EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF: CASE NO.
EMPLOYEE -*Appellant* UD1601/2009

against the recommendation of the Rights Commissioner in the case of:

EMPLOYER –*Respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr T. Taaffe

Members: Mr C. Lucey
Mr F. Keoghan

heard this appeal at Dublin on 3rd September, 20th December 2010 and 10th February 2011

Representation:

Appellant : Mr. Pat Ward, AGEMO, 22 North Frederick Street, Dublin 1

Respondent : Michael Sheil & Partners, Solicitors, Temple Court, Temple Road, Blackrock, Co Dublin

This case came before the Tribunal by way of an appeal by a former employee of the respondent against a decision by a Rights' Commissioner reference number r-070606-ud-08/JT

The determination of the Tribunal was as follows:

Appellant's Case

Giving sworn testimony, the appellant said that he commenced employment as a technician on 1 October 2004. He did all manner of work on vehicles of a certain make (hereafter referred to as ZB). He progressed to being a ZB technician. He did courses. He was there four years.

On 9 July 2008 the appellant heard verbally about redundancy. That morning every member of staff was told that there would be redundancies. PP (a former director of the respondent) did it in the workshop. A colleague told the appellant that the general manager wanted to speak to him. The appellant was told that there would be no position for him in a few months. It took just about three months. He was not told any more e.g. why he was selected for redundancy. Neither was he told at

the time why some employees were kept on. At a subsequent Rights Commissioner hearing he was told of the relevance of someone else's mother.

On the question of whether or not he had previously sought representation, the appellant told the Tribunal that he had asked the general manager about getting the union involved but that he was told that he did not need help. There was no meeting from 9 July 2008 to his redundancy. It had been decided that there would be no post for him. There was no mention of a right to appeal the decision.

The appellant was told of others who still worked for the respondent (or were re-employed by the respondent). This was not offered to him. These others did not have longer service than the appellant. The appellant made gallant efforts but was unemployed for nine months. He now had a job with less favourable terms.

There were two systems: people with over ten years' service got redundancy of four weeks' pay per year of service; and people with less than ten years' service got three weeks' pay per year of service. The appellant was told by KB (the respondent's financial controller) that if he did not sign by 24 July 2008 the offer would be withdrawn.

At this point in the Tribunal hearing the respondent's representative stated that there had been a conditional offer and that the Tribunal would hear evidence that the banks had wanted certainty by end of July 2008.

The appellant signed at end July 2008. His representative submitted to the Tribunal that employees were caught if non-signing cost them money. The appellant felt aggrieved that other employees got more by the respondent's system.

The appellant's representative confirmed to the Tribunal that four (instead of three) weeks' pay per year of service would have ended the matter (and that there was three thousand euro in the difference) and stated that, advising PP of this, the union had taken issue with the respondent's selection criteria but that the respondent had said that it was not up for negotiation.

Under cross-examination, the appellant said that he had not been told that the respondent had lost the ZB franchise and that he had heard that the respondent had declined the franchise. He confirmed that he had participated in the provision of after-sales service saying that there had been some thirteen men involved in that but that eight or nine had been made redundant. When it was put to the appellant that all but one had been made redundant he replied that two men had gone back i.e. one on the Monday after ending on a Friday and the other after a month or so.

It was put to the appellant that one had stayed on and one had come back and that the respondent would say that employees with more than ten years' service would have less chance of a new job. The appellant replied that he had been there four years, that he had been a good member of staff and that he had hoped to get the same deal.

Questioned by the Tribunal, the appellant said that nothing had been told to him but that his job was gone. He had contacted the union and sought advice but the union had had a hard time getting information. He had not known where he stood. He left it to the union.

In re-examination by his own representative at the Tribunal hearing the appellant said that people had been brought from another premises. Under renewed cross-examination he claimed that staff

from another site (DC) had been kept on and had come to do his job. When it was put to him that the said people were doing a pre-sales servicing job he replied that they were doing general servicing.

Respondent's Case

Giving sworn testimony, the respondent's managing director at the time of the appellant's 2008 termination (hereafter referred to as CD), on being asked if redundancies had been necessary, said that the respondent had had a contract with ZB but that it was due to end in October 2008. New criteria had been put in. ZB asked the respondent to move to bigger premises and to invest thirty million euro. The respondent decided not to renew the contract although the respondent would then have less work and staffing levels would have to come down. The respondent was going to sell a lesser number of cars (after having been with ZB) for so many years. The respondent was on a steep decline but wanted to sell quality used cars. However, some twenty people were made redundant. Eight of the thirteen people of the appellant's type were let go.

One employee (DG) was in the last stages of apprenticeship or nearly qualified. His mother had worked for the respondent for thirty years. She had been made redundant. DG's father was made redundant from another company. There was no further role for DG in the respondent but it allowed him to stay for sentimental reasons relating to the circumstances of the members of his family. He went to pre-sales and ended up leaving subsequently.

Asked about a foreign national (EIM), CD said that EIM had been there less than two years but "got a discretionary payment".

CD wanted to look after people who were being made redundant. People with longer service had that service recognised in that they got an extra week's pay per year of service. CD told the Tribunal "people with less service would be more employable".

CD stated that he had been at the 9 July 2008 meeting. The appellant was told of the situation about the ZB contract and that there would be redundancies although no redundancy details were given then.

The respondent wanted to get funding for redundancies and restructuring. It had to make a bank application. €750,000.00 was needed for redundancies. All bar the appellant and one other employee (RR) agreed to redundancies. The respondent wanted to talk to all. The appellant did sign by the date required. CD tried to get in touch with BM (from the appellant's union) but BM was on leave.

CD told the Tribunal that he did not know of the appellant being treated differently and said that if the appellant were treated differently all others between two and ten years' service should be treated the same.

Under cross-examination, CD stated that apprentices and DC site people were kept on. He stated that AW was a qualified mechanic who worked in another area of the respondent's business. When it was put to CD that AW had worked alongside the appellant CD replied that AW had done work in vehicle preparation.

Asked why RR had been offered re-employment, CD replied that RR was a fully qualified ZB

technician and was most productive. When it was put to CD that the appellant had had two years more of service than RR CD did not dispute this but said that he would have to check their details.

The appellant's representative submitted to the Tribunal that there had not been the consultation, which was required for a collective redundancy. CD stated that he had had little interaction with the appellant but that he had gone through paperwork with everybody. When it was put to him that the use of service and age as redundancy selection criteria caused the respondent to diverge from equality requirements he rejected this saying that the decisive criterion had been length of service.

Asked if he should not have discussed his reasons with his workforce, CD replied that the respondent had held a group meeting and that the appellant had met PS (the respondent's general manager) on his own and that the appellant had been picked because he had been working in the retail side of the after-sales department. Asked why the appellant had not been told this in writing, CD said that he did not have an answer. Asked why the appellant had not been offered re-employment, CD replied that the respondent had intended not to do more retail service work and that the respondent did not now have the franchise for ZB issues.

When it was put to CD that there would have been work for the appellant given his competencies CD replied: "If we expand." When it was put to him that the appellant had been on the dole for nine months he replied: "We did not take staff on." When it was put to him that the respondent had taken on a man on the Monday after that man had been made redundant on the preceding Friday CD replied that he thought that the employment of the said man had not ceased at all.

It was put to CD that the respondent had delayed eleven days in its contact with BM of the trade union. CD replied that he could not recall and that it had not been malicious.

Asked why the appellant had not been offered an appeal against his redundancy, CD replied that redundancy had been necessary for the respondent, that a package had been offered to the appellant and that the respondent had been under severe financial pressure, which caused time pressure. CD added that the staff handbook allowed for an appeals process.

The appellant's representative now stated to the Tribunal that he had represented people appealing but that there had been no negotiations.

CD confirmed that the appellant had not been considered for re-employment and stated that a decision had been made. The respondent was trying to service and work on all makes of cars now that it was no longer a ZB dealership.

Questioned by the Tribunal, CD said that he had tried to contact BM of the trade union to arrange a meeting.

Giving evidence the Chairman of the company stated that it became necessary to implement redundancies in the company. This came as a result of the company losing a franchise license. Consequently, the service personnel were made redundant with the exception of one staff member who was retained for his product knowledge. Subsequently, this employee departed the respondent's employment, as he was uncomfortable being retained over those employees with greater service. In total 38 of the company's 67 staff were made redundant. The witness engaged in a consultation process with staff and kept them updated. The appellant was formally notified of his impending redundancy by letter dated 18 July 2008.

In considering a redundancy package the company decided to give those employees with over ten years service two weeks extra per year in addition to the statutory to the statutory amount. A union representative contacted the Financial Controller on a number of occasions regarding the split in the redundancy package based on length of service. The witness was charged with this matter in the Financial Controller's absence due to annual leave. When he spoke with the union representative he outlined that the packages were based on length of service. There were two members (the appellant included) for which the union wanted to secure the enhanced redundancy package. The Chairman explained that the company attempted to be fair in every way and could not make an exception for two employees. The union representative and the witness agreed to meet on 30 July 2008.

The witness arrived at the Dublin premises on 30 July 2008. The appellant and the other member of staff met with the witness and provided him with signed acceptances of their redundancy packages. The witness was relieved, as he believed that the appellant was satisfied with the package offered to him. He therefore did not think anything of the union representative's non-appearance on that date.

On his desk on 30 July 2008 he had also received a letter from the union representative dated 25 July 2008 but he did not consider this letter or the union representative's non-appearance on 30 July 2008, as the two employees had now provided him with the signed acceptances.

It was not until the Financial Controller received an email dated 7 October 2008 from the union relating to the appellant and a colleague, that the company realised there was a problem. The emailstated, " *the above named members have contacted this office stating they never got the same redundancy package as those who have already left the company."*

During cross-examination the Chairman stated that he was not responsible for the day-to-day running of the business but he was involved in the decision relating to redundancies made in early July 2008. "Very great thought" was given to that issue before it was decided to let all of the service personnel go. The criteria for retaining the employment of one of the service team was based primarily on humanitarian grounds plus the fact that the respondent needed somebody with knowledge of their products to remain. It was coincidental that the retained person was the son of the respondent's human resource manger and treasurer.

This witness had only one meeting with the appellant in reference to his forthcoming redundancy and had no specific memory of that conversation. At no time did the appellant air any unhappiness or dissatisfaction with the redundancy package.

When the appellant returned the signed acceptance the witness felt that this ended the matter. He described as not relevant the contents of a registered letter, dated 25 July addressed to him from a branch organiser of the appellant's trade union. The witness was "gobsmacked" at the tone and language used by that organiser at a meeting between them.

The financial controller was satisfied he properly carried out his sole role as administrator in this redundancy process. He spoke to the union's assistant branch organiser on 23 July and relayed the guise of that conversation to the chairman by email.

Appellant's Case:

When the appellant's trade union received notification from the respondent in mid July 2008 its assistant branch organiser contacted the company twice with a view to discussing this development. No response was forthcoming but in the meanwhile employees there were being offered redundancy packages. This witness was on leave for two weeks from 28 July 2008 and was aware that the appellant had signed an acceptance form on that redundancy package on 30 July. However, the appellant was dissatisfied from the "word go" on his package and approached the witness in September 2008 about that dissatisfaction. It was the witness's belief that the appellant was put under extreme pressure to sign his acceptance of the redundancy deal. Besides, the selection criteria used by the respondent was not objective in this case.

Determination

The Tribunal carefully considered all of the evidence adduced.

1. It is satisfied that a valid redundancy arose in respect of the appellant's position in the respondent company.

2. In addressing this appeal the Tribunal proposes to consider the three principal issues raised by the appellant in support of his appeal.

    (a) It is firstly suggested by the appellant that a procedural defect occurred in the redundancy process as a result of the respondent falling to engage and consult with the appellant through his representative. In this regard it is found that this issue was raised with the respondent and was communicated to the appellant by his representative and that following this that the appellant himself communicated and delivered personally to the respondent his acceptance of their redundancy offer and therefore waived his requirement that they consult and engage prior to his redundancy and the Tribunal so determines.

    (b) In respect of this acceptance it is not accepted, as was alleged, that it was obtained by any duress applied on the part of the respondent and the Tribunal so determines.

    (c) The third and final issue raised by the appellant for the Tribunal to consider was a contention by the appellant that the re-employment by the respondent of a certain employee (RR) in preference to the appellant constituted an unfair selection for redundancy of the appellant. The Tribunal accepts the evidence of employees DG and RR had represented an unfair selection of them in preference to the appellant. In respect of DG and his re-employment it is not accepted that he filled a similar position to the appellant. The Tribunal notes the assertion by the appellant that RR was working for two years less than him and that he was similarly qualified. In the absence of any evidence either that the respondent operated a policy of last in first out or to contradict the evidence given on behalf of the respondent in respect of the grounds of their decision to re-employ RR which evidence the Tribunal accepts it follows that the Tribunal finds that this re-employment was not unfair to the appellant.

3. The Tribunal for the reasons set forth therefore determines that the appeal by the employee fails, therefore the Tribunal upholds the Rights Commissioner Recommendation reference: r-070606-ud-08/JT under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)