EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	CASE NO.
EMPLOYEE	UD1819/2009
	MN1734/2009
	RP2044/2009

against

EMPLOYER
under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. M. O'Connell BL

Members: Mr. B. Kealy
Ms. A. Moore

heard this case in Dublin on 4 November 2010

Representation:

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Claimant(s):
Ms. Siobhan Whelan, Hamilton Turner, Solicitors,
66 Dame Street, Dublin 2

Respondent(s):
No legal representation

The determination of the Tribunal was as follows:-

The allegation

It was alleged that the claimant, a graphic designer who worked for the respondent from November 2006 to May 2009, had been unfairly selected for redundancy. The respondent did not follow any procedures but immediately employed two people (MS, who had previously worked for the respondent, and KC) on lower pay to do the claimant's job which was not redundant but still existed. The claimant reserved the right to produce further evidence prior to the hearing of the action.

The defence

PF (the respondent's company secretary and administration manager) stated in writing that he understood why the claimant felt that his position was not made redundant. PF believed that, when he was not present, the claimant had called into the respondent's premises and witnessed two people working on the respondent's equipment. This was true but the claimant's assumptions were incorrect. MS and her assistant were employed on short contracts. Their work involved:

1) repairing all software and hardware issues with the equipment
2) updating all software
3) repairing all networks and sharing issues
4) removing all the claimant's personal music, videos and downloads
5) training both PF and DF (the respondent's owner) on all of the above.

The reason for the claimant being made redundant was that his job was no longer viable or profitable. The work that he did was loss-making. Therefore, the position could not continue and the respondent intended to carry out its business with a lesser number of employees due to the downturn. The criteria used were in accordance with the redundancy legislation and the respondent wished to rebut the allegation of unfair dismissal.

MS completed her project and had since returned to Poland. Her assistant continued on a four-month contract. His responsibilities included:

1) manufacturing plates for the printing machines
2) operating the digital equipment
3) training both DF and PF on both of the above.

These positions were entirely different from the graphic design position held by the claimant who at the time of being made redundant had been on a three-day week earning €387 gross (a reduction from €645 gross previously).

The hearing

At the outset it was agreed that the claimant's employment had ended on 8 May 2009.

Giving sworn testimony, PF (the respondent's abovementioned company secretary and administration manager) said that the respondent was a small printing company which had employed eight in 2006, 2007 and 2008 but had only six employees in 2009 and five in 2010. Afterthe design department had been losing money both graphic designers were made redundant. Both had been last in to the respondent's staff.

Speaking of the five people still working fulltime for the respondent in 2010, PF said that two were owed wages because they were not being paid. He stated that he and his brother, DF, (the respondent's abovementioned owner) had received no pay in the last five or six weeks. He then became visibly emotional.

Recovering his composure, PF said of the loss-making design department that the respondent

previously had been able to charge fifty to eighty euro per hour but, in the downturn, could not get twenty euro per hour. The respondent's two designers ceased to generate income for the company. The respondent was forced to close its design department.

Asked about the allegation that the respondent had taken on two individuals (MS and KC), PF replied that MS had worked for the respondent before, that she had come in on a four-week contract, that she was a web and graphic designer who had qualifications in training and that the claimant could not do that work. Months before, the claimant had been asked to attempt a repair but had not been able to do it. It had cost the respondent two thousand euro to get people in.

In PF's opinion, KC was more or less the same as MS but had other skills. DF had to be trained up. Asked if the claimant could have done that, PF said no, that the claimant had not done printing before and that, if the respondent had kept the claimant, someone else would have been let go. DF had taken on a lot of functions. The respondent had thought that the three-day week was the way to go but could not promise anything and matters had worsened. 2010 sales had seen a further 10% reduction compared to 2009.

Questioned by the Tribunal about the closing of the design department, PF replied that design was no longer done in-house and that the respondent put people in contact with others so that they would pay each other directly without any cut for the respondent because the respondent had had difficulty getting paid. Basically, the respondent was just a printing company although it did have design on its website. Most design companies offered printwork and advertised that they did printing but would "farm it out". PF stated that a print company could not advertise without design and that, a couple of years earlier, design companies would not take print jobs but now they would "farm it out" and take a margin. Some companies closed print and kept design.

Under cross-examination, PF said that the respondent did not market design very well, that it would like to have a design department but that it was contacting another business and leaving work with them. The respondent might get one per month. MS was a graphic designer who had given the claimant training.

Asked about his relationship with the claimant, PF replied that there had been no major problems but that there had been a few incidents.

The Tribunal was now referred to a letter dated 15 April 2009 from PF to the claimant which stated:

"On Thursday 9th April 2009 I entered the office at approximately 9.20 a.m. to find you with your earphones on and watching a video on the applemac computer. This misuse of the company's computer equipment during working hours is a serious breach of discipline. We have previously discussed this verbally before and I have no option but to issue you with a written warning. Anymore breaches of discipline will result in immediate dismissal and please treat this as final warning."

Asked if the respondent's view of the claimant had had relevance to his being made redundant, PF replied by saying that the claimant had spoken of having nothing to do and that PF had asked him for help but that the claimant had said that it was not in the claimant's contract thereby refusing

alternative work.

PF did not dispute that it had been late April 2009 when the claimant was made redundant and repeated that the claimant had had nothing to do. Two employees were selected for redundancy. The respondent had treated the claimant well. The claimant got four weeks' full pay when out sick for six weeks after a minor operation. This absence put pressure on the other graphic designer. The claimant had not been well before the operation and had needed to take breaks of between fifteen and twenty minutes. Asked if the claimant had received verbal warnings, PF replied: "No. That was temporary."

The Tribunal was now referred to a letter dated 15 September 2009 from PF to the claimant's solicitors setting out the respondent's defence to the claimant's unfair dismissal claim and rebutting the said claim.

It was put to PF that it had been a subjective opinion that the claimant's position was redundant and that the respondent had taken on two other employees. PF replied that the said two people had worked on two projects – one for four weeks and one for five-and-a-half months. PF rejected the contention that the claimant should have been given this work saying that the claimant had tried t6 repair but it had cost the respondent two thousand euro.

Asked when the graphic design department had ceased, PF said that this had happened over the next seven to eight weeks, that the department had been loss-making and that the respondent had re-directed people to design companies.

Asked if there had been a meeting about the claimant's redundancy, PF replied that he had met his brother, DF, who owned the respondent. And that it had not been an overnight decision. When they had put the claimant on a three-day week they had said that they hoped it would pick up.

Asked if the two employees made redundant had been permitted to make representations, PF replied that the respondent had set down the grounds for the three-day week and that there had been discussion about the three-day week but he did not deny that the employees were ultimately just told that their positions were redundant.

Repeating that the claimant had said that he had nothing to do, PF said that discipline had not been the main reason for the claimant's termination and that the respondent had done its best with him. Asked about the history of the claimant's employment, PF said that there had been an issue about videos and described the warning letter as a last resort before which there would have been a verbal warning.

Asked if the above issue had played on his mind, PF replied that the respondent had been losing money and that both people made redundant had been the last in. The claimant had been disappointed when made redundant but discipline never came up. They were given time to set up a portfolio to seek another job.

Giving sworn testimony, the claimant said that he had started with the respondent on 27 November 2006. He replaced an employee (JW) who had been there many years but went to work in Bray. The abovementioned MS was there with JW for a while but she left to go to a design house. MS did give some training to the claimant.

The claimant had a hernia operation. He was supposed to be out for a couple of weeks but it took about four. Another person (GX) was hired to take his place and then kept. There was bad feeling between the claimant and DF (the abovementioned owner). The claimant heard that he had no right to take that time off and that he had left the respondent in the lurch. This was August 2008.

Asked if there had been any verbal warning, the claimant replied that the abovementioned written one was the only one he had got. He acknowledged that all staff had been gathered and that he and GX had been put on a three-day week. Work would come in and dry up again. Asked if there had been enough work for him and GX, he said "probably not" but that there would have been enough for one of them to do three days to a full week. With he and GX doing a three-day week there could be one of them there every day that work might come in. The claimant added that he had worked on all aspects of the printing industry.

When the claimant shook hands on his redundancy he believed it was genuine but he returned to the respondent's premises about four weeks later because his social welfare office had lost documents and sent him back. He saw MS working there and a young lad at his place. He raised this with PF's sister who said it was a contract. PF and DF were not present at the time.

The claimant said to the Tribunal that he was not sure that MS could do networks. She wanted to be a designer. The claimant stated that he could have helped with the work that MS and the "young lad" (KC) had been asked to do.

Regarding the written warning that he had received, the claimant accepted that he had been listening to music on computer. Regarding having nothing to do, he said that if he was not sending anything to press others would have nothing to do either. The work amount did vary.

The claimant told the Tribunal that he had questioned whether there had been any verbal warning and had been told that it was about toilet breaks.

Regarding qualifications, the claimant named those that he held but acknowledged that he had no qualification in training.

PF now stated to the Tribunal that, regarding the excessive toilet breaks, he had spoken to his brother (DF) and had said that it was temporary. The claimant said to the Tribunal that it had been discussed at a meeting to assess employee performance and that it had been said that the respondent understood about that. PF told the Tribunal that he would not bring the matter up in front of another employee.

PF now submitted that there had not been a full week's work for a graphic designer and referred the Tribunal to turnover figures for the months before the claimant's redundancy. PF said that he had not known of any bad feelings in August 2008 and that the claimant had stayed many more months.

PF asked the claimant if he recalled the respondent's internet going down and the claimant's failure to fix it. The claimant replied that he was not qualified in networks and that Eircom had fixed it. He did not reply when it was put to him that the two brought in (MS and KC) could do this.

Questioned by the Tribunal, the claimant said that when he called in post-redundancy and saw people (whom he was told were on contract) he saw that they were designing and that was why he had claimed unfair selection for redundancy.

The claimant stated that he had been given money in lieu of notice and that he had no choice but that there had been a lot of work there. His representative stated that the minimum notice claim and redundancy appeal were withdrawn.

The Tribunal was told that MS had stayed four weeks and had left on 29 May 2009. KC had stayed until the end of 2009.

The claimant stated to the Tribunal that he could not recall not accepting work. PF put to him that he had been asked to help in finishing work. The claimant replied that he had been in printing since 1988 and had never refused work.

In a closing submission the claimant's representative said that that the respondent's case was that a genuine redundancy had existed i.e. that the claimant had been dismissed wholly or mainly due to redundancy. However, two people had been hired after the claimant and the claimant could have done some of that work. The claimant had received a warning letter just weeks before being made redundant. This had been in the employer's mind when the claimant was made redundant. The respondent ultimately relied on the defence that it had not been viable to keep the claimant in employment. It was submitted that the respondent had not discharged the burden of proof in that the claimant could have been retrained or redeployed instead of just being made redundant.

In the respondent's closing submission, PF said that the company's turnover was down 50% and that others had been let go since the claimant for whom the respondent had done its best both when he was there and when he left. PF conceded that there had probably been a few procedures with which he had not complied correctly but that the reality was that the jobs made redundant were genuinely redundant and that the respondent was trying to survive even if that meant bringing someone in for a few months for a specific purpose.

Determination:

The Tribunal, after carefully considering all oral and documentary evidence, believes that in April 2009 the respondent was encountering a significant downturn in its business. Furthermore, it believes that a genuine redundancy situation existed. The Tribunal is unanimous in finding that it is satisfied that the decision to dismiss arose wholly from the redundancy situation. The claim under the Unfair Dismissals Acts, 1977 to 2007, fails.

The Tribunal notes that the claim lodged under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, and the appeal lodged under the Redundancy Payments Acts, 1967 to 2007, were withdrawn.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)