

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE – appellant

CASE NO.
UD1282/2009
MN1277/2009
WT569/2009

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 T Brady

heard this claim at Dundalk on 31st March 2010 and 21st June 2010

Representation:

Claimant(s): Mr Aaron Shearer BL, instructed by:
Mr Conor Breen
McDonough & Breen Solicitors
Distillery House, Distillery Lane, Dundalk, Co Louth

Respondent(s): Ms Suzanne White
Arthru Solutions
Casa Mia, Mount Gorey, Malahide Road, Swords, Co Dublin

The determination of the Tribunal was as follows:

Respondent's Case:

The general manager of the respondent company gave evidence that the company got into difficulties from October 2008. This was due to the economic crisis and the fall in the value of oil, which impacted his two companies that were involved in plastics and fertilisers. The company auditors advised them that the company position was very bad and that they had an obligation to their creditors not to be reckless with the company's finances.

There was a directors meeting on January 23rd 2008. Business had not picked up and they decided that they had to make redundancies. They looked at the cost of the administration staff. They held

a consultation meeting with staff on January 26th 2009. The company's financial advisor also attended. He outlined the situation to the staff and explained that it would be necessary to implement a 12.5% pay cut and a reduction in hours. One employee said he would rather be made redundant than be put on short time.

The witness and his father, one of the company directors, made a trip to Munster to see if they could generate sales but they were unsuccessful. They returned on January 29th 2009 and discussed the situation with each other. They decided that putting the staff on short time would lead to problems with customer service and would just prolong the pain, so they decided to make redundancies instead.

The claimant, a bookkeeper, had said to him the week before that in the event of staff redundancies she was concerned for another colleague who had a young family. The claimant said that she would rather be made redundant as she had hairdressing skills.

The manager and his father drew up a matrix listing the staff, their tasks and the tasks they were able to do. They looked at what tasks they had done previously and their past employment. They listed the employees' strengths and weaknesses. They considered their comments during the week, their attendance and their disciplinary record. They tried to bear in mind anything that made anyone stand out.

They selected the claimant and the employee who had suggested that he be made redundant instead of being put on short time for redundancy. They believed that other employees could cover their roles. The witness's mother, also a company director, could carry out accounting functions. The witness, his mother, and the employee who the claimant had been concerned about now carried out the claimant's functions.

On January 30th 2009 the manager and the financial advisor met the claimant. She declined to have anyone to accompany her. He told her that they had discussed the situation and that they had decided that short time was unworkable. He told her that redundancies were required and that she had been selected. He told her she would be given two weeks notice and that she could decide if she wanted to work it or not. She opted to not to work the notice period. He did not show her the table of strengths and weaknesses.

The claimant asked for her P45, holiday pay and a letter outlining why she had been dismissed. She was upset so she waited in her car while he prepared everything for her. The manager gave the claimant her outstanding wages, pay in lieu of two weeks' notice and her outstanding holiday pay.

During cross-examination the witness explained that he had put on the notice of hearing form to the Tribunal that he could not re-hire the claimant due to the way she responded to being dismissed. She had been very angry when he went to give her the final documentation. She slammed her car door and swore at him. He became aware after submitting the form that his personal feelings were not an acceptable reason for not re-hiring the claimant.

The witness agreed that the value of company sales, across the two companies, had increased by €900k in 2009, but this was due to the increase in the price of grain. The volume of sales did not increase. He did not know where they had gotten the figure of 12.5% for the pay cuts. They were not told the figure. They felt 20% would be unfair. They did not know how much they intended to save. They had not put a figure on it.

The financial advisor worked for the company, but was not an employee. They had asked his advice regarding what should be of concern to them. He no longer provides services to the company. He was not present at the hearing. The witness was unaware of the financial advisor having met with a number of employees in the boardroom on January 23rd prior to the directors' meeting to advise them that their hours would have to be cut. He knew that the financial advisor had spoken to the employees about how short time would affect them. He didn't know what he said to them. The witness agreed that the claimant would have considered that the financial advisor was the most senior person present if he and his father were absent. The claimant reported to him.

He took sick leave into account when selecting employees for redundancy because the claimant had taken a lot more than others, but it was not a defining feature. They looked at the disciplinary records in the event that all things were equal when considering the employees' strengths and weaknesses. He didn't know that considering disciplinary records was an inappropriate selection criterion. The claimant was neither last in nor first in.

A temporary employee was hired in March 2009 for three months to cover some of the claimant's duties, as the witness's mother became ill in February. He considered the claimant but he had heard that she was hairdressing. He considered if she could do the job, but decided that she didn't have the extra skills to cover her old job and his mother's role. If she hadn't been hairdressing he would have asked her. He changed his mind about considering her when he received the Tribunal form.

An auditor for the company gave evidence that the year March 2008-2009 had begun well for the first half of the year, but deteriorated in the second half. She produced the balance sheets and profit and loss accounts from the company's accounts system. They were produced after the claimant was dismissed. She could not provide a breakdown of the costs. There were five employees made redundant in October 2008. The witness could not explain how the operating costs increased by over €170k over the rest of the year. She did not know if the five employees were paid a redundancy payment. She did not provide advice to the company at the time.

Claimant's Case:

The claimant commenced her employment with the respondent company as a bookkeeper in January 2008. She reported to the financial advisor, she considered him to be one of the managers. Four of the staff, including the claimant, had a meeting with the financial advisor. He informed them that he was instructed by the manager and his father to advise them that there would be a reduction in their hours and a 12.5% pay cut. They would be told the following week what the details would be.

They had a meeting with the manager on January 26th 2009. Her hours were reduced by two days. She queried the 12.5% pay cut with the financial director as she had heard talk of a 10% pay cut. He said he wasn't in a position to answer.

The claimant said to the manager that if he had to cut hours he should cut hers and not the colleague's who had young children. She did not say to him to make her redundant instead of the colleague.

On January 30th 2009 the financial director told the claimant which three days she would be working. He gave her a couple of hours off to go to the local Social Welfare office to find out what

she might be entitled to. The next day the manager and the financial advisor met her in the boardroom and told her that the situation was bad and that she was being let go. She was shocked, but disputed that she had been angry or had shouted at them.

There was no discussion of her skills. She was not shown or given a copy of the matrix listing staff strengths and weaknesses. She was not asked about her abilities to perform other tasks. She had worked on a payroll system when she was living in South Africa and contended that she could have learnt the system here, but she had not been asked.

It was a quick meeting. She asked for her documents, collected her belongings and waited in her car. She did not swear at the Director or snatch the documents off him when he came to her car. The claimant gave evidence of her loss.

Determination:

It is accepted that a redundancy situation arose in respect of the claimant's employment with the respondent company. The issue, therefore, that the Tribunal is required to consider and address is whether the claimant was fairly selected for this redundancy. In respect of this consideration it is clear from the evidence that:

- a) The claimant was neither consulted nor given the opportunity to participate in or make submissions in relation to the process, which led to the preparation and implementation of a matrix, which was used to make the claimant redundant. This was unfair and unreasonable.
- b) On the respondent company's own admission the claimant's alleged record in respect of job warnings and sick leave were considered by the respondent in arriving at their decision to make the claimant redundant. This in effect was a disciplining of the claimant which should not have formed any part of their decision making process and was not therefore fair or reasonable.

The Tribunal therefore determines that the procedures applied by the respondent in implementing the redundancy were significantly flawed, so significantly as to render the claimant's selection for redundancy unfair. Consideration was given to section 3 of the Unfair Dismissals Act 1977, as amended by section 5(b) of the Unfair Dismissals (Amendment) Act 1993. The Tribunal awards the claimant the sum of €7,500.00 (seven thousand five hundred euro).

The Tribunal heard that the claimant was paid in respect of her notice and holiday entitlements and therefore her claims under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and the Organisation of Working Time Act, 1997, are dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)