

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

EMPLOYEE
- **claimant**

against

EMPLOYER
- **respondent**

under

CASE NO.

UD575/2009
MN585/2009
WT250/2009

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: Mr. J. Sheedy

Members: Ms. M. Sweeney
Mr. J. Flavin

heard this claim at Cork on 24 February and 27 April 2010

Representation:

Claimant:

Mr. Mortimer Kelleher, Barry Turnbull & Co. Solicitors,
33/34 Washington Street West, Cork

Respondent:

Ms. Imogen McGrath BL instructed by Ms. Muireann Coveney,
McCann Fitzgerald Solicitors, Riverside One,
Sir John Rogerson's Quay, Dublin 3

The determination of the Tribunal was as follows:-

Respondent's Case

The Financial Controller gave evidence. The respondent's business is providing structural defect cover for new houses. New houses are registered with the respondent. An inspection process follows. When claims arise technical assessments and investigations are done. The core business is inspections.

In 2003 the respondent employed 14 field based Housing Advisors covering the whole country and

one office based Housing Advisor. In 2007 the number of registrations of new houses fell by 47% from the figure for 2006. In 2008 the decline in registrations continued. In June 2008 the respondent began to look at options. Fees were increased. Short time working was considered but that would have resulted in an unacceptable reduction in service so was deemed not an option. They considered training all the Housing Advisors to do Building Energy Rating (BER). Unfortunately this was not the saviour they hoped for.

Business continued to decline during July, August and September 2008. The difficulties were compounded by the financial crisis in September 2008. On 22 October 2008 a memo issued to all staff saying registrations of new houses were down 64% on last year and that expenditure had to be curtailed.

Management looked at all forms of cost cutting and prepared business proposals for consideration by the Board. The Financial Controller himself thought that short time working was not a realistic option for more than 2 or 3 months. Their business was declining and redundancies were needed. The Board approved a plan to make 5 redundancies. The Board did not select those who would be made redundant, that was a task for management.

The Housing Advisors were informed on 12 November 2008 that redundancies would be made. The Financial Controller and his colleague met with the claimant on 20 November 2008 and told him that the number of Housing Advisors would be reduced based on geographical areas. Housing advisors whose areas could easily be divided were chosen for redundancy. The claimant was given the opportunity to submit a proposal. All the Housing Advisors being considered for redundancy submitted proposals. Unfortunately none of the proposals would generate any work for the Housing Advisors. A pay cut and a pension freeze as suggested by the claimant would generate no work.

The office based Housing Advisor was not considered for redundancy. The respondent did not consider using last in first out as a criterion for selection for redundancy. The claimant's proposed extended area was not practical because it left part of the country without service.

Claimant's Case

The claimant wanted to submit documents that supported his contention that his geographical position would have enabled him to work 18.88% more efficiently than his colleague who was not made redundant. The respondent objected to the documents because they only got them on the morning of the hearing. The Tribunal decided that the respondent would have ample time to review the documents in the interval between the first and second days of the hearing.

On the second day of the hearing the claimant gave evidence. He explained the breakdown of his salary, pension contributions, lunch allowance, use of a company car and the allowance he received for working from home. His role included foundation, field and technical inspections, meeting with builders and setting up seminars around the country. In mid 2008 he was trained in BER and air

tightness assessments.

In February 2007 the Managing Director indicated to the staff that the market was “f****d”. In June / July 2008 the number of new registrations began to decline. However the claimant received a 6½% rise in salary later that year and he felt he had job security.

In October 2008 an email was sent to all staff informing them that registrations were down 64% and that this effect had to be recognised. A Christmas dinner invitation was declined and company diaries would not be distributed the following year. The claimant said that even at this point he felt secure in his job, he contributed greatly to the respondent company. In late October 2008 he was made aware there would be no salary increases that year. On 12 November 2008 he became aware of the business proposal to reduce the number of Housing Advisors from 15 to 10 due to the reduction in the workload. This was the first time he was made aware of the possibility of redundancies and assumed all staff would be considered. He was never made aware how his workload had reduced but stated that he had a reduction of 13% but he still carried out the BER and air tightness work.

On 19 November 2008 he was requested to attend a meeting in Kilkenny. Six staff were also called to Kilkenny. He was surprised that they had all been called to individual meetings. He was informed that he had been selected for redundancy for geographical reasons; he was very shocked and disgusted and was told that he could submit any proposals if he wished. Five of the other six staff were told they were “safe”.

On 21 November 2008 he spoke with the Financial Controller and advised him he was formally requesting his 14 weeks parental leave commencing 5 January 2009 to 13 April 2009. He also asked when they would meet again to discuss his proposals. The Financial Controller said he was not sure but would get back to him. The claimant spent the weekend, including the day of his daughter’s christening, compiling his proposal, which he submitted to the Managing Director and Financial Controller on 24 November 2008.

He reviewed the regions covered by the respondent company. A regional map he submitted displayed that he was strategically located in both his and the Munster area. He stated that he was centrally located between the satellite towns of Watergrasshill, Rathcormac and Middleton and was within 10 kilometres of the N8 and N25 motorways, which in turn connected with the N71 and N22. He also stated he was the closet advisor to Cork city. In his attached letter he also requested the clarification on the basis of the redundancy selection process.

On 26 November 2008 he emailed the Financial Controller further data, which he felt demonstrated the “non-redundant nature” of his area. He did not receive an acknowledgment or a personal response to his proposals. On 28 November 2008, received on 1 December, the Managing Director sent a business review memo to all Housing Advisors. It stated that having considered the proposals submitted it appeared there was nothing in the proposals to resolving the underlying problem that there was insufficient work for the amount of inspectors employed. *“The proposed redundancies were unavoidable”.*

On 1 December 2008 at 10.15 am he received a call from the Financial Controller explaining that his redundancy was unavoidable and would take place in 2 weeks. He informed the Financial Controller that he had submitted a request for parental leave due to commence on 5 January and also informed him that he had 18 days leave to take. The Financial Controller was “taken aback” and informed he would be paid for them.

At 1.15 pm he received a second call from the Financial Controller informing him that he had got his dates wrong and the claimant was terminated from 29 December 2008. He went home and received a number of emails. One stated that with regret his employment was to be terminated by reason of redundancy with effect on Monday 29 December 2008. Another stated that as redundancies were going ahead his request for parental leave was refused and he was to be made redundant before it was to commence.

On 9 December 2008 he contacted his solicitor who contacted the respondent by letter. On 30 December he met the Financial Controller to get his RP50 form signed and to ask about his pension. The claimant told the Tribunal that he had no alternative but to get the form signed as he had a family to feed. He declined the offer of an ex-gratia payment as he was required to sign a wavier that he would not take a case before the Rights Commissioner or the Employment Appeals Tribunal.

He stated to the Tribunal that the selection process had been flawed and that management had come to a predetermined conclusion. He gave evidence of loss.

On cross-examination he stated he could not comment on the decline in registrations between 2006 and 2009. He agreed that the bulk of the work carried out was registrations but stated that he had only had a reduction of 13.9% in his work.

Determination:

It was submitted on behalf of the claimant that a collective redundancy situation applied within the respondent in that five redundancies were effected within a 30-day period. The first of the five housing advisors selected for redundancy left the employment on 12 December 2008. The last of the five made redundant left the employment on 17 April 2009. Additionally one of the five was on secondment with the respondent and was returned to the party from whom he was seconded. For these reasons the Tribunal is satisfied that this was not a collective redundancy.

The respondent reduced its number of field based housing advisors from fourteen to nine due a severe downturn in business and it is not disputed that a redundancy situation pertained within the respondent. The selection of the claimant as a candidate for redundancy was based on a reorganisation of the territories of the fourteen advisors and in the claimant’s case on consideration of his territory against the two adjoining territories. Following the notification of the intention to

reduce the number of advisors on 12 November 2008 and his meeting with the financial controller on 20 November 2008 the claimant was given the opportunity to put an alternative proposal to management. The claimant's proposal involved one of his neighbouring colleagues being selected for redundancy and the claimant covering part of that territory but leaving part of that territory without cover.

For all these reasons the Tribunal is satisfied that the selection of the claimant for redundancy was not unfair. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

The Tribunal is satisfied that the claimant received notice of termination by reason of redundancy on 1 December 2008. His employment ended on 29 December 2008. The tribunal is satisfied that the claimant received the requisite notice. Accordingly, the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 fails.

The claim under the Organisation of Working Time Act, 1997 was withdrawn on the second day of hearing.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)