

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
Employee - *claimant*

CASE NO.
UD1424/2008

against

Employer - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. O'Leary B L

Members: Mr D. Moore
Mr A. Butler

heard this claim at Dublin on 18th March 2009
12th January 2010

Representation:

Claimant(s) : Mr. Niall Byrne BL instructed by Mr. John W. Carroll, Crowley Millar, Solicitors,
15 Lower Mount St, Dublin 2

Respondent(s) : Mr. Tom Mallon BL instructed by Mr. Kevin Langford, Arthur Cox, Solicitors,
Earlsfort Centre, Earlsfort Terrace, Dublin 2

The determination of the Tribunal was as follows:-

Respondents Case

The first witness for the respondent gave evidence that he is employed as a sales and commercial manager for the company and was the claimant's line manager. The company is part of a U.S corporation and has forty employees within Ireland. The company sells ingredients to the pharmaceutical, industrial and food sectors. The company employed two external account managers in its food and industrial sectors and one external account manager in the pharmaceutical sector. The claimant was employed as an external account manager in the company's food sector. In July 2008 the company decided to reduce its numbers in the food sector from two to one as they were over resourced, the number of customers had reduced and their performance had not grown in the previous two years. The claimant was the person selected for redundancy on a last in first out basis. A similar position existed in the industrial sector and an early retirement process was used to reduce the number from two to one in that sector. The company notified the claimant by letter of the 26 August 2008 of the redundancy situation and outlined to him his statutory entitlements plus an ex gratia severance payment.

The company met with the claimant on the 26 August 2008 and he expressed an interest in working in the pharmaceutical sector. The witness was surprised by this expression of interest by the

claimant as he had never touched items in the pharmaceutical sector in the past and had no experience of selling products in the pharmaceutical industry. He had always regarded himself as a food sales person. The witness invited the claimant to apply for a position in the pharmaceutical sector but no application was made.

The witness went on to give evidence of attempts by the company to introduce a harmonization process that would have resulted in employees losing a lunch allowance of up to €14 per day. The claimant was unhappy with this proposal and raised objections to it and the witness was in agreement with the claimant's objections. The decision to select the claimant for redundancy was in no way influenced by his objection to the proposal to introduce the harmonization process.

Under cross-examination the witness confirmed that it was his decision to make the claimant redundant. The decision was a commercial decision and was based upon the business figures in 2008. He confirmed that the claimant's figures had declined by 15% once an exceptional item was removed from his figures. The figures of the other external account manager in the food area had decreased also once the sales of one particular product were removed. He discussed the decision to make the claimant redundant with the sales director and liaised with Human Resources regarding the redundancy process.

The witness confirmed that he was aware of a complaint made by the claimant in relation to the operations manager in the company but denied that this was an official complaint. The witness was in attendance at a meeting concerning the harmonization process where the operations manager told the claimant to "grow up". It is his belief that this comment has since been retracted but an apology has not been offered. In reply to questioning the witness agreed that the claimant had experience in the past in the pharmaceutical sector and had sold chemical products previously. He had always been aware that the claimant had experience of one particular product in the pharmaceutical sector. He would have happily considered an application by the claimant to work in the pharmaceutical sector but no such application was made. In May 2008 an existing employee was appointed to the position of internal account manager in the food sector but her new responsibilities were combined with her existing marketing responsibilities.

On the second day of hearing the sales and commercial manager continued to give direct evidence in relation to the company sales figures for the 6 monthly period and the 12 monthly period in 2008. He outlined the figures for 2006 and explained that in 2008 the industry and food declined in turnover while the pharmaceutical continued to increase. From the total turnover figures he had taken out the sales for food in Northern Ireland, also an exceptional piece of business that has been lost and gone straight to the manufacturer. The overall turnover between 2006 and 2008 was down by 1.5million. In relation to food accounts within the republic of Ireland in 2006 they had 170 and in 2008 this had been reduced to 127. In December 2009 they restructured the food business and as a result of this have made the remaining external food account manager in Dublin redundant. Going forward there will be nobody managing the food sector in Dublin.

Under cross-examination he explained that in July 2008 they needed to restructure the business and had looked at the facts and figures at that time. Once the figures had been clarified it was decided that they needed less personnel in their food sector. The decision to make the claimant redundant was made in July 2008. At this time, he did not have the spreadsheets produced at this hearing in July 2008 but had access to them on their system. They examined the food sales figures in July 2008 to see if they could justify having two account managers in the republic. He had decided to make adjustments to the figures by taking out the Northern Ireland accounts and exceptional items.

In July 2008 one of their customers informed them that business was going to go back directly to

the manufacturer, this account was worth 2 million in 2008, while in 2009 it was worth €200,000. This business is now non-existent. This was a factor in the decision to make the claimant redundant. There had been an increase in one of their accounts in 2007 but this was due to a big launch of a product in the UK but this has since declined. The shortage of ascorbic acid in 2008 did not lead to a decrease in sales. Currently there is a trend of decline within the food business. He did not dispute the claimant's sales figures.

The claimant had enquired about the pharmaceutical role with him, but at this time the claimant did not tell him of his experience in this area. Another person hereinafter referred to as A, had been placed temporarily in this role and this person had exceeded even this witness's targets and has grown into the role. In August 2008, A had a year and a half experience on the road dealing with customers. He explained that pharmaceutical customers do not swap suppliers as easily as food customers, as they need approval for suppliers. A knew the system and customers and at the time had been working alongside the pharmaceutical account manager who had handed in his notice. It was put to him that all of the managers who objected to the harmonization programme were now not working for the respondent. He explained that all of the managers at the time objected including him, and he named two other individuals who still work for the respondent. This harmonisation has not been signed off to date.

Claimant's case

The claimant gave sworn evidence. He commenced employment with the respondent in September 1996 as a customer service representative. In December 1996 he was promoted to account manager serving Leinster and Munster in all products in the company's profile. He also sold solvents at this time. At the end of 1997 the company separated their products into three divisions, chemicals, food and pharmaceutical, and solvents. He commenced as account manager for the food and pharmaceutical division in January 1998.

He was promoted to sales and commercial manager of this sector in August 2002. He was commercially responsible for a number of suppliers, also for profit and loss budgets for these suppliers. At this stage he was selling pharmaceuticals for nine years. He was dealing with all major suppliers. In October 2005 the respondent restructured its business. The commercial role regarding suppliers was removed from the claimant and sent to the UK. He was then informed that he was to sell to food companies only. He was sales and commercial manager of the food ingredients, he had another colleague who also sold in the republic and Northern Ireland.

He had received a contract when he commenced with the respondent in 1996, which outlined his terms and conditions. In 2007 management from the UK visited and held a presentation for office based staff, this was in relation to the harmonisation of the Irish base with the UK company. This presentation was not made to the external staff and the internal staff informed him of this presentation. This harmonisation process would result in him losing his lunch and car maintenance allowance. In the last quarter of 2007 a letter was issued informing them that their terms and conditions were being changed. He and four of his colleagues had a meeting regarding these changes and wrote to the company asking them to meet with them. He was asked by his colleagues to take the lead on this issue. All who were disputing these changes signed the letter.

At a meeting in December 2007 the sales and commercial manager and the operations manager wanted to know the contents of the letter regarding the harmonisation process sent to the UK. During the course of the meeting the operations manager had become irate with him and told him to "grow up". The claimant asked the operations manager to retract this comment but he refused to do so. When he returned to work after the Christmas break he informed the sales and commercial manager that he wanted to lodge an official complaint about the operations manager. The sales and

commercial manager said he did not hear what the operations manager had said, so he decided not to put in a written complaint. Six months previously he had submitted a written complaint in respect of an email from the operations manager but his direct manager had refused to action his complaint.

An individual CK had returned to work in 2007 as a customer service manager and then moved to assistant marketing manager. In May 2008 CK was appointed to the position of internal food account manager. Ck had previously run the food/pharmaceutical ingredients from 1997 to 2002. On his return from annual leave in July 2008 the claimant heard that the account manager of the pharmaceutical division had tendered his resignation. The claimant approached the sales and commercial manager and informed him that he would like to be considered for this role. At this time the sales and commercial manager with the operations manager appeared to be having secretive budgeting meetings in the boardroom.

On the 25th August 2008 he had a phone conversation with the sales and commercial manager who asked him to attend a meeting at 3.30pm. During the course of this telephone call and in light of the budgeting meeting the previous week he enquired of the sales and commercial manager if he was being made redundant. He was informed that he was not. A meeting took place on that day where the sales and commercial manager handed him a letter and informed him he was being made redundant. He was in shock and no further conversation took place. The possibility of redundancy had not been discussed with him previously.

On the 26th August 2008 he attended a meeting with BG and the sales and commercial manager. MW accompanied the claimant. He was given a letter that the sales and commercial manager verbally went through at the meeting. He was informed that they were reducing the sales team from five to four people but were going to employ someone to look after the pharmaceutical accounts. He asked why he was not being considered for this role and the sales and commercial manager replied that they thought he would not be interested. The claimant found this amazing, as he had expressed an interest a few weeks previously in respect of this role. BG interceded and asked him did he wish to apply for this role. The claimant informed them that as the decision to make him redundant had already been made the trust between them was broken but he would consider his options. He was given €600.00 towards the cost of legal advice. Subsequently the claimant did not apply for this role and A obtained this position.

The claimant explained that A had joined the company a number of years beforehand as a customer service representative, then took over a customer service manager for about a year and a half. In 2007 A became a sales representative and had eight months experience before the claimant was made redundant.

He met with the HR manager on the 5th September seeking further clarification and was informed that he was being made redundant on the basis of last in first out. At this meeting he was asked if he was applying for the pharmaceutical role and he informed her that he was still in discussion with his solicitor. On the 9th September he received a letter from the HR manager informing him that the company had decided not to recruit into this role, that the role would be carried out by the sales development manager in the UK who would be supported by A.

In 2008 he, along with the other sales manager of the food ingredients had budgeted for further growth in this area. They had held the account for the exceptional item referred to where the business was going directly back to the manufacturers, for 15 years. He maintained that year on year with a combination of him and the other sales manager of the food ingredients that business continued to grow. The gross profit of the company had increased by 4% between 2006 and 2008. He and the other sales manager of the food ingredients were responsible for 1.5 million of the gross

profit. He outlined a number of examples that affected sales figures. Ascorbic and citric acid shortages, a launch of a new drink in 2007 which was manufactured in Ireland that claimed to have health benefits was contested in the USA courts, so the result of this was reflected as a loss in 2008. The launch of another drink in the UK in 2007 resulted in the increase of yeast sales that year, but other influences affected sales of this product, so in 2008 sales in respect of this product was down.

No sales figures were made available to him at the meeting of the 26th August 2008 or with follow up meetings with HR. At the meeting in August the sales and commercial manager did not indicate that he could have changed his mind in relation to his redundancy. He gave evidence in relation to loss, and his pension. He maintained he was the most highly trained account manager working with the respondent; he had attended advanced training in the UK and had also been trained by customers in their products.

Under cross-examination he accepted that there would be changes in business. However he thought an employer should ensure jobs were not lost if the business was profitable. He had produced the budget growth in June 2008 and the market conditions indicated that food ingredients would be strong. In reply to a question as to what if an employer decided to carry on with fewer employees, he pointed out that they had recruited CK 18 months previously. CK was on a six-year career break. He accepted that the respondent had decided to operate the business with one less sales person. He had asked the sales and commercial manager on the 25th August 2009 if he was being made redundant because of the cloak and dagger situation in the boardroom, at the time he felt they might have been talking about redundancies.

He was not the only one who objected to the harmonisation process. He found the term “ass covering” in the email from the operations manager, offensive and felt that he was indicating that he was not performing to his abilities. His complaint was not acted upon and there was no HR in Ireland. He felt that both of these incidents contributed to him being selected for redundancy. He agreed that pharmaceutical companies are less likely to change suppliers, as they need approval from the medical board. He explained that food companies had their own approval in-house so there would be a process to change supplier. He accepted that it was more important to build long-term relationships with pharmaceutical customers than food ingredient customers. He maintained that A had no previous experience selling to pharmaceuticals. He did not apply for the pharmaceutical position as he was still in consultation with his solicitor, when he received the letter informing him that the position was filled, he did not write back to say he was interested.

In reply to questions from the Tribunal, he believes that he was selected, as he did not fit, he was a strong character and did not conform. He did not copy the letter sent to the UK in relation to the harmonisation process to the Irish management.

A gave direct sworn evidence. He commenced working for the respondent in June 2003 in sales administration. In 2005 he became a customer service manager, looking after the customer service team and administration of all three divisions. During this time he dealt with customer complaints, had contact with customers by phone and would track sales. He then became an industrial account manager selling chemicals. When the claimant was let go, he was asked to take over the pharmaceutical role on a temporary basis. His experience of one and half years as customer service representative of selling directly to the pharmaceutical business and his previous experience as customer service manager stood to him. He took this role over directly from his predecessor. He is now an account manager looking after pharmaceuticals he also has one industrial account. He has links with the UK and they support him. He was referred to the letter the claimant received from HR, informing him that the pharmaceutical role would be carried out by the sales development manager in the UK who would be supported by him. He agreed that this was said to him at the time and that the sales development manager in the UK looked after three big customers and had

supported him at the time. He gave details of his annual salary. He recalled that he did not write a letter in relation to the harmonisation, however he may have signed the letter sent by the other managers to the UK.

Under cross-examination he recalled the harmonisation process, at the time he had discussed it with the other managers, he had objected to it, as had the senior managers. He had discussed it with the operations manager and thought that he was against it too. His predecessor in his current role had been the industry account manager previously and when the respondent had shed its Munster operations the Dublin base took on the pharmaceutical role.

Determination

The Tribunal finds that a redundancy situation existed in accordance with section 7 subsection (c) of the Redundancy Payments Acts 1967 to 2007 i.e.

“ the fact that his employer has decided to carry on the business with fewer or no employees, whether by requiring the work for which the employee had been employed (or had being doing before his dismissal) to be done by other employees or otherwise, “

The Tribunal finds that the claimant was not dismissed because he signed a letter of complaint about the harmonisation process with other members of staff. The Tribunal also finds that he was not dismissed because of the altercation with the operations manager or because of the email. The claimant had less service than the other employee in the food sales area and as the requirements of the business required only one person in that area, the claimant’s position was redundant

By reason of the aforesaid the claimant’s claim under the Unfair Dismissal Acts 1977 to 2007 is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)