was as follows:

This is a case where the employee is claiming unfair selection for redundancy.

Respondent's Case

The respondent is a general construction contracting company that build projects from .5million to 100 million in all areas, residential and commercial. The regional director who oversees all construction work in the western region gave evidence on behalf of the respondent. The company's turnover in 2007 was €240 million, in 2008 €180 million, their projected turnover for 2009 is currently 90 million. The numbers of contracts available to them to apply for have decreased in size and money. At their peak they employed 290, 130 of this were management staff. Currently they employed 140, 50 of which are management staff.

The claimant was employed as a finishing foreman. On the 12th September 2008 he was placed on temporary lay off. Between July 2008 and October 2008 the company tendered for 22 contracts of various sizes, they were not successful in winning any of these contracts. Normally they would expect to win about 30% of these contracts. They could not maintain all of their employees. In September 2008 they let go 10-12 employees, the claimant was not the first to be let go.

At this time the claimant was working on a site in Sligo, which included two sections of work, a new build and a refurbishment. The general foreman had overall responsibility for both aspects of the build; the claimant had responsibility for the refurbishment. The new build was not progressing to plan and the respondent had to bring in a specialised foreman (hereinafter referred to MD) to deal with the concrete work to turn around that element of the new build. At this time a ganger (hereinafter referred to MW) returned to the Sligo site to work under the specialised foreman. The company did not need three foremen on this site. The general foreman on the site was senior and had more construction experience than the claimant, so he deemed that the general foreman was more suitable to continue work on this site. The general foreman is also now redundant.

He met with the claimant on the Friday and told him that there would not be any more work on the Sligo site for him, but he would try and find him alternative work. He told the claimant he would get back to him the following Monday. He did not contact the claimant on the Monday, and the claimant was absent from work on the Tuesday till Friday. He told the claimant on the Friday that he could not find alternative work for him and that he was placing him on temporary lay off. The claimant expressed dissatisfaction about not getting notice; he thought he had given the claimant notice the previous week. At this time the claimant never raised any other issue about his lay off. The respondent had short term work in Oranmore and gave the claimant one more week's work here finishing the snagging along with another foreman also placed on temporary lay off. The claimant finished up work on the 12th September 2008.

He had considered placing the claimant on another job in Claremorris but after speaking with the general foreman of this site, they did not need a finishing foreman. He explained that they did not have a redundancy policy in place that selected first in, first out. The redundancy was based on the needs of the respondent. The claimant for the first six months of his employment had done some carpentry work but it is the policy of the company not to demote personnel. Of all of the employees selected for redundancy this was the first time unfair selection was claimed against them. If they had work in the morning they would rehire the claimant.

Under cross-examination he was asked to explain the company's policy on redundancy. There is no written policy; the respondent's redundancy policy is based on the skills and experience required by the company. The claimant did not accept that he reported to the general foreman on the Sligo site. He explained that the general foreman held a more senior position than the claimant. The general foreman had more experience in refurbishments, needling and underpinning than the claimant. It was put to him that it was not the normal policy of the respondent to make employees mid-contract redundant. He responded that he had already explained the new element of work on the Sligo site and that the company did not need three foremen on the Sligo site. When asked by the claimant why he was never approached to do carpentry work or why he was not redeployed in to the ganger's (MW) position. He explained that it was not the respondent's policy to demote employees; putting one foreman working under another foreman does not work. Also, the company tend to subcontract their carpentry work. They have only offered two foreman positions back on the tools, both of which had over twenty years service with the respondent, and one was involved in the forming of the company. In relation to the ganger, MW, he had experience and had worked on shuttering jobs and heavy civil work. He could not recall the claimant ever doing shuttering work

for the respondent. To the best of his knowledge the claimant did not ask him about reverting to carpentry.

In replying to questions from the Tribunal, he confirmed that the RP9 was sent on the 8th September 2008. The next correspondence was a letter from the claimant to the respondent asking if there was any work available on the 3rd November 2008. On the 10th November 2008 ST wrote to claimant stating there was no work available but he could declare redundancy on receipt of the RP9. On the 7th January 2009 the claimant wrote to the respondent enclosing his RP9 referring to their letter of the 10th November 2008. On the 9th January the respondent sent the claimant his RP 50 form and on the 16th January 2009 the respondent issued the claimant with his redundancy payment. He would have been informed by HR that the claimant was seeking his redundancy so would have considered providing the claimant with work at this time.

The general foreman of the Sligo site would have overseen the claimant's work on a day-to-day basis. The specialist foreman came to the site to do the heavy civil works, two weeks before the claimant was put on temporary notice. The general foreman took over the refurbishment project and it continued in parallel with the new build. The general foreman was made redundant in July 2009. The ganger was employed for about six years at the time the claimant was made redundant. This witness was responsible for about ten sites at this time.

Claimant's case

The claimant commenced employment with the respondent in September 2000. He has 28 years experience in the construction industry with experience in all aspects of the work. On the 7th April 2008 he was placed in charge of the refurbishment build. The general foreman was put in charge of the new build. MD a foreman was transferred to the new build in Sligo on the 29th August 2009 as a result of this the general foreman became free. The regional director who was acting as the contract manager visited the site on the 29th August 2009. He spoke to all of them on site and told them that they might be transferred. The claimant thought that the general foreman would be transferred. The following week the claimant had to go to a family funeral in England. He returned to work on the Friday and the regional director told him he was to be laid off. He insisted that he had received no notice, the regional director told him to go to the site in Oramore on the following Monday. The following Friday he was given his RP9. MW the ganger returned from a site in Claremorris to the site in Sligo at this time.

At this time the claimant did not think his lay off was temporary. Eight weeks later he was told to return his van. He was in contact with HR a number of times in the period before he claimed his redundancy looking for work. He had no contact with regional director during this time. He felt he had been discriminated and singled out when he was selected for redundancy. He thought the company could have found him work, no effort was made, previously he had been asked to go back on the tools. He claimed his redundancy money for hardship reasons, as the temporary situation could not continue indefinitely. He felt he was unfairly selected, as he was the longest serving manager on the management team of the Sligo site.

Under cross-examination he accepted that there were redundancies in the company, he referred to a Galway and Athlone site. However he thought it was normal policy to be let go at the end of a contract not during one. He had longer service with the company than the general foreman who took over the refurbishment build. When asked if he accepted that if there was work people were transferred, he agreed but he had never been transferred off a site during a build. It was put to him that he was transferred on and off the GMIT job; the claimant refuted this and said he was there till completion. The claimant did not raise the issue of the general foreman being kept on at the time

he was laid off as he was in shock. He had raised this issue with HR afterwards. The claimant could have done the general foreman's job; the general foreman was not his boss, the claimant worked with the project and contract manager. The claimant stated he was capable of undertaking larger jobs as well as a general foreman for smaller projects in the region of .5.million. He thought the problem lay with the general foreman and that was why the specialist foreman was brought in. He did not think to speak with the regional manager during the period of his lay off, as he thought the conversation was finished between them when he was laid off. He had known that the new build was behind progress but was not told that MD was a specialist foreman. When he previously worked in the UK he had experience of piling but the company had not asked him to help with the piling. MW the ganger would have been assigned to MD.

In replying to questions from the tribunal, since his redundancy he has taken a basic computer course and a CAD course that finished in February. Currently he is unemployed and seeking work.

Determination

The Tribunal having considered the evidence adduced, the Tribunal accept there was a genuine downturn in the company's business. However, the selection of the claimant for redundancy was questionable. At the time of the redundancy the claimant's job was not redundant, the respondent chose to replace the claimant with another foreman. There was no concern over the claimant's ability to continue with the refurbishment build. The respondent did not explain to the claimant the reasoning behind this replacement. Nor did they consider any alternative work on the site for the claimant but yet the claimant stated he would have been prepared to do other work. The respondent appears to have made the selection without making any effort to enquire about the claimant's ability to do other work. In making an employee redundant the employer is required to show firstly that a genuine redundancy situation existed, and then go on to show that the process by which that particular employee was chosen for redundancy was fair and did not contravene the Unfair Dismissals Acts. In the circumstances of this case the Tribunal finds that while a genuine redundancy situation existed, no effort was made by the employer to establish criteria for selection for redundancy, or to inform the claimant of these criteria, or to allow him to make representations as to why he should be retained.

In considering all of the circumstances the Tribunal makes a unanimous finding that the claimant was unfairly dismissed. Taking all the evidence, including evidence of loss and mitigation thereof into account the Tribunal awards the claimant €10,452.00 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)