EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.
EMPLOYEE UD2073/2009

-claimant

against
EMPLOYER

-respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan

Members: Mr. L. Tobin
Mr. J. Dorney

heard this claim at Dublin on 10th January 2011 and 4th July 2011 and 5th July 2011 and 17th October 2011

Representation:

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Claimant: Ms Emily Egan S.C. instructed by,
Mason Hayes & Curran, Solicitors, South Bank House, Barrow Street, Dublin 4

Respondent: Mr. Alex White S.C. instructed by,
Arthur Cox, Solicitors, Earlsfort Centre, Earlsfort Terrace, Dublin 2

Respondent's Case:

The CEO of the respondent company gave evidence that the company is an asset management firm which specialises in currency overlay and manages pension funds. The company has 21 employees. They do not advertise for new business, but meet with potential clients face to face. Most of their clients are USA based. It takes an average of two years to get a new client, meeting them approximately 50 times. Normally the marketing manager meets potential clients first and then they are introduced to the portfolio manager. Traditionally both managers go together.

The CEO had traditionally done the work of the portfolio manager, but as the business grew he didn't have the time. He wanted one person to combine both roles. The company advertised the

position in January 2008. The claimant was hired as a Portfolio Manager and Head of Product Development pursuant to a Contract of Employment dated the 5th June 2008 on a salary of €250,000. A six month probationary period was provided for under the contract, which was extended by a period of one month, which said period was due to expire in January 2009. Theprobation period was again extended in January 2009 for a further month because of the claimant's performance. The respondent wrote to the claimant on the 2nd January 2012 advisingthat (as he had been advised on the 19th December 2009) his probation had been extended by afurther month because of his "unsatisfactory performance" and that this was a "unilateral decision". The claimant was not happy with the extensions of his probation and advised the respondent of this on the 12th January 2009. [Probation also in fact extended to 2nd March2009]. The claimant was very good at the marketing side of the role, but was reluctant to learnthe portfolio side of the role. By the end of 2008 the CEO realised that the claimant didn't likeportfolio management. He considered this a risk as a single transaction could be worth €1bn.

He held a review meeting with the claimant and told him that it wasn't working on the portfolio side and suggested that he stay on the marketing side and travel to the USA more frequently. On the 28th January 2009 the respondent wrote to the claimant advising him that he had been recently assigned to the position of Marketing Manager and Client Service Portfolio Manager and that his annual salary was reduced to €175,000 plus commission. An example of what hecould earn if the claimant brought in a new client he would receive 30% of the entry amount, which could be €1m. The claimant's salary was reduced by €75,000 and the claimant did notaccept the salary reduction or the new role. He brought a claim under the Payment of Wages Actto a Rights Commissioner which was upheld. The CEO re-iterated the company's position inrelation to the claimant's role by letter dated the 3rd April 2009 again stating "you have beenassigned to the position of Client Service Portfolio Manager and Marketing Manager". He wassurprised that the claimant did not jump at the opportunity and he believed that the claimantcould even earn more in the marketing role. He understood that it was difficult to combine bothof the original roles to which he was appointed and in retrospect he believed it was impossible tocombine both roles and he has since divided the roles again.

In January 2009 he moved the claimant away from portfolio transactions and assigned a junior trader to carry them out. The claimant was still speaking to the clients at this stage.

There was an incident in the office on June 25th 2009 and the claimant walked out. The claimant criticised the company in front of a third party and said that it was not as good as it should be. The CEO met the claimant on June 26th 2009 at a nearby coffee shop, as the CEO was concerned that the claimant was trying to set something up. The claimant was not permitted to return to the office. He believed that the claimant wanted to leave the company. He gave the claimant two days off. He did however go to London two days later with the claimant to visit a client.

After the meeting in the coffee shop on the 26th June 2009 the CEO met the other directors to see if they wanted the claimant to continue. The CEO was happy to keep working with the claimant and they decided to offer him €200k pa. The claimant wanted the offer in writing whichthe CEO was reluctant to do as the claimant had set out a list of demands. He

wanted the claimant to take the offer and get on with the job, but the claimant just wanted the offer in writing. After that the CEO knew the dual role was redundant and the claimant did not want themarketing role on its own. The claimant was dismissed by letter dated the 9th July 2009 by reason of redundancy. They subsequently hired a marketing employee on €90k p .a. to carry outthe marketing role.

Under cross examination the CEO stated that the claimant was employed in a job which had two aspects (1) portfolio manager and (2) project manager. He took the view that the claimant could not do both. Portfolio management was a role that the claimant didn't show much interest in but he had a lot of flair for the role of project manager. The CEO stated that the role was made redundant, not because the claimant couldn't do it but because it couldn't be done. Performance issues were not relevant to the redundancy but included not having attention to detail in the portfolio management role, not having and interest in it and not being credible when dealing withclients. The CEO liked the claimant and wanted to keep him.

Regarding the probationary period the CEO stated that it is the company which decide the length of the period and he always thought it could be extended, he thought extending it rather than "pulling the plug" would be an advantage to any employee.

The formal warning regarding the lack of attendance was because the claimant took a lot of Fridays off. The respondent wanted him to work a five day week. He felt the claimant hadn't settled well in Ireland and taking Fridays off wasn't fair on other members of staff.

Nothing was documented in connection with the first oral warning as the respondent was trying to be constructive not aggressive. Asked if a breach of contract had occurred the CEO stated that it was the termination of one contract and wanting the claimant to move to the new position. It was not a demotion, with commissions he would have earned more and the job would have suited him much better. The claimant did not accept the revised role and the reduction in salary. Asked if the original position was still available the CEO said it not possible for the claimant or anybody else to perform it adequately.

The respondent company is based in the Isle of Man and provides services to the Dublin base which was known as L.O P. Ltd. The claimant's contract was in the Isle of Man and he was to operate as number 2 to the CEO.

The CEO reiterated that it was the initial job that the claimant was hired for which was made redundant. Asked if the respondent had a high turnover of staff he said "he didn't think so". The purpose of the meeting in the coffee shop was to see if the claimant wanted to leave the company. After the meeting it was agreed by the directors to increase the claimant's proposed salary to €200k. He didn't recall if an offer of back-pay was made but the claimant came backand was too greedy. The offer was then withdrawn. When asked by Counsel for the claimant ifthe claimant was an employee of good standing the CEO conceded that he was not an employeeof good standing and that he was "worried over [the claimant's] performance". When asked if hisresponse to this poor performance was to make the claimant redundant he replied that it was.

A former director of the company gave evidence that he set up the business with the CEO. Marketing was a weak spot in the company and they felt the business was not growing fast enough. They needed someone like the CEO to perform a senior combined role of marketing and portfolio management. The former director's understanding of the portfolio role was that it involved research and a lot of reading to decide on business for each day. Judgement was required and while there were risk controls an error of judgement could put you out of business overnight. Marketing was more of following up with clients, getting potential clients and explaining "why us" etc.

The claimant fully understood the role he was offered, he was very polished and received a huge salary but he had huge potential. His salary reflected the dual role and he was number two in the company. The witness was interested in how he was getting on, and received knowledge of him through the board. The claimant was a people person not a detail person. All staff are reviewed and the claimant was top of the list. It was apparent there was a problem with the dual role and both parts were suffering. The easiest way to solve the problem was to split the job. Hours were spent by the board and with the claimant trying to get things organised. The salary cut was agreed by the board and while the claimant wasn't pleased with the reduction in salary he was pleased with what he was doing. He received a lesser amount but had a less demanding job. After the offer of the increase in salary and because of the increase in paperwork from the claimant it was apparent that things would not end happily. The claimant had no intention of ever coming back to the company.

Under cross examination the witness said that the business was not making a profit. All directors took a 15% paycut. They spent six months trying to craft a solution with the claimant and his view was that the claimant had made up his mind and was never coming back. Asked if there were any board minutes the witness said "no". The grievance procedure was never introduced, the role was made redundant, the job no longer exists.

Claimant's Case

The claimant is a financial analyst and gave detailed evidence of his experience in the financial industry. The claimant was part of a debt structuring group that put packages together to sell to investors. He held a marketing role with the respondent; he was employed due to his marketing background. The claimant commenced employment in 2008. It was an extensive interview process; 7-8 interviews in addition to conference calls with the CEO and partners. The claimant only reported to the CEO owner and had one desk.

The claimant moved to Ireland to fill this role. His contract of employment described him as a 'Portfolio Manager and Head of Product Development.' The claimant was instructed by the CEO that he had to use the title 'portfolio manager' so clients would take him seriously i.e. clients would not want to meet with the marketing manager. The claimant's contract is built for a marketing role; all the functions and incentives therein are related to the marketing function. Section 5.2 of the claimant's contract placed emphasis on new business which is the main aspect of a marketing role. The claimant had his own office in order to meet clients/prospective clients. The role of a portfolio manager with the respondent is to manage money, make investments and to do so, studies shares, and makes recommendations. The

respondent had a software programmethat compiled all the relevant information needed to make an investment decision; this resulted inthe portfolio manager's role being mostly administrative - 80% guided by the software and 20%discretionary. The system recommended trades and they were rejected or accepted and passed onto the traders. The claimant did 'write tickets' as part of his portfolio manager role but cannotquantify the volume.

The claimant brought 6 new clients to the respondent, increasing the overall revenue by 40%. There was nothing 'impossible' about the claimant's role; the CEO had a problem with theclaimant performing it. The claimant had updated the procedures manual for the company so wasvery knowledgeable about the company and its procedures.

The claimant's employment ran smoothly until November 2008. His probation period had been extended from November to December as the CEO did not have time to conduct the review. The claimant objected to the extension. The claimant asked why his probation was extended and was informed that it was because, 'I don't know what we'll do with the role' but when asked saidthere was nothing to worry about. By e-mail dated the 4th of November 2008 the CEO instructedthat due to the volume of marketing/portfolio work, not to schedule any further marketing calls.The claimant's probation was extended by a further month until February 2009. The claimant stated that this breached the terms of his contract and so considered himself in permanentemployment. The CEO, by letter dated the 21st of January 2009 replied stating that the extensionof his probation was a unilateral decision and that it was as a result of his unsatisfactoryperformance. This is the first time his performance was questioned. He was not aware of anyperformance issues prior to this letter. The claimant was handed his performance review andasked to sign it without any input or discussion on the 19th of December 2008.

The claimant questioned the new role and salary reduction as nothing had changed from his original role except the title and salary. The CEO's attitude was that 'we'd be friends again' if the claimant accepted the offer. By e-mail dated the 5th of March 2009 the claimant highlighted that he was not accepting the new Terms & Conditions of Employment. The CEO wrote to the claimant on the 6th of March 2009, enclosing a new job specification and stated that, 'I feel you would be happier and the firm better served if you undertook the modified role of marketing Manager and Client Service Portfolio Manager…as described in the letter to you on Jan 28th.' The claimant maintains that this was never about his happiness; the respondent company wasobliged to honour his contract. That letter also stated that all future discussions should beconducted by letter only. He replied by letter dated the 8th of March 2009 raising his concerns.The change in role to 'Client Portfolio Manager and Marketing Manager' was mentioned in thatreview but there was no discussion regarding a salary decrease.

The claimant received a warning for lack of attendance at the office around the 12th of December 2008. The CEO warned the claimant about leaving early to catch a flight and he warned him that he would be dismissed if his return flight was delayed. The CEO said, 'this is a one way conversation, you're being warned.' The claimant was puzzled and scared.

A number of letters regarding the salary reduction passed between the claimant and the CEO. A further unauthorised deduction was made for telephone bills from the claimant's salary in March

2009. The claimant complained about the manner in which the CEO addressed the issue.

The CEO e-mailed the claimant on Friday the 12th of June regarding his error rate. The claimant received a warning from the CEO for 'errors' that occurred in a proposal. The claimant was one of five people involved in the proposal and he did not see, nor was involved, in the final draft of the proposal. The warning was given in June 2009, two months after the proposal was delivered. The claimant questioned whether everyone involved in the proposal had received a warning.

On receipt of the claimant's response, on the morning of the 25th of June, the CEO came to the claimant's office and said it was not up to him to question anyone else's performance and said that, 'since in my opinion you do not like the company or your employment, I might have to terminate your employment at (the company).' The claimant replied, 'so be it.' The claimant was 'thrown out of company premises' and told that he could not collect his personal belongings at that time but another time would be arranged. The alarm code for the building was changed 15 minutes later.

On the 26th of June the claimant wrote to the respondent outlining the sequence of events and his astonishment at his treatment. A meeting was held in a coffee shop on the 26th of June, where the CEO said to take the rest of the day off (Friday) and that he would speak to the other directors over the weekend and inform him whether he should come into work on Monday. The claimant did not know if he had a job or not.

The claimant was instructed to attend the office on Monday morning. A new offer was made to the claimant. The reduction of salary to €175,000 was partly reversed and he was offered a new revised salary of €200,000 and the arrears would be paid. The claimant asked if this offer would be made in writing and the CEO said it would not to which the claimant said he already had a contract in writing.

The claimant's security card and blackberry were deactivated. When he queried this he was informed that his security card was only active during working hours and that he was only permitted access to e-mail via his blackberry when travelling with work. The claimant did not receive his salary payment for June and queried this by email dated the 1st of July. The claimant wrote again to the CEO on the 3rd of July outlining his position and proposing a salary cut of 15% which was in line with the director's salary cuts. The CEO also told him at one stage that he "might have to terminate his employment if things did not improve".

On Thursday the 9th of July 2009 the claimant was handed a letter and instructed not to open it until he got home. The letter was a notice that his role was being made redundant as it could be carried out by a significantly more junior professional in the group and 'a pure marketing/business development executive.' The claimant was involved in recruitment and had trained a new person in the marketing role; his job specification stated that his role would support marketing activities. The letter also stated that the claimant had not been offered this role as, 'I believe you could take offence at the offer, however if it is of interest to you, please let me know and we can explore the reversal of the redundancy decision and your appointment to the role.' This is the first time redundancy was ever mentioned to the claimant. This letter also offered representation for the first time. The claimant did not consider the reduced role.

During his notice period Gardaí were called at one stage when the claimant returned to his office. The claimant gave evidence of his loss and his attempts to mitigate his loss.

Determination

Recruitment and Background: The claimant was hired as a Portfolio Manager and Head of Product Development pursuant to a Contract of Employment dated the 5th June 2008. A six month probationary period was provided for under the contract but this was extended a number of times, by the respondent, acting unilaterally, for "unsatisfactory performance", much to the annoyance of the claimant. The claimant protested vehemently about this, however his probation was in fact extended to 2nd March 2009.

Change of Role: On the 28th January 2009 the respondent wrote to the claimant advising him that he had been recently assigned to the position of Marketing Manager and Client Service Portfolio Manager and that his annual salary was reduced to €175,000. The claimant pursued a claim for this deduction under the Payment of Wages Act 1991 which was upheld. The Tribunal notes that this amounted to a unilateral reduction of the claimant's salary by €75,000 which is a clear indication that the respondent was unhappy with the claimant. The respondent reiterated thecompany's position in relation to the claimant's role by letter dated the 3rd April 2009 againstating "you have been assigned to the position of Client Service Portfolio Manager andMarketing Manager". The claimant's new role has been made crystal clear.

Antagonistic Relations: The claimant vigorously challenged the re-arrangement of his role and the deduction of his salary which is referred to above.
In the period of December 2008 to July 2009 the claimant and the respondent engaged in fractious correspondence with the claimant protesting vehemently about:

* the salary reduction and
* the re-assignment of his duties and

the Respondent countering by:

- Ø giving the claimant a belated verbal warning around the 4th June 2009 in relation to a mistake committed 2 months previously in respect of a named Employee Retirement System Proposal;
- Ø criticising and warning him in respect of his performance particularly in relation to making personal phone calls;
- Ø criticising his unacceptable questioning of other colleagues performance;
- Ø criticising the claimant for calling the CEO "amateur";
- Ø accusing the claimant of poisoning the corporate culture;

As a result of this the respondent, at various times during this period, took the following action;

(i) computer password was changed;
(ii) on one occasion warned the claimant that he would be fired if his return flight from trip abroad was delayed;
(iii) the claimant's Blackberry was disconnected and told it was only to be used

forbusiness trips;
(iv) the CEO "might have to terminate his [the claimant's] employment if things did not improve"
(v) the claimant escorted from the premises (meeting of the 25th June 2009)
(vi) Gardai were called at one stage when the claimant returned to his office during the notice period.

~~Dismissal Letter of the 9th~~ July 2009: On the 9th July 2009 the respondent wrote to the claimant advising him that his position was being made redundant. This letter stated, inter alia, that the company "no longer requires a Client Service and Marketing Business Development Professional". This makes it quite clear that it is the position of Client Service and Marketing Business Development Professional which was being made redundant, and not the claimant's original role of Portfolio Manager and Head of Product Development. The Tribunal is surprised by the CEO's evidence that the former role was made redundant as it is not supported by the correspondence between the parties at the time. There was no prior discussion with the claimant in relation to the proposed redundancy of either position.

Was there a genuine redundancy of the original position? Having considered the totality of the evidence the Tribunal is not satisfied that there was a genuine redundancy of the original position. This however is a moot point as it is clear from the correspondence (letter 9th July 2009 respondent to claimant) and indeed from the CEO's evidence at the hearing that the claimant had been operating in the revised role of Marketing Manager and Client Service Portfolio Manager since November 2008, and not in the original role.

Was there a genuine redundancy of the revised role of Marketing Manager and Client Service Portfolio Manager and Client Service Portfolio Manager? For the redundancy defence to succeed it must result from, as Section 7 (2) of the redundancy Payments Acts 1967, as amended, provides, "reasons not related to the employee concerned". Redundancy is impersonal. Indeed impersonality runs through the five definitions of Redundancy set out at Section 7 (2) of the Redundancy Payments Act 1967, as amended by Section 4 of The Redundancy Payments Act 1971 and Section 5 of The Redundancy Payments Act 2003, provides:
"For the purposes of Subsection (1) an employee who is dismissed shall be taken to be dismissed by reason of redundancy if for one or more reasons not related to the employee concerned the dismissal is attributable wholly or mainly to-
(a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased or intends to cease, to carry on that business in the place where the employee was so employed,
or,
(b) the fact that the requirements of that business for employees to carry out of a particular kind in the place where he was so employed have ceased or diminished or are expected to cease or diminish,
or
(c) the fact that his employer has decided to carry on the business with fewer or no employees, whether by requiring the work for which the employee had been employed (or had been doing before his dismissal) or to be done by other employees, or
(d) the fact that his employer has decided that the work for which the employee had been

employed (or had been doing before his dismissal) should henceforth be done in a different manner for which the employee is not sufficiently qualified or trained, or
(e) the fact that his employer has decided that the work for which the employee had been employed (or had being doing before his dismissal) should henceforth be done by a person who is also capable of doing other work for which the employee is not sufficiently qualified or trained.
The Tribunal must be satisfied that where an employee is dismissed by reason of redundancy that there must be a redundancy and the redundancy must be the main reason for dismissal The respondent falls well short of proving that a redundancy situation existed and that redundancy was the main reason for the dismissal. The decision to dismiss the claimant has to be viewed against a background of antagonistic relations between the parties. Even if the revised role was redundant (and the Tribunal is not holding such to be the case) the employer {respondent} must act reasonably in taking a decision to dismiss an employee on the grounds of redundancy.

Indeed Section 5 of the Unfair Dismissals (Amendment) Act 1993 provides that the reasonableness of the employer's conduct is now an essential factor to be considered in the context of all dismissals. Section 5, inter alia, stipulates that:

".....in determining if a dismissal is an unfair dismissal, regard may be had……to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal"

Applying the law to the facts it is clear to the Tribunal that there was no prior meaningful discussion with the claimant in relation to the proposed redundancy. He was not invited to submit any alternatives to redundancy. The letter of the 9th July 2009 raises redundancy (of the revised role) for the first time. When considering a redundancy defence the Tribunal has also to consider (i) was the redundancy genuine or did the dismissal take place under the cloak of redundancy and (ii) was there a cause and effect relationship between the redundancy and the dismissal. When deciding this, the Tribunal must have regard to all the circumstances.
In this case the first mention of alternatives to redundancy was in the respondent's letter, to the claimant, on the 9th July 2009. The respondent was presented with a fait accompli by letter of the 9th July 2009. The Tribunal does not accept that this position was redundant. Indeed it is clear from the CEO's letter of the 9th July 2009 that the work associated with the claimant's position is still being carried out albeit by more junior staff on a reduced salary. The respondent did not act as a reasonable employer should act having regard to all the circumstances.

Reasonableness and Fair Procedures: A dismissal is deemed unfair under Section 6 (1) of the Unfair Dismissals Act 1977 "unless having regard to all the circumstances, there were substantial grounds justifying dismissal"
It is clear that the respondent was dissatisfied with the performance of the claimant as is obvious from the correspondence exchanged, and the meetings, between the parties. There is a clear background of conflict between them resulting in the respondent making unlawful deductions of salary, extension of probation, a suspension of the claimant, removal of his pass, changing the alarm code, failing to comply with the respondent's own disciplinary procedure. During cross examination the CEO gave contradictory evidence stating that the claimant was made redundant from his [first] role "not because the claimant could not do it but because it could not be done".

However later on during the cross examination, when asked if the claimant an employee of "good standing" the CEO said that he was "worried over [the claimant's] performance". Whenasked if his response to this poor performance was to make the claimant redundant he relied thatit was.
The lawful reasons for dismissal are set out in Section 6 (4) of the Unfair Dismissals Act 1977 which provides:
"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,
(b) the conduct of the employee,
(c). the redundancy of the employee, and
(d) the employee being unable to work or continue to work or continue to work in the position which he held without contravention (by him or by his employer) of a duty or restriction imposed by or under any statute or instrument made under statute"
The Tribunal is satisfied that the respondent did not act fairly and reasonably in their dealings with the claimant.

Was the claimant dismissed by the respondent for performance issues, under the cloak of redundancy?
The dismissal of an employee under the cloak of redundancy is considered by Charleton J in clear, concise and unambiguous terms in the case of **Panisi JVC Europe Limited Jerome Panisi 2011 125CA** wherein he states "it has been made abundantly clear by that legislation [Unfair Dismissals Act 1977] that, redundancy, while it is a dismissal, is not unfair. A dismissal, however, can be disguised as a redundancy; that is not lawful"..... He goes on "Redundancy, cannot, therefore be used as a cloak for weeding out of those employees who are regarded as less competent than others.....if that is the reason for letting an employee go, then it is not a redundancy, but a dismissal".

Having considered the totality of the evidence, the fractious relationship, between the claimant and the respondent, the unauthorised reduction in the claimant's wages, changing the computer password, the change of role imposed by the respondent, the various warnings, and so on, and in particular the CEO's own evidence at the hearing, the Tribunal is satisfied that the claimant was dismissed for his performance under the cloak of redundancy.

The claimant's claim under the Unfair Dismissals Acts 1977 to 2007 succeeds.
The Tribunal determines that compensation is the most appropriate remedy and awards the claimant €200,000.

Sealed with the Seal of the

Employment Appeals Tribunal

This ___________________________

(Sgd.) ___________________________
(CHAIRMAN)