

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE

-Claimant

CASE NO.

UD151/2010

against
EMPLOYER

-Respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr N. Russell

Members: Mr J. Hennessy
Ms S. Kelly

heard this claim at Waterford on 14th April 2011 and 30th May 2011

Representation:

Claimant: Mr. Paul Hutchinson B.L. instructed by Mr. Mark Walsh,
Kenny Stephenson Chapman, Solicitors, Park House, Park Road, Waterford

Respondent: Ms. Antoinette Vahey, Ronan Daly Jermyn, Solicitors, 12 South Mall, Cork

The determination of the Tribunal was as follows:

The respondent company produces a newspaper in the southeast. It is part of a larger media group.

The claimant commenced her employment with in the respondent company in 1994, working as a sales representative. In 1997 she was promoted to the position of advertising sales manager for the Waterford publication and she carried out the duties associated with that role until her position was made redundant in the latter part of 2009.

In September 2008 the respondent had appointed another employee into a dual role, as both advertising sales manager for a Wexford-based publication and also Regional Sales Manager with responsibility for both the Wexford and Waterford publications. From the time the employee accepted the position of Regional Sales Manager the claimant reported to him rather than to the CEO.

The CEO gave evidence that the claimant was responsible for the newspaper's advertising campaign for each year. However, from the time of 2007, advertising sales were performing badly.

Between 2007 and 2008 there was a 10% downturn in advertising revenue. Between 2008 and 2009 there was a further 37% downturn in the advertising figures.

A cost cutting plan was implemented and as part of this the size of the paper reduced, costs were cut and the newspaper examined its options for feature advertising. Huge discounting was given to secure the newspaper's position but despite all of these efforts the newspaper's advertising revenue continued to fall. The claimant as advertising manager would have been aware of these figures.

The CEO reached the decision that it was inevitable to implement some redundancies. The Production Department was reduced from five employees to three employees. One employee was made redundant while the other employee left of his own accord and was not replaced.

The advertising revenue comprised 75% of the newspaper's total revenue and the magnitude of the downturn in advertising figures therefore had a huge effect. After considering all of the options the CEO decided that the two sales manager roles in Waterford and Wexford could be amalgamated. The regional sales manager was more qualified than the claimant and as he was already responsible for overseeing both locations it was decided that going forward he would divide his time between the Wexford and the Waterford publication. Therefore, the claimant's role as sales manager of the Waterford publication was made redundant.

The CEO met with the claimant on 25th September 2009 and informed her that he had to implement cost cutting and as part of this process her role was consequently made redundant. He made an offer of an alternative role to the claimant. The alternative position was working in a sister company as a sales representative for a radio station. The position came with a salary of €30,000 plus bonuses. The CEO offered this role to the claimant as it compared favourably with the role she held with the respondent. The claimant was given some time to consider the alternative role.

On 28th September 2009 the CEO received an email from the claimant who requested some further details about the alternative position. He subsequently met with the claimant on 30th September 2009 to discuss the issues raised by the claimant and he told her that if she did not accept the alternative position then the situation would result in redundancy, as her role was redundant. He also informed her that an answer was required as the radio station was approaching its busy advertising period for Christmas. He again met with the claimant on 6th October 2009 to provide her with a letter of offer for the position. The claimant told him that she would consider the alternative position.

The claimant's legal representative subsequently wrote a letter dated 9 October 2009 to the respondent on the claimant's behalf. The CEO stated that he had given consideration to re-deploying the claimant or reducing her salary as an alternative to redundancy but no position existed which could be offered to the claimant.

The claimant did not accept the alternative position offered to her and as a result the CEO informed her that her position was redundant. The claimant received her notice entitlements and statutory redundancy. The claimant's position has not been replaced. Cost cutting is ongoing and staffing levels have remained the same since redundancies were implemented. All staff have had their pay reduced. In addition to this the respondent company has moved to new offices to reduce costs. Advertising sales have slightly increased in the current year.

During cross-examination the CEO accepted that the respondent company does not have a formal

redundancy policy. The employees were not informed that there was a prospect of redundancy and the claimant's first notification of the fact that her position was selected was at the meeting on 25th September 2009. The CEO accepted that the claimant had the longest service but the selection process of last in, first out was not utilised in this instance. The witness accepted that salary cuts were not considered prior to September 2009.

It was put to the witness that the alternative position offered to the claimant was some distance away and that the claimant would suffer a loss of service if she accepted the position. The witness stated that this was incorrect and that he had been assured that the claimant's service would be honoured.

It was put to the witness that in the year prior to being made redundant the claimant had not been given the opportunity to apply for the position of regional sales manager. The CEO confirmed this was correct but stated that the claimant did not have a qualification which the regional sales manager acquired.

It was put to the CEO that a photograph in the newspaper dated 24th November 2009 stated that the employee who the company says is the regional sales manager is listed as being the advertising manager for the respondent's Waterford publication.

In reply to questions from the Tribunal, the CEO confirmed that the regional manager now performs some of the functions of the claimant's role. It was not possible to offer the claimant her position on a part-time basis, as there were no funds in the budget to offer this.

The claimant gave evidence that her employment with the respondent commenced in 1994 and she held the role of advertising sales manager for twelve years from the time that she was promoted to that position in 1997. As advertising sales manager she gave sales leads to junior staff and she met with customers in the evening. Her role was not confined to office hours of 9am to 5pm and the claimant was also often required to attend functions. The claimant described her job with the respondent as being "her life". During her employment with the respondent she raised huge sums of money for charity and started a community awards initiative.

When the CEO informed her in September 2008 that the Wexford sales manager was being promoted to regional sales manager, the claimant did query why she had not been given the opportunity to apply for the role. Although the claimant was upset she agreed to work with, and report, to the regional sales manager.

When the CEO informed her that her position was redundant at the meeting on the 25th September 2009, the claimant was very upset. She was informed that an alternative role existed but when the claimant read about the alternative position the application closing date was listed as the 14th August 2009 but the CEO told her not to be concerned about that.

The claimant felt ill after being informed that her position was redundant and she attended at her doctor's surgery on Tuesday, 29th September 2009. She was advised that she was not in a fit state to attend for work but the claimant was conscious that the current edition of the paper had to be republished and therefore she did attend.

However, the claimant was subsequently absent on sick leave. The claimant outlined details of her illness to the Tribunal and of her medication that she was prescribed at that time. The claimant

stated that she had not been on any such medication or suffered with the illness prior to September 2009. The claimant gave further evidence pertaining to loss.

The claimant confirmed meeting with the CEO while she was absent on sick leave. He showed her the application for the position in the radio station. It was a sales representative role and the radio station was a different media medium and the claimant did not have experience of working in radio sales. The position was also based some 50 miles away. The claimant was not told that her service would carry over to the position and she also noted that there was a six-month probationary period associated with the role. Compared to her position as advertising sales manager the alternative position had a lesser salary and less annual leave entitlements. The claimant had nine days to consider accepting the position but she was not in a fit state at that time to start another job. The claimant offered to accept a pay cut and also offered to give up her title for a number of years as an alternative to redundancy. Her legal representatives wrote to the respondent company to this effect in letter dated 9 October 2009.

The claimant stated that sometime after her role was made redundant she saw a photograph of the regional sales manager in the newspaper with a caption describing him as the advertising sales manager for the Waterford publication.

During cross-examination it was put to the claimant that she would have noticed a reduction in advertising figures in the approach to September 2009. The claimant accepted this but stated that the managers in the groups other publications told her that the advertising figures were the same across the suite of publications. The claimant did not believe this meant that her position had to be made redundant.

It was put to the claimant that the regional sales manager had a qualification, which the claimant did not possess. The claimant confirmed that she had not opted to gain this qualification but she thought that she should still have been allowed to apply for the role.

It was put to the claimant that it was necessary for the respondent to implement cost-saving measures. The claimant accepted this but stated that she had done everything possible to increase advertising revenues and she agreed that cost-saving was necessary but she objected to how the cost-saving was carried out.

It was put to the claimant that the CEO spoke to her on 25th September 2009 but that he held three further meetings with her prior to giving her formal notification on 2nd November 2009.

It was put to the claimant that the photographer inserted the photograph's caption. The claimant refuted this as the photographer in question was not a member of staff and would have to ask the name and title of each person. Also the editor examines all photographs before publication.

Mr. G gave evidence on behalf of the claimant that from the time of 25th September 2009 when the claimant was told her position was redundant there have been deteriorations in the claimant's health.

Dr. S gave evidence that the claimant has been her patient since 1992. Prior to 29th September 2009 the claimant only presented for routine medical checks and was of a cheerful disposition. Dr. S was not at the surgery when the claimant presented on 29th September 2009 however the other

doctor in the surgery brought the claimant's consultation to Dr. S' attention due to the claimant's disposition on that date. Dr. S' colleague had provided the claimant with a prescription and requested that she attend again in two weeks time. When the claimant presented to Dr. S on 15th October 2009 she was suffering with stress-related symptoms.

There has been a steady improvement in the claimant's condition but she continues to be under the care of Dr. S and has also been attending counselling since the time of February 2010. Dr. S stated that without a doubt there was a connection between the claimant losing her job and her subsequent illness.

Determination:

The Tribunal recognises the entitlement of an employer to implement a re-organisational strategy to counter the effects of an economic downturn and it is accepted that the respondent company, in this instance, needed to respond to the pressures on its revenues. An integral part of any remedial action in such circumstances may well include redundancies.

The loss of one's employment has a significant financial and personal impact on an individual and in deciding on the appropriate changes to make in a workplace when faced with an economic downturn, an employer must conduct itself in a reasonable fashion. The provisions of Section 6(7) of the Unfair Dismissals Act, 1977 as amended by Section 5 of the Unfair Dismissals (Amendment) Act, 1993 are clear in this regard. What is reasonable depends on the circumstances of each individual situation. It is a matter for the Tribunal to decide if the respondent company in this instance acted in a reasonable fashion.

The Tribunal is completely satisfied that the decision to dismiss the claimant had been made prior to the meeting of the 25th September 2009 between the CEO of the respondent company, and the claimant and, further, that the claimant was left in no doubt that this was the position. The parties were agreed in their evidence that this was the first discussion with the claimant on the issue.

An employer's obligation to act reasonably and fairly extends to deciding where precisely cost savings need to be achieved in a re-organisation. Any reasonable employer would consult with all employees whose employment is potentially affected, would invite representations, would consider all reasonable alternatives and would consider a broad range of factors in respect of each employee.

In this instance the Tribunal is satisfied that there was not a consultative process, that representation and suggestions for reform were not invited and reasonable consideration was not given to options such as pay reduction, hour reduction and/or voluntary redundancies from its Sales Department.

It is inconceivable to the Tribunal that the claimant, with almost 16 years experience at the respondent company, the last ten of which were in sales management, and with a significant public relations role within the respondent company, could not have made valuable and concrete representations and suggestions that may well have seen her continue to work for the respondent and would have benefited the respondent company also. Any reasonable employer would have explored this possibility.

The Tribunal has enormous sympathy for any business experiencing a downturn, however, in such unfortunate circumstances; an employer is not exempted from the obligation to act reasonably.

The Tribunal does not consider the offer of employment with the radio station to be an offer of a reasonable alternative position. The position was offered on a probationary basis, on more disadvantaged terms and in circumstances where the situation as regards continuity was unclear.

The Tribunal holds that the respondent company dismissed the claimant unfairly.

On the issue of compensation, the Tribunal is satisfied that there was a direct causal link between the significant deterioration in the claimant's health and well-being and her unfair dismissal by the respondent company. While it is not the Tribunal's function to compensate the claimant for the physical and psychological sequelae of her dismissal the respondent is likewise not entitled to assert that the claimant's inability to work should see her compensation for her financial losses reduced accordingly where that inability to work is a direct result of its actions. Accordingly, the Tribunal awards the claimant the sum of €50,000 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)