

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

EMPLOYEE

-Appellant

UD1774/2009

against

EMPLOYER

-Respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. McGrath B.L.

Members: Mr P. Pierce
Mr. S. O'Donnell

heard this claim at Dublin on 9th December 2010 and 19th May 2011

Representation:

Claimant: Ms Yolanda Kutuwska, 128 Meadow Mount, Churchtown, Dublin 16

Respondent: The directors of the company.

The determination of the Tribunal was as follows:

The Managing Director gave evidence that the respondent's business consists of roofing and cladding. The company employed 75 employees at the height of its business. However, due to the economic downturn the company had to implement the first of its redundancies in September 2008 when the number of staff was reduced to 50 employees. A further fifteen employees were made redundant in October 2008. The company made its final reduction to a core staff of 24 employees in March 2009. The claimant was one of those selected for redundancy in March 2009. He was employed as a general operative and the Managing Director made the decision to make all of the general operatives redundant at that time. The 24 core employees who were retained were chosen based on skills and work performance. From the time of September 2008 the Managing Director performed an assessment on a bi-monthly basis of the skills and work performance of the employees. A document was opened to the Tribunal showing the scores given to the employees as part of the Managing Director's assessment.

The Managing Director outlined two incidents in relation to the claimant's workmanship to the

Tribunal. In May 2008, an issue arose with work the claimant had carried out on a roof for a contractor. In addition to this, a further workmanship issue arose when the claimant failed to properly bond and torch the felt on an expansion joint. The claimant's poor workmanship was a dismissible offence but the Managing Director decided that the claimant had not been qualified enough to carry out the work. From that date the claimant did not carry out any unsupervised work.

While the claimant's poor workmanship impacted the score that he received in the bi-monthly assessment, the Managing Director had reached a decision to retain skilled roofers but make all of the general operatives redundant. As a result the claimant was made redundant in March 2009. Subsequently, in July 2009 two general operatives were employed on a short-term basis. This work was offered to the claimant at that time but he did not accept it as he was going on holidays. Since 2009 employee numbers have increased gradually.

The Contracts Manager gave evidence regarding the incidents of poor workmanship on the part of the claimant. He confirmed that on 13 May 2008 a problem with an expansion joint had arisen. On foot of the complaint from the contractor the Contracts Manager inspected the work and found that the work had not been carried out by the claimant in line with the instructions given to him. In late May 2008 the problem with the roof became apparent and again the Contracts Manager found the work had not been done properly and correctly. As a result the work had to be rectified at a cost to the company. The Contracts Manager spoke to the claimant about this issue on 3 June 2008. The claimant was remorseful and offered to re-do the work.

It was the claimant's evidence that he worked without incident up until the time that he was made redundant. He rejected the Contract Manager's evidence. The claimant said that both he and a colleague were working on the expansion joint and at that time they informed the Contracts Manager that the work could not be carried out as he had instructed. When the claimant later heard that the expansion joint was leaking he showed the Contracts Manager how the work should have been done and from then on the company made sure to do expansion joints the way the claimant had shown.

When working on the roof the claimant observed gaps between the timbers when he started laying the felt. He brought the gaps to the attention of his supervisor. The claimant and his colleagues were instructed that they should go ahead and lay the felt. Subsequently the laid felt cracked when the joints started to move. The claimant believed that he had properly bonded the felt to the plywood but the plywood was what had caused the felt to crack, as it was unstable. He confirmed that he had met with the Contracts Manager in relation to this issue. The claimant asked why he was considered to be responsible when there were four other employees working on the roof.

The claimant stated it was unfair when he was subsequently made redundant in March 2009, as he had longer service than some of employees who were retained by the company. The claimant believed that he was selected for redundancy due to the issue of workmanship yet the company retained other employees who carried out the same work. The claimant accepted that he was classified and paid as a general operative.

Determination:

The claimant comes before the Tribunal in circumstances where he says he was unfairly selected for redundancy in and around March of 2009.

The Tribunal has carefully considered the evidence adduced by both sides and there is a clear onus on the employer to demonstrate that it acted reasonably and fairly in implementing its redundancy programme and in particular in selecting the claimant for redundancy at the time that it did.

It is the uncontroverted evidence of the respondent employer that a genuine redundancy existed in the workplace against the well-documented downturn in the construction industry in 2008 and 2009. The company went from a high point of employing 76 people in September 2008 to a low point of employing 20 people in and around March 2009.

It is accepted that the contract of employment recognised the general principle of last in, first out. However, this is noted to be qualified insofar as the company clearly retains the right to consider other factors such as skill sets and disciplinary records in deciding which employee in any group of employees should be made redundant. Seniority therefore is only one factor, of many, being considered by the employer.

A considerable amount of time was given over at the oral hearing to the issues of careless workmanship. The employer received complaints from its clients in connection with up to two projects in which the claimant was involved. Both parties appeared to accept that the work, which had been carried out, was faulty and in need of remedial and or repair work. The respondent seems to have laid the blame for the faults at the door of the employee.

The employee does not accept that he was solely responsible but certainly engaged in the remedial works, which had to be carried out. These events took place in June of 2008; some three months before the first round of redundancies were made known in the workplace. The Tribunal notes that the claimant was not made redundant in the two rounds of redundancies that were implemented in 2008 and it was only at the third round of redundancies in March of 2009 that he was made redundant.

The Tribunal has carefully considered the matrix that the employer used in determining the progress of implementing a redundancy programme in the workplace. The Tribunal finds that the prepared matrix does demonstrate a fairness of intent on the part of the employer.

A reasonable attempt has been made to compile information on an objective basis so that each employee would be treated fairly vis-à-vis his co-employees. The company concedes some element of subjectivity insofar as the company ultimately assesses the skill and expertise of employees based on each individual's history and work carried out. This is as opposed to relying on certificate accreditation, which might have been acquired.

The Tribunal finds that the employer is entitled to make assessments based on the employer's personal knowledge, assessment and observations of individual employees. The net result is that in some instances employees who did not have the same length of service as the claimant herein were retained in their employment after the claimant was made redundant as the respondent had determined that their value to the company was greater at that time against a backdrop of a diminished market.

The Tribunal notes an offer of re-employment on a short-term basis was rejected by the employee.

The Tribunal finds that the employee was not unfairly selected for redundancy and therefore his claim under the Unfair Dismissals Acts, 1977 to 2007, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)