

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:

CASE NO.

EMPLOYEE
– *appellant*

UD1925/2010
PW285/2010

against the recommendation of the Rights Commissioner in the case of:

EMPLOYER – *respondent*

Under
UNFAIR DISMISSALS ACTS, 1977 TO 2007
PAYMENT OF WAGES ACT 1991

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. J. McGovern B.L.

Members: Mr. G. Mc Auliffe
Mr. J. Maher

heard this appeal in Dublin on 16th February and 2nd April 2012

Representation:

Appellant : Warren Parkes, Solicitors, Unit 1, The Capel Building,
Mary's Abbey, Dublin 7

Respondent(s): Mr. David Farrell, Ir/Hr Executive, IBEC, Confederation
House, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

This case came before the Tribunal by way of an employee appeal of a Rights Commissioner recommendation under the Unfair Dismissals Acts, 1997 to 2007, reference r-082753-ud-09 and Payment of Wages Act, 1991, reference r-090124-pw-09.

Preliminary issues

The respondent's representative stated that the respondent had not been put on notice of the appeal as per Section 7(2)(b) of the Payment of Wages Act, 1991. The appellant's representative stated that the respondent was informed of the appeal by letter dated 18 August 2010, a copy of which was opened to the Tribunal. The respondent accepted that the letter could be taken as having been received.

On the second preliminary issue, the respondent's representative stated that the initial

claim under the Payment of Wages with the Rights Commissioner was out of time in that it was submitted beyond the six month deadline and there were no exceptional circumstances which would warrant an extension of time under the legislation. **Byrne v Quigley, 1994** was relied upon by the respondent's representative. The complaint was presented to the Rights Commissioner on 11th March 2010.

The appellant received her notice on 13th February 2009 and was entitled to a month's notice under her contract of employment bringing her end date to 12th March 2009.

The respondent stated that the appellant was dismissed on 13th February 2009 by reason of redundancy and the claim was out of time when submitted on 11th March 2010. Pay in lieu of notice was paid on 19th February 2009 (payslip opened to Tribunal). Both sides made detailed submissions on this point to the Tribunal.

After considering the evidence and submissions in relation to the preliminary issue, the Tribunal affirmed the decision of the Rights Commissioner in regard to the Payment of Wages appeal.

Unfair Dismissal case

Respondent's case

The Financial Controller (FC) stated that in mid-2008 the company downsized leading to redundancies within the company. The company is a drinks wholesaler. The appellant commenced employment with the company on 20th August 2007. In January 2009 a review of the administrative support was necessary and required a reduction of one whole-time equivalent job in a sub-function identified as the accounts receivable department. Last in first out (LIFO) was used as the selection criteria for the sub-function. It was on this basis that the appellant was selected for redundancy.

A meeting was held with the appellant on 4th February 2009 to explain that her position may be made redundant based on LIFO. On 13th February 2009, the appellant was told that the decision was now final. The FC told the appellant she could finish that day and notice would be paid. The FC gave evidence as to the various roles of a number of employees. When asked if proper consultation had taken place, FC said that he did not have enough experience to say what is fair.

On the second day of the hearing, the FC continued in evidence.

In the fourth quarter of 2008, the board of directors directed him to assess staff levels in his department. He did this and made a proposal to the board which they agreed to. The proposal was given orally and not in writing.

The FC looked at the accounts receivable department which he said had three staff. That section had operated from July 2008 with two staff until mid 09 as one of the staff was on maternity leave. This demonstrated to him that the section could operate with two staff. Some work from that section, such as printing, was also reassigned to the marketing department.

The FC explained that not every department had a manager. By way of example he explained that because business sells alcohol it needs a competent person for ordering wine. This was for

all intents and purposes a stand alone position/‘ department’.

The FC said that the accounts receivable manager, who the appellant alleges had difficulties with her personally, had nothing to do with the appellant’s redundancy. He alone made the decision and proposed it to the board. When asked whether the appellant’s complaint made in July 2008 was adequately addressed, FC indicated that he had a meeting with the client and LF, which he understood cleared matters up and he heard nothing further.

When the FC met the appellant on the 4th February, he wanted to tell her at the end of the day. The appellant was upset and he advised her to go home and not to go back to her desk. The appellant was not sent home.

The General Manager (GM) stated that he is with the company for twenty eight years. The board is made up of the various heads of department. In July 2008, the business was ‘feeling the pinch’ and it had to be more efficient. They did a review of the distribution and warehouse functions as this is where the downturn would be felt most. The respondent had a meeting with the trade union and two truck drivers, three helpers and four warehouse operatives were made redundant.

There was a clear selection policy of last in first out (LIFO). In the good years the company had expanded but as the decline hit, they had to slim down.

In January 2009 the recession had deepened and they had to look at the overall company. This was the first time they had looked at the accounts receivable department. It is not a big company and is based on a single site. Everybody knows everybody. When a manager makes a proposal to the board the board would know whether it is correct or not. There was a clear understanding that it made sense to reduce the department from three to two as it had run with two staff for a long period.

The GM is satisfied that the appellant was the last in for the purposes of LIFO. She had started in 2005 and worked in the reception area for two years before moving to the accounts receivable department.

During cross-examination the GM said phase two of the redundancies required management to assess whether they could do the tasks with fewer people. In July 2008, it was not clear if they would need to do a second round of redundancies.

Part of the company’s procedures is to make a person permanent after six to twelve months. The appellant was made permanent towards the end of her first twelve months in the company. When asked how this tallied with the appellant subsequently being made redundant the witness indicated that her contract provided that she was to be made permanent.

The appellant did three major tasks - took orders, account queries and give material to the sales staff. There are two staff assigned to sales and if a sales representative phones in he could be on the phone for half an hour. Everybody in the company would be required to take an order from customers if the sales reps are busy and would in turn pass the order to the sales department for processing.

The GM did not consult with the appellant regarding her redundancy. There was no appeals process.

If the company had foreseen a second set of redundancies they would have carried them all out during the first stage.

GC works in the accounts receivable section and went on maternity leave in August 2008. She looked after point of sales, wine menu, processed orders and covered reception. She sometimes did typing, emails and acted as a secretary for CC.

When she returned from maternity leave in February 2009, she worked on sales ordering processing, cash and cheque lodgements, EDI, customer queries and covered reception. She reported to the accounts receivable manager when she got back.

Before she had left to go on maternity leave she had given some of her work to SG. She had a feeling her role would change. When she got back she no longer worked as secretary for CC.

MH is the receptionist and started in June 2008. The appellant had trained her in. The appellant was not a receptionist and there was a roster in place to cover reception while MH went on her breaks. She reported to the accounts receivable manager and took orders over the phone. Redundancy was never mentioned to her. Evidence was given that MH did not form part of the accounts receivable department and did not form part of the sub-function for the purposes of the redundancy.

Appellant's Case

The appellant started working for the respondent in August 2007. Everyone thought she was covering for N who was heavily pregnant at the time. At the interview she told them she was coming from a full time role with the B.O.I and she wanted a full time position.

From August 2007 to January 2008, she worked by herself in the accounts receivable section. It was the appellants evidence that GC worked in the wine section and worked for CC and therefore should not have been included in the accounts receivable sub-function. There were two wine sales reps and two other sales reps. There were two wine pickers in the warehouse, but the wine department closed before she left.

CM had worked in accounts payable but told the appellant she was not happy. She moved back to the reception. In January she suffered a bereavement and did not want to work at the front of the house. At the end of April LF moved her to administration. The appellant and GC covered reception on a week on/off basis when there was no full time receptionist.

There was a book at reception which was an order book. If a person phoned, she would take the order and pass it on to the staff to put on the system.

Before LF went on leave the appellant found her unapproachable in certain instances. Up to then it had been an employee/manager relationship.

On LFs first day back she asked the appellant what she had done in her absence. In the months after the appellant felt LF was snappy. As time went on she found it was only her LF was snappy towards. She kept a diary.

The appellant attended debtors meetings with the FC. He expressed on a number of occasions

that she was a good worker. The appellant continued to attend the debtors meeting when LF returned and felt LF was not happy about it.

LF called the appellant into her office and told the appellant she could not attend the debtors meetings. LF told her she had to cover reception. When the appellant told LF she was not happy about this, LF said I was going to let you go, but not now.

At 11am the appellant was covering reception. The FC walked past and said the debtors meeting was at 11:15am. She said no problem. LF came to her and said her presence was not needed at the meeting. At lunch the appellant asked the FC about this and he said he didn't know that LF had made that decision.

During a separate debtors meeting she attended with LF a sales rep gave her a bank draft for €5000. She asked the sales rep who the customer was and he told her. The money was put into that customers account but it was the wrong customer. LF said it was the appellants fault.

On the 21st July 2008, the appellant made a formal complaint against LF. On the 31st July, a meeting was arranged with the FC and LF to discuss the complaint. The appellant was waiting to hear further about her complaint when she was told she was being made permanent and her role would slightly change. The appellant felt that her complaint was never dealt with adequately. The company sent her a letter on the 31st July confirming her permanency of employment.

At her first review meeting the FC and LF attended. They said the company was not doing well and her work was not up to standard. The appellant felt she had done very well and had run the department on her own for a good while. The appellant was very upset at the review meeting. LF or the FC did not tell her how she could improve. She did not get a wage increase but for Christmas 2008 she was given two weeks wages and two crates of beer.

At 17:10pm on the 4th February 2009 the appellant was called to a meeting with the FC and LF. The FC told her she may be made redundant. GC was returning from maternity leave and there would not be enough work for everyone. She was told no decision had been made.

On the 10th February the FC called the appellant into his office and told her LF had said during a meeting that she could not find the appellant and he was given her the heads up not to be hanging around reception.

On the 11th February the appellant approached the FC and said she was not happy about what LF had said. The FC then said it was not LF who had said it.

On the 13th February the FC phoned her and asked if she could come to the boardroom. When she got there LF and the FC were present. She was told she was being made redundant by LIFO as she was last person in the office. She told them RT, LMcG and MH were employed after her. All of them reported to LF.

The appellant left on the 13th February, and GC came back on the 16th February.

On the 18th February, the appellant returned to the respondent. She was brought into the FC's office and all of her personal items were there in a box. She signed a form and left.

The appellant said GC worked in the same office as her but did wine orders and point of sale for sales representatives. She said GC should not be included in the accounts receivable department. She said CG was not trained by LF because she did not work in the accounts receivable department. GC could never do what she did on a day to day basis.

During cross-examination the appellant said she told the FC she was being bullied. He did not meet with her on this after the 31st July 2008. The appellant kept a diary from July, but there were a lot of instances before June she did not keep a record of. She never told the FC that things were better. She told the FC everything that had happened, she was upset and didn't think she could go to anybody else.

She heard a rumour that LF had to make a case to the board about who they wanted to keep. She knew LF would not fight for her

Determination

Having carefully considered the evidence adduced over this two-day hearing the Tribunal prefers the evidence of the respondent and finds that the appellant was dismissed by reason of redundancy.

The Tribunal notes that the process and procedures were lacking and the financial position of the respondent was not opened to the Tribunal. However, the ultimate decision for the Tribunal is identifying the relevant sub function to which the redundancy applied.

The Tribunal feels the appellant did not establish that GC did not belong to the accounts receivable department. LIFO was applied within the sub function and because the appellant had the least service the selection for redundancy was fair in all of the circumstances.

Accordingly the claims under the Unfair Dismissals Acts, 1977 to 2007 and the Payment of Wages Act, 1991 fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)