

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:  
EMPLOYEE -*Claimant*

CASE NO.  
UD1418/2009  
MN1398/2009

against

EMPLOYER

under

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

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. P. O'Leary B L

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

heard this claim at Dublin on 26th October 2010 and 27th October 2010

### **Representation:**

Claimant: Mr. Dominic Wilkinson B.L. instructed by Fanning And Kelly, Solicitors, 2 Hatch Lane, Hatch Street, Dublin 2

Respondent: Ms. Mary Paula Guinness B.L. instructed by the respondents.

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

The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, was withdrawn at the outset of the hearing.

### Background:

The respondent is a firm of solicitors with a large property department. The claimant commenced employment with the firm in August 1981 and held the position of senior associate at the time her employment was terminated.

### Respondent's Case:

It was the respondent's case that from early 2008 there were signs of difficulty arising from the property market and the firm made the decision to reduce costs. A meeting was held with all staff

at the end of October 2008 to inform the staff that restructuring would occur in the property department and throughout other departments. The number of senior positions in the property department was to reduce from five to three positions. Interviews were held for the remaining three positions and as a result the claimant was subsequently made redundant.

A partner in the firm who holds the position of Head Of Property gave evidence to the Tribunal. By the summer of 2008 the property department was generating 38% of the total fee income for the firm. Other areas of litigation also benefited from referral business from the property department.

By late 2007 the property market had peaked. The firm had a pipeline of work to be completed but it was evident by early 2008 that the firm was suffering a reduced flow in new business. By early summer 2008, the firm was examining a number of measures to contain costs. Temporary contracts were not renewed, employees leaving the firm's employment were not replaced (unless it was a key role) and an embargo was placed on recruitment. A discussion document of considered measures was opened to the Tribunal.

Each partner in the firm examined their critical team structure and it was decided that the witness, as Head of Property, would speak with a number of employees in the property department including the claimant. He and the Managing Partner met with the claimant during July 2008. They informed the claimant that the firm was examining costs and alternatives were discussed with the claimant. Such alternatives included reduced working hours, early retirement, working on a consultancy basis or any other propositions that the claimant might put forward. During an assessment the claimant had previously raised the possibility of working a four-day week. The claimant said that she would consider the options put forward at the meeting and revert to them in due course. She later informed them that she did not wish to consider the part-time options.

By the time of August 2008 the Managing Partner was becoming increasingly concerned as the workload had decreased even further than expected. In September 2008 it became clear after the construction industry's holidays that the impact of the property collapse was more serious than the firm had originally anticipated. It became clear that the firm needed to consider something more fundamental than options such as flexible working hours. The witness in conjunction with the human resources department made the decision that the property department would have to be restructured. The expected level of business in the future was examined and consideration given by the witness and the Managing Partner to the required number of positions going forward. A document was devised to identify the positions at risk in the department and how best to implement the resulting redundancies.

A timescale was devised and on 31 October 2008 the partners spoke to each of their teams about the situation. The witness met with the claimant after this meeting.

It was felt by the witness that the department needed one person who could step in and take on a large project if required. Four positions were identified. These included two senior solicitor positions working as part of a team in the property department, one senior solicitor position working across the property department and one position managing private clients. The claimant was invited to attend for interview. She made it clear that she was only interested in applying for the support role working across the property department. Two other solicitors also applied for this position. A senior solicitor was excluded from the interview process as she had established high profile clients and she managed the fees that were generated from these clients.

Interviews for the positions were held in early November 2008. A document entitled "Key points

to remember” was prepared by human resources and provided to the interviewers. The claimant’s score sheet from the interview was opened to the Tribunal. During the interview it was clear that the claimant was unaware of the growing link between the respondent firm and a large UK practice.

The successful candidate had a number of ideas to put forward regarding how to develop the property department in the difficult times. Both candidates were experienced and competent and the decision was close but the other candidate was marginally better than the claimant. The claimant was subsequently informed at a meeting that she was unsuccessful at interview and consequently she was made redundant. Staff numbers in the property department reduced by fourteen in a period of approximately nine months.

During cross-examination it was put to the witness that during interview the claimant was not asked questions in relation to her client skills or her legal/ technical skills. The witness stated that having worked with the claimant he had a general sense of her level of experience in these areas.

It was put to the witness that an adverse comment on the claimant’s score sheet under the “Client Skills” heading noted that there had been “historical difficulties” but the claimant had never been the subject of any procedures in this regard. The witness accepted that he wrote this note onto the claimant’s score sheet but stated that the comment related to the claimant’s client interaction skills, which in turn were not a key part of the support role that the claimant had interviewed for. He added the comment to the claimant’s score sheet based on his experience of having worked with the claimant over a number of years.

The Managing Partner gave evidence that he also holds the position of commercial property partner with the firm. Due to the reduction in business it was decided that meetings would be held with some of the longer-serving members of staff. He confirmed meeting with the claimant on two occasions in this regard.

He confirmed the meeting in July 2008 was to inform the claimant that the property department was not performing well. It was explained to the claimant at that meeting that the firm wanted to explore with her whether she was considering any alternatives to working full-time, as the claimant had previously mentioned the possibility of part-time work. The Managing Partner refuted that it was suggested to the claimant at this meeting that she should consider re-locating to Wexford. He also refuted that he had asked the claimant when she intended to retire.

The Human Resources Manager gave evidence that in early 2008 and in conjunction with the Managing Partner she produced the discussion document of the scenarios to be considered by the firm in relation to cost cutting. However, at the time of creating the document they were unaware of the scale of reduction that would be necessary.

Plan A for the property department was a document produced to try and identify possible business options the firm might have. The document was used to highlight those staff members across the firm who were close to retirement, on temporary contracts and those who had expressed a desire for flexible working hours. However, by September 2008 it was clear that the situation was more serious.

When it was decided that there would be four senior roles going forward in the property department the witness felt that the interview process was the fairest way to allow employees to outline their experience and put forward their skills. There was no prohibition on the number of roles that a

candidate could apply for.

The witness, in conjunction with the partners in the property department, created the document of required key skills for the available positions. It would be expected that a senior solicitor would possess the core skills listed on this document. A copy of this document was given to each candidate prior to interview. In addition the witness prepared the “Key points to remember” document as an aid for the interviewers and to have a system in place to make the interviews as transparent as possible. She was not present at the actual interviews.

During cross-examination the witness did not accept that the claimant should have been given a copy of the “Key points to remember” document prior to the interview.

In reply to questions from the Tribunal, the witness stated that she had no expectations in regard to whether or not the candidates were marked on anything other than the suggested questions she had provided to the interviewers.

A senior solicitor who deals with contentious litigation and employment matters told the Tribunal that he is also the human resources partner for the firm. The witness confirmed that there were ongoing discussions during the summer of 2008 about the measures the firm might have to consider going forward. At the start of the summer the firm was looking at possible scenarios but more drastic measures had to be considered by the time of September 2008.

He discussed the interview approach with the Human Resources Manager and agreed that it would be the fairest approach as it allowed the employees to express which positions they were interested in and allowed them the opportunity to sell themselves into the position. The claimant had twenty-seven years service with the firm. The other candidate was also with the firm a long time. The skill sets of both candidates were not in question and there were no performance issues in relation to either employee so the issue was what could the successful client offer the firm going forward.

The witness was present at each of the interviews. He had received the “Key points to remember” document from the Human Resources Manager before conducting the interviews. The Human Resources Manager had also set out which areas should be focused on in interview. A similar set of questions was used for each interview and the witness made notes.

The claimant outlined her technical and client skills. The witness asked her what role she was interviewing for and she confirmed she was interested in the support role. The claimant made reference to three particular clients in her interview and she outlined how she had supported other teams. The witness felt that an employee at the claimant’s level should have a better understanding of the budget in the property department but the claimant had stated at interview that she would like the proportionality of the budget explained to her.

The respondent firm was developing a link with a UK firm. It was very important to the respondent that the other firm be treated as a client. The witness was amazed that the claimant did not have a better understanding of the connection between the two firms. The successful candidate sold herself much better at the interview and had ideas for growing the position. The witness believed that as interviewers the score was not just based on the performance at interview but also on the more immediate issues of the firm’s business plan.

The witness subsequently informed the claimant that she was unsuccessful at interview. The claimant queried two sections of the score sheet where she had not received as high a mark as another candidate. He acknowledged he had overlooked a third issue she had raised at the time. The claimant signed the RP50 form but would not accept an ex-gratia payment from the firm.

During cross-examination it was put to the witness that the reference to “historical difficulties” as noted on the claimant’s score sheet had not been put to her at the interview. The witness accepted this to be the case and stated that it was a gratuitous comment, which was not going to make a difference to the claimant regarding the outcome of the process. He allowed it to be included on the claimant’s score sheet as the other interviewer felt it was relevant but it was also noted that it was not an important factor in the role the claimant was interviewing for.

### Claimant’s Case:

Giving evidence the claimant stated that sometime prior to 2008 she had enquired about the involvement of an outside firm with the respondent and she was told that it was a referral relationship between the two. The claimant did extensive work on a file with this outside company. The claimant used the referral mechanism to refer a client to the outside company. The claimant acknowledged that at interview she had mentioned that she did not fully understand the connection between the two firms.

The claimant gave evidence of attending the meeting on 23 July 2008 at which she was informed that the property department would be re-arranged due to a downturn in the property industry. It was raised with the claimant that she had previously expressed a wish to move to Wexford. The claimant agreed to consider taking a few months off and she agreed to revert with her decision on the matter in due course. The Head of Property told her that there might not be any work by January and the claimant became worried.

She confirmed that a further short meeting occurred during September 2008 in relation to this issue. After the meeting in July the claimant received some advice and realised that if she was to take a career break she might not return to her position. At the meeting in September 2008 she informed the partners that she would not be taking a career break. The Managing Partner told her that was not enough and he wanted a proposal from her. He then asked the claimant when she intended to leave. When she asked him to clarify what he meant, he asked her when was she going to retire. The claimant told him that she did not intend to retire until she was 65. The claimant felt that she was being pushed into leaving her employment and she thought it was premature of them to ask her when she intended to retire. She also felt intimidated. The claimant refuted that options of a redundancy package or consultancy work were offered to her at this time. No options were put to her but instead she was asked for a proposal.

The claimant had no prior knowledge of the possibility of redundancies prior to the meeting on 31 October 2008. When the Head of Property met with her after that meeting he told her that she was selected to interview for the support role, which would have little or no client interaction going forward. The only discussion held with the claimant pertained to this role.

The claimant was told to expect a non-formal interview. The claimant was not advised of the content of the marking form. The claimant felt that she was applying for her own job and that it was pre-determined that she was being pushed out of her job from the time of July 2008. The support role was essentially the claimant’s position but without a client base. The successful

candidate had performed different work entirely.

At the interview the claimant was asked what role she was interested in. This astounded her, as she was unaware that there were other roles. The claimant said that she thought only the support role was available to her. She accepted that she might not have had the necessary skills for some of the other roles.

They discussed the monies and fees generated by the claimant. The claimant said that the division of fees was not always fair but she agreed that the Head of Property was fair in this regard. During the interview there were no questions asked of her regarding her client skills or her legal or technical skills. The claimant outlined at interview how she had worked with the partners and she mentioned wealth management clients.

The claimant stated that it was her belief that the successful candidate would be selected from the interview process but she also hoped that they would know the kind of work she had done. The claimant stated that there were no issues ever put to her regarding “historical difficulties” nor was she subject to any disciplinary procedures in this regard.

When the claimant was informed that she was unsuccessful she was told that the successful candidate had “ticked more boxes”. The claimant was informed that her position was redundant. She later told the human resources partner that she was unhappy with the process and felt that she had been targeted since July 2008. She wrote to him requesting a rationale for the decision and received a reply some three weeks later. The claimant was given an RP50 in January 2009 and she worked her full eight weeks notice. The claimant gave evidence pertaining to loss.

During cross-examination the claimant accepted that she was not precluded from applying for the other available positions but she was not informed that she could apply for them.

### **Determination:**

The Tribunal having considered the evidence in this case, accepts that a redundancy situation existed within the employment of the claimant and the Respondent’s requirement for the future could be done with one less staff member. The Respondent used an interview process to determine which of the staff should be selected for redundancy. The interviews were conducted by two interviewers on behalf of the Respondent and a score sheet was used to record the marks given to each of the two staff interviewed. Each of the two staff when interviewed were marked under six categories. The claimant was one of the staff interviewed. The marks were totalled after the interviews and the Claimant was given marks, which were less than the other staff member. She was told that she was not successful and was made redundant.

The only question that can arise in this case for the Tribunal to decide on is: was the interview process used, to make the selection of the claimant for redundancy, fair in all the circumstances?

The Tribunal noted that the Respondent intended to use the results of the interview to determine which of the two candidates would be successful. This is shown by the information note given to the interviewers entitled “Key points to remember.” There is no indication in this note that a candidate should be marked on past performance with the firm or that their previous record should be used in deciding the marking of an individual candidate. The Claimant was with the firm for twenty-eight years as a solicitor. In her evidence to the Tribunal she stated that she was from time

to time consulted on legal matters by the managing partner. This evidence was not challenged by the Respondent. A witness for the Respondent did say in evidence that there had been historical difficulties in certain cases with the Claimant and that they had been communicated to her over the years. However, the Claimant knew of no such difficulties and no evidence was adduced by the Respondent to sustain the fact by way of warnings etcetera. The Claimant was entitled to expect that the marks attributed to her would arise out of the interview process only; however this was not the case. The Tribunal noted that the “historical difficulties” were mentioned in the comments section of the “Client Skills” category on the Claimant’s Score Sheet. This could not be information derived from the interview. There is also a comment in the “Technical/Legal Skills” category which states “Consistency and quality has met expectations for the most part” which could not have come from the interview process either.

From the above, the Tribunal is satisfied that the marks awarded to the Claimant in the interview were influenced by matters not derived by her performance there but from information the interviewers were in possession of and to which the Claimant had not been given an opportunity to respond. This rendered the interview process unfair. The Tribunal therefore find that the Claimant was unfairly dismissed. The Tribunal deemed that compensation was the most appropriate remedy in this case and took into consideration the fact that the claimant obtained employment after her dismissal but decided to leave it shortly thereafter and therefore award the Claimant compensation in the sum of €90,000.00.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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