

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE - *claimant*

CASE NO.
UD2577/2009
RP3031/2009

against
EMPLOYER - *respondent*

under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2007 UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P. Hurley

Members: Mr G. Andrews
Ms H. Henry

heard this claim at Galway on 26th May 2011
and 13th September 2011

Representation:

Claimant(s) : Mr. Fergal Doyle BL instructed by D M O'Connor & Co, Solicitors, Cross Street,
Galway

Respondent(s) : Mr. Paul Fogarty BL instructed by LK Shields, Solicitors, 39/40 Upper Mount
Street, Dublin 2

Preliminary Issue

The claim under the Redundancy Payments Acts 1967 to 2007 was withdrawn by the claimant's representative at the outset of the hearing.

Respondent's Case

(HG), head of retail operations gave evidence on behalf the respondent company. The respondent operates 160 shops countrywide and has approximately 780 employees. The company experienced rapid expansion in the years 2006, 2007 and 2008. However due to the downturn in the economy there followed a rapid decline in business in 2009 where turnover dropped by about 15%. In response to this drop in turnover it was necessary to restructure, reduce costs and reduce manpower. The company met with all employees in 2009 and pay levels and premium payments were reduced.

The claimant who was employed from November 2002 as a shop manager was promoted to district support manager in September 2003. In her role as district support manager she covered a wide geographical area and drove a company car. She reported to an area manager known as (FM). Prior to reporting to (FM) she reported to area manager (PMcG). As part of the restructuring process it was decided to subsume the role of district support manager into the role of area manager. The company employed nine district support managers and these roles were being subsumed into four area manager roles. Following this decision existing district support managers were given three options. (1) Re-employment as a shop manager with a reduction in salary of €9000.00 per annum. (2) Apply for a position as area manager. (3) Accept an offer of redundancy. As part of the selection process for the position of area manager the company devised a matrix system whereby scores were allocated to the employees concerned under five categories. The categories were, standards, administration, people management, communication and business development. The witness, the Regional Manager known as (FM) and the Human Resources Manager known as (JL) were charged with the responsibility of allocating the scores to the employees concerned. The claimant received an average score of 14.3 and was not successful in obtaining a position as area manager as were a number of other employees. She requested a breakdown of her scores from the matrix system and these were provided to her. She was very upset when she received her scores but she did not raise any objection to the involvement of either (GD) or the witness in the process. The witness is 100% satisfied that she conducted the process in an objective manner. The claimant was then offered a position as shop manager but declined the offer and was made redundant on 14 August 2009.

The witness gave further evidence that she had no personal or professional difficulties with the claimant. She told the Tribunal that she commenced a relationship with the claimant's ex-partner known as (GD) but this never impacted on her working relationship with the claimant. (GD) was employed as a regional manager with the company and was involved in the matrix assessment selection process. This relationship made no difference to her assessment of the claimant on the matrix scoring system and the claimant did not take exception to her (the witness's) involvement in the matrix process.

Under cross examination she gave evidence that the claimant performed her duties diligently. She confirmed that the claimant took on extra duties from July 2007 until March 2008 following the removal of an employee in the Kerry area. She accepted responsibility for nine additional shops without any additional remuneration and performed those duties well. She recalled an incident in September 2007 where the claimant was using her private car for work purposes and her car was damaged outside the respondent's premises. The claimant sought payment of €2500.00 as the cost of repair to her car but the witness refused to pay this amount and eventually an amount of €500 was paid to the claimant. The witness denied that she had an argument with the claimant over this matter.

She denied that the claimant discovered her relationship with (GD) at a Christmas party in 2007. She gave evidence that her relationship with (GD) only commenced in November 2008 and the claimant made her aware of her knowledge of the relationship. She told the Tribunal that this occurred at the Christmas party of 2008 and not 2007 as put to her by the claimant's representative. She accepted that (GD) and the claimant had been in a relationship for a period of time but understood that they were no longer in a relationship by November 2008. She denied that her working relationship with the claimant broke down following the discovery of her (the witness's) relationship with (GD).

She gave further evidence that in February 2009 herself and the Human Resources Manager (JL)

met with the claimant. They informed her that as part of the re-organisation process it was necessary for the company to allocate extra counties to the claimant as part of her workload. The claimant was being asked to cover a large geographical area and would incur extra travel time. She did not receive any extra remuneration for this increased workload but she accepted the increased duties and performed them well. However some weeks later the claimant approached the witness and told her that she was unable to perform her work effectively because of the increased geographical area that she was expected to cover. She asked that her concerns be addressed but those concerns were not addressed due to the fact that the company was involved in a re-structuring process which ultimately led to the claimant being made redundant.

(JL), Human Resources Manager gave evidence that she was familiar with the claimant, having worked with her in previous employment. She had a good relationship with the claimant and worked alongside her on administration and shop visits. She was involved in the selection process for redundancies. She reflected on her experience with each candidate and allocated her scores on the matrix system accordingly. Each candidate had different attributes and she marked them honestly. The candidates were not being assessed in their roles as district support managers as each candidate had performed that role very satisfactorily. She allocated her scores without any knowledge as to how the other assessors had scored the candidates. The claimant was surprised and upset when she was told of the scores. She informed the witness that she was not accepting the manager's position and said she was going to take some advice. The claimant was unhappy and was invited to avail of the company's grievance procedure. This invitation was not given to the claimant in writing but in her capacity as a district support manager the claimant would have been fully au fait with the grievance procedures. If she had availed of the grievance procedures her appeal would have been heard by a board member known as (MB). The claimant chose not to avail of the procedure. She was paid a redundancy payment of €8640 following the termination of her employment. This was her basic minimum redundancy entitlement.

Under cross examination the witness confirmed that the claimant had carried out her duties over a large geographical area very satisfactorily. She knew the claimant very well and the claimant made her aware at the Christmas party in 2007 that her (the claimant's) partner had entered into a relationship with (HG). The witness was shocked to hear this. She confirmed that there were no complaints about the claimant's work performance recorded on her personnel file. The claimant had received bonus payments in the years from 2003 to 2008 as had all district support managers in that period. The profit margin in the shops for which the claimant had responsibility were in line with the average profit margins in all of the company's shops. On 20 May 2009 the company held individual meetings with all 9 candidates and each candidate was provided with the criteria under which they were to be assessed. They were also informed as to identity of the assessors. The claimant did not raise any concerns at that meeting in relation to the assessors or the criteria under which she was to be assessed. In allocating scores to the claimant the witness did not need to check her personnel file as she had always carried out her duties as a district support manager satisfactorily. After all the assessors had allocated their marks to the candidates the witness had a discussion with the other assessors. No minutes were taken of that discussion and the four successful candidates were offered the new post of area manager. These four candidates had more appropriate skills than the claimant for the new position. She confirmed that no extra weighting was given to the claimant's geographical spread in allocating the scores. The witness confirmed that she was aware that the claimant had a discussion with the CEO of the company concerning the relationship between (HG) and (GD) but did not have any knowledge of the outcome of that discussion.

The next witness, (FM) gave evidence that he joined the respondent company in 2007. He was

promoted to area manager in 2009 and the criteria used in that selection process were identical to those used in May 2009, when the claimant was an unsuccessful candidate. He was one of the assessors in that process and was satisfied that the criteria applied were the correct criteria. He had daily contact with the claimant when she worked as a district support manager. He had no complaints concerning the work performance of any of the district support managers. They were all competent people. He allocated his scores to the candidates involved without any prior knowledge as to how the other assessors had allocated their scores. It was a very tough process and he believed it to be a fair process. He confirmed that all employees are given details of the company's grievance procedure in the staff handbook. All managers have to be aware of these procedures in order to assist any employees that may have a grievance. He gave evidence that the claimant had no significant burden of work compared to the other district support managers.

Under cross examination he confirmed that he was the claimant's direct line manager. He engaged with her daily. He spoke with her concerning standards in one of her shops but never had to officially reprimand her. He had no consultation with any of the candidates prior to the selection process. He was only made aware of the re-structuring process a couple of days prior to 20 May 2009. In March 2009 he was not aware of any downsizing in the company. He made notes as he was allocating scores to the candidates. He based his scores on the standards criteria from shop visits he had made. (HG) chaired the meeting at which the scores were recorded on a flip-chart. No discussion took place between the assessors prior to the scores being recorded on the flip-chart. He was aware that (HG) and (GD) were in a relationship. He was also aware that (GD) had been in a relationship with the claimant. He accepted that the claimant had the largest geographical spread of any of the candidates. He did not take this into account when he was assessing the candidates as the claimant was not expected to visit her Letterkenny location every one or two weeks.

Claimant's case

The claimant gave evidence that she commenced working for the respondent company in 2002. She became district support manager in March 2003. In June 2003 she started a relationship with (GD) who was employed as a supervisor by the respondent. The relationship continued and they purchased a property with both of them contributing to the mortgage repayments. In 2004 she reverted to a role as shop manager as her son was doing exams and she needed to be based at home. In or around January 2007 she successfully applied for the post of district support manager covering the counties of Limerick, Tipperary and Clare. In July 2007 she also assumed responsibility for Co. Kerry for a period of 8/9 months.

In September 2007 during a visit to a shop in Co. Clare she parked her own personal car outside the store. She removed some trouble makers from the shop and subsequently discovered that her car had been damaged. The cost of the repair to her car was €2500.00. She asked the company to cover the cost of the repairs but was informed by (HG) that the company would only pay €500 as a goodwill gesture. She was very upset by the behaviour of the company at that time. She received a company car after this incident and remained driving that car until the termination of her employment. The car had a 2005 registration number.

In December 2007 at the company's Christmas party she discovered that her partner, (GD) was involved in a relationship with (HG). She felt upset and humiliated when she discovered the relationship. She feared for her position in the company as her boss, the operations manager was carrying on a relationship with her partner. Her relationship with (GD) ended at that point and he continued his relationship with (HG). She contacted the CEO of the company at that time to confirm that her position was secure within the company. Within two weeks of the Christmas party

she attended a company meeting. (GD) and (HG) were present at the meeting and while she (the witness) was not happy with this situation she continued to do her work in a professional manner. She continued working for the respondent and in February 2009 she was allocated a larger region. (FM) became her new manager at that time. She made shop visits and conducted some interviews with him. She did not make return visits to all of the shops with (FM). Her previous manager (PMcG) outlined what was expected of her and what she expected of him in their duties. She never had any such discussion with (FM).

On 12 May 2009 she received a phone call from (JL) asking that she attend a meeting on 20 May 2009. She was not told the purpose of the meeting. She attended the meeting on 20 May 2009 and was told by (JL) and (HG) that her job was no longer in existence. The meeting lasted for about 5 minutes and she was told of the proposed process that was going to ensue. She was told of the criteria that were going to be used and was also told of the identity of the assessors. She was asked if she had any difficulties with the process and she replied that she did not have any questions. She was in a state of shock as there had been no consultation carried out by the company prior to this meeting. She hoped that she would be successful in obtaining one of the new positions as she had an excellent record with the company. She was the longest serving employee of the candidates involved and had never been reprimanded by the company. She had no further contact with any of the assessors until 26 May 2009. She met with the three assessors and was told that she was unsuccessful. She asked for a breakdown of her scores from the matrix system and these were provided to her in an e-mail. She was verbally offered the position of manager in either of two shops in Co. Galway but was not provided with anything in writing concerning this offer. She was of the view that this was a massive demotion and a big career blow. She gave evidence that she fully understood the grievance procedure in the company but did not see the point of utilising this procedure because of the relationship issue between herself (GD) and (HG). She no longer trusted anybody in head office. She contacted the owner of the company, (Mr. B) and he told her that she should not take the matter personally. He did not want her to leave the company.

She received a redundancy payment from the company and has applied for approximately 50 jobs since the termination of her employment. She has not been successful. She specifically did not apply for a position within the industry particular to her employment with the respondent. She chose not to do so as everybody within the industry knew what had happened and she would not have been wanted. She has since attended a night school course and is currently completing a degree course in university. She is in receipt of a Social Welfare payment of €188 per week.

Under cross examination she stated that she had no future remaining with the respondent company after the results of the matrix criteria were announced. She had 24 years experience in the industry and a demotion after all those years would have closed the door for her in the industry. She believed it would have been a waste of time applying for jobs in the industry. She would accept a job in the industry if it was offered to her but would not return to work with the respondent as she had lost trust in them. She expressed her concerns to the owner of the company (Mr.B) at the time as she felt she could not approach anyone else in the company. She accepted that criteria used were performance indicators and were sensible criteria but she did not agree with her scores. In relation to standards, two of the assessors had not even checked her shops to assess the standards in her shops. In relation to communications, (JL) and (HG) were not aware as to how she communicated with her staff in the shops as they were based in head office. She accepted that she did not raise any objections to the assessors when she was told of their identity. She was in a state of shock at the time and just wanted to get out of the room. She confirmed that she was the only district manager not provided with a new car. Her colleagues cars were repaired by the company if they were damaged but her car was not. She felt that she was treated differently to her colleagues. She stated

that one of the successful candidates had only 9 months experience in the industry. She accepted that she was given the option of remaining in the company as a shop manager but informed (Mr. B) that she was not accepting that position. She confirmed to the Tribunal that she did not have the authority to run a promotion or develop a business plan while working for the respondent as a district support manager. She did not engage with (FM) every day and some days he did not even contact her by telephone.

Determination

The Tribunal carefully considered the evidence adduced over the two days of the hearing. The Tribunal is of the view that the procedures used in the selection for redundancy were tainted by a lack of fairness. In particular, it cannot be said, given the evidence heard concerning personal relationships, that the application of the skills matrix was applied in a manner that was free from bias. Even if the express forensic criteria in the skills matrix could be held to have been fairly applied, which the claimant strongly disputes, the independence and objectivity of the process was flawed as a result of the involvement of assessors who were conflicted because of their personal relationships.

The Tribunal finds that the criteria applied did not or could not give a fair assessment of competencies and skills of the claimant for a new role. The Tribunal is of the view that the criteria applied were based exclusively on subjective grounds. In this regard no documentary evidence was taken into account in the compilation and grading of the candidates skills. The Tribunal is of the view that the resultant breach of trust was so fundamental that the employment relationship was irreparably damaged. In these circumstances the Tribunal finds that the claimant was unfairly selected for redundancy. The Tribunal notes that the claimant is now a full time student and is limited in her availability for work.

The Tribunal finds in all the circumstances that the claimant was unfairly dismissed and awards the claimant the sum of €60,000.00 under the Unfair Dismissals Acts 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

