

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:  
EMPLOYEE – *claimant*

CASE NO.  
UD2173/2009

against  
EMPLOYER – *respondent*

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr R Maguire BL

Members: Mr M Noone  
Mr J Dorney

heard this claim at Dublin on 7th December 2010 and 9th May 2011

#### **Representation:**

Claimant(s): Mr Patrick Purcell BL, instructed by:  
Mr Niall Clancy  
Brian A Rennick Solicitors  
Main Street, Dunboyne, Co. Meath

Respondent(s): John F Kelleher  
Solicitor  
4-5 St Mary's Terrace, Dunboyne, Co Meath

#### **The determination of the Tribunal was as follows:**

##### Background:

The claimant commenced employment with the respondent company on 10 April 2006 as a sales executive. The claimant was informed on 16 March 2009 that her position had been selected for redundancy. The claimant disputes that her position was fairly selected for redundancy.

##### Respondent's Case:

Giving evidence the General Manager outlined that the respondent company had acquired another company in New Ross and hoped to improve the revenue of both companies. However, the respondent was losing money from the time of 2008 through to 2009 as customers reduced their spending and others ceased to operate. From the time of mid-2008 it became apparent that it would be necessary to make redundancies. The financials were discussed with the Managing Director on

an ongoing basis and with the Financial Controller at quarterly management meetings. Staff who left of their own accord were not replaced in their positions. In total 14 employees left the respondent's employment and of these 10 were made redundant. Only one employee was replaced in their position.

A number of steps continue to be taken to ensure the viability of the company including pension contributions ceasing in January 2010, salary reductions from April and a reduction in working hours for some staff. In addition the rent was re-negotiated and the company car and van fleet has been reduced. Attempts were made to grow the business through a marketing campaign etcetera but this was not successful.

In early 2009, there were five engineers and three sales executives based in Dublin. It was decided that the position of one engineer and one sales executive had to be made redundant. The General Manager made the selections for redundancy. In the case of the sales staff he considered the level of business generated, the overall capabilities of the employees and the ability to "close" deals. The claimant was informed on 16 March 2009 that her sales position had been selected for redundancy. He outlined the company's situation to the claimant, of which she would already have been aware.

Subsequent to the claimant's redundancy a former employee (Mr. S) approached the company in October/November 2009 offering to carry out work on a commission only basis for the respondent company. He subsequently started sales work on an independent basis, on behalf of the respondent company. He rents a space in the respondent's office, pays his own utilities and is not an employee of the company. Mr. S was not allocated any of the accounts, which the claimant had responsibility for.

During cross-examination the General Manager confirmed that the claimant returned from maternity leave in August 2008. He met with the claimant during her maternity leave in June and July 2008 to discuss accounts and the claimant's return to work.

The General Manager accepted that he had not made the claimant aware of the selection process he was utilising prior to meeting with her on 16 March 2009. However, the claimant would have been aware prior to that meeting of the possibility of redundancies within the company as redundancies were possibly mentioned the previous August. The possibility of a three-day week was also discussed but the company did not consider it a viable option.

The last in, first out selection process was not used in this instance. The General Manager used a comparative selection process, which he had previous experience of, in selecting the position for redundancy. The selection criteria used in this instance were the contract values that each sales person had secured. Contract values are maintenance contracts held with customers to provide software and hardware to them. These values were taken into consideration in the process rather than the overall sales figures, as the contract values were more profitable to the company. The claimant had the lowest figure for contract values compared to the other two sales executives. The claimant was not given a chance to improve her figures as the company needed to reduce costs quickly.

In reply to questions from the Tribunal, the General Manager stated there were general staff meetings regarding redundancies, reduction in working hours and pay cuts.

The General Manager considered only the maintenance contract values, as they were more profitable to the company. The claimant had the least of the three sales people in contract values.

The General Manager did not perform an analysis of the sales brought in by individual employees. He did not take into account that Employee R had slightly less service than the claimant. When considering the contracts value held by the three sales people the General Manager did consider the fact that the claimant had only returned from maternity leave in August 2008 and allocated a contract value of €22,000 to her.

On the second day of hearing the General Manager gave direct evidence regarding a staff meeting held on November 27<sup>th</sup> 2008. At this meeting he informed staff that there would not be anymore pay increases and that instead pay reductions and four-day week's would be looked at. He gave a general financial overview of the company and outlined the company's goals by way of a PowerPoint presentation.

During cross-examination on this issue he contended that he had presented the full presentation to the staff. He explained the perilous state of the company in regard to profitability. He agreed that the claimant was a good employee and that she had exceeded her target of €8,000 from 31<sup>st</sup> July 2008 to 6<sup>th</sup> November 2008 and had made a profit of €34,117.45. The claimant's cost was higher than another employee. The claimant had returned from maternity leave in August 2008 and was made redundant in March 2009.

In response to the Tribunal the General Manager confirmed that he had not raised the possibility of redundancies at the November 2008 meeting. He had not consulted the claimant about her redundancy prior to meeting her in March 2009. He got agreement on staff pay reductions in April 2009.

Employee R gave evidence that she commenced her employment as a sales representative with the respondent company in October 2006. At the meeting in November 2008 staff were told that things weren't going well and there was talk of pay cuts and a reduction in hours. After the meeting she discussed with the claimant the possibility of them job sharing in order to keep their jobs. They said they'd see how things went. After the claimant was made redundant Employee R offered to the claimant that they work share and that they could offer this to the company. The claimant declined the offer and told her that the decision had been made. She later heard that the claimant had a job offer but she understood that she had not accepted it.

#### Claimant's Case:

The claimant gave evidence that her employment commenced in April 2006. She got on well in her role. In January 2008 she went on maternity leave and was due to return in July 2008. Prior to her leave the General Manager asked her not to take extra unpaid leave at the end of her maternity leave and he said he would organise that she could work from home.

She met the General Manager three times at a local hotel towards the end of her maternity leave. At the first meeting he withdrew the offer of working from home as he said it would create a precedent. He said that business was slowing down and he wanted her to return on a three-day week. At the next meeting in early July 2008 he said he was considering taking away some of her accounts and distributing them to other sales staff. The claimant resisted this as it had been agreed prior to her leave that all her accounts would be returned to her. At the final meeting the claimant objected to returning on a three-day week. She also requested to be able to work from home, but this was refused. She requested a month's parental leave to organise childcare and returned to work in August 2008.

When she returned she felt that the General Manager's attitude toward her had changed and believed that he avoided her for several days. As she had annual leave to take she requested to take a day a week off until the end of the year. This worked well for her so she requested to take a parental leave day every week from the new year, which was agreed. She continued to meet her targets. No performance issues were raised with her. She exceeded her target set for August and September 2008.

On March 16<sup>th</sup> 2009 the General Manager told her that he had to make some employees redundant and she was one of them. He said it was due to costs. She agreed to work until the end of April to handover her accounts. She believed that she was owed commission. Of the three staff in sales she had the second longest service. After her dismissal she was offered a job with a different company, but it was not feasible for her to take it due to childcare commitments.

During cross-examination she agreed that she had attended the meeting in November, but did not recall being informed about salary freezes and reduced hours. She asked the General Manager afterwards if he was considering making people redundant but he told her he didn't think so. She had discussed job-sharing with Employee R. After her dismissal Employee R had offered to job-share with her, but it was a difficult situation and no alternatives had been put at the meeting.

She agreed that she had retained her accounts on her return from maternity leave. She felt that there had been a lot of changes while she was on maternity leave. There was never an issue with her performance and she was not the last in. She was not offered to take a salary cut and no alternatives were offered. She had not invoked the grievance procedure over her selection for redundancy. She did not realise she could and it was not offered.

Determination:

The Tribunal finds that the claimant was unfairly selected for redundancy. The General Manager contended that the decision was taken on the basis of a matrix, but this was not supported with documentation at the hearing. The selection was internally inconsistent as it did not equate points with revenue and also the company did not consider non-recurring revenue.

Accordingly, the claim succeeds and the Tribunal awards the claimant €45,000 (forty-five thousand euro) under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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