

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

EMPLOYEE

UD1391/2009

claimant

against

EMPLOYER

respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Mac Carthy S C

Members: Mr F. Moloney
Mr M. O'Reilly

heard this claim at Dublin on 30th July 2010 and 27th September 2010

Representation:

Claimant(s): Mr. Conor Hannaway, SHRC Limited, Heather House, Heather Road, Sandyford Business Park, Dublin 18

Respondent(s): Ms. Cliona Kimber BL instructed by Ms Anne Leech, Anita Kent, Solicitors, Croase, Cleariestown, Co Wexford

The determination of the Tribunal was as follows:-

Claimant's Case

The claimant told the Tribunal that she joined the respondent in 1995 as a fitness instructor. In 1997 she was promoted to assistant gym manager and in 1999 she worked in a new branch as a gym manager. She managed, hired and trained staff, undertook the rosters, schedules, maintenance and hygiene of the gym. She was responsible for staff appraisals and KPI statistics. She also monitored wage levels. In 1998 she was sent to a Fitness Convention in the UK and in 2006 she was selected to go to a Convention in the USA. She received salary increases up until 2007 and reached the top of her pay scale. In 2008 she reported to HR that the area manager had made inappropriate remarks to her. She went to the HR manager and the general manager at the time as she felt that a problem was developing. She was informed that she could go the bullying and harassment route or go to mediation and she chose mediation.

She relayed an investigation that was conducted on a trainer who was her boyfriend at the time. She felt that he was going to lose his job and she spent a considerable amount of time going through CCTV footage. The area manager told her that her office was being taken from her. In May 2008 she received three telephone calls on her work phone, which were very personal and malicious, and all the calls predicted that staff were going to lose their jobs. She felt that a member of management whose voice was disguised made the telephone calls. Four employees lost their jobs within the next seven months. She reported the malicious telephone calls to the gardai.

The MD asked to meet with her offsite to discuss the telephone calls. At this meeting they also discussed the investigation undertaken in relation to the personal trainer and the comments that the area manager had made to her about her private life. Two days later the MD told her that she could not have a situation where her managers were not getting on. She had raised some issues at the meeting, which she thought would not be relayed to the area manager. The minutes of the meeting were shown to the Tribunal

The area manager refused to go to mediation but a week later he agreed to go to mediation. At the mediation the area manager stood up and he usually sat down at meetings. She was given the opportunity to go through issues and she felt her issues were not answered. She told the area manager that she did not appreciate his behaviour and he responded that if he had to change his sense of humour he would do so. Then PB, the financial controller came to her office and he told her that the telephone calls she received were appalling. She expressed her concern that it might be the area manager who had made the calls.

CK general manager told her the Tuesday after the New Year in 2009 that she wanted to meet her and a colleague MH. They were informed that they were being made redundant and that HR had informed CK that it was not open for discussion. They were told they could leave right away or work their six weeks notice period. They were informed that they could apply for the role of operations manager in location S or the role of general manager in location L.

The job of operations manager was similar to that of department head. After thirteen years with the respondent she felt that she was singled out as she had made a complaint to the HR manager. She felt that she did not fit in anymore. She received statutory redundancy and she worked one week's notice and was paid her notice pay for five weeks. Six employees were made redundant, four in the location where she worked and two in different locations. Staff were still doing her job. She felt that she was unfairly selected and she could have undertaken the job of operations manager. All of the fitness instructors were self-employed.

In cross-examination she was questioned in relation to a series of e-mails between her and the area manager and she agreed that the area manager had praised her for her proposals. She stated that she complained about the area manager's behaviour and she believed he was one of the people who made the decision regarding redundancy. She believed that the area manager had an involvement in her redundancy as he held a senior position with the respondent.

Regarding her mitigation of loss she stated that in September 2009 she started classes in boot camp and body sculpture. She is starting a new job in October 2010. Her husband works in a fitness business which she helped to establish but she did not receive any money from this business. She received her redundancy cheque and cashed it. CK had a discussion with her regarding two other positions in the respondent but she did not apply for any of these jobs.

In answer to questions from the Tribunal she agreed that she accepted her redundancy and received payment. A general manager was never given an operations manager role. An operations manager and gym manager were on the same level. When asked what the difference between an operations manager and a gym manager she responded that they all answered to the same manager and managed staff. She could have done all of the duties that the remaining staff undertook and one of those who was retained with the respondent was employed for only three months. She had no involvement in a trade union and she was not aware of the custom and practice in the respondent regarding redundancy. When she was asked in relation to Section 6. Subsection (2) she responded in the negative.

Determination

The claimant's case is that she was unfairly selected for redundancy. In the course of the hearing she accepted that her position was made redundant and that she received the statutory redundancy payment.

Subsection 6 (3) provides:

“Without prejudice to the generality of subsection (1) of this section, if an employee was dismissed due to redundancy but the circumstances constituting the redundancy applied equally to one or more other employees in similar employment with the same employer who have not been dismissed, and either

- (a) the selection of that employee for dismissal resulted wholly or mainly from one or more of the matters specified in subsection (2) of this section or another matter that would not be a ground justifying dismissal, or
- (b) He was selected for dismissal in contravention of a procedure (being a procedure that has been agreed upon by or on behalf of the employer and by the employee or a trade union, or an excepted body under the Trade Union Acts, 1941 and 1971, representing him or has been established by the custom and practice of the employment concerned) relating to redundancy and there were no special reasons justifying a departure from that procedure,

then the dismissal shall be deemed for the purposes of this Act, to be an unfair dismissal”.

Paragraph (b) does not arise in that there was no trade union agreement nor was there any custom and practice relating to redundancy.

With regard to paragraph (a) the Tribunal went through the list of matters specified in subsection 2 as amended but the claimant agreed that none of these matters caused her selection.

Section 6(3) therefore does not apply in this case and the claim fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

