

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

EMPLOYEE
- *claimant*

UD505/2009

against

EMPLOYER
- *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Mac Carthy S C

Members: Mr P. Pierce
Mr. P. Woods

heard this claim at Dublin on 26th January 2010
and 15th March 2010
and 19th March 2010

Representation:

Claimant(s) Mr. Peter Ward BL instructed by O'Mara Geraghty McCourt, Solicitors,
51 Northumberland Road, Dublin 4

Respondent(s): Mr. Tom Mallon BL instructed by Mr. Andrew Smith, A & L Goodbody,
Solicitors, IFSC, NorthWall Quay, Dublin 1

The determination of the Tribunal was as follows:-

By a majority (the chairman dissenting) the Tribunal finds that the dismissal was unfair under section 5 (b) of the amending Act of 1993.

Background

Counsel for the respondent outlined that the respondent recruited the claimant to a senior position. The claimant worked in marketing, designated innovation and strategic work. His function was to increase the value of the company brand. He received an average salary of €262,000 per annum inclusive of bonuses during the four years he worked for the respondent. The company was involved in the sale and distribution of tea and coffee. A considerable programme

was planned and the claimant and others were recruited to a series of jobs for this purpose. The respondent believed it had a strong profitable future in this planned development work. Due to the economic downturn the expected profits collapsed and a decision was made by the respondent to revert to selling coffee and tea. The claimant was made redundant, he was not replaced and the respondent continued to shed staff. All employees who earned more than €30,000 had their salaries reduced by ten per cent. Initially profits were expected to generate €9 million but that is now expected to be in the region of €1 to 1.5 million. The respondent has no money for strategic development. The claimant who had purchased shares in the company was given six months notice. A mechanism was put in place whereby Mr. P.C bought the shares at the price the claimant purchased them, together with his full costs, and a full bonus was paid to the claimant on his departure.

Counsel for the claimant outlined to the Tribunal that the claimant was head hunted by the respondent. He attended a series of meetings and he was invited to join the respondent and signed a contract. His employment was terminated in the most abrupt manner possible. The claimant received a very short letter informing him of his dismissal and this was the end of the employment relationship with the respondent. It is now incumbent on the respondent to establish its defence to the unfair dismissal claim. It is relevant that the claimant was head hunted by the respondent and the manner in which the respondent set about recruitment is at the core of the termination. The claimant signed the contract after a long period and was entitled to be an employee of the respondent.

Respondent's Case

The chief executive of the respondent's group gave direct evidence that the group had a turnover of €225 million in 1999. As a result of the disposal of their catering business this turnover had decreased to €105 million by 2004. The most profitable part of their business was the sale of tea and coffee to the trade, to pubs and restaurants. The company closed two of its restaurants in November 2004 and there was a strong public reaction to these closures. This reaction indicated to the group that there was a strong attachment to its brand and a decision was made that this brand should be developed and tapped. Prior to this the company brand had been managed by third parties through licensing arrangements. Resulting from the decision to develop the consumer brand the claimant was recruited as Managing Director of the company's global marketing division in October 2005.

The claimant was a strong agent of change when he came on board the organisation. He was very structured and analytical and made very good recommendations. Three other appointments were made by the respondent and these appointments were in place by September 2007. Mr. B.B was appointed as marketing manager dealing with the brand manifesto and assisted the claimant in his duties. Mr. N.CD joined the company and was responsible for innovation projects and also assisted the claimant. Ms. S.G was appointed to handle marketing activities within the grocery channel of the organisation. A new strategic plan was developed in 2006 with a target that the business would achieve €10 million profitability by 2010.

By the end of 2007 it was clear that the 2006 strategic plan was coming under pressure due to a number of significant events which put the organisation on the back foot. The company had to absorb losses from its Grafton St café, its brand licensing arrangement in the grocery sector was not working as envisaged resulting in a loss of income and investments made by the company in the U.S. market had substantially underperformed. Profit expectations were reduced by €2.5 million and the board had a general sense of unease. The board of the organisation reviewed the position in

mid 2008 against the changed economic circumstances and the deterioration in the growth of the company over the previous number of years. The board were of the view that a hard landing was instore and they now needed to manage the short term position. They were concerned about protecting their core business. The capacity to fund other projects was extremely limited and therisk profile was too great.

By July/August 2008 it was decided that brand development and strategic innovation would be discontinued and funding for these projects was eliminated. Accordingly the role of the claimant along with the roles of Mr. B.B and Mr. N.CD no longer existed. Mr. B.B and Mr. N.CD were made redundant by Christmas 2008 and the claimant was given six months notice in August 2008 and was made redundant in February 2009. The decision to make the claimant redundant was made at a board meeting on 31 July 2008. The claimant was on holidays for a period in August 2008 and the witness informed the claimant on 26 August 2008 that he was going to be made redundant. He worked out his 6 months notice period and his employment terminated on 27 February 2009. The claimant was very disappointed but he accepted the decision very professionally. Prior to the termination of his employment the claimant received his bonus payments for 2007 and 2008 and was paid his statutory redundancy entitlement. The claimant had also purchased a substantial amount of the company's shares (which had fallen in value) and as a gesture of goodwill an unconditional offer was made by Mr. P.C who is the majority shareholder in the company to unravel this share transaction as though it had never happened. There were no strings attached to this offer and ultimately a share purchase agreement was drawn up and the claimant was given a cheque for €595,000.00 which was the figure he had paid for the shares plus associated costs. The decision to make him redundant was in no way triggered by his work performance. He has not been replaced and all of his activities have been entirely discontinued.

The witness gave further evidence that Ms. S.G who worked exclusively on the grocery side of the business was not made redundant but resigned from her position. She was replaced by Mr. M.S in March 2009 who had previously worked for a major supermarket chain. He had experience of the trade and had good trade relationships. His responsibilities were managing the grocery side of the business with a bigger sales focus than his predecessor. He had no responsibility for brand management activities. He is a national sales manager. The witness confirmed that this position was not offered to the claimant.

Under cross examination the witness confirmed that specific roles were identified to be eliminated within two weeks of their strategy meeting in mid July 2008. The claimant had made a presentation to senior management and board members on 12 July 2008 and the witness had involvement and input into this presentation. Within two weeks of that presentation the possibility of the claimant being made redundant was raised. Whilst Mr. P.C is the majority shareholder in the company he devolves responsibility to his management team. Mr. P.C had been part of the interview team who interviewed the claimant. Mr. P.C had set out his vision for the company to the claimant. The claimant had a long and impressive curriculum vitae and had been identified by the company as someone who was of interest to them. The witness did not deny that the company made six or seven contacts with the claimant prior to his appointment but he found no resistance from the claimant in coming on board.

The claimant's position in the company changed in November 2007 and he was appointed to the position of General Manager of the company's consumer division. This change arose as part of a streamlining process to make the organisation more responsive. The company needed to focus on their brand and the claimant's new responsibility was to manage that brand domestically. The

global aspect of his role was eliminated in November 2007. His replacement, Mr. M.S was responsible for managing sales in the grocery business and has no responsibility for brand management activities. His primary function was a sales function, not a brand function. He managed key accounts which is a sales role. This role had previously been done by a third party and the claimant never suggested to the witness that he could carry out these duties. There was a substantial saving to the respondent when this change occurred. The witness did not accept that the key experience of Mr. M.S was in the area of marketing. His annual remuneration was approximately half that of the claimant's and he commenced employment in March 2009. Mr. P.C offered the claimant shares in the company as he felt that he (the claimant) would benefit from the shareholding. The witness gave evidence that Mr. P.C was of the view that a shareholding in the company provided an incentive to those shareholders to grow the business. However the refusal of the shares offer would not have been looked down upon by Mr. P.C. There was no compulsion on the claimant to purchase the shares. Nobody was forced to purchase shares.

In response to questions from the Tribunal the witness stated that he was of the view that the claimant would not have been suited to the role that Mr. M. S was appointed to in March 2009. The core requirement for that position was a sales requirement.

Claimant's Case

The claimant gave direct evidence that he commenced working for the respondent in October 2005. Prior to that he was commercial marketing director for a major drinks corporation. He was involved in marketing and commercial roles throughout his career. He became aware that the respondent were recruiting and attended for interview. He believed from his initial interview that the role would be unsuited to him and accordingly withdrew from the interview process. Following this he received a call from the respondent and was invited to meet with Mr. P.C and the chief executive of the group. It was clear to him that Mr. P.C was strongly interested in recruiting him and outlined his vision for the company. He became attracted to the idea of joining the respondent and the opportunity of resurrecting the respondent's brand was a challenge that appealed to him. He tendered his resignation to his former employer and signed a contract with the respondent.

He was invited to purchase shares in the company by Mr. P.C at a share price that inferred that there was good value for money in the shares. He borrowed to purchase the shares as he had a sense that he was purchasing the shares at a discount. The shares did not pay a dividend and this was made clear to him when he purchased them. In November 2007 the global aspect of his work was discontinued and the word global was no longer in his job title. His new focus concentrated specifically on the business within Ireland. By mid 2008 it was obvious that the original plan devised in 2006 was not going to be delivered. The business was starting to struggle and there was a very limited appetite for funding plans and ideas that he had formulated. It was made clear to him that the board no longer had an appetite for the restaurant side of the business but he had no inkling that his continued employment was under threat. The first occasion that he heard about that possibility was on 26 August 2008 when the group chief executive told him that his employment was to be terminated.

He was also told that the positions of Mr. B.B and Mr. N.CD were to be eliminated and he was asked to seek letters of resignation from both employees. He met with both individually and outlined to both that their positions were to be made redundant from 31 December 2008. He communicated to them what he was asked to communicate but it was clear they were not leaving of their own free will. They were being asked to leave in the dark of night and the respondent did not want the true facts of events in the public domain. Redundancies in the company would have been

viewed negatively and the company did not want that view to be in place. He confirmed that both Mr. B.B and Mr. N.CD were ultimately satisfied that their departures were handled appropriately.

There was no clarity as to what was proposed and it was after 25 September 2008 that the word redundancy was first mentioned to him. He sought clarity from the company on a number of issues, including his bonus payment by way of a letter dated 2 October 2008. It was intimated to him that he would be paid his full bonus entitlement if he was prepared to sign a full and final settlement agreement. He sought legal advice on this and was advised not to sign the agreement. On 13 February 2009 he informed the group chief executive that he would not be signing the agreement. Eventually he received his full bonus entitlement on the day his employment terminated. He is of the view that there was no equity in the process insofar as other employees who had their employment terminated received a different deal to him. He was never given any right of reply and questioned the manner of the redundancy.

Under cross examination he agreed that he negotiated his package and ultimately agreed to accept the package on offer when he commenced working for the respondent. He freely entered into the agreement and also freely entered into the agreement to purchase shares. He understood that there was no dividend payable on the shares. His bonus targets were different from 2007 to 2008. His 2008 targets were retail innovations, consumer innovations, food service and the protection of licensing agreements. These targets were different to his 2007 targets. There were no global objectives in 2008.

When he joined the company he recommended the appointment of Mr. B.B and Mr. N.CD. Mr. B.B's area of responsibility revolved around re-branding and to develop a new look and feel for the brand. He was also involved in the retail side of the business and Ms. S.G reported to him. Mr. N. CD's role was specifically in innovation. The witness managed these 3 employees and accepted that none of their roles involved selling. The witness accepted that he raised shares issue prior to the termination of his employment and accepted that Mr. P.C was under no obligation to purchase back the shares. He was happy to sell back the shares as though the transaction had never occurred. The chief executive of the group had proposed that course of action and he (the witness) was happy to proceed in that manner.

He gave further evidence that the appointment of Mr. M.S was presented as a low level appointment by the company. Mr. M.S is still working in this position and his responsibilities are not entirely different to those of the witness when his employment was terminated. The witness agreed that he did not challenge the validity of the redundancy at the time of his departure because his main focus was to recoup monies owed to him. He accepted that Mr. M.S earned approximately half of what he (the witness) earned per annum.

Determination

The majority determination of the Tribunal is:

The claimant was appointed to head up the new Global Marketing Division which was set up in 2005 to grow the company's brand through global strategic marketing initiatives and innovation. Two assistants were hired by the claimant in 2006, and an assistant to one of these was hired in 2007 to develop the Grocery Division sales. The global aspect was curtailed somewhat by end 2007, when performances were not meeting revenue targets. Following a major presentation by the claimant in mid-July, 2008 the Board decided at end-July to close the division, in the light of insufficient revenues to sustain its required investments, and the

anticipated collapse in the general economy. The resulting retrenchment to the Company's core business resulted in the loss of the three senior posts in the division, while the fourth more junior post of Retail Marketing Manager for the Grocery Division was retained.

The Tribunal believes that this situation resulted in a genuine redundancy requirement for the Group. The Chief Executive of the Group testified that the claimant had performed very competently and efficiently throughout, including during his 6 month notice period, and the Tribunal does not believe that there was any motive for his dismissal other than redundancy.

It was asserted for the claimant that there was an opportunity to appoint him to the alternative post of General Manager, Retail and Home Division. This post was created before his departure to fill the position left by the earlier resignation of the most junior of his subordinates, the Retail Marketing Manager, Grocery Division. One of his redundant subordinates had enquired about this vacancy at the time, but had decided that it did not suit him. The claimant himself had an input into the requirements of this post, and was well aware of it. He did not indicate any interest in it at the time, although subsequent events may have resulted in a change of mind in this regard. It does not seem realistic to suggest that the Company itself should have considered him for this position, which paid less than half his remuneration, and would have been a step back for him in his career to date.

After joining the Company, the claimant had been encouraged by the Chairman to purchase a substantial shareholding from him, and he had borrowed heavily to do so. Following his dismissal the claimant was primarily concerned with the possibly disastrous financial consequences from his share borrowings. The Company had no liability for this situation. The Chairman, although under no legal obligation, did decide on a personal basis, at his own cost, to undo the deal at no loss to the claimant. While this was dealt with generously it was some months before this was made known to the claimant.

The Tribunal next considered the possible relevance of Section 6 of the Unfair Dismissals Act, 1977, subsection 7, as amended by Section 5 (b) of the 1993 (Amendment) Act. This provides:

“regard may be had, if ...the Tribunal ... considers it appropriate to do so – (a) to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal”.

In this regard, the Tribunal has taken into account several factors that arose from the evidence given.

Some four weeks after the decision was made by the Board to close the Marketing Development Division, and dismiss the claimant, the CEO called him in and told him he was dismissed, and his notice applied from that date. No details of the terms of his dismissal were given to the claimant at the time, other than that these would be in accordance with his contract, which simply required six months notice, which he was to work as normal.

On enquiring about redundancy the claimant was told this did not apply in his case, because of his six months contract notice. It was some six weeks later that this erroneous statement was corrected, and he was told that statutory entitlement would be payable.

The claimant asked about a possible ex gratia payment, and it was some weeks before the CEO confirmed that this would not be made.

The claimant was told at the time of his dismissal that his subordinates were similarly being made redundant in line with the terms of their contracts. In fact both were permitted to work on for several months beyond the terms of their particular contracts.

The claimant queried the payment of his performance bonuses for 2007 and 2008. It was several months before the Company finally clarified that it would pay his 2007 bonus balance and his full potential bonuses for 2008, although it was accepted by both parties that not all the targets required for this had been achieved. The amount of any shortfall was disputed. The Company sought to make this payable in full and final settlement, but on his last day paid it without this agreement.

The Claimant made a comprehensive Board presentation of future development plans in mid-July 2008 (which had the support of the Group CEO). It is not clear that these were challenged at the time, but two weeks later the Board agreed to dismiss him and close the Marketing Division, and four weeks later he was suddenly told this.

Conclusion

The Company carried out a genuine redundancy situation, and did so within the terms of its agreements. However, the Tribunal ‘considers it appropriate’ to have ‘regard’ to the conduct of the Company in determining the issue of unfair dismissal. Taking into account the various factors outlined above, the Tribunal considers that the Company was less than reasonable in the manner in which it dealt with the claimant.

Compensation

The Tribunal assess compensation under section 7(1) (c) of the 1977 Act “as is just and equitable in all the circumstances”. The Tribunal has regard to the following circumstances:

- (1) The substantial ground, namely redundancy has been shown.
- (2) The errors made by the respondent in handling the dismissal were relatively minor and some of them were corrected before the claimant’s employment ended.
- (3) The respondent paid the claimant his full bonus although it was not fully earned.
- (4) The claimant’s shares were re-purchased at no loss to him (this was the claimant’s greatest concern at the time he was first told of his redundancy).

The Tribunal awards compensation in the sum of €7,500.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)