

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

CASE NO.
UD383/2011

Against

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms N. O'Carroll-Kelly B.L.

Members: Mr B. Kealy
Mr P. Trehy

heard this claim at Dublin on 4th July 2012

Representation:

Claimant: Ms. Mary Duffy-King, Siptu, Misc Unit, Liberty Hall, Dublin 1

Respondent: Ms Anne Byrne, IBEC, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

Preliminary issue

The secretariat of the Tribunal received the claimant's application under the Unfair Dismissals Acts, 1977 to 2007 on 20 January 2011. Among the details on his signed T1A was his date of termination of employment with the respondent. That was stated as 7 January 2011. It was submitted to the Tribunal that the claimant was paid up and until 21 January 2011, the RP50 was dated that day as was the P35 and that the claim was submitted before the dismissal took place therefore leaving it invalid. The T2 as submitted by the respondent did not address the issue.

Respondent's case

KC M.D. of the respondent told the Tribunal that the business is an on-line motor parts supplier. It began as a small operation in 2004 and by 2007 had grown to an extent where larger premises were required. The business now sells throughout the world. They now employ 20 people and hope to increase it to 27 by the end of the year. The claimant was a warehouse manager who accepted stock, packed and shipped it and did stock counts. At the end of 2010 a board decision was taken to make the claimant redundant. The operation needed a head of logistics with procurement and IT skills. It needed somebody fully versed in international logistical movement and who would report to the board. The position was a very senior one and the person hired had international engineering as a background. The claimant could not have done the job, he did not have the skills or the experience.

There were no alternative posts in the warehouse at the time of the redundancy. The claimant was advised he was being made redundant on 7 January when he was given his RP50 and his redundancy cheque. The meeting came to an abrupt end when KC found that the claimant was recording the meeting without his knowledge or authority. KC was angry at the time and cancelled the cheque, in hindsight he stated that he should not have done it and payment was made at the end of January. The right decision was made at the time, the right people were employed and the business is flourishing. KC stated that the claimant looked for references and the business had no problem in providing them.

Under cross examination KC stated that there was no consultation, there was no alternative positions. The position as advertised on 13th January was not the claimants post. Logistics had previously been carried out by couriers.

Claimant's case

JM stated that his job was to pick and pack, collect orders and dispatch, do stock control and run the warehouse. Some days up to 90% of his job would be picking and packing. When the advertisement for a new person was placed it included the majority of his duties. The claimant said that he was given no opportunity to up-skill, he offered but was told they didn't have time to wait on him to train. On the day he was made redundant he was called to the office and told he was being let go, he had no prior knowledge and was not given the opportunity to have someone with him.

Under cross examination JM stated that he was not qualified in IT, he didn't do reports or statistics as part of his job and didn't report to the board.

Determination**Preliminary Point.**

The claimant was made redundant on the 7th January, 2011. He was paid two weeks notice in lieu. The notice expired on the 21st January, 2011 or if you take the contractual period of notice into account on the 4th February, 2011. The claimant lodged his claim on the 20th January, 2011 one day short of the expiration of the notice period. The respondent claimed that the Tribunal didn't have jurisdiction to hear the matter as same was filed whilst the claimant was in employment.

The claimant argued that after he was escorted off the respondent's premises on the 7th January, 2011 he was in no doubt that his employment with the respondent had come to an end and he was therefore entitled to file his claim at any stage thereafter.

The Tribunal note that the respondent filed a T2 form on the 6th September, 2011 stating only "the

employee was dismissed fairly by reason of redundancy”. The respondent should have put the claimant on notice of the jurisdiction point. The parties have a right to know the claim that is being made against them. Had the respondent put the claimant on notice of the point he could have filed a second T1A. The fact that the respondent did not address the matter in its reply is a fatal flaw and estops them from making the argument when the matter comes up for hearing.

Secondly, the date of dismissal and the date of termination can be two completely different dates. The date of dismissal is the date where the claimant leaves his place of work for the last time. In this case that is the 7th January, 2011. The date of termination is the date upon which the notice period expires. In this case that is either the 21st January 2011 or the 4th February, 2011.

Section 24 of the Redundancy Payments Act 1967 “ the time period for making a claim begins on the date of dismissal or the date of termination of employment”.

The definition of the date of dismissal under the Unfair Dismissal Act 1977 is) where prior notice of the termination of the contract of employment is given and it complies with the provisions of that contract and of the Minimum Notice and Terms of Employment Act, 1973 , the date on which that notice expires.

(b) where either prior notice of such termination is not given or the notice given does not comply with the provisions of the contract of employment or the Minimum Notice and Terms of Employment Act, 1973 , the date on which such a notice would have expired, if it had been given on the date of such termination and had been expressed to expire on the later of the following dates—

- (i) the earliest date that would be in compliance with the provisions of the contract of employment,
- (ii) the earliest date that would be in compliance with the provisions of the Minimum Notice and Terms of Employment Act, 1973 ,

The claimant was made redundant on the 7th January. He was not dismissed. The only way that redundancy can fall under the umbrella of the Unfair Dismissals Acts is if the tribunal find that either a genuine redundancy situation existed or that the claimant was unfairly selected for redundancy. Until such a determination is made the termination of the employment remains one by way of redundancy. Section 6 (3) Unfair Dismissals act is merely a mechanism which allows a claimant to have the fairness of the redundancy assessed by the tribunal. Therefore claimant is entitled to lodge his claim on or after the date of dismissal or on or after the date of termination of employment.

Thirdly, the claim was filed on the 20th January, 2010. The claim was before the Tribunal for the entirety of the statutory six months. Even if the Tribunal did not have jurisdiction to hear the matter before the 21st January, 2010 it did have jurisdiction from any date thereafter.

The Tribunal are satisfied it has jurisdiction to hear the claim.

Determination.

The tribunal have carefully considered all of the evidence in relation to the above matter together with the documentation submitted. The respondent gave evidence that they set up their online car parts company in 2004. Slowly the business grew which necessitated them purchasing/leasing a warehouse in 2007 to house stock. The respondent was anxious to expand the business internationally. At that time (late 2010) they did not employ anyone with the required expertise to oversee, develop and market their international business. Once the respondent had made the decision to hire an individual with the requisite skills it became obvious that the warehouse manager's role would become subsumed into the new position.

It was put to the respondent that the claimant could have up skilled to meet the respondent's requirements. The tribunal feel that that was an unrealistic proposal. The claimant admitted that approximately 85%- 90% of his time was spent picking and packing. In relation to logistics

didorganise couriers to collect and deliver locally but his skill did not go beyond that. No evidence wasadduced as to whether he even met the basic university entrance requirement. At the very least itwould take the claimant four years to complete a degree course. The respondent's contention that itsimply didn't have the time to wait for the claimant to up skill is understandable and reasonable.

The claimant stated that he was never given the opportunity to have a representative with him when he was told by the respondent that he was being made redundant. There is no requirement in law for the respondent to facilitate such a request at a redundancy meeting.

The claimant stated that he was never invited into a consultation process in relation to the proposed redundancy. In this instance there was no need for a consultation process due to the fact that only the warehouse manager role was being made redundant and there were no other vacant positions at that time. The respondent is not obliged in law to create a position for an employee whose position is being made redundant.

The respondent did state that they made the decision to make the subject position redundant in October 2010. The claimant was given absolutely no notice of the pending redundancy. In the current employment climate it was grossly unfair of the respondent to keep it from the claimant. The claimant was a hard working loyal employee and deserved better. No explanation was forthcoming as to why the decision was kept from the claimant. However, unfair as it was to the claimant the decision not to inform him of the upcoming redundancy does not affect the validity of the redundancy.

The Tribunal having assessed all of the evidence find that a genuine redundancy situation existed and that in the particular circumstances of this matter the selection process was fair. The claimant's case fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)