

## **EMPLOYMENT APPEALS TRIBUNAL**

CLAIM(S) OF:

CASE NO.

EMPLOYEE

UD672/2009

against  
EMPLOYER  
under

### **UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. T. Ryan  
Members: Mr M. Noone  
              Mr. P. Trehy

heard this claim at Dublin on 18th November 2009, 11th January 2010 and 12th January 2010

Representation:

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Claimant(s) :

Mr. Joseph McDonagh, Joseph P. McDonagh & Associates, Solicitors,  
Brehon House, 2 The Rise, Main Street, Blanchardstown, Dublin 15

Respondent(s) :

Mr. Stephen Sands, Construction Industry Federation,  
Construction House, Canal Road, Dublin 6

The determination of the Tribunal was as follows:-

#### **Respondent's case**

The respondent held that the claimant was fairly selected for redundancy. The criteria used in selecting those made redundant was based on certain skill sets and then "last in first out" on a site by site basis. This procedure was agreed with the Claimant's union SIPTU. A list detailing these skill sets and the commencement and termination dates of employment together with a list outlining skill levels of each employee was handed to the Tribunal. These lists were used as a point of reference throughout the hearing.

Evidence was given that the claimant had been informed of his redundancy on the 9<sup>th</sup> January 2008. The claimant was not required to work his notice but was paid in lieu of said notice. The respondent confirmed that a member of site security was present while the claimant was leaving but denied that the claimant was escorted from the site.

The respondent claims that they did not have an alternative suitable position for the claimant at the

time within the Company which would be in keeping with the skill set offered by the claimant and that, as such, the respondent had to terminate the claimant's employment effective from close of business on that same day.

The respondent claims that there were currently no other vacancies within the Company due to the downturn nationally in the construction industry and the imminent completion of other contracts.

It was put to the respondent that the claimant was selected for redundancy ahead of others with less service and the same or lesser skill sets than him. Particular reference was made to another former employee who had less service than the claimant, worked on the same site and according to the claimant had a lesser skill set than him. However it was claimed by the respondent that this other person had welding skills that the claimant did not have.

It was also put to the respondent that the real reasons for termination of the claimant's employment were two fold:

Firstly the claimant had injured himself on two occasions while working for the respondent the second injury suffered when he was using machinery for which he was not trained in. He had engaged a solicitor in relation to this matter who had written to the respondent. This letter was received by the respondent on the same day as the claimant was notified of being made redundant and the claimant was asked to leave the site immediately.

Secondly the respondent was extremely annoyed that he had to pay almost €10,000 in travel and subsistence allowance arrears to the claimant and that the claimant was made redundant as retaliation for this and in fear that he would tell his co-workers of the outcome of his claim.

The respondent vehemently denied that the above reasons had anything to do with the claimant's redundancy and pointed out that the claimant had been notified of impending redundancy as far back as October 2008. The reason the claimant was made redundant was because of the severe economic downturn. They had to reduce the Dublin workforce from 150 to 65. The respondent gave evidence that 17 general operatives had been dismissed by the Respondent, in the Dublin area alone, by reason of redundancy between 20<sup>th</sup> March 2008 and the 9<sup>th</sup> January 2009. Furthermore the Tribunal notes that the claimant had been considered for redundancy which was to take effect from the 10<sup>th</sup> October 2008 but this had been deferred.

Another general operative was let go the same day as the claimant. The claimant did not have the same skill set as some other general operatives. In particular he did not have a ticket to drive any track machines.

It was also put to the respondent that as further evidence of the respondent's vindictiveness the claimant's Christmas bonus was reduced by 50% whereas all of his fellow employee's had a reduction of 25%. The respondent denied any vindictiveness and that it was explained to the claimant by his foreman that the reason for this was due to the recession and because of the claimant was absent from work meant he was entitled to less bonus than his co-workers.

A witness for the respondent denied having given a "horrendous" reference to a subsequent employer of the claimant. Another witness, who was named as a person from the subsequent employer, denied any knowledge of such a reference.

## Claimant's case

The claimant gave evidence that he was unfairly selected for redundancy and that his dismissal was unfair and unlawful and was not brought about in reality by reason of redundancy but came about for the following reasons:

1. The claimant pursuing a personal injury claim against the respondent. The claimant gave evidence that he sustained lower back injuries resulting from the operation of a T Rex machine in or around 28<sup>th</sup> April 2008. He said that he had informed his foreman and one other employee of the respondent that he did not know how to operate this machine. However his foreman insisted that he use the machine. The claimant further states that he suffered a recurrence of his back injury when he was directed, on or about the 9<sup>th</sup> October 2008 to use the same machine which had caused or contributed to his previous injuries sustained in April 2008. The claimant stated that he was warned that if he did not use the machine he would be instantly dismissed. In fear of losing his job the claimant operated the machine and as stated activated his previous injuries resulting in him having to attend the respondent's Company Doctor and being certified unfit for work for four weeks, initially from 10<sup>th</sup> October 2008 to 10<sup>th</sup> November 2008. On the claimant's return to work he was informed by his foreman that he would not be requested to operate this machine as he had not got the required ticket of certified competence. On the 5<sup>th</sup> January 2009 the claimant submitted a letter of claim in respect of his personal injuries requesting compensation for the injuries he suffered in that accident. The following Friday, 9<sup>th</sup> January 2009, the claimant was called in by the respondent's foreman, handed an envelope instantly dismissing him from employment with effect from close of business that same day and was verbally told that his contract was terminated by reason of "a downturn in the economy". The claimant was then verbally instructed to leave the site immediately at 11am on that Friday, 9<sup>th</sup> January 2009.

2. The claimant pursuing the respondent to settle with the claimant in respect of the failure by the Respondent to pay the claimant's travelling expenses and holiday pay lawfully owed the claimant under the registered employment agreement.

The claimant states that he had been put through undue and unfair difficulties and obstacles by the respondent by not being paid any travelling expenses for a prolonged period and then only being offered a backdated underpayment of €2,000. The claimant's union had to embark on negotiations with the respondent and finally obtained the proper amount of €9,000 which was due to the claimant. (The claimant accepted this payment on or about 5<sup>th</sup> January 2009). It subsequently transpired that the claimant had not been paid holiday pay which was due to him and when this matter was raised with the respondent the respondent reluctantly paid over a further sum of €1,200 which was due to the claimant.

The claimant asserted that the dismissal was unfair and unlawful because the claimant was dismissed in an attempt to keep him from telling his co-employees the fact that the respondent had failed to pay him in respect of travelling costs and holiday pay lawfully due under the registered employment agreement.

The claimant, through his union representative, participated in an appeal hearing against dismissal at which he pointed out that other employees were being retained by the respondent who were significantly less qualified and / or less experience than him, who had less service time than him and who, unlike the claimant, did not hold the qualification in Construction Skills Certificate Scheme and Confined Spaces Ticket and a qualification to drive 10 tonne dumpers, which the claimant had procured respectively through FAS. The claimant's Appeal was rejected.

As evidence of the respondent's vindictiveness the claimant stated that his Christmas bonus was reduced by 50% whereas all of his fellow employee's had a reduction of 25%. The claimant was informed by his foreman that the reason for this was due to the recession and because of the claimant "being out of work"

Both the claimant and his solicitor gave evidence that they had been informed, by the claimant's subsequent employer, that he had received a "horrendous" reference from the respondent.

The claimant's union representative gave evidence to the Tribunal that he had no issues with the company in relation to their redundancy procedure and that the company policy of selecting for redundancy was not just on the basis of "last in first out" and that this "procedure" only applied if all other things were equal and that it was not site specific.

It was asserted on behalf of the claimant that the dismissal, particularly the manner in which it was effected, was not a reasonable or proportionate reaction by the respondent either to the facts presented to the respondent and / or in all of the circumstances, which the respondent ought to have taken into account, but failed to.

### **Determination**

The respondents gave evidence that a genuine redundancy existed in the company, due to the severe economic downturn which saw it reduce its workforce in Dublin alone from 150 to 65, and that the claimant was fairly selected for redundancy along with several other workers. The claimant was made redundant on the 9<sup>th</sup> day of January 2009. The respondent furnished to the Tribunal a list containing the criteria used in selecting employees for redundancy and scored each employee under approximately 25 headings. The criteria used in selecting those made redundant was based on certain skill sets and then "last in first out" on a site by site basis. This procedure was agreed with the claimant's union SIPTU. While a few general operatives with less service than the claimant were kept on these few had additional skills that the claimant did not have. (It is noted by the Tribunal that even these employees were subsequently dismissed by reason of redundancy). The claimant gave evidence that he was unfairly selected for redundancy and that employees with less service were kept on and that the reason for his redundancy was because of the fact that he was bringing a claim against the company and that he had negotiated a payment of €10,000 from the company in respect of unpaid travelling expenses which he claimed should have been paid to him under a Registered Employment Agreement.

The claimant's union representative confirmed to the Tribunal that he had no issues with the company in relation to its redundancy procedure, which in itself is significant, and that the company policy of selecting for redundancy on the basis of all things being equal that a "last in first out procedure" applied and that this was not site specific.

The Tribunal had to consider if the claimant's dismissal for reasons of redundancy was not genuine and if in fact it was vindictive, revengeful and related to matters other than the claimant's position becoming redundant? This is basically the claimant's contention. The suddenness of the claimant's notification of redundancy on the 9<sup>th</sup> January 2009 coupled with his simultaneous departure from the site is supportive of the claimant's contention. While the Tribunal has reservations about the way this was handled by the respondent it nevertheless must consider this against a background of overall drastic reduction in the workforce caused by the severe economic downturn. The

Tribunal notes that 17 general operatives had been dismissed by the respondent, in the Dublin area alone, by reason of redundancy between 20<sup>th</sup> March 2008 and the 9<sup>th</sup> January 2009 the date of the claimant's redundancy. Furthermore the Tribunal notes that the claimant had been considered for redundancy which was to take effect from the 10<sup>th</sup> October 2008 but this had been deferred.

The Tribunal determines that based on the totality of the evidence presented to the Tribunal, and set against a dire economic situation, that a genuine redundancy situation existed and that the respondent acted fairly in selecting the claimant for redundancy.

Accordingly the claimant's appeal under the Unfair Dismissals Acts, 1977 To 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)

