

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.  
EMPLOYEE -*Claimant* UD2534/2009  
against  
EMPLOYER -*Respondent*  
under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. S. McNally  
Members: Mr. P. Casey  
Mr. D. McEvoy

heard this claim at Cork on 4th November 2010 and 14th December 2010

#### **Representation:**

Claimant: J W O'Donovan, Solicitors, 53 South Mall, Cork

Respondent: Mr. Paul Dunne, IBEC, Confederation House, 84/86 Lower Baggot Street, Dublin 2

#### **Respondent's Case:**

The Business Manager gave evidence that the respondent is a pharmacy and member of the Independent Pharmacy Ownership Scheme (hereinafter referred to as IPOS). IPOS was set up as a fund to buy 100 pharmacies approximately six years ago. IPOS is the managing company for the pharmacies and as a Business Manager the witness was responsible for managing 15 pharmacies. The pharmacy particular to this case (hereinafter referred to as pharmacy B) was purchased in 2004 but is currently in receivership. IPOS had a model for the business based on yearly growth of between 7.5 and 10%. However, the model did not incorporate a plan for a decrease in business. IPOS required the witness to manage ten pharmacies in the Cork region referred to as "critical care" pharmacies. One of these pharmacies was pharmacy B, within which the claimant was employed as a counter-assistant.

Pharmacy B was profitable and had good staff but when managing the pharmacy the witness realised that the pharmacy was not making enough money to cover the principal of the loan which would become due in December 2009. Up until that time pharmacy B had been making interest only payments.

The pharmacy made 50% profit on the drug payments scheme but this was reducing to 20%. In

addition four new pharmacies had opened in the area and a change in legislation in June 2009 meant a reduction in the price of medication. The pharmacy was dispensing drugs at a loss of 6.5%.

The witness prepared profit and loss estimates for the pharmacy from March 2009 to year ending March 2011 and it was evident that steps needed to be taken to try to save the business.

On 20<sup>th</sup> March 2009 the Business Manager met all of the staff in individual meetings. He outlined the figures in the profit and loss accounts to each staff member and made them aware of the situation. A number of staff were aware that another pharmacy in the group was operating at a loss and they enquired if this was a factor that was impacting on pharmacy B. The witness reassured the staff that separate management accounts were being prepared for each pharmacy.

A number of staff commented on how busy the pharmacy was on some days and the witness explained that the principal sum on the loan was due for repayment from December 2009.

The witness informed the staff that he would examine all costings including overheads. He negotiated with the insurance company and various suppliers and he reduced stock as much as possible. There were two landlords and the witness contacted both of them with a view to negotiating a reduction in rent. However, one landlord refused to negotiate and the other was seeking a rent increase. In any event the sum of rent paid remained unchanged. The witness sourced the cheapest supplier of medications. In addition, management were meeting with the bank in an effort to re-negotiate the terms of the loan.

A rota document was opened to the Tribunal showing the number of employees in March 2009 and the hours usually worked. The staff consisted of a pharmacist, two qualified assistants who could dispense medication with supervision from the pharmacist, two technicians, five over-the-counter assistants (of which the claimant was one), and four part-time over-the-counter assistants. One other employee worked on the fragrances counter.

The business needed to reduce salaries and so the Business Manager met with all staff members individually on 29<sup>th</sup> and 30<sup>th</sup> April 2009 to see if reduced hours were suitable to any of the staff. The claimant's hours had already reduced from five days to four and every fourth Saturday. His notes of the meeting with the claimant recorded that she had a preference for reduced hours rather than a reduced hourly rate.

The meetings with the staff members did not resolve the salaries issue. The Business Manager examined the amount of business the pharmacy did on different days of the week over a period of eight weeks. He considered the opening hours of the pharmacy and considered late opening in the latter part of the week and also opening on Sundays. From this he considered the staffing levels required for the business. He reached a decision that the respondent could operate its business with one less full-time over-the-counter position. The four remaining full-time over-the-counter positions would suffer a reduction in hours. The remaining positions consisted of two positions offering 24 hours work each (these positions were referred to as OTC1 & OTC2) and two positions of 14 hours each (referred to as positions OTC3 and OTC4).

The Business Manager drew up a new rota and he met each staff member on 8<sup>th</sup> and 9<sup>th</sup> June 2009 and outlined the required changes. He met with the claimant on 11<sup>th</sup> June 2009 and the claimant stated that she would have a preference for the position of OTC2. Another employee also had a preference for this position. Should more than one staff member apply for a particular position

it was the Business Manager's intention to hold interviews and base selection criteria on skill sets rather than on a last in, first out process.

The witness informed the claimant that another colleague was also interested in the same role and that both of them would have to be interviewed for the role. The claimant then enquired about the position of OTC3 and the witness told her that another colleague was also interested in that role. The claimant did not want to attend for interview and she enquired from the witness about the possibility of voluntary redundancy. The witness asked the claimant for time to consider the matter and he continued to meet with the remainder of staff. Later that day a further staff member informed him that she also wished to take voluntary redundancy.

Around the 15<sup>th</sup> June 2009 the witness left a voicemail for the claimant outlining the sum of redundancy that would be owing to her. On 22<sup>nd</sup> June 2009 the claimant telephoned him to say she would accept the redundancy.

The claimant was due to finish on 15<sup>th</sup> July 2009 as she had some holidays to take prior to her notice period. The witness asked her to attend at his office on that date and when she arrived he presented her with form RP50. The witness did not have a cheque to give to the claimant on that date, as the business had a lack of funds but he explained to the claimant and her colleague how they could claim their redundancy payments. The claimant and her colleague were unhappy, as they had expected to receive cheques on that date. The claimant brought form RP50 from the office that day but she later sent it back to the witness and it had been signed and dated 21<sup>st</sup> July 2009.

Only two issues were raised after the claimant was made redundant. During July 2009 the claimant telephoned to say that she needed a letter stating that she had not received a redundancy payment from the business and she requested her P45. This was the only contact received from the claimant and she never raised a grievance. The respondent has a grievance procedure in place. The grievance policy states that a staff member can raise an issue informally with the pharmacy manager or formally raise the matter with the Business Manager. No such grievance was received from the claimant. It therefore came as a surprise to receive a letter from the claimant's representative dated 12<sup>th</sup> October 2009, which stated, that the claimant believed she was unfairly dismissed as two people had replaced her. However, both of these people were employed at the same time as the claimant. One of them worked in the photo printing area and the other occupied the position of OTC4. It was therefore not correct to say that the claimant was replaced in her position. The claimant was not selected for redundancy but had instead approached the Business Manager and requested to be made redundant.

In March 2010 the business made a profit of €440,000 but two other pharmacies in the group were unable to make their payment and the bank put the group into receivership.

During cross-examination the witness stated that the business had saved €75,000 between the two redundancies and the reduction in salaries for the remaining staff members.

The witness confirmed that the respondent opened a new pharmacy in the area during 2009. This was due to the fact that the local doctor moved premises and the respondent hoped by being in the vicinity it would grow the business. However, instead pharmacy B retained its usual customers. He accepted that the new pharmacy owed money to pharmacy B but the profit and loss he compiled was solely for pharmacy B. He had informed the directors the two had to be separate.

### **Claimant's case**

The claimant stated that she was initially told that there was to be a re-structuring of work and that there would be two work patterns with two employees assigned to each pattern. At that stage she was told that if more than two people applied for the same pattern there would have to be interviews held. However it later transpired that in fact there were 4 different patterns being introduced and that there were 5 employees applying for 4 OTC posts. Therefore one employee was to be made redundant.

The fact that there were 5 OTC employees came as a shock to the claimant and as far as she was concerned there were only 4 current OTC staff. However she was informed that a colleague, whom she had regarded as being employed on the cosmetics counter, was in fact an OTC employee. During the hearing the respondent submitted a copy of the terms and conditions of employment for the employee concerned and this document described her as OTC. This document was given to that employee when at the commencement of her employment one year before the claimant had commenced.

On 22<sup>nd</sup> June the claimant was informed that another employee wished to be considered for the same hours as she and that they would both have to interview for the job. However it was also put to the claimant that she could opt for redundancy if she wished and that she was to let the respondent know within 24 hours what her preference was. The claimant felt that she would not be selected for the job given her history within the employment of the respondent. However she did not elaborate on what she meant by this. Therefore the claimant felt that she had no option but to apply for redundancy.

The claimant expected to receive a cheque for the redundancy lump sum on leaving the employment but the respondent told her that she would have to claim it from the Social Insurance Fund as the company was not in a position to pay it at that time. The redundancy lump sum was paid through the Social Insurance Fund approximately six months after she finished employment with the respondent.

### **Determination**

Having considered the evidence adduced the Tribunal had reservations about the procedures adopted by the respondent in order to communicate to the employees the restructuring of the business and the limited positions available. Notwithstanding this the Tribunal is satisfied that the claimant's willingness to accept redundancy led to the situation whereby there was no selection for redundancy necessary.

Therefore there was not an unfair selection for redundancy and the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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