

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.  
UD1515/2009

EMPLOYEE

*Claimant*

against

EMPLOYER

*Respondent*

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr J Flanagan BL

Members: Mr G Andrews  
Mr J Dorney

heard this claim at Dublin on 1<sup>st</sup> April 20 and 1<sup>st</sup> July 2010 and 12<sup>th</sup> November 2010.

#### **Representation:**

Claimant: Mr Conor Hannaway,  
SHRC Limited, Heather House, Heather Road, Sandyford Business Park, Dublin 18

Respondent: Ms Cliona Kimber BL instructed by  
Ms Anne Leech of Anita Kent, Solicitors, Croase, Cleariestown, County Wexford

The determination of the Tribunal was as follows:

#### **Background**

The claimant's representative stated that the claimant had been employed by the respondent for nine years and had fulfilled a number of roles. The claimant had been employed in a part of the respondent's business referred to here as R. The claimant had been the manager in the reception area and had dealt with customer service issues. The claimant had managed the day spa and stores and had dealt with staff matters and business development. In 2006 the claimant's hours had changed to thirty-four hours per week. The claimant had been a member of the senior management team. The claimant believed that in recent years her management role had been downgraded and that she had been denied the opportunity for training and development.

A rationalisation of the business took place in January 2009. The manager and assistant manager of the gym were both made redundant. The claimant had been scheduled to work on 22<sup>nd</sup> January 2009, but she was then asked to come in some time prior to commencing her shift. The claimant had a suspicion that something was not right. It was a short meeting. The general manager told the

claimant that she was going to be made redundant and no alternative was offered to her. The claimant was shocked to have been selected for redundancy given her long service. As far as the claimant was concerned no objective selection process had been carried out. It was the claimant's view that her job had not disappeared. In April 2009, approximately one month after the claimant had been made redundant, two sales people were hired on a salary of €20,000. The claimant had business development experience and felt that she could have been considered for one of these roles.

Since being made redundant the claimant had obtained a part time job in a gym, but she now earns €300 less per week than she had previously. The claimant was the only one made redundant at the time.

The claimant's representative stated that the respondent needed to establish how an employee with greater seniority should be chosen for redundancy over employees with lesser service. The claimant's representative believed that the respondent had the opportunity to find alternative employment for the claimant within the business.

The representative for the respondent stated that prior to making the claimant redundant in February 2009 four employees had been made redundant in January 2009. The claimant had received her redundancy cheque and had cashed it on 23<sup>rd</sup> February 2009. The respondent believed that other employees in the group could carry out the claimant's role in the course of their own jobs. The claimant was not replaced. The general manager and four to five other employees undertook the claimant's work between them. Some of the other employees carrying out the claimant's functions had additional skills which the claimant lacked. The claimant had taken the bookings at reception for clients seeking beauty treatments. The beauticians were to take the bookings themselves and thereby assist in eliminating the claimant's role. The claimant was not a trained beautician so it was not practicable for the respondent to offer the claimant one of their positions. The employer had made a decision to terminate the claimant's employment and other employees now undertook her duties. Mention was made of an employee S who was not a beautician and who managed the children section. It was suggested that S could have been made redundant instead of the claimant and that the claimant could have been retained to carry out the job of S. The claimant worked in R, which was a spa, and at the front reception desk. S organised children's parties and managed the food.

The respondent did not select for redundancy using last in first out (LIFO). If that were the case S would have been the one to leave.

### **Respondent's Case**

The first witness for the respondent described herself as an employee and director of the respondent company as well as managing director of a club called WWC. The connection between these two entities allowed the respondent to facilitate the claimant's wish to undertake receptionist duties at the WWC. While undertaking those duties the claimant was in the employment of the club. As an employee of the respondent the claimant worked as a manager in a unit called R in its Clontarf branch. The respondent had two other branches in the Dublin region. In addition to the unit called R, the Clontarf branch had a number of other divisions including a section called F, which was oriented towards children and their activities. Each of those sections had their own separate accounts which were accumulated into the respondent group's overall accounts.

The witness told the Tribunal that as a result of changing patterns of consumer behaviour the turnover for the R section had fallen by more than ten per cent. Outlay on salaries accounted for

over fifty percent of that falling income. The witness referred to a set of figures showing the financial summaries for R from 2004 to 2009. Among other figures it showed that the absolute profit had not changed significantly from 2004 to 2009 but that the income had fallen considerably. This general deteriorating financial situation and its effects on the business was discussed between the witness and the group financial controller for WWC. A decision was made to make some staff redundant.

The claimant's position as manager of the R section was among those chosen for redundancy. The witness explained that the claimant's duties could be undertaken and absorbed by a number of other current staff. The claimant was not qualified to act as a beautician and it was not feasible to place her in F where the workload and responsibilities were greater and more demanding. The claimant was described by this witness as a good employee. A copy of the claimant's RP50 form named her employer as WW and was signed by a general manager. A letter to the claimant dated 13<sup>th</sup> June 2006 from the contemporary human resource manager of WWC informed her that her new employer was now TD. The claimant accepted and cashed her redundancy payment.

The current human resource manager for WWC insisted that a manager was essential for F and making that manager redundant would not have amounted to a genuine redundancy unlike that of the claimant's position. There was no written policy on redundancy procedure nor did a letter of dismissal issue to the claimant.

The general manager outlined the management structure of the respondent. The club had a large number of members. The claimant undertook a number of duties including managing three therapists; the claimant scheduled rosters and undertook stocktaking. The claimant was not trained as a beautician. The claimant had attended a course on how to get the most out of managing a spa. The claimant had been employed as a reception manager. The general manager was not involved in the decision to make the claimant redundant even though she informed the claimant she was redundant. The claimant enquired if the other two branch managers were being made redundant and she was told no. There were no other posts available at that time in that area or in the other areas. Redundancies were implemented prior to the claimant being made redundant and some redundancies were implemented later.

The claimant had considered taking on R as a franchise but had decided against it, as it did not make financial sense to do so. S was the manager of F and sixteen young staff members were employed. This area consisted of an adventure centre on three floors and a kid's area. The kitchen had to be managed and this was a different position. An operations manager had left in July 2008, the claimant would have been ideal for that position, she was asked if she was interested in this position but she was not. S was then offered the position.

The claimant would need a qualification for the childcare centre. The managing director had made the decision to make the claimant redundant. It would take about a month's training before the claimant could take on F. On the day that the claimant was made redundant she was asked to come in early. The claimant had asked to remain on as a reception manager but she was told she could not be facilitated.

### **Claimant's Case**

The claimant described her roles with the respondent since she had commenced her employment in 1999 as a reception manager. The claimant was part of the management team and had helped to build up the client base. In 2004 the general manager asked the claimant to take on R as its manager. R had a lot of staffing issues and as manager the claimant successfully solved these

problems. In the course of her employment the claimant had developed skills in planning, organisation, people management, leisure, beauty and working within a budget. The claimant had worked the operations shift and she believed she would be able to undertake the job in F with only one day of training to get to know the respondent's ordering procedures. The claimant had dealt with young employees and sixteen-year-olds carried out the cooking duties in the kitchen. The claimant had become somewhat concerned when two general managers were made redundant.

The claimant had received a call on the day that she was made redundant. The claimant was asked to come in early to a meeting. The claimant asked the general manager was she being made redundant and the general manager said yes. The claimant asked the general manager about two other managers. The claimant asked could she remain on as receptionist manager and this was refused. The claimant was told that she would have to go to a manager in another location for her redundancy cheque. The general manager did not appear to know who would be doing the claimant's job. The general manager told her that she did not have to work her shift that evening if she did not want to but the claimant came in to do her shift at 5pm. The discussion regarding her redundancy took approximately fifteen minutes and she felt shocked. The claimant had enjoyed her work with the respondent and after her redundancy she found alternative employment in April 2009 in a gym.

### **Determination**

The fact of dismissal was not in dispute. It was the respondent's case that the dismissal was for reason of redundancy. The Tribunal notes that the claimant had accepted a redundancy lump sum.

An excerpt of some of the relevant parts of section 6 of the Unfair Dismissals Act 1977 No. 10/1977 is set out below:

*6(1) "Subject to the provisions of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, to be an unfair dismissal unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal.*

*6(3) "Without prejudice to the generality of subsection (1) of this section, if an employee was dismissed due to redundancy but the circumstances constituting the redundancy applied equally to one or more other employees in similar employment with the same employer who have not been dismissed, and either—*

*(a) the selection of that employee for dismissal resulted wholly or mainly from one or more of the matters specified in subsection (2) of this section or another matter that would not be a ground justifying dismissal, or*

*(b) he was selected for dismissal in contravention of a procedure (being a procedure that has been agreed upon by or on behalf of the employer and by the employee or a trade union, or an excepted body under the Trade Union Acts, 1941 and 1971, representing him or has been established by the custom and practice of the employment concerned) relating to redundancy and there were no special reasons justifying a departure from that procedure,*

*then the dismissal shall be deemed, for the purposes of this Act, to be an unfair dismissal."*

The Tribunal finds that there was no procedure in the workplace of a type described in sub-subsection 6(3)b nor did the dismissal occur for reasons referred to in subsection 6(3)a of the

Unfair Dismissals Act 1977 No. 10/1977.

The Tribunal notes that even where a purported redundancy is not carried out for reasons described in subsection 6(2) and where there is no procedure as described in subsection 6(3) a purported redundancy may be found to be an unfair dismissal if the Tribunal finds the reason for the termination of employment was not in fact wholly or mainly for reason of redundancy.

The employment of the claimant was terminated by the respondent as one in a series of such terminations where the other employees were, according to the respondent, let go for reasons of redundancy. The Tribunal finds that the claimant's job consisted of various tasks which could be absorbed by existing members of the workforce. In this way, by subsuming the claimant's tasks into the roles of other employees a reduction in the workforce was achieved. The Tribunal therefore finds that there was a redundancy situation in the company.

The Tribunal has carefully considered the written submissions filed by both parties and does not consider it necessary to set them out in detail. The essence of the case made by the claimant is that she was unfairly selected for redundancy. The claimant asserted that she should have been given one of the positions being carried out the remainder of the workforce on the basis of her time with the respondent company, her experience and/or her skills. The Tribunal finds that in the absence of a procedure as referred to above, an employer is entitled to use any reasonable criteria for selection for redundancy and is under no obligation to use a selection method based upon the employee's duration of service. Where the position solely occupied by an employee is redundant and the employment is not subject to a procedure described in subsection 6 of the Unfair Dismissals Acts 1997 to 2007, the employer is entitled to make the employee occupying that position redundant and the employer is under no obligation to widen the selection pool to include other employees occupying different positions.

Having carefully considered all the evidence in this case the Tribunal finds that the claimant was dismissed wholly or mainly by reason of redundancy, which is a substantial ground justifying dismissal, such that the claimant was not unfairly dismissed and therefore her claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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