

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

CASE NO.
UD482/2009

Against

EMPLOYER
under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms N. O'Carroll-Kelly B L

Members: Mr M. Noone
Mr J. Dorney

heard this claim at Wicklow on 26th January and 25th February 2010

Representation:

Claimant : Mr Niall Neligan B L instructed by
P.C. Moore & Co., Solicitors, 17 South Great George's Street, Dublin 2

Respondent : Ms Audrey Coen B L instructed by
Augustus Cullen Law, Solicitors, 7 Wentworth Place, Wicklow

The determination of the Tribunal was as follows:

Respondent's Case

The respondent deals in all types of waste disposal from skip hire to heavy duty recycling. Its customers include industrial, commercial and domestic users. The respondent, which was established in 2006, employed up to thirty workers at one stage but those numbers have steadily decreased from the end of 2007. The owner of this company listed several dates from that time onwards when the respondent was forced to make many of their staff redundant. Those redundancies were the results and consequences of a "huge downturn" in business. In addition to those redundancies all remaining staff took a ten percent decrease in their remuneration.

This witness said he was not familiar with the policy of last-in, first-out in relation to redundancy. His attitude was to retain the hardest workers as long as possible and in that context the owner maintained the employment of the claimant. Not only did he fall into that category the owner never had a problem with him. In confirming the company employed two staff in the summer of 2008 the witness said that they were taken on as maintenance staff. As part of a continuing cost cutting exercise the company had discontinued contracting out its maintenance needs, as it was more economical to engage their own staff for that work. Neither at the time of their recruitment nor when the claimant was informed of his forthcoming redundancy later that year did the witness

enquire of the claimant's availability for those posts. The owner said he was fair to all his staff and that the respondent took their decisions from a productivity point of view.

A member of the office staff confirmed that there were also cutbacks in the administrative side of the business. She referred to an accident the claimant sustained on the company's premises in late August 2008. A form was submitted to the Tribunal that included an application by the claimant for loss of wages due to that accident. However the witness said that the claimant continued working subsequent to that accident. Mention was made of a letter dated 27 September 2008, which bore the witness's signature. According to the witness the date of that letter was incorrect as it contained a typing error. However she was in no doubt that its contents were understood by the claimant.

This administrator stated that the decision to terminate the claimant's employment was the owner's. Another member of staff told the claimant of that development.

Claimant's Case

The Tribunal heard evidence from LK, a previous employee of the respondent. He worked for the respondent from 2nd April 2007 until 13th March 2009. His duties included general yard duties, working on the tractor, cleaning the yard, and sorting waste. LK told the Tribunal that he commenced employment with the respondent after the claimant. The claimant's employment concluded prior to his. LK was not aware of redundancies pending. Approximately six months after his employment commenced the respondent hired two more employees, LC and JC. LK did not agree that these employees were involved mainly in maintenance. He told the Tribunal that if something was broken they tried to fix it and if they couldn't they would call the maintenance company, but their main duties were cleaning the yard.

During the course of LK's employment the claimant was injured when he got a nail in his foot. The doctor came and for two days he worked and then he didn't work. While the claimant was absent his work was covered by other employees, including LC and JC.

LK was notified of his redundancy in writing two weeks before his date of termination. The letter was hand delivered by his supervisor and the letter said that if the job were to recommence he would be called back. LK told the Tribunal that there were two supervisors, M in the office and R in the yard. R was the claimant's supervisor. LK did not receive a redundancy payment on the cessation of his employment because he did not have the minimum service required under the Redundancy Payments Acts, 1967 to 2007.

Cross Examination

Under cross examination LK agreed that a number of employees had been made redundant prior to him. He also remembered that there were a lot more employees at the start of his employment. In September 2008 there were eight yard operatives made redundant. LK told the Tribunal that he remembered approximately half of these. LK agreed that he could not recall everything that happened in the yard and could not remember dates.

In relation to R being the supervisor in the yard, LK was informed of this by the office supervisor, M. LK told the Tribunal that he carried out the same work as everyone else in the yard. When asked about maintenance, LK said that he carried out maintenance on machinery, every morning and evening he would check oil levels and carry out any minor jobs. LK said it was possible that LC and JC carried out the major maintenance but they could only do what was in their ability and then they would have to call the maintenance company. LK agreed that only LC and JC would

attempt to carry out the major maintenance.

During direct evidence the claimant told the Tribunal that during his employment he had two supervisors, R in the yard and M in the office. The claimant told the Tribunal that R was Lithuanian and was the supervisor for the whole of yard. He presumed that M was responsible for answering phones and telling R what to do. The claimant answered to R. R would follow directions from the office and the claimant followed directions from R. If the claimant had a query he would go to R. The claimant told the Tribunal that JC and LC did exactly the same job as him at the beginning of their employment.

In August 2008, the claimant did not think that there was a downturn in business. He thought that everything was normal. He was aware of other employees leaving the company but he had been told by the director that people come and go.

On 25th August 2008, while carrying out his work, the claimant slipped and received an injury from a nail sticking out of a piece of timber that he was carrying. An accident report was not completed at the time of the accident but was subsequently filled in. The claimant was absent from work the following day and had further periods of absence as a result of the pain. Medical certificates were submitted for each absence.

On 25th November 2008 the claimant found a letter addressed to him on M's desk. The claimant asked R to translate the letter. The letter stated that the claimant's employment with the company was to cease on 5th December 2008 due to the downturn in business. R promised the claimant that he would talk to him about it the next day. R told the claimant that he had been told in the office that the claimant had missed too many days and as a result was being dismissed. The claimant told R that if this was the reason for his dismissal then he would sue the respondent. R subsequently told the claimant that the dismissal was not about missing too many days, it was because there was not enough work. The claimant told the Tribunal that this letter informing him of the cessation of his employment was a bolt from the blue.

The claimant did not receive an offer of further or alternative work from the company but in June 2009 he was asked to cover while another employee was on holidays.

Cross Examination

During cross examination the claimant confirmed that he did not carry out maintenance work and therefore his work was different to LC and JC, who carried out the major maintenance work. The claimant also agreed that he was informed of a 10% pay cut in October 2008.

The claimant did not attend work on 26th August 2008, the day after the accident. He contacted a fellow colleague and asked them to clock him in. The claimant did not agree that R was used to translate information provided from the office to the yard because M could not communicate directly with the employees who spoke different languages.

During cross examination it was established that the claimant had lodged a claim with a separate body in respect of loss of earnings resulting from his injury. The claimant agreed that the dates provided on the form, for that claim, were incorrect. This was substantiated by company records which show that the claimant worked for the respondent on the dates in question.

Determination:

The Tribunal are satisfied, based on the oral evidence, the documentation and the case law handed

in, that a genuine redundancy situation existed in the respondent company and that the claimant was fairly selected for redundancy and therefore the claimant's claim under the Unfair Dismissals Acts 1977 to 2007 must fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)