

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.
UD1490/2009

EMPLOYEE *-claimant*

against

EMPLOYER *-respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr T. Taaffe
Members: Mr. R. Prole
Mr M. O'Reilly

heard this claim at Dublin on 22nd July 2010
and 3rd December 2010

Representation:

Claimant: Mr. Gerry Flanagan,
SIPTU, Liberty Hall, Dublin 1

Respondent: Mr. Brian O'Sullivan, IBEC,
Confederation House, 84/86 Lower
Baggot Street, Dublin 2

Background:

The respondent is an Irish part of a philanthropic global organisation that actively supports human rights. The claimant worked in the respondent in a number of roles and he is a Doctor of Economics and finance.

The claimant contends that he was unfairly dismissed by reason of unfair selection for redundancy. The respondent contends that the claimant's role was redundant due to financial constraints/re-organising.

Respondent's case:

The Tribunal heard evidence from the financial controller. He knew the claimant well and worked in the same room as the claimant for three years. The respondent is worldwide based in 150

countries. It was formed in London in 1961 and set up in Dublin one year later. The set up in Ireland is autonomous. It is a philanthropic entity and the respondent was set up to generate income for the organisation. The claimant's role was trading manager for trading activities. They have shops in Galway and one in Dublin. These include retail cafes and merchandise sales. They also have online facilities.

Over the last number of years the respondent had significant losses in trade.

They had traded in Fleet street in Dublin but moved to Haymarket in 2007. The operation traded up to 2009 when they negotiated with a third party to take over the running of the café. They closed Haymarket in 2009 because of continued losses and the company was insolvent. The company was subsidised by the global body by €200,000.00.

A comprehensive / extensive amount of evidence was adduced / opened to the Tribunal regarding the finances of the respondent and efforts to alleviate the situation.

The witness clarified that the claimant did work in the Galway cafe and the person who took over the Galway café still pays them an income/rent. The claimant was trading manager and the day to day operations of Galway were delegated to the manager in Galway.

The representative for the claimant put it that the claimant was trading and office manager and that they did concede that the roles changed in 2007.

The Tribunal heard evidence from the operations director. He was with the respondent for 4.5 years and was responsible for over viewing financial areas, IT areas, HR, fundraising, Training. The claimant reported to him.

The witness explained that the claimant would have been aware of the financial difficulties of the respondent. There had been trading difficulties in previous years and these losses had been underwritten by members money and donations and fundraising. The executive committee would not underwrite further losses. The projected loss to 2008 was €93K and this turned out to be €70K and the executive committee decided not to underwrite the losses.

It was decided to cease trading in Dublin, to change from a retail outlet to an online store. It was decided to make two people in Dublin redundant. Having reviewed the accounts it was decided that the company could not trade it was insolvent.

The witness was asked why other positions were not displaced (redundant). The witness explained that they decided to keep certain positions as it was crucial to keep people in specialist areas such as IT and the finance manager is an accountant.

It was put to the witness that eighteen months later the claimant was invited to apply for a tender to run one of the cafes and he explained that the claimant did not apply. They were looking to outsource the Galway café.

In cross-examination of the second witness, the representative for the claimant put to him that the claimant has all the skill sets for the new job the witness replied, "I do not accept that". He further explained, "Based on my professional experience I don't feel that (the claimant) has the professional skills for that role, that's my opinion. "I managed (the claimant) for two and a half years I was in a good position to make judgement call". When again it was put to the witness about

the claimant has all the skill sets he replied, “No we were looking for a specialised person, to hit the ground running”. The skills needed couldn’t be developed overnight, the position needed to be filled quickly.

The witness was asked if positions became available after the claimant left and he replied, “Yes”. He was asked if it would have been reasonable to offer the claimant a position, “We would have considered an expression of interest”. In answer to the questions the witness explained, “It is important to ensure correct skills to do a particular job. There is a process to ensure a person is correct for a role, so a thorough professional recruitment process. I think it is reasonable for the claimant to apply for a position.”

The Tribunal heard evidence from the chief executive officer. He gave evidence as to the financial difficulties of the company. He explained that it was a very very difficult and emotional decision to make the claimant redundant. The claimant had been with the respondent for years.

There was recruitment at the level of fundraising but this was at a different level (than that of the claimant). The claimant did not apply for that role. The HR manageress phoned the claimant about that role. The position was one of three year fixed term temporary contract and required a postgraduate international law qualification.

Regarding the claimant’s role and “incidental ongoing recruitment, there is an enormous difference”.

In cross-examination the witness was asked why voluntary redundancies were not offered and he replied that it would be impractical.

The representative for the claimant put it that his contention was that the claimant had the skill sets that he could fill roles in the respondent company. The witness was asked about short-listing the claimant for fundraising / HR, facilities roles. The witness explained that the claimant would have been short listed and been allowed to present a case for getting the role.

The Tribunal heard evidence from the HR and facilities manager. The witness explained that the HR was advisory to the claimant’s redundancy. Early retirement was examined and voluntary redundancy was examined as was last-in-first-out. The respondent was facing insolvency and the directors had to make a decision.

Claimant’s case:

The Tribunal heard evidence from the claimant. He graduated with a doctorate in economics and finance. He joined the respondent in 1999 as a volunteer. At one time he spoke to the deputy director about his ideas to improve the shop to make money. He was offered the job as trading manager and he accepted the position. In September 2001 he was offered the position of office manager (taking care of supplies). He took this position and also continued as the trading manager. The human resource section shared the building.

The secretary general of the respondent decided to set up the company into a limited company because as an NGO the company could not reclaim VAT. His job position did not change.

In 2006 the respondent had losses of €24,000.00. At the same time they increased the Galway and Dublin offices. They set up an online shop and sold to other EU countries he found that he was

working 60 to 70 hours per week so he asked the HR manageress (SB) if he could be relieved from the office manager duties. So in 2007 he left the office manager role and concentrated on the trading role. In 2008 they asked the “section” for more money. They had opened a shop in Cork, which needed funding. The shop in Cork closed after one year.

The Dublin office had moved to another location in Dublin (Ballast house) in 2007 and remained there until March 2008. They also had a place in Haymarket.

To save money a manager in Galway went on unpaid leave for a year and he covered that manager’s duties to save money. He travelled to Galway for two days each week to save money.

He went on holidays in January 2009 for two weeks and returned on 19th January. He received an e-mail to meet regarding the trading accounts. He felt that it was thought that it was his fault that they were losing money. That same morning redundancies were being discussed. He spoke but they did not want to listen. . He was one of the longest serving staff. They spoke of redundancies and insolvency.

Some time after he asked for a meeting with the financial controller, the executive director and the operations director. He met them on the 19th January and it was awkward as the financial controller was not present and it “was awkward” as he was the person in charge of finances. He met them again on 28th January and the financial controller was not present again. The other two told him that they had losses of €70,000.00. The financial controller joined the meeting for a few minutes and he outlined the accounts and then left.

The claimant told the Tribunal “to work in respondent for ten years and get a decision so fast, to be treated like that. I am a doctor of . . . I studied marketing, finance and law, I do accounts”.

He said things at the meeting and the executive director pointed at him and said that “you were told last year that if you were not making a profit”.

They allowed him to appeal the redundancy decision. On 05th February he had two meetings, one in the morning with the executive and another later with the board. The people in the executive were new. The executive refused the appeal.

The claimant told the Tribunal, “no one asked me what I could do (work wise) I wasn’t asked”.

The claimant explained that his last day working there was 25th February. He attended a meeting at midday and that the “head of fundraising job description was just a draft”.

Determination:

The Tribunal carefully considered all of the evidence adduced. It is satisfied that a redundancy situation arose in respect of the claimant’s position and so determines. It also notes that the respondent when considering a selection for redundancy will, “Everything being equal”, apply a policy of “Last in first out”, while reserving to itself the right to decide which position should be made redundant.

- (A) The Tribunal is not satisfied that the respondent, prior to its decision to make the claimant redundant, applied this policy fairly and reasonably to the claimant in that it failed to enquire (a) whether there were any fellow employees who were prepared to avail of

- voluntary redundancy and (b) whether any such redundancy would have resulted in the claimant succeeding in filling a position after consideration of his skill sets.
- (B) The Tribunal also finds that the respondent after entering into an engagement and consultation process with the claimant prior to its conclusion made its decision to make the claimant redundant. It finds this failure to bring the process to a proper conclusion to be unfair and unreasonable to the claimant.
 - (C) The Tribunal considered Section 6 (3) of the Unfair Dismissals Acts 1977 as amended by Section 5 (b) of the 1993 Unfair Dismissals Act, which states that:
 - “(7) Without prejudice to the generality of subsection (1) of this section, in determining if a dismissal is an unfair dismissal, regard may be had, if the rights commissioner, the Tribunal or the Circuit Court, as the case may be, considers it appropriate to do so -
 - (a) to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal, and ”
 - (D) The Tribunal is satisfied that matters referred to at (A) and (B) hereof are such as to render the process of selection of the claimant for redundancy unfair and it therefore determines that the claimant was unfairly dismissed.
 - (E) The Tribunal gave consideration to the remedy of re-instatement sought and is not satisfied that it is appropriate in the circumstances of the case.
 - (F) The oral evidence of the claimant in respect of his efforts to obtain alternative employment is noted and while it is accepted that some efforts were made the Tribunal is of the view that a greater and more sustained effort should have been made. It is therefore determined that the claimant contributed to his financial loss.
 - (G) Having carefully considered the matter and allowing for the redundancy payment of €16,700.00, already paid to the claimant, the Tribunal awards the claimant a sum of €10,000.00, under the Unfair Dismissals Acts 1977 to 2007.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)