

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

EMPLOYEE

UD874/2010

claimant

against

EMPLOYER

respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms N. O'Carroll-Kelly BL

Members: Mr T. O'Grady
Mr T. Brady

heard this claim at Dublin on 26th August 2011
and 23rd November 2011
and 24th November 2011

Representation:

Claimant(s): Mr. James Doran BL instructed by Mr Emmet Butler, Butler Monk,
Solicitors, DMG Business Centre, 12 Camden Row, Dublin 8

Respondent(s):
The determination of the Tribunal was as follows:-

Respondent's Case

The interim HR manager CM told the Tribunal that he deputised for the HR manager who was on maternity leave between 2008 and 2009. The respondent provided software solutions to insurance companies and the banking sector. The respondent had offices in North America, Australia and South Africa and employed approximately three hundred. The respondent's business model was based on their client's ability to pay. Cost savings of €1.5m had to be found in May/June and he was asked to undertake a review. The ELT (Executive Leadership Team which comprised of senior managers) met once every two weeks and on a regular basis. A redundancy programme was implemented in May-June 2009. Strawman was developed which meant the roles the respondent had clients associated with, they could be in Australia or New Zealand. A meeting took place on 3rd June 2009 with professional services. A decision was made to bring employees who were abroad home earlier as a cost saving measure. The respondent ultimately implemented twenty redundancies, one in the United States, sixteen in Ireland and three in Poland. The claimant was on secondment in Australia. He received an email from the chief operations

officer on the 10th June 2009 regarding the claimant's repatriation to Ireland. An e-mail issued to all employees regarding a business update meeting on the 11th June 2009. A further e-mail issued to all employees on the 12th June 2009 whereby MK requested suggestions and feedback from employees. All decisions were to be implemented by the 10th July 2009. The respondent received seventy to eighty suggestions. Certain roles had to be made redundant. He received an e-mail from the CFO on the 15th June outlining that the 24th June 2009 was the cut off point for the feedback. In an e-mail dated the 17th June 2009 he outlined to all employees the suggestions received to date. All suggestions were considered.

An email regarding North American staff reduction suggestions was sent to IL ELT on the 2nd June 2009. An e-mail issued to all employees abroad on the 29th June 2009 regarding an update. Amongst the recommendations was that the offices close down for a week over the Christmas period, all flights booked must be economy, subscriptions such as magazines, newspapers to be discontinued, the box at Croke Park be discontinued and the electricity supplier changed. The suggestions regarding cost savings amounted to €899,000.00 in 2009 and €1.382 for 2010. He sent an e-mail to all employees on the 3rd July 2009 outlining these selection criteria that was being used where required. A score was assigned to each criteria. An e-mail issued to all employees on the 9th July from TW regarding the close out note on the suggestions.

He tried to ensure there was consistency in the selection criteria. By letter dated 13th July 2009 he informed the claimant that he was being made redundant. He outlined in detail his redundancy package and the conditions attached thereto. If the claimant wished to review the decision he could contact the witness by the 15th July 2009. The respondent arranged an outplacement service with Springbox to assist him. It also provided a list of preferred recruitment agencies that the respondent used so that it could help him to seek alternative employment.

In cross examination he stated that no one appealed the redundancy. He gave a letter to the claimant marked confidential and this is what he had done previously. He compiled the criteria based on past experience and he obtained advice regarding the criteria he used. He looked at opportunities for the claimant but none were apparent. The respondent advertised jobs in November 2009 and he could not recall how many were advertised. He was involved in an advisory role and research and development. The respondent tried to identify how it could save €1.5 million. HR devised the scoring system and gave it to the line manager. Senior management decided on the wording. The claimant was in Australia and he was out of the loop physically. The same could be applied to employees in the USA. He identified ten categories and he was obviously closer to what was taking place. Staff were taken on in the respondent's Polish office after the claimant was made redundant. One of the staff in another Polish office was re-employed. The respondent paid their employees the same as their competitors. In relation to the respondent's close competitor the respondent would have been competitive.

In answer to questions from the Tribunal regarding the fact that he challenged some of the decisions made by line managers he stated that there were certain matters he could not question.

He ensured consistency and he was not aware of the overall score and the consequences. When asked about the fact that the claimant received his letter of redundancy on the 13th July 2009 and if there was enough time to put into place all the criteria he set out whether the claimant remained in employment or not he replied that employees did not want the process prolonged. He looked for suggestions from employees. The respondent could have extended

the process by eighteen to twenty days but employees wanted it completed as soon as possible. At the time the claimant was made redundant other employees who were undertaking a similar role were not affected by redundancy.

The second witness for the respondent, the chief financial officer TW told the Tribunal that he was involved in IT, HR and legal and commercial areas of the respondent. In August 2003 he was a member of the board. He outlined the structure of the respondent. It had an ELT (Executive Leadership Team) who were responsible for total management. It had two hundred and fifty to three hundred and fifty employees and had nine subsidiaries. The HQ was located in Ireland. In 2009 a review took place. Customers changed their revenue and that had an impact on the respondent. New budgets were put in place. The budget of €40.3 million was reduced by €7.8 million. Seventy per cent of the revenue included consultancy services. Employees were moved to Australia and New Zealand in 2004/2005, this was expensive and the respondent paid for the relocation costs and accommodation.

Employees abroad were evaluated and the respondent started to relocate them back in May. June 2009. It was important for the respondent to maintain a profit over three years when submitting a project for a government body or insurance company contracts. It needed to reduce outgoings to ensure that the respondent was still profitable. Employees accounted for eighty per cent of the costs in the respondent and there was no way to solve the €1.5 million reduction without reducing the numbers.

An e mail issued to employees on 12th June 2009 and they were asked to liaise with the respondent. The 24th June 2009 was the closing date for suggestions. All suggestions were considered and some implemented. A saving of €899,000.00 was made, €500,000 from closing the office for one week Christmas, €132,000.00 in pension saving, €40,000 in changing from travelling business class to economy class, €19,000 in discontinuing the respondent's box in Croke park. It needed another €600,000. The reality was there were employees with no work to do.

The respondent explained to all employees at all times what they were going to do and kept them appraised of the plan. ELT made the decision based on their examination of the books. Twenty four redundancies in total were implemented. In the selection criteria it made sure that it was fair to all. In 2011 the respondent was awarded additional business and it hired more employees as the business had improved.

In cross examination he stated that the criteria for assessing employees were validated. He could not test the specifics but he did go to the managers of the particular areas and obtained their opinion on the issue. Employees were evaluated every six months and the respondent had full knowledge of each member. The respondent ensured it was made fair and reasonable. The criteria were not tested. The criteria were based on roles, skills and competence. He could not say how many marks were allocated to each category. He did not tell the managers the marks and they did not know until they were evaluated. He did not know the number of jobs in each category. In 2009 the respondent set up in Poland and South Africa, these were different roles and departments. Thirty employees were recruited between July 2009 and March 2010. Implementing the redundancies resulted in a saving of €550,000 to €580,000.

DS (the third witness for the respondent) told the Tribunal that he was Software Development Services manager. He was asked to attend a meeting regarding the €1.5 million cost saving. He along with CM, (HR) and CK (head of professional services) discussed how they

ould liaise with employees. He was involved in the selection criteria also. He evaluated approximately seventy employees in his department. CK evaluated approximately sixty eight in her department. This was done very quickly. The staff feedback indicated that if redundancies were to happen it should be done quickly. He had a team of six who helped him. No employee requested the scoring regarding each criteria and he did not receive feedback regarding the system. He was not aware of the scoring of each category and that kept it completely objective. He knew the claimant socially but never worked with him. He felt that the assessment for the criteria was fair.

CK (the fourth witness for the respondent) told the Tribunal that she was head of practice management for professional services. She was in the professional services for the past five years. She worked with PM (chief technical officer) and established where business was and she came to the conclusion that they had too many employees for the positions available. She along with DS and CM discussed cutting measures. CM (HR) identified the areas where redundancies could be implemented. He gave her a spread sheet which identified the categories. They needed a matrix to ensure that they retained the skills they needed going forward. Employees did not request the ratings. The employees who were made redundant were invited back to discuss the ratings.

They had too many senior technical consultants. An employee B was needed in Holland so he could not be made redundant. DM (chief consultant practice lead) worked with all these employees directly so he was asked to evaluate them. Discretionary categories were used in the evaluations. DM and PG did not know the score for each category. She discussed the areas with PG and DM on the 6th July 2009 and she asked them to look at the spread sheet. Both were familiar with the group of employees and she felt that they would be able to evaluate them. She spoke to them when they had completed the task. She then met them after they had completed ratings as she wanted to ensure that they were comfortable with the ratings they had awarded. They then discussed the ratings and she wanted to be sure they understood the categories and allocation of each subsection.

In cross examination she stated that she told PG and DM that they could take the time they needed to come to their conclusion. Both of them undertook four categories. There was a rating number attached to each category, she did not know how many would be made redundant. She wanted them to select a category that applied to the individual and not a number. The claimant's appraisal from July 2008 to June 2009 was factored in. This was not signed off by the claimant and they could not use it. They had the claimant's other appraisals. The claimant validated some of the comments in this review. CM (HR) challenged her regarding the ratings and she was comfortable with the ratings. The claimant was employed with the respondent in Australia for one year and in Ireland for eight years. The claimant chose to go to Australia and she did not ask him to go. The claimant received a nil rating for innovation. The respondent then took on three employees one was in Poland, one in USA where a local was employed and in the UK. The claimant was offered a position in the UK but declined it.

DM (the fifth witness for the respondent) told the Tribunal he was the chief consultant practice lead with responsibility over Europe and North America. He looked after best practice regarding technical discipline. He joined the respondent in 2004. He worked with the claimant and PG. He dealt with the claimant as a lead and asked him to undertake software assignments. He was in the same office as the claimant from June 2006 until the claimant went to Australia in 2008 and he also back filled for PG sometimes. He hired a large number of the

employees that were on the list. He did not hire the claimant as he was there before him. He had a very good knowledge of sixty to seventy percent of the employees. He knew the claimant but he did not have very good knowledge of the claimant.

CK spoke to him and PG regarding the categories to be applied in selecting employees for redundancy. It took about four hours to complete. The witness and PG went through the list as fair and as comprehensively as they could. When they had it completed CK challenged them on a number of points.

The claimant received the lowest rating in his group under the heading innovation. During the time he worked with the claimant, the claimant never made suggestions regarding improvements. T made suggestions every day. Regarding flexibility and adaptability he stated that changed leaders are those who lead change and it needed someone who will take an idea and start the process from start to finish and brought clients with them. Satisfactory regarding change meant going with the flow.

The claimant obtained a rating of good for product knowledge. Some of the newer employees knew the product better than the claimant. You must know the product and all its components and how each of them work. When the task was completed CK checked it and then HR checked it and it was complete. They did not have employees' appraisals in front of them at the time of doing this task.

In cross examination he stated that he never did an appraisal on the claimant. The majority of employees he appraised would have met the criteria. The appraisal system was good. It is one of the better ones when he compared it to another PC company. The test was subjective for those four categories.

LC (the sixth witness) for the respondent told the Tribunal she was a senior HR generalist and she commenced employment with the respondent in 2005. In 2009 twenty four redundancies were implemented worldwide, sixteen in Ireland. She worked in Australia for four weeks to deputise for a colleague. She spoke to employees regarding the arrangements to return. She spoke to the claimant in June 2009 and explained all the arrangements to come back, including tax payments, removal packages and air freight. She returned to Ireland on the 15th July 2009. She had two weeks holidays before she returned home. To the best of her knowledge the claimant did not contact anyone regarding the request in the letter. SB who was the HR manager in Australia was the contact for the outplacement workshop. The claimant did not take up this option. The respondent recruitment is reactive to customers needs. The skills set for an analyst is very different from that of a technician.

An employee BOG was recalled to the respondent for ten days as a customer requested specific skills. She knew that the claimant had arranged a holiday and this customer re-engaged BOG until October 2009. She believed that BOG remained on with this company until December 2009. This position became permanent in the New Year and as of now she is not aware what customer BOG is employed with. BOG was asked to do this engagement day to day as the customer was going through a crisis.

In cross examination she stated she did not know if her post was under threat at the time redundancies were implemented. When she started in 2005 the US market was the main focus. She spent eighteen months with the respondent in Australia prior to the claimant moving there. The claimant received statutory redundancy.

PG (the seventh witness) told the Tribunal he resigned from the respondent in December 2011. He was a technical manager at the time he left. His role was to complete evaluation of employees in June/July 2009 in a technical capacity. He went to Poland and spoke to employees regarding redundancy. He was responsible for assessing technical consultants in Ireland and Poland. He along with DM met with CK regarding a spread sheet and they were asked to complete it for all employees. He was not told what the result would be. He was very familiar with ninety per cent of employees on the list. In 2004 the claimant undertook project work in Ireland and the UK, the claimant was a very good and competent developer, he could be assigned a task and have it completed.

Innovation as a professional consultant meant this role involved meeting customers and discussing their needs. It needed a very good level of communication. He stood by his rating that he gave the claimant for innovation. The claimant attained a satisfactory rating for flexibility and adaptability. Employees went to customer sites and met the customers; they put themselves forward and were not told to do so. An employee would have to be outward and would be looking to embrace change at management level. The claimant would not have knowledge of the entire respondent's work. On direction the claimant could complete work within the framework for consulting.

He had not seen the scores prior to the hearing.. He spoke to CK and DM. They worked on spread sheets and came up with the rating. He worked on his knowledge of employees over the years. Product knowledge was important in determining rating. The claimant exhibited great development and software development. He never had an issue with the claimant's performance. There was a certain level expected of a senior technical consultant. The claimant worked on a project in NR in the UK which required travel. This project needed to be continued and maintained. The claimant indicated that he wanted to move away from this project. It was never for the claimant take up a leadership role. The claimant had some difficulty in communicating with customers. If you wanted to be a lead technical consultant there were areas that needed to be focused on. The claimant undertook bug fixing duties. These duties were usually undertaken by junior staff. When the claimant worked in a confined environment he worked very well. At a senior technical consultant level, innovation did not come across.

After the claimant's employment ended he contacted the claimant regarding a position that may arise in the UK with NR. He received a response from the claimant that he was not going to pursue it and he was going to put the respondent behind him.

In cross examination when rating he looked at each individual and reviewed the overall situation in its totality. He did not have performance evaluations with him when he rated employees for redundancy. He knew employees very well and he relied on his experience.

He was satisfied with his ratings and that he got it right. He would not change anything. He along with DM did the ratings. If in doubt they would be generous in evaluating employees and give them the benefit of the doubt and marked up. The claimant was a quiet person and the onus was on the individual to provide ideas regarding training needs. The training requirement could be worked out with the technical leader, the individual and HR. Management was supportive of the needs of training employees.

The role of support in NR was diminishing. The claimant asked him for a reference and he

told the claimant that there could be a role for him in NR in the future.

Claimant's Case

The claimant told the Tribunal that he joined the respondent in 1998 as a software engineer. He had five years previous experience in the industry after he left college. In 2003 he was a technical consultant. He was then promoted to senior technical consultant. He enjoyed his time with the respondent and did not encounter any particular problems. In his annual review under flexibility/adaptability DC raised with him about engaging more with customers and he took this as constructive criticism. He went to Australia for three months in March 2008. He returned to Ireland to organise his visa. In July 2008 he returned to Australia to work for the respondent. The respondent selected a few applicants for Australia. In 2001 he joined a share option scheme and invested €5,000.00.

He first heard about redundancy while in Australia. He was summoned by KF to go to his office. SB HR in Australia was there with KF. He was informed that he was being selected for redundancy. He was given a form and SB gave him a brochure. After that he handed back his keys, swipe card and left the office. He received a letter regarding his redundancy at the meeting. This occurred before 12 noon. He asked why he was made redundant and he did not receive a response. The exchange lasted ten to fifteen minutes. SB went through the general review and she told him savings had to be made. SB did not go through the scoring system with him. He was told he could appeal the redundancy if he wished. He returned to Ireland two weeks later. He had been notified some months previously that his contract was ending. He saw no point in appealing his redundancy and there was no point in going back. He contacted PG for a reference which he received. The offer of a job in NR was rather vague and there was no concrete proof of a proper job offer. He thought about this position and he decided that he was not interested in pursuing it.

After he was made redundant he was unemployed until the 23rd February 2010. He then commenced another contract which continued until July 2010. He obtained a job on the 20th October 2010 where he is currently employed. He is working in a similar role to that which he undertook previously. He would not return to the respondent.

In cross examination he stated that he had no issue with the criteria used for redundancy. He knew some were discretionary and others non-discretionary. He did not feel that he would be selected for redundancy. The selection criteria were not questioned by employees. He thought that the criteria would be based on knowledge and experience and he was familiar with the respondent's old and new system. When he was asked if he should have been retained instead of another employee he replied that he had worked with BMcG and he did not think he was good and he was the same level as he was. He did not feel the need to take part in outplacement. He had a good working relationship with PG and he respected his judgment. He disagreed with some of the criteria.

There was no training available and it was not up to him to say that he needed training. He was not aware of technical training in the respondent. He obtained unpaid leave in September to December 2007 and had no problem in obtaining this. While he was on unpaid leave he received health care benefit.

In answer to questions from the Tribunal he stated that he is a quiet person and it was not fair to judge on personality. The matrix system that was used in deciding the redundancy was not

entirely fair. If all his experience was included in the matrix this could have made a difference in his selection. He was not told he could bring a representative to the meeting. He found out about redundancy when he went to the meeting.

Determination

The Tribunal have carefully considered all of the evidence adduced over the three day hearing together with all of the documentation handed in and the submissions made.

The claimant alleged that he was unfairly selected for redundancy and relied on Section 6(3) Unfair Dismissal Act, 1977.

“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 Respondent relied on Section 6(4) (a) of the Act,

(4) Without prejudice to the generality of subsection (1) of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, not to be an unfair dismissal, if it results wholly or mainly from one or more of the following:

- (a) the capability, competence or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

Evidence was adduced that the respondent needed to make financial cuts amounting to €1.5million. They commenced a consultation process with the employees and requested their views on costs cutting measures. Numerous suggestions were proffered. Those suggestions that were implemented amounted to a saving of €900,000.00, leaving a shortfall of €600,000.00. That was not contested. The respondent stated that at the material time there were several employees who simply had little or no work to do. On that basis they did not consider pay cuts or reduced hours. Once the decision had been made that redundancies were necessary the respondent developed a matrix system to assess which employees were to be made redundant and acted swiftly when applying that matrix to its employees.

The headings under review were as follows:

- Total experience
- Competence/Technical ability
- Ability to be developed now and in the future
- Innovation
- Flexibility
- Performance standards
- Length of service
- Product knowledge
- Attendance record
- Disciplinary

All but four of the categories were static. The four discretionary categories were the subject of a lot of general criticism from the claimant's representative. The respondent stated that those vested with the responsibility of grading the employees were not given the points apportioned to each category. Their task was to select the appropriate category from the drop down menu. It was the respondent's view that that system made it almost impossible to manipulate. The Tribunal agree with that view. The Tribunal are satisfied based on the respondent's explanation of how the options were allocated to the four discretionary categories in relation to the claimant were fair. There was no evidence of corruption or of a preconceived agenda to make the claimant redundant. Furthermore, there was no specific evidence suggesting what higher score would have been more appropriate and why.

Evidence was adduced that shortly after the claimant was made redundant the respondent employed several new employees. The Tribunal are satisfied that the claimant was offered the only position that would have been suitable to his skills set. That position was with NR in the UK. The claimant turned down this position for his own personal reasons. It turned out that that position became a permanent one. All of the other positions that were filled were not relevant to the claimant's skill set.

The Tribunal are satisfied that a genuine redundancy situation existed at the material time and that the claimant was not unfairly selected for that redundancy. Accordingly the claimant's claim under the Unfair Dismissals Acts, 1977 to 2007 must fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

