

## EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

EMPLOYEE –**claimant**

against

CASE NO.

UD1500/2009

RP1691/2009

MN487/2009

EMPLOYER –**respondent**

Under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007**  
**REDUNDANCY PAYMENTS ACTS, 1967 TO 2007**  
**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. N. Russell

Members: Mr. J. Hennessy  
Mr. T. Kelly

heard these claims at Clonmel on 31 August 2010

**Representation:**

Claimant: Ms. Ann Gallagher, Solicitor, The Lodge,  
Roche's Road, Wexford

Respondent: Mr. Kieran Kelly, Fanning & Kelly Solicitors,  
2 Hatch Lane, Hatch Street, Dublin 2

The determination of the Tribunal was as follows:

The claimant and his business partner (BP) founded the respondent company in 1998 in Thurles. The respondent performs powder-coating operations with steel fencing being its main line of work. The major customer of the respondent was a group of two companies involved in, respectively, the manufacture and installation of steel fencing (the group). In 2001 the directors of the group purchased the shares in the respondent. As part of this share purchase agreement the claimant received a contract of employment that guaranteed a minimum five years of employment as Sales and Marketing Manager from 1 October 2001.

On 30 January 2002 the Managing Director (MD) wrote to the claimant to state that, as a commercial decision had been taken to service only existing customers plus the group, there would

be no need for the claimant's position and he was declared redundant. Following the intervention of the claimant's solicitor in order to assert the claimant's contractual right to five years employment the respondent withdrew this decision. There were further discussions about the claimant's future but he was retained in his position as Sales and Marketing Manager.

In 2006 the respondent relocated to new premises in Cashel and from this time there were seven other employees in the respondent apart from the claimant and BP. Some time in early 2008 the group suffered a downturn in business when a major contract was not renewed. This resulted in the employees of the respondent, apart from the claimant and BP, being placed on a three-day week for a period in 2008. On 20 June 2008 the claimant sent MD an email subject "Redundancy/Early Retirement" in which the claimant, who at that stage was just over 2 years from his 65<sup>th</sup> birthday, set out what was described as a "full retirement figure net of tax". Over time the respondent made significant reductions in the price it charged the group for powder coating. There were eighteen redundancies in the group during the period January 2008 to March 2009.

At the end of December 2008 the claimant suffered a shoulder injury. Among other things he was unable to drive because of this injury and on the first working day of 2009 arranged for BP to bring him to work so that he could make arrangements for the respondent to operate in his absence for the next few weeks. The claimant returned to work on 26 January 2009. The following day he met MD and was told of his dismissal by reason of redundancy. This was confirmed in a letter the same day that stated his employment was to end on 10 February 2009.

The respondent's position was that the selection of the claimant as the candidate for redundancy was based on senior management meetings including their accountants. The decision was based on what areas in the group could no growth be seen and the calibre of the people. MD wanted to retain people who could multi-task and, as it had been decided that one of the two administrative people in the respondent had to go, the claimant was chosen for redundancy.

The claimant's position was that at the time of the share purchase he had been promised a job until he retired as long as the respondent was still powder coating. The claimant's position is further that, as a founder of the business, he was capable of performing any job in the respondent.

### **Determination:**

No evidence was adduced to reinforce the respondent's assertions in regard to the profitability, or otherwise of the respondent. MD told the Tribunal that the selection of the claimant was based on meetings of senior management based on what areas in the group could no growth be seen and the calibre of the people. There was no objectivity in the process that was opened to the Tribunal. The Tribunal is not satisfied that the selection of the claimant as the candidate for redundancy was impersonal. For all these reasons the Tribunal finds that the selection of the claimant for redundancy was unfair. The Tribunal awards €30,000-00 under the Unfair Dismissals Acts, 1977 to 2007.

Claims under the Unfair Dismissals Acts and the Redundancy Payments Acts being mutually exclusive the claim under the Redundancy Payments Acts, 1967 to 2007 must fail.

The uncontroverted evidence of the respondent being to the effect that the claimant received in excess of his statutory entitlement under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 the claim under those Acts must also fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)