

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

EMPLOYEE

- *Claimant*

CASE NO.

UD1955/2010

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. L. Tobin
Mr J. Jordan

heard this claim at Wicklow on 3rd April 2012

Representation:

Claimant: Mr. Peter O'Keefe B.L., Mr Dermot Monahan, Monahan & Co, Solicitors, 10 Dyer Street, Drogheda, Co Louth

Respondent: Mr. Conor Feeney B.L., Mr. David Alexander, Rutherfords, Solicitors, 41 Fitzwilliam Square, Dublin 2

The determination of the Tribunal was as follows:-

Respondents Case

The Tribunal heard evidence from SF, the managing director of the respondent company. SF explained to the tribunal that she has been an employee of the company, which was established in 1970, since 1998. In 2008 she became the managing director. At this time the country was hit by a financial crisis which resulted in one of the company's major clients seeking a reduction in rates. This client began to reduce their spend which resulted in a downturn of shipped product and also a reduction in the price paid for that product.

The company kept a close eye on all expenditure and began to review the tariffs for all utility services. The company also sought reductions in cost from their suppliers. In 2008 they also introduced a pay freeze and since then there have been no increases in salary. In 2009 they looked at the option of introducing part time work or job sharing as a cost cutting measure but this would have affected continuity of services provided. The only option left was to implement redundancies.

The respondent company contacted an employment advisor for advice about the selection process they should use when implementing redundancies. They were informed that they needed to set out

their selection criteria which they did. They began to look at all departments within the company. The marketing department was still quite busy but other departments were quiet such as the warehouse, service and general office. The claimant worked in the general office. An employee retired from the warehouse and there was a redundancy in service.

Within the general office the claimant and a fellow employee, SR, had duplicate roles. The claimant's date of commencement with the respondent company was more recent than SR's and based on this he was selected for redundancy.

SF called the claimant to a meeting on 27th May 2010 and informed him that due to the downturn there was not enough work available to continue his employment and as a result he was being made redundant. The claimant acknowledged the downturn. SF offered to help the claimant compile an up to date CV and he accepted this offer. SF told the Tribunal that the claimant did not appear to be surprised about the redundancy and accepted it. He did however appear quiet. SF informed the claimant of his entitlements and furnished him with an RP50 form which he signed.

In respect of the claimant's notice entitlement he was offered paid leave to seek alternative employment. He did not accept this offer and returned to the office for the rest of the day but left early. He did not work the remainder of that week and when he returned to work the following week he began to make threats and allegations to other members of staff. SF tried to contact the claimant but could not reach him. She left him a voice mail telling him that he could not work out the remainder of his notice. She also sent the claimant a text message because she wanted to have a written record. SF received a phone call from SR the next working day to say that the claimant was in attendance at work. She told SR to put the claimant in a meeting room and she would speak to him. She told the claimant that he would be paid in lieu of his notice.

During cross examination SF confirmed that the redundancy process took place behind closed doors to avoid stress on the claimant and other employees. No other employees were aware of the impending redundancies except for heads of departments and that staff being chosen for redundancy were not aware until such time as they were informed of their redundancies. Staff being considered for redundancy were not aware of the criteria being used.

SF agreed that the claimant had occasionally worked in the warehouse during the course of his employment but she did not agree that he had longer service than the staff in the warehouse.

SF confirmed that there was an ongoing issue prior to the claimant's selection for redundancy surrounding high temperatures in the general office. During the 6 month period prior to the claimant's redundancy approximately three people threatened legal action against the respondent company. There was disharmony in the general office and the claimant made a formal complaint about two of his colleagues regarding bullying. SF spoke to the colleagues in question and believed that to be the end of the problem.

In March SF was approached by SR who informed her that the claimant was considering legal action in relation to the temperature issue in the general office. This was the first time the issue had been raised since October. SF sent an email to the claimant informing him that the dial for the temperature had been turned down. She denied approaching the claimant directly about the issue and disputed any connection between this incident and the claimant's notice of redundancy.

SF agreed that the claimant's role changed as soon as he was made redundant and this was due to the claimant's absence from work. SR took over the order role and data entry. SR informed the

claimant that if he wished to return to work there was data entry to be completed. The claimant's access and password to his computer were changed because it was not clear if he would return to work for the period of his notice.

In relation to the voicemail left on the claimant's phone telling him not to return to work, SF explained that this was as a result of an email she received from a sales representative and another manager informing her that the claimant was only in the office to gather information to sue the company. SF thought that it was best to remove the claimant as soon as possible.

SF maintained that the redundancy process was fair and transparent and the claimant was chosen because he was in a quiet department, there was a duplication of his role and he was the last employee recruited.

SF confirmed that during the pay freeze, in place since 2008, a number of promotions took place and employees received salary increases in line with their new roles. A new fleet of company cars were purchased in line with company policy.

The Tribunal heard evidence from SR, the customer services manager, who was the claimant's immediate supervisor. SR carried out the same work as the claimant aside from his managerial role. SR was aware that the workload was decreasing and there was no option but to implement redundancies because there was barely enough work for one person.

SR was in attendance at the meeting when the claimant was informed of his redundancy. Before going into the meeting he told the claimant to brace himself because he was not about to get good news. After the meeting he asked the claimant a number of times if he was ok and the claimant replied in the affirmative.

SR told the Tribunal that he was approached by the company accountant and informed that one of the girls in the general office was very upset. The claimant had been telling her that he was not happy with being chosen for redundancy and was going to take a case against the respondent company. The girl was very upset and SR felt he had to do something about the situation.

During cross examination SR confirmed that the first warning the claimant got about his selection for redundancy was when he told the claimant to "brace yourself" prior to the meeting. This meeting lasted approximately 45 minutes and the claimant was offered gardening leave.

SR confirmed that there was an ongoing issue in the general office in relation to high temperatures. It was hard to regulate the heat and they tried to cope with it as best as possible. SR could not remember what height the temperature reached but did remember feeling quite warm. In March 2010 the claimant told SR that he was still suffering from the heat in the office and SR brought this information to SF.

SR was aware of the claimant's selection for redundancy four weeks before the claimant was informed.

Claimants Case

The claimant commenced employment with the respondent company in July 2006. He was initially employed to deal with customer service and various other roles. Within two weeks of his commencement the accountant passed on and began to put orders through. He gave quotations to marketing staff. He also brought picking lists to the warehouse staff and carried out some picking

himself. He carried out work in sales and marketing.

Ms. B was then recruited to fulfil some of his roles. She answered the phones to ease the claimant's workload and she also carried out hotel bookings for managers.

The claimant told the Tribunal that he had an ongoing issue with the level of heat in the office. He described the office as small and he was situated at the back. The average temperature was 24-26 degrees but on occasion it could reach 31 degrees. He felt that an open door or window would alleviate the situation but two other staff members told him that it was too cold to do this. This led to acrimony in the office. The claimant tried to keep quiet and hoped that the situation would blow over.

The situation came to a head when a fellow colleague was continuously sniping and saying that the office was too cold. The claimant sent an email to SF requesting that something be done because it had been this way for approximately one year. The claimant told the Tribunal that SR was aware of the problem. In an email to SF the claimant told her that he was under constant bombardment from his colleagues and at one stage was told not to open the f**king window.

SF organised a conciliatory meeting but this degenerated into a shouting match. The outcome was to move the claimant near a window which led to him feeling ostracised and excluded and left out when orders were being taken for coffee and breakfast. On 30th October 2009 the claimant signed a letter stating that he was satisfied to leave the situation as it was because he believed there were steps coming, the revamp of the office, to resolve matters.

In March 2010 the claimant was in the photocopy room when he was approached by SF in relation to him contemplating legal action. He told her that it was about the heat in the office and SF said that she thought that problem had been resolved to which he replied that it had not.

On 26th May 2010 the claimant was approached by SR and told to brace himself because SF wanted to talk to him. The claimant thought it was about a big order and was not aware that redundancy was imminent. There had not been any discussions in the office about redundancy. The meeting lasted approximately 10-15 minutes. He was informed that the respondent company had no alternative but to implement redundancies. He was offered help with updating his CV. The claimant was shocked by what he was being told. He was not offered any future work with the company or payment in lieu of notice. He went home early on 26th May and then phoned SR to tell him that he was going to take the next two days off from work.

When the claimant returned to work the following Monday he was unable to sign on to his computer as his log on information was blocked. He was provided with work to carry out that he had never done before, such as changing database entries. The office was very quiet and everyone mentioned how terrible it was that he was being made redundant. During that week he was not aware of any employees becoming upset by his demeanour during conversation and he did not tell any of his colleagues that he was considering taking legal action against the company.

On the Friday he received a voicemail from SF saying that she would prefer if he did not return to work. He contacted his solicitor who advised him to attend work the following week. He attended work on the Monday and SF asked him to leave.

During cross examination the claimant confirmed that he always worked in the general office but maintained that he had carried out administration work connected to sales and marketing, giving

quotes occasionally in busy times. The claimant believed that he was picked for redundancy because of his issues with the high temperatures in the office and management believed that he was being awkward.

At the meeting on 26th May the claimant did not raise any issues about his selection for redundancy or suggest any alternatives to same because he was in a state of shock.

Determination

The Tribunal have carefully considered all of the evidence adduced, the documentation submitted and the legal submissions made in this matter.

The Tribunal are satisfied that a genuine redundancy situation existed within the respondent company in the early/mid part of 2009. The Tribunal are also satisfied that the claimant's termination resulted from that situation. It is evident following the hearing that there was no consultation process at all and that the criteria used to select posts for redundancy was established by the managing director and her father, the chairperson. It would seem that no other employee had an involvement in that process. The question to be decided is, does the lack of consultation and transparency convert the redundancy into an unfair dismissal by reason of an unfair selection process.

SF gave evidence that she sought independent advice on what was involved in the redundancy process. She identified departments within the company that were not busy and within those departments she identified where there was a duplication of roles. Once that had been established she used the last in first out criteria. A company are perfectly within their rights to establish whatever criteria they need to meet the objective of their exercise. However, the criteria must be fair and transparent. Looking at the selection process in this case it does seem perfectly fair and transparent. The fact that the employees were not made aware of the selection process does not automatically render it unfair. Someone's knowledge of the process/selection criteria doesn't affect the fairness or unfairness of it. In this case the consultation process would only have put the employees on notice of the criteria that was going to be used. A consultation with employees would not have altered the outcome. There are many circumstances where a consultation process is necessary to firstly try and reduce the number of redundancies and secondly to try and identify key departments and/or roles that have become surplus to requirements. That was not the case here.

The Tribunal by majority, with Mr. Jordan dissenting, finds that the Claimant's claim under the Unfair Dismissal Act 1977 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)