

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE – *claimant*

CASE NO.
UD1346/2010

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 R. Murphy
Mr P. Woods

heard these claims in Dublin on 4th November 2011 and 31st January 2012

Representation:

Claimant: Ms Christine Ryan BL instructed by Dympna Murphy of Ivor Fitzpatrick & Co. Solicitors, 44-45 St Stephen’s Green, Dublin 2

Respondent: Mr J. McGuigan BL instructed by Jean Connors of Jean Connors & Co. Solicitors, 48 Main Street, Bray, Co. Wicklow

The determination of the Tribunal was as follows:-

Respondent’s Case

The director of the respondent company gave evidence. He started the business in 2007 in a house that had been his family home. The house is used as a venue for functions and also provides self-catering accommodation. At first he employed a part time gardener. Other services were contracted out. The claimant was hired in November 2007 as operations and marketing director. These were two distinct roles. Operations involved all the general and financial administration, coordinating with contractors. Marketing involved looking after sales, viewing and general marketing. It was a start-up situation that required the claimant to work in a flexible way.

As the business grew a part time assistant D was employed. She worked about 20 hours a week in the beginning. Her hours increased until she was working almost full time. Later the new arrangement was put on a formal basis and the roles were split and new contracts drawn up. Then D

became operations manager and the claimant retained the marketing function as marketing manager. There was very little overlap in the roles. At around this time a consulting company assisted with the marketing and over time the company's involvement grew. This was never about pushing the claimant out of her position.

In 2008 the recession hit. Projected sales targets were not met. The director decided to restructure. As the consulting company was doing most of the marketing it became apparent that the claimant's position could not be maintained. The director decided to make the claimant redundant. She has not been replaced. The director issued the appropriate documents and paid statutory redundancy.

The decision to make the claimant redundant was not influenced by her performance. It was a financial decision and if he had not made the decision the business would have collapsed. The claimant was paid €50,000.00 and D was paid €40,000.00 per annum. The independent consultant was paid about €40,000.00 per annum at this time. There were no issues between the director and the claimant. He looked after the building. He dealt with the county council over the planning issues. It is a private house so despite the claimant's concerns he does not need a liquor licence. The director denied that there were issues around paying suppliers. Occasionally an invoice was questioned but there was never an issue with payments.

The director had discussions with the claimant regularly about increasing business and cutting costs. They aimed for weekly meetings but if the business was busy or if things were running smoothly meetings were less frequent. The director could not recall meeting the claimant on 23 November 2009 but he accepted that he had handed her a letter making her redundant at the end of a meeting that day. The director did not inform the claimant in advance that her position was at risk of redundancy. Neither did he discuss alternatives with her. The director did not discuss a pay cut or a lay off with the claimant. Only a redundancy would achieve sufficient cost cuts.

D remained in employment. The director accepted that she was less skilled and had shorter service than the claimant. The director did not consider keeping the claimant, who had established that she could combine both operations and marketing roles, and letting D and the consulting firm go.

The claimant was paid statutory redundancy but the director did not advise her of her entitlements. The director did not consider asking the claimant to work part time because he believed such a proposal would have been unacceptable to her. The director did not consider employing the claimant as a consultant because she did not put such a proposal to him. The director considered that he had behaved reasonably in his dealings with the claimant. She was not replaced.

The independent consultant gave evidence. He is a marketing consultant who had a range of clients in the hospitality field. He was engaged by the respondent to undertake a feasibility study of the plan to turn the house into an event venue. On the basis of the study the venue came to market. He was involved in the start-up but he was discharged after the initial phase was finalised.

The independent consultant was reengaged in mid-2009 to assist with the marketing function. He was working about 8 hours per week for the respondent. He was assisting the director and the claimant with the marketing function. By September/October he was billing the respondent for 15 – 20 hours a week. It was about 20% of his consultancy practice. The claimant was giving the marketing work to him. The independent consultant met with the claimant and the director weekly. The cost of his fees, salaries and marketing were monitored.

During early 2009 he was tasked with identifying and separating the roles of operations manager

and marketing manager. He also wrote the contracts. The claimant was involved in the process.

2008 – 2010 were a period when trading was difficult. It was necessary to cut costs. The claimant would only consider taking a day off and reducing her salary by a fraction. D was working 25 – 30 hours a week. Redundancy was only considered late in the day. Much of the marketing function was being done by the independent consultant and making the claimant redundant would cut costs. He advised the director that his fees were a significant cost. The independent consultant was taking care of most of the marketing function but the claimant had been employed as marketing manager. He did not accept that duties had been stripped from the claimant. Costs were the primary consideration when the claimant was made redundant. Costs were reduced by €60,000.00 to €70,000.00 by making the claimant redundant.

No consideration was given to making D redundant. Operations management is an essential function and cannot be cut. In 2010 the number of events hosted rose to 44. Therefore D had to work longer hours. She was also given a pay rise.

Since D left most tasks have been outsourced. The caterers look after the viewings and most other functions. The independent consultant is no longer involved with the marketing function.

Claimant's Case

The claimant gave evidence. She had been in the jewellery business but then got involved in doing events and a bit of PR. She applied for the job in November 2007. She was informed at interview that her role was going to be assisting in taking the business from start up to market leader.

When she started work the house was not fully decorated. The basement and garden level were in a raw state. She worked with the director to complete the fit out. She also dealt with trades people. On the marketing front a website had been set up and she worked on the text for the room descriptions. She also arranged for glossy photographs of the rooms to be taken. At this time she was required to work 40 hours per week but for the first 6 months she worked between 50 and 55 hours per week. As the volume of work increased D was recruited as the claimant's assistant and she worked 9.30am to 4.30pm three days a week. D assisted the claimant by preparing the house, getting the bar ready and opening the gates. When the clients arrived the claimant looked after them. D also helped the claimant in the office. There was considerable overlap between the roles.

In June 08 as business increased D was made full time. There were only 2 employees so they constantly helped each other out. They were always stressed due to understaffing. The director was happy with the first season.

The business focus was on weddings because they never got into corporate hospitality. In January 09 they did a big wedding fair, followed by viewings from January to April to secure the bookings.

The claimant was told that D came up with the idea that the roles should be split. D approached the independent consultant. The claimant was then presented with D's suggestions of what the role splitting would mean. The claimant was informed that her role would be marketing director. This was not discussed with her in advance. The claimant understood that D was looking for a job title. The claimant agreed to the role split but she did not know that it was intended to take operations away from her.

At first the claimant thought that it was a good idea to split the roles. The overlap of roles continued

as they had to cover for one another and because it was a small enterprise. However, in hindsight, the claimant felt that it marked the beginning of her roles being stripped away.

The role of the independent consultant was never specified to the claimant. The director trusted his opinion. The claimant did go to him with issues as she respected his opinion. However she never asked for her marketing tasks to be taken from her and given to him. When the director was in Ireland he would come to the office and have weekly meetings with her. The director was not involved on a daily basis in the business.

The claimant had some concerns about the way the business was run. There was a bar downstairs but there was no liquor licence. She raised this concern on a number of occasions but it was just pushed aside. Also there were delays in paying caterers, suppliers and staff. The security company was paid on time.

During the first season when there was an event the claimant would work from 10am through to 4am and then come to work the following morning. She was not paid overtime. There was a verbal agreement that she could take time off in lieu. When the claimant went to take her time off in lieu the director was not happy and shortly afterwards she was made redundant. She was not informed in advance that her position was in danger of being made redundant.

At a regular meeting with the director she filled him in on what was happening. At the end the director handed her an envelope and read her a letter that said that she was being made redundant due to the economic downturn. The claimant was given no opportunity to give him any ideas or to discuss alternatives. The claimant felt that she was made redundant because she asked to take time off in lieu and because she challenged the director over a number of issues, including not paying vendors on time, the lack of a bar licence and the absence of planning permission to use a private house as an event location. She cashed her redundancy cheque. When she received a reference from the director it had been signed by D.

The claimant established loss for the Tribunal.

Determination

The claimant's case is that she was unfairly selected for redundancy and that the process adopted by the respondent was unfair. The respondent's case was that a genuine redundancy situation existed and that whilst the process adopted was flawed, those flaws were not fatal to their case. The onus of proof lies with the respondent to show that the redundancy was genuine and that the selection process was fair, reasonable and objective.

There were two employees relevant to the redundancy. The claimant was the more qualified of the two in that she was initially employed to do both the marketing and operational functions within the company from the business start-up. There was no evidence that D was qualified or capable of carrying out the marketing role. The respondent in evidence that he was at all times happy with the claimant's abilities and her ability to be flexible within the company.

There was no evidence that D was ever considered for redundancy. It is incumbent on the respondent when there are two or more employees who fall into the same category to apply whatever criteria he has created to meet his objective, fairly and objectively. There was no evidence given that any criteria were applied and therefore the respondent has failed in his

obligations in that regard. Also despite the existence of an employment contract allowing for lay off and short time these options were never explored with the employees.

The respondent stated that the company's objective was to reduce costs. However there was a serious conflict of evidence given between the director and the independent consultant in relation to the figures. The director was involved in the creation and growth of the company while the independent consultant was merely employed from time to time by the respondent and therefore the Tribunal prefer the director's evidence in respect of the figures. Based on the director's figures, at the material time the claimant's earnings were €50,000 per annum, D was earning €40,000.00 and the consultant €40,000.00. The Tribunal are unclear as to what savings were made by the respondent at the time of the claimant's redundancy.

No notice of redundancy was given to the claimant prior to her being presented with a redundancy letter at the end of a normal weekly meeting on the 23rd November 2009. She was never given an opportunity to discuss her redundancy or alternative solutions.

There was a complete lack of procedures fair or otherwise and that coupled with the fact that there was no consultation process leads the Tribunal to conclude that the claimant was unfairly dismissed. The Tribunal awards the claimant the sum of €50,000.00 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)