

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

EMPLOYEE

- *Claimant*

CASE NO.

UD1414/2010

Against

EMPLOYER

- *Respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms O. Madden B.L.

Members: Mr J. Goulding
Mr. P. Woods

heard this claim at Dublin on 1st December 2011
and 7th February 2012

Representation:

Claimant: Mr. Brendan Liddy, Hughes & Liddy, Solicitors, 2 Upper Fitzwilliam Street, Dublin 2

Respondent: Ms. Anne O'Connell, William Fry, Solicitors, Fitzwilton House, Wilton Place, Dublin 2

The determination of the Tribunal was as follows:-

The Tribunal heard evidence from GC, the Human Resource Manager of the respondent company. The company is a small to medium consulting company. It was established in 2005 and offers it's clients business and technical consulting. At present there are 39 employees, 4 of which are support staff and not employed in a chargeable capacity. Income is derived from consultant employees who charge clients on a "per day" rate.

Employees complete time sheets which show billable and unbillable hours. At the time of the claimant's redundancy the company had suffered 8/9 months of losses and a number of projects had ceased unexpectedly, one of which stopped with little notice to the employer. Also in 2009 a contract with the public sector ended which led to a 30% loss of business.

The company took a number of measures to quantify it's losses and in September 2009 decided to hold off for another month before looking to redundancies as a cost cutting measure. In November 2009 the company made four people redundant, one of which was the claimant. The

company had looked at short time as an option but felt that it would be disingenuous. The company then implemented a 5% pay cut for all remaining employees. The claimant was not replaced.

At the time of his redundancy the claimant's role was not chargeable. Effectively his role was dissolved and aside from unfinished projects the work he was on had finished. When employees are not carrying out chargeable work they are classed as unassigned and charged with training and upskilling of others and developing resources. This is not a support role, it is only done while not on chargeable work and once chargeable work is available it is assigned immediately. At this stage the claimant had been on non-chargeable for part of September and all of October.

On 29th October the manager, DP sent an email to everyone in the company outlining that the company was in a cash flow negative and in a position to take immediate action by means of pay cuts and "headcount adjustments." He explained that there would be consultations with staff and a partner would attend at each client site to meet with employees. The consultations took place that afternoon.

A selection matrix was devised with objective criteria to choose employees for redundancy as a last in first out policy would not have made good business sense. Staff were scored under three headings, salary scoring, current chargeability, future requirements. The company took a timeframe of two months, September and October, to obtain averages for use in the matrix

The claimant attended a consultation at 2pm. At the consultation it was explained that the company was in a cash negative situation and although it had looked at other measures including pay cuts these were not enough and redundancies were now required. It was explained that a selection matrix had been drawn up and all employees would be entered into it and the criteria to be used would be applied objectively.

The matrix was devised by GC and the managing partner. They looked at people's cost to the business and people's income to the business. The matrix was only shown to employees when they had been selected for redundancy so that they could see the reason for their selection.

The matrix was completed on the Friday and the following Monday GC sent emails to those affected asking to meet with them. GC met with the claimant who had been placed third in the matrix based on his scores and was therefore made redundant. His notice period was explained to him and GC told him that she would document the meeting in a letter to him. She sent him a letter the next day with clarification of the breakdown and explaining how his pension and healthcare subscriptions would be closed out. The claimant called in sick for work on Tuesday, Wednesday, and Thursday. They met again on Friday 6th December.

The claimant had requested a copy of the matrix by email which could not be provided and he was given a hard copy at the meeting on 6th December. At the meeting on 6th December the claimant accepted the scores he received in relation to salary and chargeability but said it was not his fault that he was not on chargeable work. He questioned the future pipeline of the project he was working on and was told that there was no definitive start date from the client. The claimant also questioned the lack of an ex gratia payment. It was explained that because of the size of the company it was not in a position to provide an ex gratia payment. This meeting with the claimant ended abruptly.

GC and the claimant met again on Monday 9th December. He again questioned the lack of ex gratia payment and GC reiterated the company's position. It was explained to the claimant that he had a contractual obligation to work his notice period to ensure the completion of projects. The claimant did not want to work his notice period.

On the 12th and 13th December the claimant was in the office starting a handover of work which involved completion and archiving of projects. The following Monday, Tuesday and Wednesday he called in sick. At this stage he was sent a letter classing the 13th as his last day of work and advising that he would be paid in lieu of notice.

At the meetings with GC the claimant questioned the future pipeline of the project he had been assigned to and it was explained that the client had unexpectedly stopped and it was not known when it would start again. It subsequently started in January 2010. The claimant would not have been required on the project again until the middle of February 2010, when the build phase was due to commence. Nobody else was hired or recruited into the company to work on this project because there were resources available within the company at that time.

There was an issue with an advertisement placed on a recruitment website by the company seeking applications for what the claimant viewed as his role. GC explained that the advertisement was not for the claimant's role but for a temporary role to cover her maternity leave. The company was also looking to recruit an ETL Manager from March 2010. The claimant was not considered for this role because they felt that he would require another two years of experience to be at the required level. GC confirmed that there were no HR issues regarding the claimant and if there was a job available there would be no issue with the claimant applying for it.

During cross examination there was issues raised about the start date for the next phase of the project that involved the claimant. The claimant believed that this phase started around the end of November. GC told the Tribunal that only the design phase of the project commenced at this stage and that work was carried out at a more senior level than the claimant. The design phase could take up to 3 months before the build phase commenced, which would involve the claimant.

GC explained to the Tribunal that the job advertised on a recruitment website was updated on 25th November 2009 to replace the word "professional" with "manager". A person was recruited for this role with substantially more experience than the claimant and commenced in March 2010. It was explained to the claimant at the time that the position available was a manager's role and if the claimant applied for the role he would have been considered. He was not made aware of this during his notice period.

GC confirmed that when meeting with the claimant there was no mention of alternatives to the option of redundancy. The company felt it would be disingenuous to place the claimant on short time because the company would still not be able to cover costs.

GC explained that the criteria applied to the claimant in the matrix placed him as a consultant who earned more than his peers because he was on a higher salary. Therefore, he scored higher on the matrix. The higher the score received meant the higher the chance of redundancy. However, the claimant was not classed as a senior consultant because his skills and experience were relevant to a consultant level.

GC did not agree that the two month timeframe used for chargeability in the matrix was a small window. The company felt that an 8 week view was realistic to allow for periods of unutilised resources. GC explained that it would not be cost effective to place an employee on unchargeable work for a period before redundancy.

The Tribunal heard evidence from JH who was the claimant's senior manager at the time of the redundancy. He was also the manager of the project that the claimant had been working on.

JH explained that in September/October 2009 the claimant was not carrying out chargeable work. One phase of the project he was working on was coming to an end and it was anticipated that the next stage, the build phase, would start straight away. Based on this JH sent an email on 6th October 2009, to the claimant and others, requesting that a build team be assembled and prepped for the build phase due to start on 20th November 2009. The client decided not to start the next stage of the project immediately and invoked a warranty period on the work already completed. This work had not been included in the contract with the client and therefore the respondent could not charge the client for this work. In order to maintain its relationship with the client the respondent had no option other than to provide this warranty work and as such the claimant was assigned to this because he had knowledge of the codes that were required.

In October 2009 the company had no guarantee for the commencement of the next stage of the project. There was no signed contract and there was no verbal agreement. The client was tentative and wary to proceed to the next stage until the warranty work had been provided. In January 2010 the client assessed their finances for the coming year and gave the respondent verbal assurances for the commencement of the next stage of the project but this did not start until the end of January 2010. As the claimant was part of the team used in the build phase of the project he would not be required until February 2010.

When the build phase of the project did commence the claimant's position had already been made redundant and staff were taken from other projects that had ceased to carry out the work.

JH told the Tribunal that meetings took place weekly with members of management wherein they reviewed resources, chargeability and demand from clients in order to assign employees to work. If an employee is not on chargeable work they are classed as being on the bench and when new work comes in management look to the bench for the skills they require. In October 2009 JH would have looked at who he wanted on the next stage of the project, which included the claimant but the work never commenced.

JH was not involved in creating the selection matrix and his input to the matrix was minimal. He did provide an input into the likelihood of any potential work for the scoring of "future requirements". The input for "chargeability" was generated from weekly reports.

During cross examination JH did not agree that the claimant possessed all of the requirements in the job advertisement for a "Data Management/ETL Consultant" placed on a recruitment website. He explained that when he sent the email on 6th October 2009 he was reasonably confident that the work would proceed as scheduled in the month of November.

When the work for the project was confirmed in January 2010 another consultant was taken from a project that had tapered off to carry out the build phase. This consultant was "on the bench" at the time. JH agreed that the engagement and re-engagement of consultants on

projects was sometimes haphazard due to the requirements of the client and if the client decides not to proceed with a project the company have no recourse.

JH did not have an input into the decision process for selecting redundancies. He was informed of what positions were being made redundant after the decision was made. JH confirmed that the claimant had been assigned to work which was not chargeable prior to his redundancy and assigning work to the claimant came under his remit. This type of non-chargeable, warranty work was unusual because it was post sale but it had to be provided to the client in order to maintain the client - company relationship. JH told the Tribunal that it was unfortunate that the claimant had been assigned to non-chargeable work for the timeframe used to inform the matrix.

JH told the Tribunal that short-time is not a genuine option within the company.

Claimant's Case

The claimant told the Tribunal that he worked for the respondent from April 2007 until December 2009. He was responsible for consultancy work which involved going to different companies and carrying out their IT projects, dealing and managing data and data analysis etc.

During his employment the claimant worked on a number of projects but from late 2008 he was primarily employed on the project which ultimately required the warranty work. He worked extensively and exclusively on this project and in March 2009 he began to build a business information platform.

Over the course of his employment with the respondent the claimant was occasionally "benched". During his time on the bench the claimant would have been involved in researching new technologies, training other people, and receiving training.

When this project finished the client requested that the company provide a period of warranty for the work already completed. This involved maintenance on the project that had been developed because there was a lot of old data to be gathered, tidied, and imported into the new system. The claimant said that this work took many hours and often involved weekend work. In October 2009 the claimant worked an additional 30 hours because of the warranty period requested by the client on this project. The claimant was assigned to the warranty work by his line manager, JH, because he knew the codes that had been used on the project. The claimant maintained that two of his colleagues also had the technical expertise required to carry out the warranty work.

The claimant explained that if chargeable work became available he did not see how it would be possible to remove him from the warranty work because this would upset the client and therefore jeopardise the client – company relationship.

The claimant received an email from JH on 6th October 2009 telling him that the next phase, the build phase, of the project was due to start on 20th November and he was asked to prepare a training plan for the team, which included him. He began to prepare the plan and finalised it by the last week in October. The first session of training took place on the 28/29 October with the first three people who required the training. The claimant was not the team leader of the project.

When the claimant received the email from DP on the 29th October which stated that

“headcount adjustments” were required, he understood this to mean that there would be redundancies. However, he did not think he would be affected because he understood that there was work lined up for the build phase of the project and the warranty work had kept him busy with 30 hours of overtime. Also he had received the email of 6th October 2009 which stated that the next stage of the project was due to commence on 20th November and had not received any correspondence subsequent to that which stated otherwise.

The claimant attended a general meeting on 30th November in the office where all staff were addressed by the director and GC. There was a general discussion about what was going on in the company and what criteria would be used for the selection of redundancies.

On 2nd November the claimant was called to a meeting with GC. At this meeting he was told that certain criteria had been used in the selection matrix and as a result his position had been selected for redundancy. The claimant was told that he would receive statutory redundancy. He queried his selection and was told that certain criteria had been used.

The claimant was aware that he was on a high salary but later learned that this resulted in a higher score being assigned to him in the selection matrix that was used. If the 5% pay cut was taken into consideration it would have resulted in a lower score on the matrix. However, the 5% pay cut did not apply to any of the candidates within the matrix.

The claimant told the Tribunal that the use of September and October as the timeframe for scoring in the matrix was detrimental to him because he had been assigned to non chargeable warranty work for that period. He felt that a twelve month period would have provided a better view of his contribution to the company.

The claimant was also surprised that he did not score better in the “future requirements” category. Two of the claimant’s colleagues had scored differently to him for future requirements and he felt that he would have been interchangeable with these employees. He raised this issue with GC at a meeting on 6th December. At this meeting the claimant enquired about individual criteria, ex-gratia payments and alternative opportunities within the company. He was told that there were no alternatives.

The company requested that the claimant work his notice period and he queried the necessity of this due to the lack of work. He was on sick leave for 2 days immediately after receiving his notice. He then returned to work for 2/3 days and went on sick leave again. The company then contacted him to say that he did not have to work his notice.

While seeking new employment the claimant found an advertisement on a jobs website for the respondent company. It was last updated on 25th November 2009 and the claimant felt that the description of the candidate required in this advertisement matched the criteria within his CV.

During cross examination the claimant confirmed that he had no knowledge of the negotiations that took place with the client in respect of the next phase of work. He also had no involvement in the discussions about the warranty work. However, he was aware of the pressure from the client and the fact that the work was non chargeable but had to be done in order to maintain the client – company relationship.

As the claimant felt that he was interchangeable with two of his colleagues he felt that he was unlucky in being assigned the task of warranty work which was non chargeable. At the

meetings with GC he queried if there were alternatives to redundancy but this was a general request and he did not specify what alternatives he felt should be looked at.

The claimant requested not to work his notice because he felt that if his position was redundant there was no work to finish. It was agreed that there were certain tasks that needed to be completed. The claimant told the Tribunal that there was flexibility given to him during his period of notice and GC offered to help the claimant update his CV and she was also available for meetings.

Determination

Having carefully considered the evidence adduced over the course of the one and a half days, the Tribunal are satisfied that the claimant was dismissed by reason of redundancy and that the selection criteria used in respect of this redundancy were fair and reasonable in all the circumstances. As a result thereof the claim under the Unfair Dismissals Acts 1977 to 2007 must fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)