

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
EMPLOYEE - *claimant*

CASE NOS.
UD2409/2009
RP2753/2009

against

EMPLOYER – *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 REDUNDANCY PAYMENTS ACTS, 1967 TO 2003

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr. G. Andrews
Ms. H. Henry

heard this claim at Ennis on 15 June and 28 September 2011

Representation:

Claimant: Ms. Antoinette Simon BL instructed by Ms. Tina Hills of
Brophy & Hills Solicitors, Abbey House, 7 Bank Place, Limerick

Respondent: Mr. Kevin Langford of Arthur Cox Solicitors,
Earlsfort Centre, Earlsfort Terrace, Dublin 2

The determination of the Tribunal is as follows:

Summary of Evidence

The respondent sells cleaning and safety products including personal protective equipment throughout the country. The claimant commenced employment with the respondent on 12 February 2007 as a sales representative. When SD joined the respondent as its sales director in early 2008 it had a sales force of 18 operating in different geographic areas and by this time the claimant was a business development manager in Munster. SD's first task was to restructure the business into 4 sectors (redistribution, health care, contract cleaning and industry). The respondent advertised internally for four sector leaders to lead up the new sectors, drive the

business and report to SD. The claimant did not apply. Following an interview process no appointment was made. On a reappraisal of its decision the respondent decided to appoint 2 sector leaders in the industry division, one to cover the north & east of the country and another to cover the south & west of the country. The claimant successfully applied and in July 2008 he was promoted to the position of sector leader for the south & west, heading up a team of three.

Business was difficult but the restructure was done to address that. However, by the end of the first quarter of 2009 the expected revenues did not materialise. Senior management decided that costs had to be cut to make the company more competitive and viable. A decision was taken to make seven positions in the industry sector redundant.

SD invited the claimant to a meeting in Dublin on 11 June 2009 to discuss sales progress. When the claimant arrived SD and the HR manager were present in the room and SD informed the claimant that he was being made redundant and gave him a letter to this effect. This came as a major shock to the claimant. SD assured the claimant that the decision was an economic one, based on the need to cut costs, and was not performance related. SD had not given the claimant prior notice of the purpose of the meeting and there had not been any prior consultation because the decision had already been made. SD informed the claimant that a newly created position of key account manager was available and that all 7 staff members, being made redundant, had the option to apply for it. The claimant's position was that: he had been called to the meeting under false pretences. When SD felt that the sector leader positions were not performing, he should have informed both of them of his concerns and given them the opportunity to respond. The claimant maintained that other courses of action, such as pay cuts, ought to have been explored with the sales staff. The claimant also maintained that the job description for the position of key account manager was very similar to that of business development manager.

The application process for the new position involved an interview and a presentation which took place on 16 June 2009, with less than 24 hours' notice to the claimant. The managing director and SD conducted the interviews. Only the two sector leaders applied for the new position and both were unsuccessful. The claimant found that the interview was laboured and without any dynamic. The person appointed to the position came from a competitor company. The claimant appealed the decision. The appeal was not successful.

The claimant sought written details as to why he had been unsuccessful in his application for the position of key account manager. SD wrote to the claimant on 23 June 2009, listing five essential requirements for the role. The respondent's position was that while the claimant met three of these requirements he had not demonstrated 'a proven track record' in managing large PPE accounts or in winning and delivering large contracts, although he had some success in both fields. The claimant refuted this in his letter of response dated 23 June 2009, in which he set out his successes both in the employment and in a previous employment, acknowledging that there was some fall back but that was due to the downturn in the economy. As regards his ability to win large contracts he had introduced some good opportunities to the respondent but SD had put protocols in place for negotiating prices and the claimant could only negotiate within these rigid parameters. According to the claimant SD ignored his advice on what would be a competitive price for large orders and refused to lower the price, resulting in the loss of sales.

The claimant accepted that sales had fallen and that action needed to be taken by the respondent. However, his position was that it made no sense for the respondent to get rid of its two sector leaders, who were its best salesmen. He could do all the tasks demanded of the role.

There had not been any suggestion that he needed further training.

The claimant unsuccessfully appealed the decision to make him redundant. The appeal meeting had an air of inevitability about it and the claimant was not surprised that his appeal was unsuccessful.

The respondent's position was that the role of the sector leader is to manage and get the best out of the sales team whereas that of the key account manager, who has no direct reports, is to endeavour to maintain and build on the company's presence in the market. The respondent made a quick decision because it did not want to draw out the procedure. The possibility of putting the claimant back into his old role of business development manager was not considered.

Determination

Initially the claimant sought alternative employment after being made redundant. The employment situation was not optimistic so he has returned to full-time education.

Trading in the industry sector suffered a serious downturn in 2008 and up to the relevant time in 2009, compared to previous year or part thereof.

The Tribunal is satisfied that a redundancy situation existed in the respondent company. The respondent made the two positions of sector leader redundant. Accordingly, the provisions of section 6 (3) of the Unfair Dismissals Acts which applies to dismissals for redundancy where 'the circumstances constituting the redundancy applied equally to one or more other employees in similar employment with the same employer who have not been dismissed' have no application in this

However, Subsection (7) of section 6 of the Unfair Dismissals Acts as amended provides:

'in determining if a dismissal is an unfair dismissal, regard may be had, if the rights commissioners, the Tribunal or the Circuit Court, as the case may be, considers it appropriate to do so—

(a) to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal".

The two positions made redundant were positions which had been both created and to which the claimant and his colleague had been promoted less than one year before the redundancies. They had been promoted from their former positions of business development managers and these positions still existed. The Tribunal considered the case of *Thomas and Betts Manufacturing Ltd. V Harding [1980] IRIR 255* where the English Court of Appeal, upholding both the Industrial Tribunal and the Employment Appeals Tribunal held that the employee's dismissal was unfair because she should have been offered alternative work as a packer (a position she had formerly held) even though this may have meant dismissing someone else. The two positions made redundant were positions which had been both created and the claimant and his colleague had been promoted to those positions less than one year before the redundancies. They had been promoted from their former positions of business development

managers and these positions still existed. Relying on the aforementioned case the Tribunal finds that in failing to consult the claimant and explore the possibility of reverting him to his former position the respondent had not acted reasonably within the meaning of section. Accordingly, the dismissal is unfair and the claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds. The Tribunal awards the claimant the sum of €40,000.00 as compensation under the Unfair Dismissals Acts 1977 to 2007.

The claim under the Redundancy Payments Acts, 1973 to 2007 is dismissed.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)