

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.
UD12/2011

EMPLOYEE -*Claimant*
against

EMPLOYER
 -*Respondent*
under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms J. McGovern B.L.
Members: Mr. N. Ormond
 Mr J. Flannery

heard this claim at Dublin on 27th April 2012
 and 17th July 2012
 and 18th July 2012

Representation:

Claimant1: Ms Helen Callinan BL instructed by
Ms Davnet O'Driscoll solicitor, Hayes, Solicitors, Lavery House,
Earlsfort Terrace, Dublin 2

Respondent: Mr. Tom Hogan BL instructed by Ms Bernadette Daly,
Solicitor, C/O Ernst & Young Ireland, Block 1, Harcourt Centre,
Harcourt Street, Dublin

Background:

The Respondent is a global organisation the deals with accountancy, business needs and professional services organisation. The Claimant worked in an IT support role with the Respondent. The IT support team dealt specifically with audit support software

Respondent's case:

The Tribunal heard evidence from the Claimant's manageress (AY) for the Respondent with whom she has worked for eleven years. She works in the audit technology team and her role includes the development of technology specifically for the Respondent to be used in the day today running of the business. AY was charged with handling middle-east part of the world and also the UK and Ireland which was categorised as a sub-area. The Respondent develops software internally for its auditors. Gamex was the name of one of the software products they developed and it was used as an audit tool. The Claimant was hired as part of the

team of three people to assist with Gamex and other internally developed products. The Claimant was the longest serving member of the team. The team was in charge of implementing the tools and products together with supporting the users of the product. By way of support the calls/emails from users requiring assistance were classified as tier 1 calls and tier 2 calls. Tier 1 calls required basic assistance and generally could be dealt with expediently. Tier 2 calls related to more in depth technical problems that may have arisen for the user and would require a higher level of assistance. Tier 1 calls required a minimal level of IT skills. An employee could gain knowledge and be promoted to tier 2. In October 2007 the Claimant was promoted to level two (tier 2 calls). Over time the various products were developed and put in place with the users thereby reducing the level of support required for users. There were changes to the team in 2009-2010 as they were no longer getting phone call queries of a certain type.

A capacity review was undertaken by the Respondent and it was identified that the team had an over capacity of one person. There was a decrease in the level of project work for the team together with the decrease in users making support calls. All of the tier 1 support calls were transferred to Glasgow therefore the requirements of the team reduced. The Gamex software was used by Auditors specifically. Auditors were busiest in January and February each year. The witness explained that she was given the responsibility to evaluate the support network after February 2010. In carrying out the capacity review she engaged with the team members to assess the level of support calls attended to by each team member together with their capacity for project work. In carrying out the capacity review AY engaged with other team members, the HR manager and her own senior managers in order to assess what was required of her. The witness gave evidence that the review was finalised in or about May 2010 and an over capacity of 164 hours and of one person was identified.

The selection of candidates was based on a Performance Management and Development Programme. The PMDP review was carried out between 01st July and 30th June each year. Each employee has goals assigned to them and the ratings on the PMDP reflect the success in reaching their goals. This document was opened to the Tribunal. The PMDP for each employee would be discussed by an employee's senior management at what was known as 'round table meetings' wherein a rating would be decided based on the input of the various attendees at the meeting. The witness was asked if the document was used at the time of making the decision and she replied that it was.

The witness explained that the PMDP had nine sections and the ratings were from 1 to 5, 5 being the best rating. AY stated under cross examination that the capacity review was not completed in April 2010 when the PMPD was being conducted. She did not indicate to the Claimant that a capacity review was being conducted nor did she mention the possibility of any potential redundancies. It was AY's position that until the capacity review was finalised she could not communicate the possibility of redundancy to any staff member.

The Claimant was given a score of 2 which meant that he had 'met expectations' in terms of his performance in his job where the other team members exceeded expectations. The PMDP rating was used in the selection procedure for redundancy and it formed 30% of the selection criteria. The Respondent company does not have a procedure in place for making employees redundant. This instance was the first time AY was involved in a redundancy procedure. The half yearly assessment took place in January of each year. Ratings were not discussed until the end of the assessment year which was in May. Each employee was assigned a counsellor and AY was the Claimant's counsellor. In addition each employee did a self-assessment. AY had recommended

to the Claimant that he manage his time better and that he take more support calls. The Claimant expressed concern that the report document (the PSG report) that showed the full extent of the support calls he had taken. AY investigated the report and ran a brand new report document taking into consideration the Claimants concerns. While there were some changes the overall number of calls the Claimant still had the lowest number of calls taken. The Claimant further expressed concern that other members of the team were 'more aggressive' in taking calls therefore that team member's numbers were higher. AY stated that all calls came from the same source and each team member had equal access to the call stack. She was not going to discourage team members from taking calls whether aggressively or not.

Each team member's project work was assessed separately to that of the support calls. The Claimant expressed concern that his work on what was known as the GAAIT project was not scored accordingly. It was put to AY that his GAAIT work was not scored high enough in that he was taking support calls for this project and those calls were not registered as support calls thereby reducing his calls taken but also reducing his available hours to attend to 'real' support calls. He was the only team member dealing with the GAAIT project. It is the Respondents position that if the Claimant had spent more time on project work than taking support calls his project work assessment would rate higher. The Claimant did in fact have a higher score for his project work than his support calls. When asked why the Claimants various other 'outstanding' performances during the course of his employment were not taken into consideration in his ratings AY indicated that the ratings applied for the assessable year in question and not previous years. In previous years the work in question would have been taken into consideration in due course. It was noted by AY that the Claimant only received a 3 rating for the previous year and a 3 rating for the year before that.

The Claimant communicated to AY that he was not satisfied with the way his work was categorised. During April 2010 a series of emails were sent between the Claimant and AY detailing his dissatisfaction. AY asked the Claimant to complete an 'issue resolution template' to document his issues. AY indicated that she found the Claimant resistant to this but ultimately he completed to document. As far as AY was concerned the 'issues' were resolved as she heard nothing further from the Claimant and the Tribunal was directed to email correspondence that alluded to this.

AY gave evidence that the selection criteria for the redundancy were determined by the needs of the business. An over capacity was identified within the team. The other candidates were included in the selection criteria. The three team members were rated and assessed together and the Claimant came out at the bottom. In the circumstances he was identified for redundancy.

AY and a senior manager (CC) met with the employee relations manageress in HR (AOH) on 24th May 2010 to find out what the process was regarding redundancy The HR manageress explained quite clearly that they had to meet the Claimant to notify him of the situation and what would happen if his role became redundant. They should encourage him to seek guidance and identify any internal opportunities that were available and suitable.

AY and AOH met with the Claimant on the 26th May 2010 and notified him that his role was at risk as a result of an over capacity of staff on the team The Claimant was the only member of the team of three that was told 'his role was at risk'.

She and the employee relations manageress in HR met the Claimant on 26th May 2010. The

purpose of this was to identify internal roles that the Claimant could maybe avail of. AY gave evidence that if there was a suitable role within the company the Claimant's role would no longer be at risk. No suitable role was identified therefore it was confirmed to the Claimant that this role was redundant. AOH explained the redundancy package also included an ex-gratia payment.

The position at present is that the Respondent has not employed any additional team members. Two other people that were hired in January 2012 and April 2012 but have no IT experience and they were level one staff. There is no change in the senior support staff. From January 2009 IT employees left and they were not replaced. The support team went from ten or eight down to three. Brief reference was made to the general IT section and the selection pool in the context of the redundancy but the matter was not addressed in any material way in evidence.

The Tribunal heard evidence from the director of IT risk (LC). She explained that the Claimant did not have the relevant qualifications to fill a particular vacancy in the company.

The Tribunal heard evidence from a senior manageress (CC). Her role is now different from when the Claimant was employed in the company. She was a member of the round table group that assessed the Claimant's PMDP.

It was put to the witness that she met the Claimant in November 2009 and told him that he would be given a rating of four on his review because of the work he was doing on the GAAIT project. She denied this and said that she would not have said that to him but she would have said the work he was doing was excellent. Furthermore, the ratings that were given at the end of the year (in or about May) and she would not have been in a position to discuss ratings in November. CC went to the round table meeting with AY and the UK contingent. AY proposed that the Claimant would get a rating of two or three and the UK contingent proposed a rating of one. She opposed rating of one on the grounds of the Claimant's work on GAAIT.

AOH spoke to the Claimant at a later time about other job possibilities for the Claimant and the Claimant said that he was not interested in a particular role that arose in Glasgow as it was not suitable.. She asked the Claimant if there were any other roles that he had identified and he told her that there were not. She then told the Claimant that on that basis he was redundant. She confirmed that his role was redundant.

Claimant's case:

The Tribunal heard evidence from the Claimant. He commenced in the Respondent company in 2006 as a second level agent in software support. His role was part of a newly formed team providing direct IT support for auditors. He had experience in IT support and had worked in various multi-nationals prior to working with the Respondent.

The Claimant had a six month probationary period on commencement with the Respondent. He explained that the people were a nice group of people who were friendly, open and helpful. He had a good and normal working relationship with his colleagues. They all got on well and it was a nice place to work. In 2009 he felt his feedback was good in relation to his work. There were some issues but nothing that could not be worked out.

The Claimant explained the GAAIT system and the Gamex system to the Tribunal as

being direct audit tools developed by the Respondent for its business. The work that he did on the GAAIT system was classed as project work. The system was not operating at a satisfactory level in 2009 and a manager (not AY) told him that the UK team wanted the system to run at 85%. The Claimant indicated that to bring the system up to a satisfactory level he had to update all of the user's machines to 'unclog' the system, reinstall the software on the machines and teach users to use the software effectively. He maintains that there were approximately 680 users the system installed on their computer with some 380 using the system regularly. He had to contact the users by phone to arrange to update or fix the system. This adds to the difficulty of a usual support call as normally the user would phone the IT support to solve a problem but in this case he had to contact the users. The Claimant was the only team member dealing with GAAIT and he expended substantial time on the system. This work was project work but his manager told him to log the work as PSG work. Therefore in November December of 2009 and January 2010 he logged this work as normal work. It is the Claimant's position that all of the calls he would have taken in relation to GAAIT were not logged as 'support calls' therefore his figures in the PMDP were distorted. The Claimant estimated that at one point in time he was spending 40-50% of his time on GAAIT work.

The Claimant gave evidence as to his disagreement regarding a report and his contact and correspondence with AY on the matter. He thought that the work or PMDP report on him was flawed and also he had fixed up to 300 machines and he was not allowed to put that on his report. This was the first time that he saw a report on case numbers. It was an important report and it was sent to the UK therefore management in the UK could observe his work pattern. He did not want mis-information about his performance communicated to senior managers. At some time during the beginning of 2010 he heard rumours that there might be redundancies. He asked his supervisor and the supervisor told him to keep his head down. AY did not say anything about redundancy situation in advance of the 'at risk meeting' on the 26th May 2012. She did not say anything to him about a capacity report. The first he heard of a capacity report was at the Tribunal hearing. The Claimant was confused as to why a redundancy situation existed in the Respondent as it is a viable business. Furthermore he was confused as to the rating systems in the PMDP. He knew his team-mates were both scored 4 for the year in question and he felt he could not compete as he did not know what they were doing different to him. He felt his work on GAAIT was not rewarded properly in the rating system. He was concerned about a redundancy situation as he was trying to purchase an apartment and his evidence was that he communicated this to his managers..

He had no knowledge of the criteria of selection for redundancy and he did not know that the Respondent was going to reduce the head count by one person. He did not know that performance/the PMDP could affect a redundancy situation.

In or about April 2010 the Claimant accepts that he was asked by AY to fill out an 'issue resolution template'. He did not want to do it as he felt the report, which he considered flawed, spoke for itself. He also indicated that he was stressed at the time but ultimately filled it out. He communicated his concerns in that document. He did not consider his issues a grievance and did not take the matter any further. When asked whether the matter was resolved as AY thought it was he indicated that he just 'wanted it finished'.

The Claimant was invited to and went to a meeting with AY and CC on the 5th May 2010 which concerned his end of year review. He was invited to a further meeting on the 26th May 2010. He had asked what the meeting was about and he was told that it was an update (about

ork matters). It turned out that the meeting concerned his role being identified as 'at risk' of redundancy. The Claimant was in shock and felt nauseous. All he could think of was the deposit for the apartment. He said this to CC and she told him that she had not known about that. He said to AY that she must have known about the situation and she did not reply to him.

Following this meeting the Claimant contacted GK in relation to any available internal positions that would be suitable for him. He saw some jobs advertised but they were accountancy based jobs and not to his skill set.

In the next meeting he had with management on the 28th May 2010 it was communicated to him that as there were no suitable positions available within the company they were proceeding with the redundancy. They did not put any alternative positions to him other than a position in Glasgow which the Claimant believed was not a suitable role for him as he did not have fluent German which was required. Furthermore it was a more junior position than he held previously. The Claimant sought re-instatement as his preferred remedy and both his Counsel and Counsel for the Respondent addressed the Tribunal on the merits of same.

Determination:

The Tribunal are unanimous that a redundancy situation existed in this case.

The Tribunal must therefore decide whether or not the selection of the Claimant for redundancy was fair. It is common case that the Claimant was the only person within the team of three identified as having 'his role' at risk. Surely all three team members should have been told that a role within the team was at risk. It seems to the Tribunal that the Claimant was identified for redundancy rather than the role within the team.

None of the employees on the team were warned that a potential redundancy situation may arise. It is coincidental that the capacity review and the final stage of the PMDP were conducted at the same time and the Claimant was not aware that the PMDP would impact on the selection for redundancy. The Claimant's evidence is that he was confused by the application of the various ratings in the PMDP. Some considerable time was expended during the course of this hearing on the application of the Respondents scoring systems. It is not a system that is clear in its application and it was the Claimant's evidence that he did not understand it nor was it communicated to him in a cogent manner. All that seems to have been communicated to him was the fact that he scored the lowest and therefore his role was at risk of redundancy.

The process of communicating the decision to make the Claimant redundant was conducted very quickly. The Claimant was called to a meeting on the 24th May 2010 and was told his role was at risk unless he could find a suitable alternative within the company. That did not happen and on the 28th May 2010 he was told that his role was being made redundant. Following the decision to identify the Claimant's role as being at risk of redundancy it seems to the Tribunal that no material effort was made by the Respondent to find the Claimant an alternative position within the organisation.

Whilst the Respondent's evidence is that there is no appeal process the Claimant gave evidence that he should have been able to communicate the decision to make him redundant 'further up the line'. In fact evidence was given that as of May 2010 the Respondent had no formal

procedures in place to deal with a redundancy situation.

In all of the circumstances by a majority decision, the Tribunal finds that the Claimant was unfairly selected for redundancy. The majority of the Tribunal consider compensation to be the more appropriate remedy than re-instatement having heard the arguments of both sides.

The Tribunal awards the Claimant the sum of €40,000.00 (being forty thousand euro) under the terms of the Unfair Dismissals Acts, 1977 To 2007.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)