

**EMPLOYMENT APPEALS TRIBUNAL**

**CLAIM(S) OF:**  
EMPLOYEE

**CASE NO.**  
UD1546/2009

*- claimant*

against  
EMPLOYER  
under

*- respondent*

**UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms D. Donovan B.L.

Members: Mr J. Browne  
Mr F. Dorgan

heard this claim at Waterford on 23rd November 2010 and 2nd February 2011

**Representation:**

Claimant: Mr. Colin O'Sullivan BL instructed by M.M. Halley & Son, Solicitors, "Presentation House", Slievekeale Road, Waterford

Respondent: Mr. Richard Downey BL instructed by: Purcell Cullen Kennedy, Solicitors, Ash House, Cove Roundabout, Dunmore Road, Waterford

**The determination of the Tribunal was as follows:**

**Respondent's Case:**

The respondent's General Manager gave evidence. The respondent had employed him for fifteen years. The respondent was involved in providing storage and transport of products for various companies including pharmaceuticals products, milk products, Waterford Crystal and timber in various locations.

In January 2007 the respondent took over another company's business. The witness interviewed the staff of this company and management and 7 staff (including the claimant) were hired. The claimant commenced employment on January 15<sup>th</sup> 2007 with 2 others (LD and GB) on a 12-month probationary contract. The witness stated that a few employees commenced on January 15<sup>th</sup> 2007 but it was agreed by all those interviewed that their official start date would collectively be February 1<sup>st</sup> 2007.

The claimant was sent to work in Warehouse K (Kilcohan), which stored crystal. A few months later he was asked by the witness to move to another site – Belview (Warehouse B) – that had 5

warehouses. He did not move at that time.

In May 2008 work slowed in Warehouse K and the claimant agreed to move to Warehouse B. As time passed and work decreased a survey was conducted. Management felt the warehouse was overstaffed and decided to cut staff numbers from 8 to 7. The Quality Manager carried out the survey and one of their biggest customers (G) had an input into the decision. Staff assessments were also carried out.

It appears from the staff assessments that the claimant did not have some of the same skill set as his colleagues. One of the skills was to be able to drive a reach truck, which needed specific training. He was trained in “handballing” but due to a back injury he had told his supervisor that he could not complete the task. The witness told the Tribunal that the claimant would have needed a few weeks training in some tasks. He was also not available to carry out overtime work.

In December 2008 the staff were informed there would be changes. The claimant was not present and was informed 2 days later. In January 2009 issues worsened. One of their main clients went into receivership and the company was owed a lot of money. 5 of the staff were let go at that time. Some staff left of their own accord. Management looked at the list of remaining staff and found that 8 staff had the same amount of service. Staff assessment forms were again reviewed and it appeared the claimant had the worst score.

The witness stated that there had been manual work in other sectors of the plant but the claimant was not trained to carry it out. Letters were compiled for the staff and he hand delivered them. The claimant did not receive his till the following day, as he was absent. He was upset and confrontational and asked why he had been picked. The witness agreed that the reply he gave him was flippant – *“I picked your name out of a hat”*.

When asked he stated that another staff member had been re-employed because his skill set was so high. He again stated that the claimant had been chosen because of his low scoring assessment and availability for overtime.

On cross-examination he stated that the claimant had done overtime in the past but did not want to do it. When asked, he stated that if the respondent had the time and money the claimant could have been trained up in other skills.

The General Manager was recalled on the second day of hearing. He stated that the claimant had not notified management that he was competent at driving a reach truck. He stated that the claimant was employed on a man up machine in both Warehouse K and Warehouse B.

He confirmed that the director’s son is learning all aspects of the business with a view to eventually becoming a director of the company.

He stated that another employee retained after the claimant (but with less service than the claimant) was retained because of his skills relating to the maintenance of the machines in the warehouse.

### **Claimant’s Case:**

The claimant gave evidence that prior to commencing employment with the respondent he was employed as a warehouse operative with responsibility for a store in a multi-national company. His position with that company was subsequently made redundant.

A director of the respondent company and the General Manager interviewed the claimant on January 11<sup>th</sup> 2007. He subsequently commenced employment as a full-time warehouse operative. The claimant understood his position to have been a twelve-month probationary period but he considered that he had a full-time permanent position once he had successfully passed the probationary period.

The claimant started work on January 15<sup>th</sup> 2007 in one of the respondent's warehouses (hereinafter referred to Warehouse K). Two other employees commenced employment on the same date as the claimant. Subsequently, in early February 2007 a number of other employees started when the respondent took over another company. Crystal products were stocked in Warehouse K.

The claimant outlined his duties in Warehouse K to the Tribunal. Sometime after his first year of work, the General Manager gave the claimant a second contract. He queried why he had to sign another contract but felt that he had to sign it. The claimant remained in Warehouse K until May 2008.

In May 2008 the claimant moved to another of the respondent's warehouses (hereinafter referred to as Warehouse B). His duties remained unchanged except that he was not required to do computer work as he had done in Warehouse K. Overtime was available in Warehouse B and the claimant did overtime of one or two hours every morning and he stated that this was shown on his payslips

In September 2008, the director's son commenced employment with the company. The claimant trained the director's son on many elements of the work in the warehouse.

Towards the end of 2008, an assessment was carried out by a Mr. K on Warehouse B as it was assessed that the overtime bill for the warehouse was too high. A new shift arrangement was brought into practice. The claimant and a number of colleagues raised an issue about how the shifts were divided but in any event the claimant started working the new shifts as requested by management.

The claimant returned to work from annual leave on January 5<sup>th</sup> 2009 and left at the finishing time of 3.30pm. When he attended for work on January 6<sup>th</sup> 2009 another colleague informed him that five employees had been made redundant and that four of the five had been notified the previous day. The claimant later heard that the General Manager had attended at the warehouse the previous day and the claimant correctly deduced that he was the fifth employee who had been selected for redundancy. This was confirmed to him later that morning by the General Manager, who arrived at the warehouse, put an envelope on the table in front of the claimant and told him that he was being given two weeks' notice due to the fact that the crystal company had entered into receivership. The claimant told the Tribunal that he disputed this fact, as Warehouse B did not stock crystal products; this was done in Warehouse K.

The claimant enquired from the General Manager about the selection process used in selecting his position for redundancy but was told by the General Manager that anyone could have been selected but that it was the claimant's name who had "come out of the hat." During his notice period the claimant continually approached the General Manager enquiring about the selection process used in selecting him for redundancy but this information was not provided to him.

The claimant stated that the first time he had sight of the employee assessment document provided by the respondent was on the first day of the Tribunal hearing. He noted that there was no assessment carried out for the director's son. The claimant stated that he was not asked for any input into the assessment nor was he even aware that such an assessment was taking place. The claimant disputed the assessment given to him on a number of grounds. For example, the claimant had received a nil score under the ability to drive a reach truck section of the assessment. However, the claimant stated that he had over fifteen years experience of driving such a truck.

The claimant stated that he took part in the handballing of stock in Warehouse K and had carried out the same duties as his colleagues in that regard. He had a back problem in 1996, which was subsequently healed with a small medical procedure. At the time of 2009, he had been performing his duties without any associated problems.

The claimant stated that the four employees made redundant at the same time as him have all been re-employed by the respondent, some in the period of two weeks after he was made redundant. The claimant stated that he was not given prior notice by management that there was a possibility his position may be selected for redundancy. The claimant gave evidence pertaining to loss.

During cross-examination it was put to the claimant that he was provided with a letter dated January 11<sup>th</sup> 2007 stating that all employees employed at that time would all have an agreed start date of February 1<sup>st</sup> 2007. The claimant stated he had not received this letter.

It was put to the claimant that he was employed on a twelve-month contract initially. The claimant replied that he understood the probationary period to be for twelve months but that he had a full-time permanent position once he had successfully passed the probationary period.

It was put to the claimant that he had not informed anyone in management that he was able to drive a reach truck. The claimant stated that he had driven a reach truck as part of his duties in Warehouse K and in Warehouse B.

A document detailing overtime for the employees in Warehouse B was opened to the Tribunal. It was put to the claimant that he had carried out much less overtime than some of his colleague during 2008. The claimant replied that this was due to the fact that he was only re-deployed to Warehouse B in May 2008 and therefore did not have the opportunity to do overtime in the first five months of the year.

It was put to the claimant that he was unable to carry out handballing duties on milk powder products due to his back. The claimant stated that milk powder products were not part of his duties. However, he had on one occasion assisted with milk powder products when required. He accepted that an employee should be trained in HACCP to handle the products but he had not been trained in this regard.

It was put to the claimant that he had received a much lower mark than his colleagues in the employee assessments. The claimant stated that he was scored below average for an employee with 22 years experience as a warehouse operative. He said that one other employee who had received a higher score than him did not have the same level of experience as he had, had never driven a reach truck and did not have computer experience.

The claimant did not accept that the first four redundancies were carried out on a last in, first out

basis. He stated that the respondent continued to retain the same number of employees (8) in the warehouse as when the claimant was an employee.

It was put to the claimant that the director's son has been training in all areas of the company, as he will eventually be taking over responsibility for the company. The claimant replied that he had started in September 2008 and was carrying out the same duties in the warehouse as the claimant at the time the claimant was made redundant. The director's son had not trained in other departments while the claimant was working there.

A former colleague of the claimant's gave evidence to the Tribunal that he was employed by the respondent from April 2007 to November 2007. He confirmed that while he was employed he observed the claimant driving the reach truck and all of the other machines in the warehouse and that the claimant had handballed stock with the rest of his colleagues.

**Determination:**

Having carefully considered the evidence adduced at the hearing the Tribunal accepts that due to a loss of the crystal contract there may have been a necessity to make some workers redundant. However, the Tribunal finds that the selection criteria was based on a single assessment and that there was no warning or consultation with the claimant either in relation to the assessment or the possibility of redundancy. The Tribunal noted that no evidence was adduced as to whether the possibility of alternative employment for the claimant in the respondent company was considered. Therefore the claim under the Unfair Dismissals Acts, 1977 to 2007, succeeds. The Tribunal awards the claimant the sum of €14,560.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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