

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE

-Claimant

CASE NO.
UD886/2009

against
EMPLOYER *-Respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. P. McGrath B.L.

Members: Mr. L. Tobin
Mr. P. Trehy

heard this claim at Dublin on 24th February 2010 and 10th May 2010

Representation:

Claimant: Ms. Kiwana Ennis B.L. instructed by Ms. Elizabeth O'Mara,
Sherwin O'Riordan, Solicitors, 74 Pembroke Road, Dublin 4

Respondent: Mr. Stephen O'Sullivan B.L. instructed by Niall T. Cawley & Co.,
Solicitors, Main Street, Blackrock, Co. Dublin

The determination of the Tribunal was as follows:

Respondent's Case:

The Marketing Director gave evidence that the claimant commenced employment with the respondent mid 2007. The claimant was responsible for print advertising for one of the respondent's publications (hereinafter NCG). Another person (Mr. B) was responsible for online advertising revenue at that time.

Another employee (Mr. L) was employed in July 2008. He was responsible for selling advertising on NCG's website but he also represented online advertising for other publications. He had 100% responsibility for the suite of automotive publications and he had very good experience.

The respondent's business suffered a downturn year on year between March 2007 and March 2008. In July 2008 the Marketing Director decided to take action and examined the list of 30 Irish car distributors and the business generated in the preceding two years. The claimant had been dealing with the 30 distributors but it was agreed with the claimant to divide the lead list into two for a period of four weeks. The claimant was given 14 of the distributors that did business on a regular basis. The other 16 distributors had not done business with the respondent in the previous 36

months. It was decided to approach these customers with “a new face.” Mr. L was given these 16 distributors. As a new approach at this time both the claimant and Mr. L sold both print and online advertising. The division of the lead list was extended for a further four weeks to allow enough time for them to meet with all of the clients. After this time it reverted to the claimant selling print advertising and Mr. L selling online advertising.

By mid September 2008 the Marketing Director knew that the focus was on the new car season and an advertising package was created for presentation to the distributors. The presentations were to be a joint effort by the claimant and Mr. L. The claimant was concerned that he would suffer a financial loss as a result of a joint pitch, if the confirmation of the sale was not received by him. The Marketing Director reassured the claimant that he would receive commission regardless of who received the confirmation of the sale. It was in or around this time that the Marketing Director requested the claimant to prioritise contacting distributors.

On the 7th October 2008, the Marketing Director attended a meeting with the claimant. The claimant wanted to discuss the plan for the new car season and there had been a number of emails between them in or around this time. The claimant raised the issue that he had lost 70% of his distributors and 100% of his lifestyle clients but it had already been agreed to split the list and the focus at that time was not on lifestyle clients. The claimant raised a number of other issues and the Marketing Director became frustrated, as the issues had already been resolved and she threw a magazine across the room. She later apologised to the claimant both verbally and in writing. She informed the claimant that if he wished to raise a grievance about the matter he should do so to the Financial Controller, as the Managing Director was her brother. The Marketing Director believed the situation to have defused. However, the claimant invoked the grievance procedure which was later resolved in December 2008.

The Marketing Director outlined to the Tribunal that as a result of a management buy out in 2007 the respondent had a large loan and in around the latter part of 2008 a number of options were discussed with the bank. On 9th December 2008 the respondent received a letter from the bank. As a result management reached the decision that a number of positions had to be made redundant. The Marketing Director met with the Managing Director and it was decided that eight positions had to be made redundant. They examined each area of the business to see where costs could be reduced and what areas of the business were performing best. A profit and loss account was prepared for each section of the business. As a result of the cost analysis a list of redundancies was prepared. It was apparent that customers had moved from print content to online advertising. On the 11th December 2008 the claimant was informed that his role was being made redundant. He did not have the requisite service to qualify for a redundancy payment but he was given commission for some business that had not converted into actual sales.

The Marketing Director stated that Mr. L did not replace the claimant. At that time the distributors were not spending money on print advertising and the online aspect of the respondent’s business continues to thrive. If a print advertising order is received, its put on an order form and given to the production team. The claimant was a senior sales person. A number of people have been employed since the claimant’s employment was terminated but they were employed in entry-level positions. The claimant’s redundancy was not connected to the claimant’s invoking of the grievance procedure. Many other positions have been redundant since the claimant’s employment was terminated in December 2008.

During cross-examination it was put to the Marketing Director that the respondent advertised for the position of Advertising Sales Executive in April 2009. The Marketing Director stated such a

position did not exist after making eight people redundant and she thought it might have been an old advertisement. The Marketing Director did not have at the hearing the profit and loss accounts that were used in selecting the areas and positions where the redundancies would take place. It was put to the Marketing Director that the claimant's distributor list was split for longer than eight weeks. This was refuted.

It was put to the Managing Director that the claimant was asked to train Mr. L. The Marketing Director stated that the claimant was asked to introduce Mr. L to clients but he was not asked to train Mr. L. Mr. L was hired for online sales and his experience was greater than that of the claimant, for this reason he was not selected for redundancy.

In reply to questions from the Tribunal, the Marketing Director stated that in choosing the claimant's position for redundancy, the ability to perform the online advertising role was examined and it was decided that the claimant did not have the same experience and knowledge as Mr. L to perform the role.

The Financial Controller (hereinafter FC) gave evidence that he commenced employment with the respondent in June 2008. Mr. L was employed as the Online Sales Manager some weeks later. He confirmed that a letter was received from the bank on the 9th December 2008. Since December 2008, forty employees have been made redundant. A wage cut was implemented in January 2009 and some staff work reduced hours, including the Financial Controller. During 2008 the company suffered a loss in revenue and advertising figures had reduced dramatically.

FC had been asked to handle the claimant's grievance and he met with the claimant in December 2008 regarding his grievance. It seemed to FC that the claimant's grievance related to the giving of his distributor leads to Mr. L. There had been a significant amount of emails between the claimant and the Marketing Director and FC told the claimant that he did not have time to go through these emails. FC asked the claimant if the grievance could be resolved informally.

FC organised a meeting between the claimant and the Marketing Director on the 3rd December 2008. FC took notes at the meeting but the claimant requested that there would be no notes of the meeting placed on his personnel file. The meeting was to "clear the air" in an informal manner. Bullying was discussed at the meeting in relation to one specific incident and the Marketing Director apologised to the claimant for her behaviour at the meeting in October and it was agreed that she would put the apology in writing to the claimant. No issue was raised at the meeting regarding the claimant's commission.

In reply to questions from the Tribunal, FC stated that 95% of Mr. L's work is online advertising.

Claimant's Case:

A former employee (Mr. B) gave evidence that he was the respondent's Online Commercial Manager from August 2007 to mid July 2008 and he was responsible for all online revenues. Mr. L was employed and their employments overlapped by some four weeks. However, there was little interaction between them until the last week of Mr. B's employment when he was instructed to hand over a number of elements of his work to Mr. L. Mr. L was given 40%-50% of Mr. B's workload. Mr. B also managed a sales team and this duty was given to another employee.

Mr. B worked with the claimant on a day-to-day basis and he supported the claimant by uploading online campaigns, which the claimant had sold as part of a package to a client. There was a new car section on the website and the claimant was responsible for all of the advertising for that section. The claimant sold a lot of online advertising, as Mr. B did not deal with distributors as part of his role. The claimant could have carried out the work that Mr. B had been instructed to give to Mr. L.

It was the claimant's evidence that he was employed in July 2007 and was responsible for print advertising for the NCG magazine as well as online advertising content for the magazine.

Prior to the employment of Mr. L, the claimant was responsible for new car distributors and lifestyle customers. He gave presentations to clients and he offered packages to them that included online advertising.

When Mr. B left the respondent's employment the claimant was asked to give 70% of his distributor clients to Mr. L. The claimant had been informed that Mr. L was replacing Mr. B but that was not what took place. The Marketing Director picked the 70% of clients for Mr. L without consultation taking place with the claimant. A comment was also made by a member of management that the claimant would have "a bit of competition with Mr. L." This was confusing to the claimant as he was told that Mr. L was replacing Mr. B.

The claimant agreed to 70% of the clients being given to Mr. L for a four-week period. He also agreed to merge his database with the Marketing Director's database but he later discovered that the Marketing Director gave this information to Mr. L. The claimant stated he was now in a situation where he had 30% of distributor clients, 0% of lifestyle clients and 100% of dealers, the result of which would mean a reduction in the claimant's commission. The claimant became concerned when the 70% of distributor clients was not returned to him after the agreed four weeks and he requested a meeting to clarify the situation.

The meeting was to take place on 7th October 2008 and the claimant prepared an agenda for this meeting, as there were some further issues that he wanted clarified. The claimant wanted his clients returned to him and he also requested a written statement of the changes to his position. His target levels had remained unchanged despite having fewer clients. At the meeting the Marketing Director asked the claimant to train Mr. L but she then retracted that statement and said she would train Mr. L herself. The claimant was concerned for his position and raised the issue of his commission. The Marketing Director told him that she would take care of him regardless of who brought in the revenue but she refused to put a bonus structure in writing. The meeting became heated and the Marketing Director shouted at the claimant and threw a magazine across the room. She stormed out of the meeting stating that she was wasting her time. The claimant subsequently requested to invoke the grievance procedure as he felt he was being bullied in his workplace.

The claimant stated that he had a good relationship with Mr. L, as it was not Mr. L's fault that he had been given 70% of the distributor clients. Even without these clients the claimant achieved advertising figures of €35,000 per month. When he had the full list of clients he had achieved €40,000 per month.

FC did not meet with the claimant until December 2008 when he enquired if the matter had been resolved. FC told the claimant that he did not think that there was an issue of bullying, as what had happened was once-off incident. The claimant disagreed with this.

The following day the claimant attended the meeting with FC and the Marketing Director. The claimant asked for a copy of the notes of the meeting but his request was refused. At the meeting the Marketing Director apologised to the claimant for what had occurred at the meeting in October 2008. The claimant subsequently received a letter from the Marketing Director but he refused to sign it until it was amended. The Marketing Director emailed the claimant several times in one day pressuring him to sign the letter, which he found strange. On 9th December 2008 an amended letter was subsequently given to the claimant stating that his grievance had been fully resolved. The Marketing Director informed the claimant that he was not required to sign the letter.

On 11th December 2008 the claimant attended at the office and was informed by FC and the Marketing Director that his position was being made redundant. He was informed that a number of other employees were also being made redundant. The other employees who were made redundant were ancillary staff working in the areas of IT; administration and marketing but not sales staff. The claimant was shocked, as he had no prior warning that his position may be selected for redundancy and he had secured €56,000 in advertising figures for the magazine's annual issue.

During cross-examination it was put to the claimant that the distributor list was re-emerged. The claimant agreed but stated the list was not re-merged until some two or three months later. Even after that time the lifestyle customers remained with Mr. L. The Marketing Director told the claimant that she would only review this situation if the claimant agreed to bring Mr. L to meet all the clients. It was put to the claimant that it was unreasonable of him not to take Mr. L to meet clients. The claimant stated that he felt that his position was under threat as the 70% of the distributor list was given to Mr. L, despite the fact that Mr. L was also responsible for corporate clients.

Determination:

The Tribunal has carefully considered the evidence adduced in the course of this two-day hearing. The claimant was notified of his redundancy on the 11th December 2008 having worked for the respondent company for some eighteen months.

The claimant makes the case that his selection for redundancy was unfair and unreasonable. In essence it seems that the claimant believes that his selection for redundancy was not based on any economic downturn (as evidenced by his healthy sales in the last month of his employment) but was in fact a convenient and expedient method of sidelining the claimant in circumstances where the claimant had been engaged in a grievance procedure against his line manager in the two month period immediately preceding this redundancy.

It is worth noting that the claimant was notified of the fact of this impending redundancy on the 11th December 2008, some two days after a final letter from the said line manager issued to the claimant, purporting to apologise for certain inappropriate behaviour from which the grievance process had stemmed.

In looking at the interaction between employer and employee in the last four or five months of the employment, the Tribunal notes that the claimant had every reason to be dissatisfied with how he was being treated. The rationale for taking the claimant's client base from him and then allowing a new employee have that client base was never satisfactorily explained, where from the claimant's perspective, the move only resulted in a loss of commission to the claimant.

The Tribunal cannot accept that the inordinate delays between the bringing of the grievance process and the hearing of the grievance process to be acceptable. The Financial Controller's handling of the process demonstrated a lack of expertise and a lack of understanding at how concerned the claimant was about his financial situation.

Under the relevant Unfair Dismissals legislation, the onus rests with the respondent company to demonstrate that the selection for redundancy was fair in all the circumstances. Ordinarily, an employer would be able to demonstrate some process through which the employees had been selected for redundancy. Such a process would show a clear, fair and transparent rationale for making the choices it did. No such process was introduced by the respondent company in the course of the evidence. It seems that seven or eight persons were made redundant in and around December 2008 and the Tribunal does not need to consider the reasons behind any of these redundancies, save that of the claimant's redundancy.

In particular, the claimant made the case that his sales records were not faltering (relative to the market backdrop) and that his experience, skills and attributes were comparable to, if not greater than those of Mr. L, an employee who had only arrived in the company in the last six months and to whom the company had directed the claimant that he should give experience, guidance and training to Mr. L.

In all the circumstances the Tribunal cannot accept that there was a fair selection for redundancy in the claimant's case. The nexus between the invoking of the grievance procedure and the decision to terminate the employment cannot be overlooked. The Tribunal would further be critical of the fact that there was no consultation process to alert employees to the fact of impending redundancies.

Lastly, the Tribunal finds fault with the employer for not conducting an open examination of the claimant's skill base, which tends to suggest to the Tribunal that inappropriate and extraneous criteria relating to the recent grievance process were applied.

The claim under the Unfair Dismissals Acts, 1977 to 2007, succeeds and the Tribunal awards the claimant the sum of €45,000.00. In awarding this figure the Tribunal accepts that a fair redundancy situation would in all likelihood have occurred between December 2008 and the date of making this determination.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)