

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE –**Claimant**

UD1243/2009

MN1245/2009

WT550/2009

against

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: Ms. P. McGrath B.L.

Members: Mr. M. Flood
Ms. E. Brezina

heard these claims at Dublin on 12 May 2010

Representation:

Claimant:

Ms. Shelley Horan B.L. instructed by
Mr. Barry Kenny, Connolly Sullivan Solicitors,
Market Court, Town Hall,
Bray, Co. Wicklow

Respondent:

Director of the respondent

The determination of the Tribunal was as follows:

The respondent, which was to operate a gymnasium complete with beauty salon (the gym), employed the claimant, who has considerable experience in this field of work, from 16 July 2007 as business development manager. Initially the claimant's duties were involved with the construction and fit out of the gym along with the recruitment of members. By the time the gym opened in April 2008, at which time the respondent was operating in a rent-free period, the claimant was now General Manager with responsibility for sales and marketing.

When the first rental payment fell due, in September 2008, the respondent had difficulty in meeting

the payment. The respondent negotiated a rent reduction for the gym from February 2009 and sought to make savings by reducing staff costs through reduction in hours of work. At this stage there were eleven employees.

The employment was uneventful, with the respondent considering the claimant to be a good employee, until 10 September 2008 when the claimant raised a grievance with the directors about demands being placed on him and the lack of funding for advertising and promotion. He stated, "It really feels as if I am being set up to fail in my current role."

A director of the respondent (AD) carried out a performance appraisal of the claimant on 18 February 2009. This appraisal resulted in the claimant receiving an overall performance rating of acceptable. The claimant was dissatisfied with this review and wrote to AD on 1 March 2009 setting out his position. The claimant's uncontroverted position was that another director of the respondent had telephoned him to say that his letter of 1 March 2009 was a disgrace.

In late February 2009 a sales and marketing specialist (MS) was employed by the respondent to perform a role, which hitherto had been a major part of the claimant's responsibility. On 16 March 2009 the Managing Director (MD) gave the claimant notice of redundancy. His assistant, MD and MS, then carried out the claimant's functions. The gym closed in November 2009.

Determination:

The Tribunal has carefully considered the evidence adduced. The onus rested with the respondent to establish that the selection of the claimant for redundancy was fair in all the circumstances.

The Tribunal is not satisfied that the respondent acted reasonably in all the circumstances being particularly mindful of the fact that MS was brought into the respondent with the express intention of taking on a large part of the claimant's workload in the weeks before the claimant was declared redundant.

In addition it seems the claimant was the only employee considered for redundancy and no reasonable criteria were adduced by the respondent to demonstrate what methodology was being applied in his selection. In particular, the Tribunal notes absolutely no consideration was given to restructure the workplace to allow everybody continue with some role including reduced hours and reduced wages. Lastly the Tribunal cannot ignore the level of bad feeling between the claimant and the directors themselves. The claimant ultimately became the victim of a disastrous joint venture.

For all these reasons the claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds. The Tribunal must take into account that a genuine redundancy situation would have occurred by mid November when the gym closed and consequently awards the claimant €23,750.

The claims under both the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and the Organisation of Working Time Act, 1997 were withdrawn during the hearing

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)