

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

-Claimant

CASE NO.
UD1735/2009

against

EMPLOYER

-Respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. N. Russell

Members: Mr. J. Hennessy
Ms. S. Kelly

heard this claim at Kilkenny on 6th May 2010

Representation:

Claimant: Ms. M. McKenna B.L. instructed by Ms. K. Burke, Patrick J O'Meara & Company,
Solicitors, Liberty Square, Thurles, Co Tipperary

Respondent: Mr. J. Fitzgerald, J.J. Fitzgerald & Co., Solicitors, Friar St., Thurles, Co. Tipperary

The determination of the Tribunal was as follows:

Preliminary Issue:

At the outset of the hearing the respondent's representative submitted that the Tribunal did not have jurisdiction to hear the claim given that the claimant had signed an agreement after the termination of his employment and had been provided with an ex-gratia payment. A notice agreement document dated 27th April 2009 was opened to the Tribunal. The claimant and a representative of the company signed it on the 29th April 2009. The document stated that the claimant was in receipt of an ex-gratia payment in the amount of €11,494.93 and that the payment was in full and final settlement of all claims.

The claimant's representative submitted that the sum received of €11,494.93 consisted of final salary and holiday pay owing to the claimant and therefore was not an ex-gratia payment.

The claimant was presented with the document to sign when he attended at the respondent's offices to receive his final pay and outstanding holiday money after his position with the respondent was made redundant on the 10th April 2009. The claimant had not been paid in March 2009 and he was owed six weeks wages by the time he signed the document on the 29th

April 2009. Therepresentative stated that, as there was no compromise agreement between the parties the Tribunalhad jurisdiction to hear the claim. The Tribunal was referred to S.13 of the Acts.

The claimant and the Chief Finance Officer gave evidence in relation to the preliminary issue.

Respondent's Evidence on Preliminary Issue:

It was the evidence of the Chief Finance Officer (hereinafter CFO) that he spoke to the claimant on the 10th March 2009 and informed him that his position was being made redundant. After this date he had numerous conversations with the claimant about his redundancy and he provided the claimant with a copy of the notice agreement. Between the 8th and 10th April 2009, CFO reviewed this agreement with the claimant but he did not put the claimant under pressure to sign the document.

There were a number of redundancies at that time and some of those selected for redundancy chose not to sign the agreement and the company did not take issue with this. CFO was not present when the claimant signed the agreement on the 29th April 2009.

A copy of the draft agreement, which CFO stated he had shown to the claimant during April 2009, was submitted to the Tribunal. It was dated the 15th April 2009. CFO could not explain why the figures on the draft document differed from those on the document, which had been signed by the claimant on the 29th April 2009.

Ms. M of the respondent company gave evidence that she was present in the office on the 29th April 2009 when the claimant requested his cheque. They both signed the agreement on this date and the claimant was given his cheque.

Claimant's Evidence on Preliminary Issue:

It was the claimant's evidence that CFO entered his office on the 10th March 2009 and informed the claimant that he was "letting him go". The claimant had not received prior notice of his redundancy. The claimant was not informed about the agreement document nor did CFO discuss apayment with him.

The claimant was informed by another member of staff that he would not be paid on the 15th March 2009, as expected, but instead he would receive six weeks pay on the 10th April 2009 upon termination of his employment. It was the claimant's evidence that CFO did not discuss the redundancy situation or the notice agreement document with him in early April as CFO had statedin his evidence. The first time the claimant had sight of the notice agreement document was on the29th April 2009 when he attended at the company's office. The claimant had not been paid for aperiod of six weeks prior to the termination of his employment. Ms. M of the company informedthe claimant that the other employees who had been made redundant had signed the document in order to receive their cheque from the company. The claimant needed his last salary cheque and sohe signed the document in good faith.

Determination on Preliminary Issue:

The Tribunal determines that the Claimant is not bound by the terms of the Agreement dated the 27th April 2009 and signed on the 29th April 2009. There is a failure of consideration for this Agreement as it envisages a stated ex-gratia payment, which was not made. In the circumstances, the Tribunal is not required to decide between the conflicting evidence as to the circumstances surrounding the signing of the said agreement or the extent to which Section 13 of the Unfair Dismissal Act 1977 applies.

Respondent's Evidence on the Substantive Issue:

CFO has a background in retail, mergers and acquisitions. When the respondent company merged with other companies he was charged with managing the integration of the companies. He had to streamline the respondent's processes with the result that a number of employees were made redundant. He discussed this with the Chief Executive Officer (hereinafter CEO) but the decision regarding the selection of positions for redundancy purposes rested with CFO. There were six employees including the claimant working in the finance section. The number of employees in this section reduced to two and the claimant was one of those selected for redundancy. CFO informed the claimant on the 10th March 2009 that his position was being made redundant.

Ms. K, an Accounts Assistant was one of the employees retained in the finance section. In or around the 10th April 2009, Ms. K applied to transfer to a different role. As a result Ms. K's position in the finance section became vacant and the respondent subsequently advertised a vacant position for an accountant in a number of newspapers. CFO refuted that it was the claimant's position that was advertised. The duties associated with the vacant role included posting invoices, photocopying and reconciliation but not compiling accounts, as was part of the claimant's duties. The advertisement stated that an accountant was required because CFO did not want candidates without the relevant experience applying for the role. The role was a junior position with a salary of €40,000. As part of his duties the claimant prepared profit and loss accounts, balance sheets, management accounts as well as performing sales analysis. These duties differed from those associated with the advertised role. The position was subsequently filled by a qualified accountant.

CFO did not receive contact or a job application for the vacant position from the claimant. The claimant did not raise with CFO that he was willing to accept reduced working hours or a reduction in pay as alternatives to his position being made redundant but the CEO informed CFO that the claimant was willing to accept such options. CEO had been contacted by the claimant after the 10th April 2009 and he did inform CFO that the claimant was very distraught and was willing to accept reduced hours as an alternative to redundancy.

At the time the claimant was made redundant an alternative role did not exist. The role that was advertised was a junior role. The claimant was a very experienced accountant and it would have been demeaning to the claimant to be offered this role.

In reply to questions from the Tribunal, CFO stated that the advertised role was not offered to the claimant because CFO did not think the claimant would be interested in such a role and even if he accepted the role the claimant might vacate the role for something more senior within a short space

of time.

Claimant's Evidence on the Substantive Issue:

The claimant gave evidence that he has 25 years experience as a qualified accountant and he previously held the position of Financial Controller in a multi-national company for a number of years. When the claimant was interviewed by the respondent prior to commencing employment the CEO asked the claimant if he was interested in the role of Chief Financial Officer. The claimant outlined at the interview his reasons for preferring a role with less responsibility than that of Chief Financial Officer. The claimant was subsequently employed as an Assistant Accountant. His role developed some further duties during the course of his employment.

On the 10th March 2009, CFO told the claimant his position had been selected for redundancy. The meeting lasted approximately three minutes. The claimant asked CFO if he minded if he spoke to CEO about his selection for redundancy. The claimant also made it clear to CFO that he was desperate to remain in employment. He enquired about the possibility of the position left vacant by Ms. K but CFO stated that role would no longer exist.

The claimant subsequently spoke with CEO and outlined his willingness to accept a reduction in pay, shorter working hours or any alternative to being made redundant. CEO assured the claimant that he would raise it with CFO. Approximately, two weeks later the claimant again contacted CEO and re-iterated that he was willing to accept a lesser role or any other alternative to his position being made redundant. CEO told the claimant he would speak to CFO again but he did not think that he would change his mind. The claimant's employment was terminated on the 10th April 2009.

The claimant attended at the respondent's office on the 29th April 2009 seeking his last pay cheque. In the days following he saw the respondent's advertisement for an accountant. CEO had assured the claimant that he would be contacted if any suitable positions within the company became available but the claimant was not informed of this vacant position either by email or by any other means.

The claimant outlined that he was fully capable of completing the duties of the advertised role. The salary for the role was €40,000, which was the same as his starting salary with the respondent. The claimant did not consider the role to be beneath him as he was interested in a lesser role due to his personal circumstances.

The claimant telephoned CEO immediately and asked if he could take up the advertised position. He subsequently telephoned CEO a second time and reiterated his willingness to take up the position but he heard nothing further from the respondent company.

The claimant gave evidence pertaining to loss.

Determination:

The Tribunal accepts that there was a genuine reorganisation within the Respondent Company that necessitated redundancies and that the selection criteria used to decide on the roles to be made redundant were fair.

The Tribunal finds that there was no consultative process with the Claimant before he was informed of the termination of his role in the Company. Specifically, the Tribunal finds that there was no discussion as to the availability of, or suitability of, the Claimant for any other post within the Company.

The Tribunal accepts that, in the course of the Company reorganisation, the Claimant's existing position within the Company became redundant.

The Tribunal does not accept the Respondent's claim that the position advertised in the Tipperary Star dated 1st May 2009 and Kilkenny People dated 2nd May 2009 was not envisaged or available on the termination of the Claimant's employment.

The Tribunal finds that the Respondent Company acted unreasonably and unfairly in not considering the Claimant for the aforementioned advertised position. The Claimant had impressed on his employer, the Respondent, from the 10th March 2009 that he was desperate to retain a role within the Company to the extent that a reduction in hours, salary or change of position within the Company would all have been acceptable to him.

The Claimant gave evidence, not only that he would have been happy to take the position and reduced salary advertised, but that he contacted the Chief Executive Officer of the Respondent Company, identified by both the Claimant and Respondent as the Principal in the Respondent Company, to reiterate his anxiety to stay in the employ of the Company and, specifically, to ask if he could be considered for the advertised position.

The Tribunal does not accept the Respondent's evidence that the Claimant was not considered for the advertised role as he was over-qualified and the Respondent had concerns that, while he would take the position, he would leave as soon as a more senior position became available elsewhere. The Tribunal heard no persuasive evidence to support this contention and, indeed, the personal circumstances of the Claimant, which were known to the Respondent, would have suggested that such an occurrence was unlikely.

The Tribunal was impressed by the fact that the Claimant joined the Respondent Company as an Assistant Accountant in a role, which was on a par responsibility-wise, and salary-wise with the advertised position. The over-riding issue for the Claimant, which was known to the Respondent, was the needs of his son and his consequent need to work close to home. This motivated him to take the role of Assistant Accountant with the Respondent Company at a salary well below that previously enjoyed by him in the International Financial sphere. His full circumstances were discussed with the Respondent at his initial interview and he made a commitment to the Respondent that he would be dependable and could be relied upon to dedicate himself to the role (for which he was over-qualified) and not leave if a more senior position became available elsewhere. Some promotion to a more expanded brief followed. The Claimant did express some reticence when offered this opportunity for promotion within the Respondent Company fearing that the additional responsibility might undermine his primary objective of being available for his son.

The Tribunal is satisfied that the Claimant was eminently suitable for the advertised position which it believes was available when his employment was terminated and that the Respondent acted unreasonably in not considering him for that post and that consequently and for the reasons stated in this determination he was unfairly dismissed.

The Tribunal determines that the Claimant be re-engaged by the Respondent from the date of termination, being the 10th April 2009, with no loss of continuity of service or pay, to the position advertised in the Tipperary Star dated 1st May 2009 and Kilkenny People dated 2nd May 2009 or in an equivalent role on equivalent terms in either the Respondent's Finance Department in Portlaoise or in its Urlingford offices.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)