

## EMPLOYMENT APPEALS TRIBUNAL

**CLAIM(S) OF:**  
EMPLOYEE  
- *claimant*

**CASE NO.**  
UD2079/2009

against  
EMPLOYER  
under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr T. Taaffe

Members: Mr J. Horan  
Mr F. Keogh

heard this claim at Dublin on 16th December 2010  
and 18th April 2011

#### Representation:

Claimant: Cliona Kimber BL instructed by Tom Conlon, Solicitors, 14 South Leinster Street, Dublin 2

Respondent: Mr Tom Mallon BL instructed by J.W. O'Donovan, Solicitor, 53 South Mall, Cork

This is a case where the claimant maintained he was unfairly selected for redundancy.

The determination of the Tribunal was as follows:-

#### **Respondents Case**

The manager of the eastern region (hereinafter referred to as F) at the time of the claimant's redundancy gave evidence. He commenced this position in 2007 and at that time they had 70 employees and a few large projects in this region. He outlined how the turnover of the respondents had decreased since 2007 to date. In 2008 the number of employees in the eastern region had decreased to 20 mostly through redundancies.

In autumn 2008 he advised the claimant that there was no guarantee of work in the future as the respondent were finding it difficult to trade and to acquire new contracts. The claimant was concerned and he had monthly contact with him where he advised the claimant they were actively seeking work. In early 2009 a lot of their projects were coming to an end, the claimant's project finished and they moved him to another project (A) and he helped out another project manager on this. Project A was completed in April 2009.

In early March he was aware that there were no other projects in the pipeline and he notified the claimant of the situation and reiterated to him that there was no guarantee of work. On the 18<sup>th</sup> March 2009 on project A site he informed the claimant that his position was being considered for redundancy. On the 20<sup>th</sup> March 2009 he met the claimant again and informed that the decision making process was ongoing and it was likely that his position would be redundant. He requested the claimant to meet with him in the office on the 23<sup>rd</sup> March 2009.

On the 23<sup>rd</sup> March 2009 witness and a representative from HR met with the claimant. At this meeting they informed the claimant that his position was being made redundant, he further explained to him that they had been hopeful of obtaining contracts but had not succeeded. The claimant acknowledged that the company was in decline but had commented that it was not nice being made redundant.

Under cross-examination he confirmed that the meeting where the claimant was made redundant took place in their office in Baldoyle. The claimant was aware that his position was under threat of redundancy for a number of months. The claimant did not sign the separation agreement, which would have entitled him to an ex-gratia payment of €10,000.00. He was referred to their accounts where it showed the company still in profit in 2008 and in 2009 in the region of 12 million. He explained that these accounts were based on a contingent fund of €10 million being paid from a large project that was subsequently cancelled and this €10 million was written off in 2010. He disagreed that the redundancy process was very quick as he had a number of conversations with the claimant regarding same as far back as August 2008. It was suggested that the claimant would say no consultation with any alternatives were offered to him, he disagreed and stated that the claimant was of the view that there were no other projects available for him to work on.

The claimant commenced as a foreman with the company and progressed to the position of a project manager. He was not asked to revert to the position of foreman, as there were no positions available at the time. The respondents have other regional offices and a business in the UK. He explained that if you were employed in a regional base you stay in this base, the regional offices were autonomous. Their UK operation is separate to their construction company in Ireland.

He was involved in preparing the matrix for selection for redundancy. This was drawn up and completed in February 2009. The claimant was scored against a senior project manager and a site manager. There was another project manager employed at the time but was not included as he was made redundant at the same time as the claimant. The senior contracts manager (LF) and this witness scored the matrix. LF was their line manager. He commenced with the company in September 2008 but was working with them on a hands on basis and had 40 years experience in the construction business. They went through each employee and scored them on each individual skill, they also looked at performance appraisal documents and their CVs. Their scores were decided through discussion between him and LF. The claimant was not invited to input into the matrix nor was he shown same.

He was referred to the company handbook in relation to redundancy where it states, "Factors considered will include skill, experience, flexibility, attendance, time-keeping, value to organisation, disciplinary records and length of service." He confirmed that the matrix used to select the claimant was skills based.

In reply to questions from the Tribunal he explained between 20<sup>th</sup> and the 23<sup>rd</sup> March a management meeting was held in Cork where the directors made the decision to make the claimant

redundant. The redundancy was made based on their options going forward. The other two employees on the matrix are still in employment. This witness was made redundant in June 2010.

The hearing was adjourned until the 18<sup>th</sup> April 2011.

At the second day of the hearing the representative for the respondent explained that the company's situation had deteriorated since the last day. Their staff have been further reduced to 93 the majority of which are on short time and further pay cuts. The company is now part of NAMA.

The respondent's case continued. The senior contracts manager (LF) of the eastern region and midlands UK gave evidence. At the time of the claimant's redundancy he was the senior contracts manager of Dublin. He explained that there were a significant amount of redundancies around the time of the claimants. They had three live projects in Dublin then that are now all complete, and some old jobs that would need retention. Currently they have a construction project that phase one will be completed in May 2011, they hope to acquire phase 2. Two maintenance contracts in Dublin Airport and another project finishing on the 13<sup>th</sup> May 2011. They have no future work lined up after these. They are finding it hard to compete in Ireland as the opportunities available to them have reduced and they are seeking further work in the UK. At present he spends 2/3 days a week trying to drum up business in the UK. In 2006 the Irish operation had 315 employees in 2009 these numbers were halved when they had 40 senior staff and 100 employees. Of the two employees included in the skills matrix which resulted in the claimant's redundancy, MB was let go in February 2011, VE has completed the project he was working on and they are assessing the situation.

At the time of redundancy he reported to F. He explained that due to the complexity of the projects and the nature of their work it would not be the norm to swap project managers between sites. When the claimant project came to an end he came to work with him on project A. At this stage MB was still on a project and when this was concluded he was put on tidying up small projects. VE was on small projects and finalising them and then went to a larger project they acquired in a hospital. This is now complete.

In respect of the matrix he had scored the other two employees while F scored the claimant. He would have known MB and VE job valuation as they were reporting to him. While MB has scored one less than the claimant in Technical Competence MB skills were predominantly engineering. MB was involved in tendering and estimation and was more efficient in this than the claimant. He relied more on MB and VE on their project management skills, as he knew their strengths.

Under cross-examination he confirmed that both MB and VE were still in employment in February 2011. He explained that based on the skills of MB and VE they had been successful in acquiring small amounts of work. He explained that the matrix was skill based while it differs from the general redundancy guidelines in their handbook. It was suggested to him that F during the course of his evidence had referred to a third set of criteria. He did not offer a comment on this.

He explained that he and F when completing the matrix he had completed the sheet for MB and VE he handed this to F who would ask questions and he called out the answers to him. He was with the company five months at this time; the employees he scored had been with the company for a few years previously. At the time he did not have access to the claimant's performance appraisal.

The HR manager gave evidence he commenced with the respondent in February 2008 and was made redundant in February 2011. At the time he commenced with the respondent Group there

were 800 employees when he left this had been reduced to 400 while the respondent company employees had been reduced to 100. All levels of employees were affected by the down turn, there had been constant restructuring of the group, and there are now only two directors for the respondent company. He was not directly involved with the claimant's redundancy, but the claimant's performance had not been an issue in it, the company needed to ensure that they had the skills required going forward. F the manager of the eastern region had decided on the skills to be included in the matrix. The skills matrix would be different for different times and jobs. The skills matrix is specific not like their redundancy criteria in the handbook. This skills matrix was to bring a degree of objectivity to ensure that the company would have the skills they required when the process was completed. It was an appropriate matrix at the time. He was satisfied with the selection process.

When he joined the company in February 2008 he was new to the construction industry, while things were looking difficult at this time growth was projected. However in a number of months this had changed and they had to restructure the company, they had removed a layer of management, and introduced other cost savings e.g. pay cuts. There had been a bonus scheme in place but this had been discontinued since 2008.

Under cross-examination he confirmed that F had made the decision to make the claimant redundant on instruction from senior management. He had met the claimant on the 8<sup>th</sup> April 2009 to sign the RP50 forms and also because the claimant wished to meet him. They had provided the claimant with a HR advocate to help him through redundancy and to provide aid to him for the future. He understood that the claimant had met with F on the 18<sup>th</sup> March 2009. HR introduced the skills matrix as a tool for selecting employees for redundancies.

He was referred to a performance appraisal of the claimants from 2008. He explained that a performance management appraisal system was introduced a year before he took up his position but they had stopped this as from his professional experience it is not good. MB and MVE appraisals were also produced he agreed that they and the claimant were all scored by the same person and that MB and the claimant came out with a similar score. He accepted it would have been better if the same person completed the matrix for all three; the manager who had done the appraisals was redundant at the time. The skills matrix was not shown to the claimant, as this is common practise. The other criteria in the handbook were not included, as they had no issue with the three employees. The claimant at the meeting on the 8<sup>th</sup> April 2009 had informed him that he was not happy with the ex gratia payment but had not raised any issue in relation to the process or of him being made redundant.

A HR administrator gave evidence on behalf of the respondent. Week commencing the 16<sup>th</sup> March 2009 F telephoned her and informed her that he had been speaking with the claimant about his potential redundancy. On the Friday F telephoned her again and told her that the claimant would be coming in to head office on 23<sup>rd</sup> March 2009 to discuss the redundancy. She attended this meeting with the claimant as the role of the claimant's advocate as part of this role she was there to support the claimant. F read through the redundancy letter with the claimant, explained the lack of contracts and that unfortunately that they would have to make him redundant. She emailed the claimant on the 6<sup>th</sup> April 2009 confirming the appointment for him to come in to sign the RP 50 form and to collect his final payment. Within this email she offered to help him update his curriculum vitae, as it was not that they wanted to make him redundant. She also gave him the opportunity to come in for interview training if he wished. She was not present at the meeting on the 8<sup>th</sup> April 2009. She did speak with the claimant informally and he never expressed concern over the selection process. He had told her that he had been expecting it but dreading it.

Under cross-examination she thought that the meeting at the weekend in Cork was perhaps a conference call. She had typed the redundancy letter on the Monday 23<sup>rd</sup> March 2009. Prior to going to the meeting on the 23<sup>rd</sup> she had told the claimant that she was there to support him and to ensure fairness. At the commencement of this meeting the claimant was asked if he had any questions or input and he said no.

F had contacted her about a week prior to the redundancy asking her about a matrix, she had sent him a blank template and explained the concept of the matrix to him. F had decided on the skills that were most appropriate to be included in the matrix. The matrix is used to add objectively to the process and is to aid the managers in making a decision. The HR manager was not involved in the claimant's redundancy at this stage as he was overseeing the senior management redundancies.

### **Claimants Case**

The claimant gave direct sworn evidence. He commenced with the respondent in Spring 2002 as a foreman. While in the respondent's employment he returned to college and did a diploma in construction management and progressed to the position of Project Manager. The first contract he had on his own, as Project Manager was 2006 – 2007 where he was responsible for all works on this site. His salary at the time of his redundancy was approximately €73,000.00, he also received a bi-annual bonus, and other benefits included a company car, laptop and expenses. He was due a bonus in February 2009 but he did not receive this.

On February 2009 he was working on a project helping him to complete a project when F informed him that he was placing him on protective notice and he would inform him of any change in the future. He was shocked. On Friday 20<sup>th</sup> March 2009 he was to meet with F regarding the situation but F informed him that there was a meeting in Cork and that he would talk to him the following week.

On the 23<sup>rd</sup> March 2009 he was informed by F on the site of the project either outside his office door or the car park. He had a meeting with F in the respondent's head office on same day he was called in and advised of his redundancy F read through the letter that set out the conditions of his redundancy and he was told to consider this and revert back to them. He was given no other options at this meeting. F informed him that he would have to come to terms with the fact he was being made redundant and he would be notified as to when it would be finalised. He was also presented with a "Separation Agreement" offering him an ex gratia payment of €10,000.00 which he did not sign as he did not want to sign his rights away. When he sought further clarification on this and informed them he would not be signing the separation agreement the offer €10,000.00 was removed from the table.

On the 8<sup>th</sup> April 2009 he sent an email to the HR administrator confirming he was unable to sign the separation agreement, as he wanted certain issues addressed. An amount of monies had been stopped his bonus, and overtime and he wanted to know how the selection process had taken place. The meeting he had with HR on the 8<sup>th</sup> April 2009 was to hand back any items to the company and to sign the RP50 form. It was at this meeting he was told the offer of €10,000.00 had been removed and he was asked to sign the RP50 and leave.

He had originally worked as a foreman with the respondent for five years and then became a project manager. He was always flexible and worked on a number of projects outside of normal working hours, e.g. 6.00pm to 6.00am and also would work seven days a week to get a job finished. He was

the longest serving employee in the Dublin region and had longer service than the other two employees on the matrix.

He did not think his redundancy was fair, he did not think that it was the current climate that had caused his redundancy as there were other things happening in the group. He felt that the selection process was unfair; he had certain grievances, which he was never given the opportunity to raise.

Under cross-examination he reiterated that his redundancy was unfair, in 2009 there was a restructuring to the group ongoing and this had contributed to him being made redundant. He did accept that at the time redundancies were necessary because of the collapse in the construction industry and also accepted that 100 staff were let go before him. It had been suggested that one of the reasons he was made redundant because he was one of the most expensive, he was asked would he accept that at the time of his redundancy MV was on a salary of €74,000.00 and MB on a salary of €80,000.00. He replied that he would have to accept this. He was aware that there were pay cuts across the board in 2009, however he expected his bonus would be paid in February 2009 as he was not aware that no one else received a bonus at that time.

He had never discussed the possibility of his redundancy with F informally. While there had been discussions generally about redundancies as others were being let go he could not recall discussing his redundancy with F informally. He had no real involvement with F, as MV was his direct boss at the time. He would have discussed redundancies with MV on occasions. Even though there had been previous redundancies he was surprised to be selected. At the time of his redundancy he knew that the respondent was seeking more contracts. He accepted he was slotted in to the project with MV as extra help. There were certain skills on the matrix for project managers that he had never been involved in e.g. commercial management skills. He was referred to his performance appraisal where he had marked himself down under cost issues, he accepted this as a weakness in his skills. He disagreed that the matrix was consistent with his own appraisal.

## **Determination**

The Tribunal carefully considered all of the evidence adduced. It is satisfied that a genuine redundancy arose and that it is for the respondents to prove that they fairly selected the claimant for this redundancy.

For the purpose of clarity the Tribunal does not propose to address the issue of financial payments alleged to be due to the claimant since no such claim is before it.

Among the matters given consideration to were (a) the consultation process (or adequacy or lack of) engaged in and (b) the preparation of and the consideration given to a matrix used by the respondent in their selection process and which involved a comparison being made between the claimant, a fellow project manager and a fellow site manager respectively. The requirement of the respondent is for them to establish that they acted fairly and reasonably in the manner in which they addressed these issues.

In respect of the consultation process it is accepted that while this took place formally over a short period that an informal process was also present prior to this. It is also satisfied that both the nature of his work in the latter stages of his employment and his general knowledge of the state of the respondents business would have realistically informed the claimant that redundancies would be arising.

It is common case that (a) the claimant did partake in a performance appraisal some time prior to the redundancy and (b) that he was unaware of the existence of the matrix prepared and implemented and therefore had no input in to it. Submissions made on behalf of the claimant included a suggestion that the provisions of the respondent's handbook dealing with redundancies were not strictly complied with. It is found that this handbook is intended to be of assistance as a guide in the preparation of a matrix and does not of itself preclude the respondents from including additional skill sets in the matrix which it considers applicable or appropriate.

Having carefully considered the evidence of the parties in respect of the preparation of, content of, and implementation of the matrix the Tribunal finds that the respondents acted fairly and reasonably and that the claimant was therefore fairly selected for redundancy before his two colleagues after consideration of their various skill sets and subsequent scoring in respect of same.

Section 6(3) of the Unfair Dismissals Act 1977 as amended by section 5(b) (a) of the 1993 Act states that "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 to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in, relation to the dismissal".

The Tribunal finds that the respondents acted fairly and reasonably in their engagement with the claimant in respect of a genuine redundancy and in all the circumstances therefore fairly selected the claimant for this redundancy, the claimants claim therefore fails and the Tribunal so determines.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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