

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE - **claimant**

UD1057/2010

against

EMPLOYER -**respondent**

under

UNFAIR DIGMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms S. McNally

Members: Mr P. Casey
Mr D. McEvoy

heard this claim in Cork on 7 July and 14 October 2011

Representation:

Claimant:

Mr Patrick Mullins, Mullins Lynch Byrne Solicitors,
Melbourne House, Model Farm Road, Cork

Respondent:

Ms Anne Marie McIlwraith, Consultant,
Avec House, Unit 4, Block 1, Waterfront Business Park,
Little Island, Cork

The determination of the Tribunal was as follows:-

The claimant was employed as fresh food manager of the respondent's supermarket from May 2000. He was one of five departmental managers. The employment was uneventful until October 2009 when the claimant was issued with a verbal warning on account of "unacceptable standards in your department and your work performance". This related to an unsatisfactory "floor report" carried out by the general manager (GM). GM met the claimant on 14 October 2009 in company with the human resource manager (HR) to conduct the disciplinary hearing. The claimant refused to accept the written confirmation of the verbal warning. It was issued on 19 October 2009 and he unsuccessfully appealed the verbal warning to the managing director (MD). The claimant was notified of the failure of his appeal on 14 November 2009.

The claimant received excellent or very good appraisals from GM's predecessor.

GM commenced employment with the respondent in October 2008. GM and the claimant had worked together in a previous employment. It is the claimant's position, based on the evidence of HR who gave evidence on behalf of the claimant, that GM "could not believe it when he was landed with the claimant" with whom he had worked in a previous employment. It was contended that the claimant had been "basically hung, drawn and quartered with no chance to make submissions" for redeployment or other alternative to redundancy.

The performance of the supermarket deteriorated over 2009 such that it was necessary to implement cost saving measures in order to protect the business going forward. At weekly management meetings on 23 & 30 November and 11 December 2009 members of management including the claimant were apprised of the difficult situation facing the business.

On 11 January 2010 GM sent a redundancy warning to all management, this clearly stated that the claimant's position was under threat. Suggestions were sought on how redundancies might be avoided. A consultation meeting for all fourteen employees at management level was held on 18 January 2010. At this meeting MD warned that up to five management positions were in danger of being declared redundant. The claimant then attended an individual consultation meeting on 21 January 2010 with GM and the respondent's representative (RR) at this Tribunal.

There was a further meeting, conducted by GM, of the management team on 25 January 2010. At this meeting managers were invited to consider reduced hours, reduced pay, job sharing, transfer from management to staff positions among other proposed cost saving measures. Individual final consultation meetings were held, the claimant's meeting being on 28 January 2010.

A general management meeting was then held on 1 February 2010 and at this meeting GM announced that the process was complete and there would be two redundancies from among the management level. GM told this meeting that he and RR would meet individual managers later in the day. At the claimant's meeting he was told that his position as fresh food manager had been selected as one of those positions which were to be made redundant. The claimant received his statutory entitlement under the Redundancy Payments Acts plus an ex-gratia payment. HR was the other manager whose position was declared redundant.

There is a dispute between the parties as to whether the claimant offered to take a twenty per cent pay cut or whether the respondent offered the opportunity of redeployment to the claimant. It is common case that no criteria for selection of the claimant as a candidate for redundancy were made available to the claimant prior to that selection other than the poor performance of the fresh food department.

Determination:

Throughout the process which led to his selection for redundancy the claimant signed documents which state "I invoke my right not to have a representative at this meeting". This is disingenuous and should state "I waive my right to have a representative at this meeting". The respondent's position was that this claim was frivolous or vexatious in that the claimant had signed the afore mentioned waiver had then signed an agreement, on 1 February 2010, asserting that the ex-gratia payment was in full and final settlement of matters arising from the employment and therefore not entitled to bring this claim before the Tribunal.

Moreover the respondent sought the award of costs on the grounds of the claim being frivolous or vexatious. The Tribunal cannot accept these arguments. While it is true that the claimant, along with his managerial colleagues, were certainly aware from 11 January 2010 that their positions were under threat the claimant did not know that he had been selected until his individual meeting with GM after the general meeting on 1 February 2010. GM's evidence to the Tribunal was to the effect that the claimant sought an ex-gratia payment after he was told his position was to be made redundant. The Tribunal cannot accept that the claimant was in any position on 1 February 2010, the day he signed the agreement at a meeting at which he was unrepresented, to seek advice to enable himself to make a fully informed decision on a full and final settlement of the matter. For these reasons the Tribunal is satisfied that there is jurisdiction to hear this claim.

GM told the Tribunal that the claimant was selected as a candidate for redundancy based on the performance of his department. No documentary evidence was produced in support of this assertion. Neither the claimant at the time, nor the Tribunal during the hearing of this case have been made aware of any objective criteria for the selection of the claimant for redundancy. In those circumstances, especially in the light of the evidence of HR about GM's comments about the claimant when GM began his employment with the respondent and which the Tribunal accepts, the Tribunal is not satisfied that the selection of the claimant for redundancy was impersonal. Accordingly, the Tribunal is satisfied that the selection of the claimant for redundancy was unfair. That being the case it is not necessary for the Tribunal to come to any conclusion about the matters of the pay cut or redeployment. The Tribunal awards €7,000-00 under the Unfair Dismissals Acts, 1977 to 2007. In making this award the Tribunal is cognisant that the claimant has already received both statutory and ex-gratia payments in respect of his dismissal.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____
(Sgd.) _____
(CHAIRMAN)