

## EMPLOYMENT APPEALS TRIBUNAL

APPEALS OF:

CASE NO:

EMPLOYEE           - *claimant*

UD2002/2009

against

EMPLOYER       - *respondent*

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal  
(Division of Tribunal)

Chairman:   Mr.P. Hurley  
Members:   Mr. T.L. Gill  
              Mr. F. Dorgan

heard this claim in Ennis on 23 June 2010  
                                  and 26 October 2010

### **Representation:**

Appellant: Sharon Curley, Carmody & Company,  
Solicitors, Peach House, Shannon, Co. Clare

Respondent: Jim Healy, IBEC, Gardner House,  
Bank Place, Charlotte Quay, Limerick

### **Background:**

This case before the Tribunal is an unfair dismissal claim by virtue of selection for redundancy.

### **Respondent's Case:**

*23 June 2010*

The Tribunal heard evidence from the CEO of the respondent. He is also the chairman and co-founder of the respondent. The company was founded 20 years ago. The company is an air chartering brokerage company, whose customers include the entertainment industry and royalty. The company has 21 employees now and in 2008 they had 23 employees; the lowest amount they had was 16 in 2009.

The respondent has an office in California, USA, and is incorporated there. They have an office in Shannon Ireland. The company is a limited company registered in Ireland and is based in California.

The witness explained that he knew the claimant through his personal assistant since 2002. The claimant minded his children previously. She then joined the company in 2006. The claimant was an operations controller. Operations controllers take phone calls from customers and knowledge of geography is important.

The claimant was absent sometimes because of illness and he was aware of this. The claimant was an important part of the operation of the company. If she was absent it caused scheduling issues for another two staff members and it meant that they would have to work overtime etc. Therefore they/he was anxious to establish a time line within which the claimant would return to work: but however there was no pressure put on the claimant. The claimant was absent and at the time had less than one years service but they kept her on as it took six months to train someone for the position. In 2007 she got a formal warning about her absences and she accepted the warning.

The witness explained that in 2008 two potential or existing customers based in the Middle East stopped or didn't materialise. They had three extra staff for that work that did not materialise. In December 2008 cash flow was an issue. An E-mail was issued to all staff on 02<sup>nd</sup> December 2008 to say that all unnecessary expenses were being cut. E-mail was issued to all staff on 01<sup>st</sup> February 2009. This e-mail contained a recorded digital presentation by the witness and a DVD replay of this was opened to the Tribunal. The presentation referred to a five-stage protection budget. The main message contained in the video for all staff was that expenses had to be tightened and curtailed.

After this, the staff in the Ireland office were placed on a three-day working week. In February 2009 the company had huge cash flow problems and needed to make more cuts. They came to stage three of their budget plan. Both he and the financial officer (herein known as PH) worried about financial matters on a daily basis. They skipped stage two of their budget plan and went to stage three. This was to implement a new temporary booking commission rate. All three of the company owners made an additional capital investment.

On or about 20<sup>th</sup> February 2009 the company decided to make some staff positions in Ireland redundant. They had made redundancies in the USA. The method of redundancy selection was to use a performance based matrix and they used a scoring/point system.

The witness explained in detail the system used in this process and the information/documents were opened to the Tribunal. Two employees out of four employees were to be considered for redundancy. The scores that were set for four employees were for attendance, production, years of service, disciplinary and overtime. The claimant had the lowest score for production and this gave her the lowest overall score (all the other employee scores for the other headings were equal).

Production heading was further broken down into sub headings, system knowledge, geography, prior qualifications, attention to detail, bookings and requests built.

The matrix was used and it was based on an overall score for the employee and not merely for the bookings made. The deciding factor in selection for redundancy was not merely one element: a mix of elements was taken into account which comprised

amongst other things: knowledge of geography, computer system (ability) and attention to detail. The witness explained that they were “cutting the staff from four to two so it was very important to choose carefully”

The witness explained, in great detail, the operation of their booking system. He outlined the concepts of “building a request” and “requests-built-in”.

The witness further explained the reasons for selecting one employee, and the function of the scoring system. He also further explained the “Production” sub headings part of the matrix, e.g., prior qualifications, and service. He told the Tribunal, “It was my job to put the matrix together and to see who is to stay or go, my(training) manager and another provided me with the information”. His task for the Irish base was to let- go two employees out of a total of four.

The witness explained to the Tribunal the reasons he kept one employee on and let another go. That left the claimant and another employee. There was a huge difference in the production scores between the claimant and the other employee. He “unfortunately had to let (the claimant) go”. The claimant’s leave history was not a factor in the decision: her illness leave was not taken into account. The main illness leave had occurred some years previous; “2007 was not considered at all for the purpose of the matrix”. He also explained a document, which was opened to the Tribunal. The document explained the claimant’s strengths and weaknesses and it had been copied to the claimant.

He informed the claimant personally by telecommunication about her position being redundant. He was in the USA and apologised he could not speak to her in person because he was in USA. He did not ask anyone in the office to tell her and he wished to inform her himself. He told her that it was a very, very tough decision that he had to make and it was one he did not want to make. The whole company was in jeopardy and it still is.

In the summer of 2009 (after she was made redundant) he offered her some work shifts but she declined. They did not hire any additional employees in 2009.

*Adjourned on 23 June 2010*

*Resumed on 26 October 2010*

The CEO’s Personal Assistant gave evidence on the **second** day of the hearing. The respondent had employed her for 10 years. She had known the claimant very well prior to her employment with the respondent and had actually informed her of the position available. They had a good relationship.

The claimant commenced employment with the respondent in April 2006 as an Operations Controller.

The claimant had a period of sick leave in November 2006 following an operation. On the day before her return to work she was involved in a serious traffic accident on the way to her doctor. The injuries sustained extended her certified absence until January 2007. The witness said house had called to the claimant’s house with flowers

from the staff of the respondent and had never pressured her to state when she would return to work. The claimant was concerned she had been absent for some time but the witness told her that she would speak to the CEO.

In 2007 the claimant had a further period of sick leave and was issued with a written warning regarding same. The witness referred to the letter attached to her T1A form. This made reference to the "Atmosphere" the claimant claimed to have experienced in relation to her co-workers concerning any other sick leave. This was read out to the witness. She replied that she was unaware that the claimant had concerns in that respect. The witness said that she had an open door policy and the claimant could have spoken to her at any time of her concerns. In 2008 the claimant's attendance improved.

In January 2009 staff were put on a 3-day week and there was a decrease in wages of up to 20%. The witness said she was devastated at the thought and had been consoled by the claimant on the matter.

On February 23<sup>rd</sup> 2009 she received a call from the CEO informing her some staff were to be made redundant. She told him she did not want to know the details of who it was as these were her colleagues and she did not want to know before they did. She was informed that as the CEO was in the United States she would have to process the paperwork.

The following day she attended work. She spoke to the claimant and informed her she had no paperwork compiled to sign off on her redundancy. She also told her that if she did not want to return to work she would call to her house with all the paperwork, as she did not want to cause her any stress. She later called to the claimant's home and went through all the paperwork concerning the redundancy and any monies owed. No papers were signed by the claimant that evening; she left a copy with the claimant and took the originals away. The claimant was very upset.

On March 10<sup>th</sup> 2009 the claimant came to the office and signed the papers. The witness sent the payment through to the claimant's bank account and the claimant signed off on it. When asked, she stated that if the claimant had needed more time to consider the matter the respondent company would have given it to her. The witness stated that she felt the claimant had been treated very fairly by the respondent and felt it had been a genuine redundancy.

The claimant's position had not been replaced until March 2010. She agreed there had been an advertisement on their website for a position of Operations Controller but that it had been for more of a PR exercise. The details of the contact person were out of date.

On cross-examination she said that the claimant had asked her why she had been chosen but had explained that she had told the CEO that she did not want to know the details. She agreed that the redundancies were a "bolt out of the blue" and were the last option for the respondent to take. She had changed to a 3-day working week from June 2009 to January 2010.

When asked why the RP50 form was dated February 24<sup>th</sup> 2009 she replied that the

claimant had not signed the form that day. She stated that her colleague had contacted the claimant at a later date to offer her 3 days work. The claimant later declined the offer to the witness.

When asked by the Tribunal she said that the CEO had not discussed the employment evaluation matrix with her.

The now Senior Accounts Manager gave evidence. At the time in question he had been the claimant's supervisor for a period of 2-2 ½ years. They had a very good working relationship and the claimant was very capable to carry out the job. However, she did ask for refresher courses on some aspects of the job.

At a meeting it was decided that the shift rosters would have to be altered meaning the staff did 4 earlys with 1 late shift. He emailed the claimant the details but she was not happy. There was a bit of a row about it but he said if she had a problem they could have spoken about it. When put to him, he said that he had not carried out an evaluation on the claimant in 2007 or 2008; this was done by a member of HR from the United States. The claimant had signed off on it and she was aware of her weaknesses. An email was opened to the Tribunal showing where the claimant had made some typing errors: the witness was surprised that these errors were by the claimant made after 2 years employment. The claimant's record of sick leave did not tell against her when it was decided she would be made redundant.

On cross-examination the witness stated he said he had offered a refresher course to the claimant. When asked, he stated he had not carried out the appraisals in 2007 and 2008 with the claimant. When the witness was asked if the misspelt email dated March 11<sup>th</sup> 2008 was the only misspelt message sent by the claimant in her employment up to that point, he replied that if was just one example, there had been more. When asked, he stated he could not remember the content of any texts he sent to the claimant when she was on leave. When asked about the web advertisement for the claimant's position he stated it was an old advertisement.

The Operations Manager gave evidence. She had been the claimant's supervisor for some of her employment. She explained the training she had given the claimant in the first 3 months of her employment. She would not have been left on her own to run the office and even after the 3 month period and she was alone and had a difficulty, she or the Senior Accounts Manager were only a phone call away.

She stated the claimant was a very friendly person but her attention to detail was deficient. On occasions she would not look at the "knowledge base", a lotus notes document with all the information required to carry out the job. When the claimant was out on a period of sick leave, another staff member was also out on sick leave after a fall. The witness informed the United States office that they were short staffed but were doing the best they could.

The witness stated that the first time she was made aware the claimant had problems in work was when her solicitor sent a letter to the respondent. She was not involved in the compilation of the employee evaluation matrix.

On cross-examination she stated another staff member had difficulties with the job but

she had been in the position for a shorter time than the claimant. She stated that claimant had made plenty of errors while working for the respondent but had never lost them a booking. She explained that the bonus scheme was divided equally as a team as it encouraged teamwork.

### **Claimant's Case:**

The claimant gave evidence. She explained that she had been friendly with the CEO's Personal Assistant who had told her of the position with the respondent. She applied for the position but was unsuccessful and was placed third on the panel. The CEO had informed her at the interview that a good knowledge of geography was very important in the job. She informed him that her knowledge was not very good. Some time later, she was contacted and offered the position, as the first 2 candidates did not take up the offer.

She explained her role within the company and explained the work she was engaged in was a team effort. When you received a call from a potential client, the wheels would be set in motion to evaluate the job and cost it. During this time the United States office would take any further calls to the office. She explained that as it was a team effort it meant that if you did not press the "book" button it did not mean that you had not put the groundwork into it.

Quarterly staff meetings were held but she was not always rostered to attend. On one occasion it to changes the rosters had been discussed so that staff would work 4 early shifts and 1 late shift. She received a call the following day from the Senior Accounts Manager telling her that her shift was changed. She was very annoyed, as she had not been consulted on the matter. She stated when asked that sometimes she did not feel part of the team.

The claimant explained her 6-week illness in 2006 including her car accident. A second bout of illness related to the incident in 2006 recurred in 2008. She had an appointment for a surgical procedure and informed her supervisor (the now Senior Accounts Manager) but was told to postpone it for 2 weeks. When attending her doctor she received a text from him asking how long she would require off work and would have to take annual leave. She asked her doctor for a letter concerning her condition; she also got one from her gynaecologist.

When asked, she stated she had never seen a copy of her appraisals before the first day of the Hearing. No signed copies were submitted in evidence to the Tribunal. She stated that she had requested refresher courses as she felt everyone needed to "brush up" their knowledge from time to time. She had suggested it in her last job and the suggestion and been implemented. She explained that the misspelt email put before the Tribunal could have been typed in haste and would have been thoroughly checked before submission to any potential clients.

In January 2009 there had been no mention of 3-day weeks or redundancies. The staff were lead to believe that the company was doing very well. The CEO emailed the staff with a video attachment stating staff were being put on a 3-day week. She viewed it early in the morning. She was very shocked and had to wait 2 hours before she could speak to anyone to see what was going on. On the Thursday before she

was made redundant she had a one to two meeting with the CEO and another member of management. There was still no mention of redundancy at that meeting. She was asked how she was getting on in the job and how her supervisor was working out.

When put to her she stated the first time she had viewed the second video concerning redundancy was at the first day of the Hearing. On February 23<sup>rd</sup> she received a call from the CEO stating they wanted to build the company but that she was to be made redundant. Another colleague with less service was also to be made redundant. She asked how she was chosen to be made redundant. He replied that “names were taken out of the hat, it was like drawing straws”. She was shocked and contacted her family to inform them.

She rang the CEO again and asked was she to return to work the following day and was told no, the redundancy was immediate but to go in to sign off the papers with his Personal Assistant. She attended work the following day but the Personal Assistant did not have the paperwork ready. The Personal Assistant asked could she come to her house later with paperwork agreed. That evening she arrived and the claimant signed some papers but she was not sure what they were. Two months later she saw her position advertised on the Internet and she felt humiliated and very upset about the matter.

She stated she had never seen a copy of the employee evaluation matrix before the first day of the hearing. She could not understand why she had been chosen for redundancy, when she had been the longest serving member of operations staff in the office. She felt she had been a very flexible worker and had even worked on the respondent’s facebook page within work and personal time.

In June 2009 she was offered 3 days work with the respondent but declined as she was out of the area at the time and had only been given 12 hours notice. She explained that her redundancy had had a huge impact on her personal life. She gave evidence of loss.

On cross-examination she stated had had both certified and uncertified leave in the past. She had been disciplined in the past with a written warning concerning her sickleave. She agreed that the email sent to the Senior Operations Manager with an expletive remark should not have been sent but she had been very angry at the time and apologised. When it was put to her that the phrase “lackadaisy” was used in an email of July 15<sup>th</sup> 2008, she replied that sometimes it was “good to be pulled up”.

When asked the words the CEO had used in his call regarding her redundancy on February 23<sup>rd</sup> 2009, she replied that she could not exactly recall. She was paid her notice.

**Determination:**

The claimant asserts that she suffered an unfair dismissal by virtue of her selection for redundancy. The Unfair Dismissals Acts impose a burden on the respondent to show that dismissal was not unfair.

The Tribunal has carefully considered all the sworn evidence adduced and submissions made over the two-day hearing in this case. The Tribunal finds that the respondent failed to observe proper or fair procedures in the selection process for redundancy in this case.

While the claimant had been issued with warnings concerning her absences due to illness, which the respondent claims had not influenced the decision to make her position redundant, it is clear that the claimant had not been informed or notified of the application of the mechanisms in the matrix, and their potential significance for her, which were used to justify the Applicant's dismissal by way of redundancy. The tribunal is influenced by the claimant's evidence that she had never seen a copy of the employee evaluation matrix before the first day of the hearing.

The Tribunal also finds, however, that the Claimant did not always appreciate the significance of the position she occupied. The tribunal finds the claimant contributed to some extent to the dilemma forced on the respondent in having to make a selection. In this respect, the Tribunal instances the claimant's attitude in respect of the language used in her email to her supervisor and her occasional lack of respect and non observance of the respondent's chain of command. The claimant, in her own words, had stated she occupied an important position. The Tribunal finds that the claimed unfairness of the decision to select her for redundancy is thus attenuated. For these reasons the Tribunal find that the claim succeeds and awards the claimant the sum of € 9,500 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

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