

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE – claimant

CASE NO.
UD1375/2009

against

EMPLOYER – respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr C Corcoran BL

Members: Mr M Flood
Mr A Butler

heard this claim at Dublin on 24th June 2010

Representation:

Claimant(s): Mr Peter McInnes
McDowell Purcell, Solicitors
The Capel Building, Mary's Abbey, Dublin 7

Respondent(s): Mr Eamon Shortall BL, instructed by:
Ms Ciara Tierney
Redmond & Company, Solicitors
Bridge Point, Abbey Square, Enniscorthy, Co. Wexford

The determination of the Tribunal was as follows:

Respondent's Case:

The Group Company Accountant and Company Secretary gave evidence that four companies come under the group including the respondent company. She has responsibility for the accounts of all the companies. The claimant was responsible for the ERP division (Enterprise Resource Planning) in one of the companies, which had a retained loss of €34,371 for 2008. The claimant had target areas to meet in Licensing, Consulting and Development areas in order to receive a quarterly commission. He did not meet his targets in these areas. Other divisions in the

company made a combined profit of €59,152.

During cross-examination the witness explained that of the €380k consultancy fees €371k was paid to the consultancy company of a consultant who was brought in to restructure the company and for technical consultancy. 14% of that sum was paid as fees to the Consultant.

The Group HR Manager (HRM) gave evidence that he provides support to senior management but does not have a decision-making role. When the company was making redundancies he was asked to attend meetings, process the relevant documentation and agree to whatever deal was on the table.

There were eight employees in the ERP division, including the claimant who joined in January 2008. Five employees were made redundant from the ERP division in October 2008. The claimant was made redundant in February 2009. The witness was informed that there was no other position available for the claimant. The remaining two employees in the division were technical staff required to maintain the service to existing clients.

The division was then subsumed into the Systems division. The Managing Director took on the sales and marketing role, previously carried out by the claimant. The claimant was not replaced. A number of cost saving measures were carried out in 2008.

The claimant was present with the witness for a number of the meetings in October 2008 when the employees were informed that their positions were being made redundant. Pay in lieu was offered to the employees. The claimant did not complain about the procedure employed, how the employees were selected or that they were offered pay in lieu of notice. The employees were not replaced. The Managing Director and the Financial Controller informed the witness that there were no alternative positions available for the employees. They have both since left the company and have not been replaced. They were not in attendance at the Tribunal hearing.

The Financial Controller informed the witness that the claimant was to be made redundant approximately a week or two in advance. He was asked to prepare the documentation and to travel to Dublin for the meeting. The claimant was not entitled to a redundancy payment so the witness organised his notice payment. The witness prepared the 'Employment Cessation' document in case the claimant decided to accept a payment in lieu of notice.

The witness was present at the meeting on February 16th 2009 with the Managing Director, the Financial Controller and the claimant. The claimant seemed surprised to see the witness. He agreed that his presence at the meeting would have rung alarm bells for the claimant. The Financial Controller outlined the situation and informed the claimant that his position was being made redundant.

There were no disciplinary issues regarding the claimant and there were no warnings on his file. There was no reference to the claimant's performance at the meeting. He was not summarily dismissed as he contended in an email the following day. The witness explained that the claimant was not entitled to a redundancy payment and they discussed his notice figure. He offered the claimant one month's pay in lieu of notice. The claimant refused to sign the waiver document, as he wanted to take further advice. Therefore, there was no agreement in place and the claimant was expected to work his notice period.

The Managing Director forwarded the claimant's email to the witness for response. In his email of the 17th February 2009 the claimant indicated that he would be returning to work on Thursday of

that week. The witness understood that the claimant did not return after that date, but he could not confirm this, as he was not present in the Dublin office after the meeting of February 16th. The witness clarified by email that the claimant could work out his notice period.

During cross-examination the witness stated that he lives in Enniscorthy and provides HR services for all the companies in the group. He was not involved in recruiting the claimant. His first substantial interaction with the claimant was at the redundancy meetings with his staff.

He did not speak to the claimant in advance of the meeting of February 16th 2009. He recalled that when the claimant asked for a break during the meeting, to make a phone call to get advice, the Managing Director said there was no need as the witness was there for that. It was agreed that the claimant would receive four weeks' notice as per his contract and his car allowance. He was asked to sign the waiver to confirm that he had been paid his entitlements. There were no notes taken at the meeting.

A HR Manager for the respondent company gave evidence that the consultancy company contracted to restructure the company recruited the claimant. The claimant was hired as a day-to-day division manager with responsibility for sales and new business development. 86% of the consultancy fees paid was for technical support, which could not be done in house.

The witness was instructed by the Consultant to work with the claimant and his team for their performance management review. The grievance procedure was available on the company intranet. Since receiving the Tribunal notice the witness checked to see if there were any alternative positions available for the claimant at the time of his dismissal, but there were not. At the time of the claimant's dismissal the witness's role had contracted and she was not longer involved with the respondent company. She was still employed by another company within the group.

During cross-examination the witness confirmed that she had no involvement with the claimant's redundancy. She was not asked to investigate if there were any alternatives for the claimant.

Claimant's Case:

The claimant commenced his employment with the respondent company, a software solutions company, in January 2008. He was headhunted by the Consultant to fill the role of ERP manager. When he started the claimant was dismayed to find out the extent of the losses being suffered by the company. The original Managing Director left shortly after the claimant began and he assumed responsibility for the profit and loss of the whole company.

The claimant worked hard to collect debts and get new contracts. He won a major new contract with a marketing company. There was a performance management process to train his team in Microsoft, but in the meantime they had to rely on external consultants. His line manager was the Managing Director of the Group, but he mainly reported to the Consultant. This caused a conflict of interest as the claimant wanted to reduce costs but he was reporting to the Consultant whose company provided the external technical consultants.

They had to make redundancies from the division in October 2008 as, while there had been new sales, costs were high and there were a number of staff who didn't have the required skills. He attended three meetings with the HRM. After the redundancies the company was manageable and profitable. The claimant believed that his job was secure as the team was as lean as it could be.

There were two meetings with the Managing Director in September and December 2008. In December the Managing Director said that the sales were not as good as she had expected and that the claimant was not performing as well as she had hoped.

The claimant sought prices from other technical consulting firms and found two that were half the price of the Consultant's company. He suggested to the Managing Director that they stop using the Consultant and start using the companies that he had interviewed. He was subsequently told by the Managing Director and the Consultant to stop looking at costs and to focus on sales. In January 2009 the Consultant took over the management side of things and the weekly team meetings. The claimant was not happy about this.

By the end of 2008 the claimant believed that his division had made a profit of €100k. In January 2009 he was told that they had made a loss of €100k. He asked to meet the Financial Controller to discuss the profit and loss accounts and his bonus. A meeting was arranged for February 16th 2009. When he arrived he saw that the HRM was there. He knew immediately what that meant.

The Financial Controller told him that as his division was underperforming he was to be let go with immediate effect. There was no discussion of alternatives or of any possible ways of avoiding the redundancy. The HRM took over and discussed how much the claimant would receive. The claimant told the HRM that he wasn't going to sign the waiver form. The Managing Director later asked him for his keys, laptop, phone and swipe card. He then left the office.

There was an email exchange with the HRM and he understood that he could return to work. He went to the office the following week and met the Managing Director and the Financial Controller. It was a hostile meeting. When he said that he was seeking legal advice the Financial Controller said they shouldn't talk to him. They offered him the loan of a different laptop to the one he used to have to work on.

The claimant did not return to the office after that and was paid in lieu of notice. The claimant gave evidence of his loss.

During cross-examination the claimant stated that the meeting he had was no different to the ones held with the employees in October 2008. He considered that he was entitled to return to work afterwards when he received confirmation from the HRM.

Determination:

On the evidence adduced, in particular allowing for the fact that a number of important and relevant witnesses did not tender evidence on behalf of the respondent company, the Tribunal finds that the respondent has not established that a genuine redundancy situation concerning the claimant had arisen within the respondent company at the time he was asked to leave his employment. Accordingly, the Tribunal finds that the claimant was unfairly selected for redundancy and therefore that the claimant was unfairly dismissed.

Having regard to all the circumstances of the case, and in particular allowing for the fact that the claimant succeeded in obtaining gainful employment soon thereafter, the Tribunal awards the claimant €28,000 (twenty-eight thousand euro) under the Unfair Dismissals Acts 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)