

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
Employee – claimant

CASE NO.
UD913/2009
MN942/2009
WT404/2009

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: Mr T Taaffe

Members: Mr T O'Sullivan
Mr F Barry

heard this claim at Dublin on 4th February 2010 and 23rd April 2010

Representation:

Claimant(s): Mr Pdraig Lyons BL, instructed by:
Ms Aileen Fleming
Daniel Spring & Co, Solicitors, 50 Fitzwilliam Square, Dublin 2

Respondent(s): Ms Rhona Murphy
IBEC, Confederation House, 84-86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

Respondent's Case:

The operations director gave evidence that the company has been affected by the recent economic downturn. The company provides warehousing and distribution services. Contracts were lost and they had to cut margins to keep customers. Initially management looked at cutting their cost base including introducing partial pay freezes. In 2008 no one earning over €26,000 per annum got a pay increase. In 2009 no one got a pay increase.

The company introduced a non-recruitment policy unless a strategic post was required. Five or six senior level staff left. There were forty-eight or forty-nine employees and that was reduced to forty-one. The witness, the finance director and the managing director, discussed making

redundancies at a meeting in mid-2008. They reviewed which roles should be redundant. They decided that middle management provided an opportunity. He was unclear as to when they drew up the criteria for selection. The document produced to the Tribunal was undated.

The first employee made redundant did not have two years service. The witness did not have the dates of when people were made redundant. Of the employees made redundant only the claimant, who was the warehouse manager, had more than two year's service.

The witness and the finance director met the claimant on February 5th and 6th 2009 and told him about the redundancy situation and how it might impact him. Two alternative roles were offered to the claimant, a junior graphic design role and a junior warehouse position which was a support role to the kitting and mailing manager. The claimant wanted to think about it. They met again the next day. The claimant wasn't interested in either role. They both agreed that he wasn't qualified for the graphic design role and he did not want to assume a lower position in regard to the second position offered.

He was a good worker and they had a good relationship. The claimant was demoted from a previous position, as logistics manager, as he did not have the skill set for the role. But this did not have a bearing on his selection for redundancy. He contended that there was no one left in middle management with shorter service than the claimant and no one was kept in a similar function to the claimant.

During cross-examination the witness disputed the contention that he had suggested that the claimant was not suitable for the junior warehouse role. They had previously discussed training the claimant in computer skills, including Microsoft Excel.

The meeting on February 5th was to inform the claimant that he was being made redundant. It was not a decision-making meeting. The decision had been made previously with other management. The meetings were to discuss possible re-deployment. The claimant's input was not requested. He was already aware of the policy of non-recruitment. The witness accepted that the claimant might have had suggestions that wouldn't have involved making him redundant, as he was party to other cost saving initiatives.

Previously there were minor issues with the claimant's performance. The previous July the claimant said he did not have a recruitment role for his division, but that was ironed out. The witness had ended a letter to the claimant, dated 28th May 2008, regarding the issue stating: 'I would respectfully suggest that if these issues cannot be addressed positively by you then it would be better for all concerned if we parted amicably.' The witness contended that he had written that as the claimant could be opinionated at times and he wanted to get some sense into it. He did not intend for the claimant to leave.

A further issue was collating orders. The witness did not believe the claimant was delegating enough work as warehouse manager.

The witness hired a transport manager without consulting the claimant, as there wasn't the time. That role reported to the claimant. He knew the candidate and knew he would be a good fit. The contract of employment did not specify recruitment as one of the claimant's responsibilities.

The witness did not allow the claimant to carry his holiday entitlement as it was against company policy. Some non-Irish employees were allowed to carry leave to facilitate returning home for the

Christmas holidays. The claimant was paid his holiday entitlement when his employment was terminated.

He could not recall when the decision was taken to make the claimant redundant, but they were considering what decision to make in December 2008. Cost, skill sets, longevity were considerations. The claimant had the skill sets. He did not have the longevity, but 'last in, first out' was not applied. Service was a small factor. Others made redundant had short service, but this was due to an 'unfortunate convergence of roles in middle management'. The criteria were not written down and there were no notes to show objective criteria were applied.

He did not consider it unusual that a warehousing business would begin redundancies by making the warehouse manager redundant. There was no longer a specific warehouse manager. The role was divided up between other staff including the witness, who took on most of the claimant's responsibilities.

The finance director gave evidence that the company was in a difficult financial situation. To keep clients the company had to reduce their prices and that meant they had to look for savings elsewhere. They looked to reduce what they paid to their suppliers and service providers and to reduce payroll costs. The witness was one of the decision makers who decided on the redundancies. They decided to take out a layer of middle management, which was comprised of five employees.

The witness attended both meetings with the claimant on February 5th & 6th 2009. The first meeting was to inform the claimant that his position was being made redundant. The meeting on the 6th was a follow up. He explained the company situation to the claimant and that his role had been identified as one to be eliminated. The claimant asked about the other roles on offer, but he was not interested in either. He did not recall the claimant putting forward alternatives to him being made redundant.

The company has since replaced two graphic design employees. The claimant was offered a graphic design position but he was not suitable, as he does not have a graphic design qualification. The second role was beneath what he was doing.

During cross-examination the witness agreed that they had discussed making the claimant's position redundant a considerable time before, at a meeting on 16th January 2009. They wanted to wait and see if the situation improved. He agreed that he did not engage with the claimant between that meeting and February 5th, which did not meet the company's own criteria of engaging with an employee once their role had been identified for redundancy.

He could not recall if the claimant was told if he could appeal the decision. He was told that if he was not happy he could speak to the managing director. He knew that the claimant had met the managing director at a later stage. He took some notes at the first meeting but he did not know where they were.

The print area was a loss area but it brought in other business in the storage and distribution area.

They did not select the new transport manager for redundancy as he was involved in changing the company to a new courier company and had experience in export documentation which was required for a new client. The claimant had previously covered the transport manager's role, but he was not familiar with all the customs regulations. The claimant was not involved in the

negotiations for changing to a new courier company.

The witness contended that service was not a factor in the selection criteria. He agreed that he would look at the situation differently now.

The managing director gave evidence that in order to protect the business they had to remove a layer of management. He could not recall when the appeal meeting was. There was nothing in writing. The company does not employ secretarial staff. The claimant came to see him. They spoke about the graphic design position and the junior warehouse role, but the claimant did not want either. The transport manager role was not raised. The claimant did not raise any alternatives.

During cross-examination the witness said that the claimant rang him to arrange a meeting. The witness had an 'open door' policy and all staff could come to him if they had a problem. He had been one of the people who decided to make the claimant's position redundant.

He did not remember saying to the claimant in February 2007 that he was not up to the job, that he regretted employing him and that he should look for another job over the next three months.

He had no memory of telling the claimant to get rid of an employee in 2006 by making his position redundant and then suggesting that the claimant should have an assistant. An email by the managing director sent on November 23rd 2006 produced by the claimant's representative included a reference to hiring a new number two for the claimant.

Claimant's Case:

The claimant commenced his employment with the respondent company in December 2004 as the warehouse manager. He was responsible for overseeing the warehouse, transport, goods in and stock control. In May 2006 he applied for the position of logistics manager and was successful. He received an increase in salary. His role expanded and his responsibilities grew to include overseeing the customer service area and warehouse queries. He had more contact with the managing director and operations director.

There was a six-month probation period in the new role, which was due to expire in January 2007. He believed he was doing well in the role. There were discussions with the managing director and operations director about getting an assistant for him due to the magnitude of the role. The warehouse supervisor used to report to him but in May 2006 managing director told him to get rid of him by making him redundant. He contended that he took care of the new client referred to by the finance director and their export needs when he was in this role.

He thought he was doing well in the role but in January 2007 the claimant's probation was extended until March 2007. In February his probation was extended to June. The managing director told him that he regretted employing him, that he was average and that he would give him three months to find another job. In June 2007 he was demoted back to the position of warehouse manager. The claimant had covered the role of transport manager as warehouse manager in the past.

He believed the company wanted to get rid of him when he received the letter of the 28th May 2008 from operations director suggesting that they part amicably. He responded to the letter in writing in as positive a manner as possible. He asked for training in areas that the company thought he was weak in. The claimant felt isolated in his position over the next six months and was not included in

management issues. At Christmas he asked if he could carry two days leave in order to bring his son to physiotherapy appointments, but he was refused.

On February 5th 2009 the operations director asked him to come to a meeting. The finance director was also there. He was told that they were making his position redundant. He had not been given prior notice of the meeting. Nothing was discussed regarding alternative positions in the company. He asked for it in writing and so they called him back the next day and gave him a letter. Two positions were discussed on the 6th February, the graphic designer position which was agreed was not suitable and a junior warehouse position which the operations director said involved using Microsoft excel, which he said the claimant was not good at. The claimant denied refusing the position. He contended that he used Microsoft excel in his work.

He did not know if the company were selecting by service or by skill set. He had longer service than others and he believed he also had better skills.

The claimant was told he could work for the following two weeks but then he was to leave so that they could implement the new structure. This confirmed to the claimant that they wanted to get rid of him.

He contended that he was not given an opportunity to suggest alternative roles for himself or offered an appeal. The decision had been made. He did not have any meeting afterwards with the managing director.

He contended that he was completely familiar with customs export procedures required for the transport role. He had also sought to reduce the company's courier costs and had emailed a proposal to the directors on January 29th 2009. He believed he had a greater skill set than the transport manager and could have taken on that role again as part of his warehouse manager role. He would also have taken on the lesser role. The warehouse area of the business was the most profitable. The print area was a loss making area but there didn't seem to be any redundancies made there.

During cross-examination the claimant agreed that the company was in financial difficulties and needed to make redundancies. He did not write to the company afterwards to state that he wanted the junior warehouse role as he felt his input would not be taken into account.

The Tribunal heard evidence of the claimant's loss. The claimant's representative stated that there was no issue with regard to notice.

Determination:

The Tribunal carefully considered the evidence adduced. It is accepted that a redundancy situation arose in respect of the claimant's position. The Tribunal is of the view that there was a significant deficiency in the procedures applied by the respondent in selecting the claimant for redundancy.

The failure of the respondent to give any notice of the meeting at which they announced the intended redundancy and the time-period they allowed for the claimant to engage with them was unfair and unreasonable as was their failure to inform the claimant of his right to appeal before an independent appeal body.

The Tribunal has considered section 6(3) of the Unfair Dismissals Act 1977 as amended by section

5(e) of the Unfair Dismissals (Amendment) Act 1993, and is satisfied that the deficiency in procedures referred to is sufficiently significant so as to render the selection for redundancy process unfair and unreasonable resulting in the claimant being unfairly dismissed.

Accordingly, the claimant's claim succeeds and he is awarded the sum of €30,000.00 inclusive of the redundancy payment of €5,880.00 already paid on the termination of the claimant's employment.

The Tribunal dismisses the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005. The Tribunal also dismisses the claim under the Organisation of Working Time Act, 1997 as no evidence was adduced indicating a breach of that Act.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)