

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:
EMPLOYER
- *appellant*

CASE NO.
UD2501/2009

against the recommendation of the Rights Commissioner in the case of:
- *respondent*

EMPLOYEE
under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr M. Gilvarry

Members: Mr. D. Morrison
Ms. R. Kerrigan

heard this appeal at Letterkenny on 19th January 2011

Representation:

Appellant: In person

Respondent: Ms. Fidelma Carron, Assistant Branch Organiser, Siptu, Port Road, Letterkenny, Co Donegal

This case came before the Tribunal by way of an employer appealing against the Recommendation of the Rights Commissioner ref: (r-074324-ud-09/EOS)

The determination of the Tribunal was as follows:-

Appellants Case

The company's internal accountant gave evidence on the employers' behalf. In 2008 there was a downturn in their business and in February 2008 all employees took a pay cut. By the end of 2008 they could no longer sustain all their employees they had to make some employees redundant. At this time they had about 110 employees. This was the first time that they were in the position of making staff redundant. Eleven staff were made redundant at this time in the yard and in the office.

The respondent had originally been recruited as a scaffolder and had progressed to the position of quantity surveyor at the time of redundancies. They had four quantity surveyors in their

employment including the respondent. They looked at each quantity surveyor to see how critical they were to the organisation; this was based on qualifications, experience and competence. One of the quantity surveyors was part-time so he was selected for redundancy along with the respondent. MP was rated highly and was retained, as he was the longest serving, he was made redundant in 2010. DM was critical to the company and is still employed. The two quantity surveyors retained were involved in projects at this time. They had looked at the alternative of retaining the respondent as a scaffolder but they did not want to displace another scaffolder as the respondent had been working in the office a number of years.

Employees were not told that there may be redundancies in the future; all employees only heard when the decision was made. The managing director had informed the respondent of the decision to make him redundant. The respondent received his statutory redundancy. He thought that the respondent had accepted his redundancy in good faith. The decision of selecting people for redundancy was not taken lightly.

Under cross-examination they did not think it was necessary to talk to the quantity surveyors before making their decision, this would have complicated the matter. They were not informed of the selection criteria used. DM was heavily involved in the contract that was their lifeline at the time of the redundancies. He confirmed that the first criterion was qualification and then service. He was aware that a foreman had reverted back to a scaffolder but this was because he was on site. Two individuals KD and JB had assisted the respondent in his work, after the respondent was made redundant they were transferred back to site as general labourers, they were both 18 years of age. The respondent was an advanced scaffolder and they had no position at that time. The respondent's salary was not considered in making the decision as they could have approached him seeking a further pay cut. He confirmed that the respondent was on €65,000.00 per year while DM was on €45,000.00. The criteria used were only established on the run up to the redundancies.

In reply to questions from the Tribunal, the financial controller, the managing director and this witness had selected the employees for redundancy but ultimately it was the managing director's decision. They had considered the position of scaffolder and foreman for the respondent but scaffolders were being let go as well and the respondent had not been on site for 5 years. They also looked at lay off but knew they would have the same problem in 13 weeks time. On the 7th January 2011 they made eleven redundant. Currently they have about 4/5 employees including MD who is trying to collect fees. In October 2007 their turnover was 9.5 million currently they are looking at a turnover of 300 to 400 thousand for this year. KD left in July 2010 and JB worked up to two months ago.

Respondents Case

The respondent gave evidence he commenced as a scaffolder in 1999 and in 2004 he became a quantity surveyor. He agreed to take a pay cut in February 2008. In August 2008 the managing director asked him if would agree to work in Dublin, he agreed to this however later the managing director told him he had changed his mind in respect of this. On the 17th October 2008 the managing director informed him he was making him redundant along with ten others. The managing director did not tell him the names of the others, as they were not aware of the situation yet. He was surprised he had been selected as he was one of the longest serving and had scaffolding and quantity surveying experience. He only became aware that DM was not selected when he was signing his RP50. DM had shorter service than him. The company had never informed him that an academic qualification would be useful; normally quantity surveyors do not need a qualification. He thought that DM was not selected because he was on a lower salary than

him. DM and MP had worked on sites in Dublin together and MP had overall authority. DM was based on site in Dublin while MP was in the office. He would have considered a drop in pay or position he would rather have kept his job. He gave evidence of loss.

Under cross-examination he said would have been happy to take a pay cut. He thought DM was being made redundant. He accepted that some contracts were coming to an end at the time of his redundancy, however others were ongoing. He always had a good working relationship with the appellant. He had made no objections to the managing director when he was informed of his redundancy.

Determination

A decision to dismiss by way of redundancy must be reached in a fair and consistent manner. Where possible the employer should carry out a genuine consultation process prior to reaching a decision as to redundancy. While in some cases there is no alternative to the making of one or more jobs redundant, and no alternative employment available for the employee whose job is being made redundant no matter what consultation process is carried out, the employer who fails to carry out a consultation process risks being found in breach of the Unfair Dismissals Acts. Such a lack of consultation may be seen as unreasonable and in some cases may well lead to the conclusion that an unfair selection for redundancy has taken place. Furthermore where a selection has to be made between a number of employees as to whose job is to be made redundant the criteria for selection must be clear and fair. In this case there was no consultation whatsoever and the Tribunal do not consider that any objective method of selection was applied prior to selecting the claimant for redundancy. There was a genuine redundancy situation in the company, however the respondent was selected unfairly and the dismissal was therefore unfair, and the Tribunal so find.

The Tribunal determines that compensation is the appropriate remedy and in relation to loss, the Tribunal is satisfied that the respondent would have eventually been made redundant at the time that DM was let go.

Bearing this factor in mind the Tribunal awards the claimant the sum of €12,500.00 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)