

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

CASE NO.
UD660/2010

against

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O' Mahony BL

Members: Mr. D. Hegarty
Ms. H. Kelleher

heard this case in Cork on 18 May 2011 and 22-23 September 2011

Representation:

Claimant : Ms. Jane Anne Rothwell BL instructed by Holohan, Solicitors,
Water-View House, 16 Sundays Well Road, Cork

Respondent : Mr. Justin MacCarthy, MacCarthy & Associates, Solicitors,
10 Upper Mount Street, Dublin 2

The determination of the Tribunal was as follows:.

The claimant alleged that he had been unfairly dismissed because he was unfairly selected for redundancy. He had worked for the respondent from December 2006 to late November 2009.

Summary of Evidence.

The principal shareholder, and managing director (MD) of the respondent company established an electrical contracting business in 1995. The business grew and had contracts throughout the country. As the respondent was frequently asked to do work on the mechanical side of construction it set up a separate mechanical division, on a smaller scale, and staffed it separately from the electrical business.. In the boom years 10 employees worked in the mechanical division.

The claimant commenced employment as a contracts manager in the mechanical division in December 2006, on a salary of €60,000, a lodge allowance and bonus. Accompanying his contract of employment was a detailed job description. MD was not on the interview panel. The claimant was interviewed by the then Operations Manager and one other. MD's position was that the claimant was employed because, having worked on projects for the pharmaceutical industry he would have contacts in that niche market to bring in new work to the respondent. The claimant's position was that his experience on projects for the pharmaceutical companies was neither raised at his interview nor mentioned in his letter of appointment or job description. The respondent was working on a contract for a pharmaceutical company at the time. A second contracts manager commenced employment with the respondent in the mechanical division in or around May 2008. It was the respondent's case that the latter dealt more with commercial projects.

When the mechanical division manager resigned in October 2008 the respondent promoted the other contracts manager to the position. (DM) over and above the claimant. This occurred while the claimant was away in Australia. While the claimant was disappointed that he had neither been given a chance 'to have a go at it' nor been appropriately informed about the vacancy. However, he indicated in his evidence that had he been chosen for the position he would not have taken it.

Due to changing business fortunes the mechanical division sustained a serious downturn in its work throughout 2009 and three employees in the division were made redundant between January and 30 September 2009. The situation continued to deteriorate and the respondent was neither winning new business nor winning repeat contracts from customers. MD's position was that the claimant contributed to that situation. As part of a cost cutting exercise the respondent introduced a pay cut. Employees in management are costed as an overhead while the construction team are on an hourly rate. The mechanical division could not support its management structure. Costs had to be cut. At a board meeting on 23 October 2009 it was decided to make the claimant redundant. MD denied that the claimant had been phased out of certain contracts in 2009. The respondent did not have any more large contracts and was schools and shops.

The claimant maintained that he had been selected for redundancy because he had a fraught relationship with the construction director (CD). He outlined three specific incidents where he had been treated in rude, aggressive and abusive manner by CD, including being told that he was 'f-----sick of him', 'get out of my f----- office' and shouting at him while pointing a biro close to his face. The claimant was disgusted rather than upset at CD's behaviour. He did not make any complaints about CD's conduct because it would be to the divisional manager who had been hired into the company by CD. It was the claimant's position that MD was aware that there were issues between them and told him they would have to work together and to sort it out with CD. In July a member of the HR section introduced a new employee (NE) to the claimant as the new contracts manager. For some time prior to this the claimant had felt his time with the respondent was coming to an end. His salary was reduced without prior notification. By 15th June 2009 the claimant had only two projects and these were coming to an end. Within two months of starting NE was on seven contracts. The claimant had never heard NE being described as a commissioning technician but had been described in company documentation as contracts manager.

On the claimant's return from Australia MD had told him that he would be making a decision on the mechanical division shortly. The claimant offered to relocate to England. The first discussion on redundancy was on 7th October and the final decision was made on 23rd October. In the interim a review and analysis of the business showed that the work going forward was small contracts.

MD's position was that a supplier recommended NE to him as a hand-on commissioning technician for small contracts. He worked part-time. The claimant and NE had completely different roles; the claimant was in a management role and NE worked as a tradesman; he was a qualified plumber, came to work in his overalls, always carried his tools, he operated on an hourly basis on a number of sites, was paid a lodge fee and actually did the commissioning.. He was a vital link in that sector and a big help to the respondent. MD denied that NE had any managerial role despite what was indicated on some company documents, where NE had been described as a contracts manager. MD explained that this had been done to "beef up" the company at the pre-qualification stage. NE worked in the construction sector of the mechanical division. He was a vital link in that sector.

The respondent started up business in the UK in 2010 with three or four employees. Having an Irish team in London would not work for the respondent. An English manager was hired and the mechanical work was outsourced.. It is necessary to have people with knowledge of and experience in the English market and someone respected and known there. The respondent accepted that other options such as placing the claimant on a shorter working week, transferring him to another office or overseas were not presented to the claimant. He did not have the necessary experience to transfer him to the electrical division.

NE's P60s show that he also received income from the respondent in 2008 but the claimant had not met him during that time. NE's earnings from his employment with the respondent in the three years 2008 to 2010 were respectively, €22,884.00, €17,863.00 and €323,768.00., which are less than half of the claimant's annual salary.

Determination

Having carefully considered the evidence adduced, the Tribunal is satisfied that a genuine redundancy situation existed at the time that the claimant was made redundant. The Tribunal does not accept that NE replaced the claimant. These two employees worked at different levels. The claimant as contracts manager, managed the contracts 'from conception to completion' including managing the commissioning of the particular projects. NE, on the other, worked as a tradesman doing the commissioning on the smaller contracts.

It was clear from the claimant's evidence that CD's behaviour towards him was inappropriate and unacceptable. However, the respondent based its decision, on whom to keep and whom to make redundant, on the skill sets required going forward. Accordingly, the Tribunal finds that the claimant was not unfairly selected for redundancy and the dismissal is not unfair. Thus, the claim under the Unfair Dismissals Acts, 1977 to 2007, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)