

## EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:  
EMPLOYEE

CASE NO.  
UD874/2009  
RP975/2009

*-claimant*

MN902/2009  
WT382/2009

against

EMPLOYER

*-respondent*

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007**  
**REDUNDANCY PAYMENTS ACTS, 1967 TO 2007**  
**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005**  
**ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. M. Levey B.L.  
Members: Mr P. Pierce  
Mr G. Whyte

heard this claim at Dublin on 29th January 2010  
and 21st April 2010  
and 22nd April 2010

### Representation:

Claimant:

Mr Joseph Burke, McCartan & Burke, Solicitors, Iceland  
House, Arran Court, Smithfield, Dublin 7

Respondent:

Smith O'Brien Hegarty, Solicitors, 24 Lower Abbey Street,  
Dublin 1

### **Background:**

The case before the Tribunal is of unfair selection for redundancy.

### **Respondent's case:**

The Tribunal heard evidence from the Group HR manageress (NK). She explained the communication with the claimant regarding his proposed redundancy. The communications were

by letter and by meetings. A large amount of correspondence regarding the communications about the proposed redundancy or continuation of employment or re-deployment was opened to the Tribunal. The witness also gave evidence as to the financial situation in the respondent company. She also gave evidence as to meetings that were held on the subject.

The witness explained the financial situation in the company for June 2008. She told the Tribunal of the considerable amount of loss the company sustained at the time. Consequently the board of directors directed that there would be cost cuts. A review was carried out by the operations director of the whole group and in the individual modules of the whole group including the General Manager (MK) of the building where the claimant was based.

The witness explained that there was no role or work position that was equivalent to the claimant's position.

She and MK and the claimant had a meeting on (Thursday) 13th November 2008 regarding the proposed redundancy and he was given paid time off to think about the proposal. MK told the claimant that he was considering making his role of yard supervisor redundant and also considering re-deploying the claimant elsewhere. MK advised the claimant that he (the claimant) was not expected to make a decision and that he could take the rest of the day and the following day off to consider the options. The claimant asked MK "what the bottom line was" [redundancy amount]. MK explained that he had not done the calculations that the meeting was to raise the subject and discuss all options. NK told him that it would be statutory redundancy of about €34,000.00. The claimant told them that he "would not be going anywhere for that". The claimant told them that he should be informed in advance of meetings as he had a right to representation. MK told the claimant that the reason that they met him was to make him aware that they were considering this(sic) [redundancy?] option and to give him the opportunity to think about it. At the end of the meeting MK said that they would meet again on Monday, (17<sup>th</sup> November).

The claimant arrived at the meeting for 17<sup>th</sup> November. The meeting was postponed to allow the claimant to get representation.

The witness opened correspondence that outlined complications regarding representation due to subscriptions being paid outside of the pay procedure, i.e. union subscriptions not being directly deducted. A letter of 17<sup>th</sup> November from MK to the claimant stating "it is your own responsibility to arrange representation If you so wish". "I think it is important again to re-iterate that this is a consultative process and we are keen to engage in discussions with you on all alternatives relating to your employment with [names respondent] including redeployment". The meeting was postponed until Wednesday (19<sup>th</sup> November).

They met the claimant and a union representative (AK), on 19<sup>th</sup> November. Following the meeting they wrote to the claimant on 20<sup>th</sup> November. The letter contained amongst other things,

"Your representative [names representative] indicated that you are keen to remain with [names respondent] and were willing to engage with the company on these proposals. He listed your preference in terms of options as follows:

1. To remain in the role as it currently exists
2. To remain in the role as it currently exists and to take on extra responsibilities in order to improve efficiencies
3. To be redeployed within the company on the same pay".

The company stated in the letter that proposal number one was not viable as they had to cut costs, that option two was not viable as his duties were as yard supervisor and he could not take on extra work outlined as his role required him to be at various locations throughout the day and therefore take on the other various extra responsibilities. Regarding option three, they had taken time to consider other roles around the company and the only role they could identify was a non-supervisory role and would result on an hourly rate of pay but they would consider his 27 years service in evaluating the rate of pay. They could pursue the option further if he was interested.

The letter also stated that there was another option that they had not discussed at the meeting and that was the option of redundancy, which would, taking into account his service of 27 years, the statutory amount and ex-gratia payment and minimum notice amount to €55,988.00. The letter also asked the claimant to take time in considering the proposals.

At the meeting on 19<sup>th</sup> November the claimant was represented by AK who was a trade union representative, but was representing the claimant in a personal capacity. At the meeting the claimant/his representative said that the procedures regarding redundancy were unusual, that they did not value the claimant's service. There was an issue regarding the claimant's brother who also worked at the respondent. A letter was opened to the Tribunal, which explained that correspondence was sent to the claimant via his brother.

The witness was asked if there were other positions made redundant at the time and she explained that there were 14 or 15 middle management positions made redundant.

The claimant did not indicate he would take up another position or indicate he was willing to discuss taking up another position.

A meeting was scheduled to take place on 27<sup>th</sup> November but was cancelled as MK got a call from AK to say that he was no longer representing the claimant.

MK wrote to the claimant on 23<sup>rd</sup> November to cancel the meeting and to ask the claimant to contact him to discuss the matter. The next correspondence was on 27<sup>th</sup> November from a solicitor representing the claimant. The letter was opened to the Tribunal. The witness was asked about points raised in the letter and explained that the claimant was not informed of redundancy on 13<sup>th</sup> November and that no decision was made regarding the claimant's position in advance of the meeting. There was never any written response by the claimant/his representative indicating a choice to any of the alternatives outlined (in the letter of 20<sup>th</sup> November).

Other letters of correspondence between the claimant's rep and the company were opened to the Tribunal.

Cross-examination:

The witness, when asked who decided to make the claimant redundant replied that it was the Board of management.

*The witness told the Tribunal that she would furnish her handwritten notes of the first meeting with the claimant for the next day of the hearing.*

The witness further explained that they tried to engage with the claimant. They never met the claimant after sending the last letter regarding (the offer) of redeployment. After the meeting of 17<sup>th</sup>

November they never had an opportunity to discuss a role with the claimant.

She and MK had no choice and were given no option but to make the claimant redundant. The witness denied that there was no consultation or that there was no chance of the claimant being kept on. She also said in reply to another question that the claimant never engaged with them regarding redeployment.

On the second day of the hearing the Tribunal heard evidence from the factory manager (MK). The claimant was employed as a yard supervisor in the abattoir in Clonee. He was the only yard supervisor on site and the only yard supervisor in the respondent company. A board meeting took place and he was informed that the company needed to reduce costs and labour.

He contacted the claimant and asked him to a meeting with him and NK on November 13<sup>th</sup> 2008. The claimant was informed of the impending cost cutting measures and that all staff roles in the Clonee plant were reviewed. Consideration was being given to make the role of yard supervisor redundant. Consideration was also given to re-deploying the claimant. The claimant was shocked. The claimant was told that he did not have to make a decision at that time. He was given the rest of the day and the following day to consider his options. The claimant asked what was the "bottomline" and was informed that he (the witness) and not compiled the calculations. The meeting was quite heated. The claimant said that in future he should be notified in advance of further meetings as he was entitled to have representation.

The witness wrote to the claimant after the meeting again explaining that the company needed to reduce costs, including reducing staff numbers. He was again informed that a definite decision had not been made, that he was to consider the options made to him and welcomed any suggestions he could make at their next meeting to be held February 17<sup>th</sup>.

On February 17<sup>th</sup> the claimant arrived at the meeting and informed the witness and NK that he was entitled to have a representative with him. He informed the witness and NK that he would be bringing his union official (AK) to the meeting.

He wrote 2 letters dated November 17<sup>th</sup> to the claimant after the meeting. He told the claimant he was in breach of the Union Agreement in view of the fact that he was paying his union subscriptions outside of the respondent's deduction system. He was again reminded him that no final decision had been made and they were still only going through the consultation process. He was also invited to a meeting 2 days later and was given time off to consider the options.

On November 18<sup>th</sup> he received a letter from the claimant's union representative stating the claimant's human right to be free to choose whom his representation would be. The claimant attended the November 19<sup>th</sup> meeting with AK. The witness outlined what had occurred in relation to the company's financial status and what had occurred with the claimant in the past week. AK commented that he had only seen staff sent home on full pay when they were suspended with pay.

The witness stated that the role of yard supervisor would be absorbed into the role of the abattoir manager. AK suggested the claimant take on more duties as with 27 years service he had experience in the workings of the yard. When asked if the claimant wanted to take on a new role he replied that would not make sense to take on a job elsewhere that could not be easily fitted in with his existing duties. He agreed he would be interested in redeployment. AK summarised the

claimant's preference:

1. To remain where he was.
2. To remain where he was and asked to take on additional duties.
3. Redeployment on the same rate of pay.

On November 20<sup>th</sup> he replied in writing to the claimant's preferences. He stated the he could not remain in the position as the role was to be absorbed by the abattoir manager. Other roles in the company could not be taken on as additional duties as staff in these areas worked these roles fulltime. In respect of this third preference the witness offered him a position as a general operative in the boning hall. His 27 years would be taken into account when deciding his rate of pay, as the rate for general operatives was lower.

On November 27<sup>th</sup> he wrote to the claimant acknowledging the fact AK was no longer representing him and requesting a firm decision as to his preferred option. He received a letter from the claimant's solicitor dated the same day requesting a meeting. When asked he said that the claimant had not been told he was being made redundant on November 13<sup>th</sup>. The respondent's solicitor replied asking for a response as to which option the claimant was choosing. It also stated that if they had no reply by December 8<sup>th</sup> they would have no option but to proceed to make a decision without the claimant's input.

On December 23<sup>rd</sup> the witness and NK met with the claimant. He felt it was not enough for someone with his service. He requested € 80,000. He was given his official notification of his redundancy and told the 2 cheques and RP50 form would be sent to his solicitors. The witness accompanied him to his locker and handed over his security card and fob. He explained that it was company policy to accompany people off the premises. He said he had not been disrespectful to the claimant. The cheques and RP50 form were sent to his solicitor.

Cross-examination:

The witness disagreed that the decision had already been made to make the claimant redundant before discussing other options. When put to him that the claimant only had 2 options, work in the boning hall at less money or take the redundancy package he replied that his 27 years service would have been taken into account in relation to his salary in the boning hall. When asked why the method of last in first out (L.I.F.O.) was not considered, he replied that it had not been his decision to make.

When asked he stated there were no other positions available apart from the boning hall. When put to him he stated that other supervisors with less service were made redundant.

He explained to the Tribunal that there were 2 supervisors in the boning hall but they had a different skill set to the claimant. He stated that the abattoir manager had been reviewing staff roles since summer 2008. He agreed it was unfortunate coincidence that the abattoir manager had mentioned to the claimant on November 13<sup>th</sup>, before he met the witness that he may be in line for redundancy.

When put to the witness that from November 13<sup>th</sup> to November 20<sup>th</sup> the process had changed from a consultation to a redundancy package, he replied that it had been the claimant had raised the issue of redundancy. He stated that they had never got to the stage of discussing his rate of pay if he took the general operative's job in the boning hall.

### **Claimant's Case:**

The claimant gave evidence. He commenced with the respondent in 1981 and had worked in various locations and roles in his 27 years service. MK was his direct line manager at the time he was let go.

He said he was not aware the respondent company wanted to cut costs and had only been asked to conserve water where possible.

At 9.30a.m. On November 13<sup>th</sup> he was requested to go to the boardroom to a meeting of which he knew nothing about. He met the abattoir manager in the corridor who told him he, the claimant, was to be made redundant. MK and NK were present. He was informed of the cost cutting measures the respondent was trying to make. He was very upset. He asked what the "bottom line" was and MK mentioned redundancy. He was told he was being made redundant.

He went to his union and was told not to attend any further meetings without a representative. He explained that he had been paying his union subscriptions independently. He told the Tribunal that he was prepared to take on more roles as he had carried out other duties in the past. MK was aware he had covered for other staff that were absent on leave. He said that the respondent did not want to engage in discussions about alternatives to his redundancy. He had not been informed he could be re-deployed at the same rate of pay. When asked he said that he would not have entertained the offer of an alternative position at a reduced rate of pay. He said that he was given a number of days to consider the matter. He told the Tribunal that the only reason staff were sent home with pay was if they had done something wrong.

He stated he did not sign the RP50 form. He told the Tribunal that after the abattoir manager had mentioned his redundancy on November 13<sup>th</sup> he had asked him on numerous occasions about what was working he was carrying out.

The claimant gave evidence of loss.

### **Cross-examination:**

When asked he stated that the letter on November 13<sup>th</sup> stating they were still only in the consultation process did not put his mind at ease. He said at the second meeting MK told him it was not personal and to go home for 2 days to think about it. He felt his redundancy was a foregone conclusion. He said that a proper process was not followed. When asked why he had not enquired what the rate of pay would be in the boning hall, he asked why they had not told him.

When asked why he had not re-engaged in the process he replied that he was full sure the decision was already made on November 13<sup>th</sup> and by December 23<sup>rd</sup> he was trying to look for the best deal he could.

## Determination

Having heard all the evidence in this case the Tribunal is of the view that a reasonable alternative was not offered to the claimant. It appears to the Tribunal if the respondent had genuinely wanted to redeploy the claimant it should have come up with specific proposals as to what its plan was with regard to rates of pay, red circling of his supervisors pay rate or compensation. While the claimant did not come back to his employer regarding these issues the reality is the onus is on the employer to work out what specifics it proposes to take in such a situation and put those suggestions to the claimant. The respondent failed to do that and consequently the claimant's claim succeeds.

The claimant was paid €33,000.00 statutory redundancy. The Tribunal is of the view that the manner in which the selection was done was unfair. In addition to the statutory redundancy payment the Tribunal awards him compensation of €20,000.00 under the Unfair Dismissals Acts 1977 to 2007 on the basis that he already accepted €60,000.00, which included his statutory redundancy payment, holiday pay, minimum notice and bonus. He is therefore not entitled to compensation under the Organisation of Working Time Act, 1997, the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and the Redundancy Payments Acts, 1967 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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