EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE - claimant

CASE NO.
UD2133/2009

against

EMPLOYER - respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. J. Sheedy

Members: Mr. D. Hegarty
Mr. J. Flavin

heard this claim in Cork on 6 October 2010 and 28 January 2011

Representation:

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Claimant(s):
Mr. Barry Sheehan, Solicitor, 26 Marlboro Street, Cork

Respondent(s):
Mr. Jim Reaney, IBEC, Knockrea House, Douglas Road, Cork

The determination of the Tribunal was as follows:-

It was alleged that the claimant had been unfairly selected for redundancy after an employment from March 2006 to 10 April 2009. (He was notified at 4.45 p.m. On Friday 27 March 2009 that he was to be made redundant.) He had suffered a work-related injury after which the relationship between him and the respondent had allegedly broken down.

It was contended on behalf of the respondent that the claimant's redundancy had taken place due to a severe downturn in business, that the respondent had been in trouble and that selection criteria had been used in the sales area so that key skills were retained.

The Tribunal heard sworn testimony and received documentation.

Claimant's Representative's Arguments

1. By written terms and conditions of employment (hereinafter referred to as "the Contract of Employment") dated 5 March 2006, the Claimant was employed as a sales person with the Respondent with effect from 6 March 2006.

2. By written amendment to the Contract of Employment dated 2 June 2006, the Claimant was re-employed as a trainee manager with the Respondent with effect from 8 May 2006.

3. By written amendment to the Contract of Employment dated 21 September 2007, the Claimant was further re-employed as sales person with the Respondent with effect from 22 September 2007.

4. On 27 March 2009, the Claimant was informed by the Respondent's management that he was being made redundant with effect from 10 April 2009.

5. By written amendment to the Contract of Employment dated 21 September 2007, the terms and conditions of the Claimant's employment were, under the heading *Remuneration*, altered to provide as follows:

> Your rate of pay will be €30,000 gross per annum subject to statutory and other agreed deductions.
>
> [...]
>
> *No Commission will be paid on the first €0 - €500,000 net delivered sales (sales exclusive of vat and customer accounts). 2% Commission will be paid after reaching delivered sales of €500,001 on delivered sales above that amount*. Commission is paidmonthly in arrears. Commission when you leave the company is paid on items deliveredup to the date you leave, and not on undelivered orders. It is envisaged that in the nearfuture the commission pay structure will change to incorporate commission on customerpayments received and this change in calculating commission will form part of yourcontract of employment with the company.

Section 6(4)(c) of the Unfair Dismissals Act 1977 provides as follows:

> Without prejudice to the generality of subsection (1) of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, not to be an unfair dismissal, if it results wholly or mainly from one or more of the following:
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> [...]
>
> (*c*) the redundancy of the employee.

The term "redundancy" is defined, under section 1 of the Unfair Dismissals Act 1977, by reference to its definition under section 7(2)(a) to (e) of the Redundancy Payments Act 1967 (as substituted by section 19(1) and the Schedule to the Redundancy Payments Act 1977 and amended by section 5 of the Redundancy Payments Act 2003) as follows:

> For the purposes of subsection (1), an employee who is dismissed shall be taken to he dismissed by reason of redundancy if for one or more reasons not related to the employee concerned the dismissal is attributable wholly or mainly to—
>
> > (a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased or intends to cease, to carry on that business in the place where the employee was so employed, or
> >
> > (b) the fact that the requirements of that business for employees to carry out work of a particular kind in the place where he was so employed have ceased or diminished or are expected to cease or diminish, or
> >
> > (c) the fact that his employer has decided to carry on the business with fewer or no employees, whether by requiring the work for which the employee had been employed (or had been doing before his dismissal) to be done by other employees or otherwise, or
> >
> > (d) the fact that his employer has decided that the work for which the employee had been employed (or had been doing before his dismissal) should henceforward be done in a different manner for which the employee is not sufficiently qualified or trained, or
> >
> > (e) the fact that his employer has decided that the work for which the employee had been employed (or had been doing before his dismissal) should henceforward be done by a person who is also capable of doing other work for which the employee is not sufficiently qualified or trained.

Section 6(2)(c) of the Unfair Dismissals Act 1977 further provides:

> Without prejudice to the generality of subsection (1) of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, to be an unfair dismissal if it results wholly or mainly from one or more of the following:
>
> > [...]
> >
> > (c) civil proceedings whether actual, threatened or proposed against the employer to which the employee is or will be a party or in which the employee was or is likely to be a witness.

Section 6(3)(a) of the Unfair Dismissals Act 1977 finally 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
> >
> > [...]

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

Submissions

Respondent has failed to prove a redundancy situation

6. By amendment to the Contract of Employment dated 21 September 2007, the Respondent varied the Claimant's terms and conditions of employment to provide that "no commission will be paid on the first €0 - €500,000 net delivered sales (sales exclusive of vat and customer accounts). 2% commission will be paid after reaching delivered sales of €500,001 on delivered sales above that amount."

7. It is submitted, on the basis of the *contra proferentem* rule of contractual interpretation, that any ambiguities in the said Contract of Employment should be construed strictly and against the Respondent (i.e. the *proferens*).

8. As previously orally submitted by the Claimant's solicitor to the Tribunal, it must be presumed that once the Claimant exceeds his contractual sales target of €500,000, and therefore becomes entitled to earn commission on subsequent sales, the actual cost for the Respondent of employing him has been fully absorbed.

9. It will be recalled that at the hearing of this claim on 6 October 2010, the Respondent led evidence that the Claimant had exceeded the said sales target by over €100,000: *Tab C of the Respondent's Booklet of Papers*.

10. It will be further recalled that the Respondent led evidence that its *profits* had fallen from €23,000,000 in 2007 to €11,000,000 in 2009 however, at all material times, the Respondent was solvent when it took the decision to dismiss the Claimant by reason of an alleged redundancy situation.

11. Accordingly, the Respondent is unable to reply upon the provisions of section 6(4)(c) of the Unfair Dismissals Act 1977 in defence of this claim and the Claimant is therefore entitled to the redress sought of compensation under section 7(1)(c)(i) of the said Act.

The Claimant was unfairly selected for redundancy

12. In the alternative, and without prejudice to the submission contained at numbered paragraphs 6 to 11 above, it will also be recalled that the Respondent led evidence that the selection criteria

for redundancy was based upon delivered sales for 2008 and actual sales of January 2009.

13. In addressing the fairness of the Claimant's selection for redundancy, it is submitted that the Tribunal should adopt the criteria identified by the English Employment Appeal Tribunal in the leading case of *Williams v Compair Maxam Ltd* [1982] UKEAT 372/81 where Browne-Wilkinson J. held:

> [...]The second point of law particularly relevant in the field of dismissal for redundancy, is that the tribunal must be satisfied that it was reasonable to dismiss each of the applicants on the grounds of redundancy. It is not enough to show simply that it was reasonable to dismiss an employee; it must be shown that the employer acted reasonably in treating redundancy "as a sufficient reason for dismissing the employee," i.e. the employee complaining of dismissal. Therefore, if the circumstances of the employer make it inevitable that some employee must be dismissed, it is still necessary to consider the means whereby the applicant was selected to be the employee to be dismissed and the reasonableness of the steps taken by the employer to choose the applicant, rather than some other employee, for dismissal.
>
> In law therefore the question we have to decide is whether a reasonable tribunal could have reached the conclusion that the dismissal of the applicants in this case lay within the range of conduct which a reasonable employer could have adopted. It is accordingly necessary to try to set down in very general terms what a properly instructed industrial tribunal would know to be the principles which, in current industrial practice, a reasonable employer would be expected to adopt. This is not a matter on which the chairman of this appeal tribunal feels that he can contribute much, since it depends on what industrial practices are currently accepted as being normal and proper. The two lay members of this appeal tribunal hold the view that it would be impossible to lay down detailed procedures which all reasonable employers would follow in all circumstances: the fair conduct of dismissals for redundancy must depend on the circumstances of each case. But in their experience, there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:
>
> 1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.
>
> 2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.
>
> 3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be

objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

14. It will further be recalled that the Respondent led evidence that its management decided in or around the month of February 2009 to make staff redundant. It also led evidence that employees (including the Claimant) were never given any warning of the impending redundancies due to a concern on the part of management that the Respondent's sales would be affected by employees worried about their own livelihood. Arising from such decision, employees (including the Claimant) never had an opportunity to consult with the Respondent's management as to the best means by which the desired management result could be achieved fairly and with as little hardship to employees (including the Claimant) as possible. Moreover, as the Respondent's employees (including the Claimant) were unaware of the impending redundancies, they were accordingly denied an opportunity to agree the criteria upon which such redundancies were subsequently made.

15. Notwithstanding the foregoing, the Respondent nevertheless failed to even ensure that the Claimant's selection for redundancy was made fairly in accordance with its own (unilaterally prescribed) criteria as his delivered sales for 2008 and actual sales of January 2009 were almost €10,000 higher than the lowest such figure, achieved by XXXX who was not made redundant. Indeed, Mr Curzon's sales were subsequently increased by almost €115,000, on a somewhat opaque and artificial basis, in order for the Claimant to be deemed as having the lowest sales figure: *Tab C of the Respondent's Booklet of Papers*. Moreover, the delivered sales for 2008 and actual sales of January 2009 of another employee, XXXX, were not taken into consideration even though she had returned from maternity leave during the relevant period and would therefore, presumably, have had the lowest sales figures of all such employees: *Employee v Employer*, Employment Appeals Tribunal, Case Number UD886/2009.

16. It will further be recalled that the Respondent led evidence that its management never offered to re-deploy the Claimant, either on a full-time or part-time basis, to another department within the

Respondent, notwithstanding that the Claimant had significant experience, in comparison to other sales people, of working in other areas of the Respondent's business.

17. It will finally be recalled that the Respondent led evidence that it employed additional sales people following the Claimant's alleged redundancy.

Redundancy resulted wholly or mainly from civil proceedings against the Respondent

18. In the final alternative, and without prejudice to the submission contained at numbered paragraphs 6 to 11 above, it will be recalled that the Claimant led evidence at the hearing of this claim that he suffered a right inguinal hernia as a result of lifting heavy furniture at work at the Respondent's premises in Limerick in or around September 2007, which ultimately resulted in the Claimant having to have, on medical advice, an operation on 5 February 2008.

19. It will be further recalled that the Respondent led evidence that it did not accept "that any particular accident occurred to [the Claimant] at work": *Department of Social and Family Affairs – Occupational Injury Benefits Form* dated 29 April 2008.

20. It is reasonable to infer from the Respondent's said response that it was concerned the Claimant may issue civil proceedings against it, which he subsequently did in personal injuries proceedings entitled *XXXX v XXXX, Cork Circuit Court, Record NumberXXX*, and therefore hisdismissal was unfair as it resulted wholly and mainly from the perceived threat of suchproceedings: sections 6(2)(c) and 6(3)(a) of the Unfair Dismissals Act 1977.

Redress

21. By reason of the foregoing, it is respectfully submitted that the Tribunal should mark its disapproval of the Respondent's actions and demeanour towards its employees generally in thecontext of proposed redundancies, by analogy with aggravated and exemplary damages at common law, and award a sum of compensation towards the upper end of its monetary jurisdiction of €66,000 (i.e. €576.92 weekly remuneration x 104 weeks + €57.69 weekly commission x 104 weeks): section 7(1)(c)(i) of the Unfair Dismissals Act 1977 (as substitutedby section 6(a) of the Unfair Dismissals (Amendment) Act 1993.

Respondent's Representative's Arguments

Under the unfair dismissals legislation a dismissal caused wholly by reason of redundancy will not be deemed to be an unfair dismissal. It is submitted to the Tribunal that the redundancy which occurred at the respondent company was genuine as defined by section 7 (2) (c) of the Redundancy Payments Act, 1967, in that the employer has decided to carry on the business with fewer or no employees whether requiring the work for which the employee has been employed to be done by other employees or otherwise.

The case before the Tribunal from the claimant is one of unfair selection for redundancy. I am sure the Tribunal in their assessment of the evidence presented at the hearings will look firstly at the reason for redundancy and secondly at the fairness of the selection method.

Taking my first point on the reason for the redundancy, I would ask the Tribunal to review the context and background for the redundancy.

The respondent company (a long-established family business) was heading into severe financial difficulties due to a massive down turn in sales. The company primarily supplies carpets, furniture and bedding and stated in cross-examination that its turnover dropped almost 50% (€ 23m to €11m) in the period January 08 to January 2010. During this period the company rationalised by way ofnatural wastage and redeployment of duties. However after the sales period in January 2009, it became evident that a number of staff would have to be made redundant. The company did not haveany further redeployment opportunities.

This sales decline must be viewed in the context of the collapse of the economy as whole and in the company's case this was largely attributed to the complete standstill in the construction industry which the company supplied into for the furnishing of new houses and the depressed retail climate. It is worth considering the following statistics from the CSO which paint a very real picture of the depressed market my clients were trying to survive in.

1. That new house builds went from a high of 90,000 at the peak of the boom (2007) to a low of 10,000 (2010) in a relatively short period of time.

2. That 50,000 jobs have been lost in retail since 2008.

3. That the value of furniture sales in Ireland has dropped by a staggering 46% since 2005. This figure would be a lot higher if we used the peak of 2007 as the base.

4. The retail industry is in free fall and at least 12 major furniture stores have either closed all or some of their businesses. Only on Wednesday last, retail Ireland announced that it expected 400 outlets to close in the month of January.

The stark facts outlined above illustrate that the company had to rationalise to survive and regrettably the claimant's position in sales was a victim of this downturn.

Coming to my second point and the claimant's selection for redundancy, The company in its evidence stated the importance of sales to the business. It does not have a precedence of selecting employees by LIFO. Because of the critical nature of the sales role and its contribution to the survival of the business, it had to select employees using a methodology which would be fair and

transparent to all sales employees and also ensure it retained the best sales personnel. The most obvious way and fairest way of doing this for redundant sales positions was to use actual delivered sales figures. In an effort to ensure fairness in the process the company adjusted the claimant's figures to compensate for periods not spent on the sales floor by using a methodology proposed by the claimant for commission. The claimant and his legal adviser suggested that another employee (hereafter referred to as PT) had a more significant adjustment made to his overall figures and that this gave him an edge when compared to the claimant. The company in its evidence submitted that PT works one day a week on duties other than sales. They adjusted PT's figures to reflect that period when he did not have the capacity to make sales. The very same criterion is used when calculating PT's commission. Therefore, the company submits that it treated the claimant and PT the very same way in calculating the adjusted figures i.e. both were compensated according to time spent on other duties.

The company met with the claimant, outlined the criteria used, discussed any issues he had with it and suggested that he contact them subsequently should he have any concerns. The claimant acknowledged the need for the redundancies and agreed with the criteria. He outlined that the redundancy had come at an opportune time and would give him the opportunity to pursue his legal studies. PG (the respondent's operations director) gave the claimant his business card and telephone details and asked him to contact him if he had any issues with the redundancy

The claimant did not contact the company again and waited almost six months before lodging an unfair dismissal claim.

I put it to the Tribunal that this redundancy was genuine and that the company in selecting the claimant acted in a fair and reasonable manner. The company accepts that the consultation around the redundancy could have been handled differently but, as outlined in its evidence to the Tribunal, the longer consultative interpersonal relationships built up with customers by sales personnel is key to successful sales. It is submitted that, had sales staff been informed too far in advance, they could lose motivation levels and customer relationships might suffer as a result causing further erosion in sales. The selection criterion was explained to him at a meeting with PG and PC (the respondent's sales director) and he raised no objections to it. He was given an opportunity to reflect on the matter and also to follow up with PG should he have any concerns around it. The claimant's disposition during the meeting (and for close on six months afterwards) was one of acceptance regarding the redundancy. The claimant could have chosen the avenue of appealing the decision to the company as was offered by PG but he instead waited practically the full permitted time before lodging an appeal to the Tribunal. I submit to the Tribunal that the claimant is being opportunistic in lodging this claim in the hopes that he can gain some financial reward from a company that made a genuine redundancy decision in trying to preserve its business and sustain employment.

Determination:

The Tribunal received documentation, heard sworn testimony from witnesses and considered submissions from very assiduous representatives. The respondent's data show that there were genuine redundancies at the time. This division of the Employment Appeals Tribunal decides unanimously that, based on the evidence presented by both parties, it was satisfied that the claimant was fairly selected for redundancy. The claim under the Unfair Dismissals Acts, 1977 to 2007, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)