

## EMPLOYMENT APPEALS TRIBUNAL

APPEALS OF:  
EMPLOYER

*-claimant*

CASE NO.  
UD521/2010  
PW67/2010  
TE53/2010

against the recommendation of the Rights Commissioner in the case of:

EMPLOYEE *-respondent*

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007  
PAYMENT OF WAGES ACT, 1991  
TERMS OF EMPLOYMENT (INFORMATION) ACT, 1994 AND 2001**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr. P. Casey  
Mr. D. McEvoy

heard this appeal at Cork on 9th May 2011

### **Representation:**

Appellant: Ms Rachael O'Flynn B.L. instructed by Mr. Alan McGee,  
Ken Murray & Company, Solicitors, 3 Oliver Plunkett Place, Midleton, Co Cork

Respondent: Mr Frederick Gosnell, Frederick V Gosnell, Solicitors, Pembroke House,  
Pembroke Street, Cork

**This case came before the Tribunal by way of appeals by the employer of the Rights Commissioner's Recommendation ref: r079910-ud-09JOC, the Rights Commissioner's Decisions ref: r-079912-pw-09JOC and r-079915-te-09JOC. The appellant will hereinafter be referred to as the employer and the respondent as the employee.**

The appeals of Rights Commissioner's Decisions ref: r-079912-pw-09JOC and r-079915-te-09JOC were withdrawn at the outset of the hearing.

### **Summary of the Evidence**

The employer owns and operates a quarry as well as manufacturing concrete blocks and aggregate, mainly for the construction industry. The company also manufactures timber house frames. The employee commenced work with the company in late 2000. Having spent around two years driving a forklift the employee was transferred to the block-making unit, where he substantially increased production. During the boom years three worked in the block making unit: the employee who was the main block manufacturer and operated the block-making

machine, his brother, and the manager of the unit (MU), who had a much broader role, which as well as managing the unit included dispatch, quality, a full range of office duties, responsibility for health and safety and reporting to the board of the respondent company. As well as making blocks the claimant sorted, banded, stacked and loaded the blocks.

A rapid decline in the business in 2008 continued into 2009 resulting in a 50% reduction in sales in the period. The employer's managing director (MD) maintained that he spoke regularly to the staff about business and told them if the trend continued there would be redundancies.

MD appointed a committee of senior managers, comprising himself, his wife (also a managing director), the office and sales manager and the accountant to discuss cost-cutting measures and compulsory redundancies. Non-core assets were sold, pension contributions for senior management, transport and over-time costs were cut and there was no option but to make a number of employees redundant. The committee decided that the policy of LIFO would apply subject to the retention of key skills. The employee denied MD's assertion that he had informed the staff, in groups in the canteen after tea break or individually as they came to the office, of the upcoming redundancies.

Due to the dangerous nature of quarrying it is vital to have properly trained employees. Because different skills are required for the various tasks employees are not easily transferrable between jobs. Over 2009, around 28 positions were made redundant. Applying LIFO, the claimant's brother, who worked in the block-making unit was made redundant in January 2009.

In March 2009 there was no longer a requirement for a full-time block maker. On 9 March, the employee was informed that he was being given four weeks' notice of his redundancy. The office and sales manager along with the accountant informed the claimant of his redundancy. The employee denied the office and sales manager's assertion that he told him that the criterion for selection was LIFO subject to the retention of necessary skills and versatility. The employee was annoyed and the manager instructed him to go home, think about the matter and to let the employer know if he wished to work out his notice. The employee did not revert to the employer regarding working his notice period but informed the employer he would be seeking legal advice.

On making the employee redundant MU, who had 17 years' service with the company, took on the block-making role along with performing his other duties (outlined above). MU was also capable of operating heavy machinery. There was only around 2 days of block making work so MU spent the other three days performing his clerical role. MD maintained that the employee would not have been capable of fulfilling MU's role within the company. MD considered MU to be an important member of management. The employee denied that MU was a competent block maker; if there was a problem with the quality of blocks the issue was referred to the employee. Subsequent to the employee's redundancy, 12 other employees were made redundant over the remaining months of 2009 and 5 of these were truck drivers. In March 2010 part of the business was sold.

MD denied the claimant's assertion that he could have performed the duties of a number of employees, identified by him, who had less service than he with the employer. Two of these employees operated crusher machines which is a dangerous job requiring a specialised skill set and training; another had experience and a range of skills in operating heavy plant and machinery and others only worked part-time in the quarry and were otherwise working on the timber house framing. MD adamantly denied that the employee was a trainer. The employee could not have performed the role of any of those identified by him with lesser service except

that of truck driving which he had already turned down.

It was the MD's position that in January 2009 and again in early March 2009, at the time of the claimant's redundancy, he offered the employee the position of truck driver but he turned it down. Due to the training level required the employee would not be capable of working in the quarry or handling heavy machinery. The employee denied that he had been offered work as a truck driver; the position had not even been discussed with him. He had a large family aged between 3-18 years of age. Just some months prior to his selection for redundancy the employee had taken on a large mortgage and the respondent had furnished a salary certificate on his behalf to the mortgage company. The employee would have taken any job or a pay cut rather than be made redundant.

### **Determination**

The Tribunal is satisfied that there was a redundancy situation in the company including a redundancy situation in the block-making unit where the claimant worked. It is further satisfied that the redundancy in issue comes within the definition in section 7 (2) (e) of the 1967 Act as amended *viz* "that the employer has decided that the work for which the employee had been employed ... should henceforward be done by a person who is also capable of doing other work for which the employee is not sufficiently qualified or trained". Accordingly, the employer was entitled to require MU to take over the employee's work of block-making as well as continuing with his other duties, including his office duties for which the employee was neither qualified nor trained

The Tribunal recognises the dangerous nature of quarrying and accepts the employer's position that some of those retained at the time of the employee's redundancy though having less service than the employee had more experience and a greater range of skills in operating heavy plant and machinery than did the claimant.

The criterion for selection for redundancy was LIFO subject to the retention of key skills and versatility. The Tribunal on the balance of probability, accepts that the employee was not offered the position of truck driver as an alternative to being made redundant while a truck driver with less service had been retained. Accordingly, the Tribunal finds that the employee's selection for redundancy was unfair and the claim under the Unfair Dismissals Acts 1977 to 2007 succeeds. The Tribunal varies the Rights Commissioner's Recommendation ref: r079910-ud-09JOC and awards the employee €20,000.00 in compensation under the Unfair Dismissals Acts, 1977 to 2007. This award is in addition to the monies already paid to the employee by the employer.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

