EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	CASE NO.
EMPLOYEE	UD1451/2010 MN1396/2010 WT601/2010

Against

EMPLOYER

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997
UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Mac Carthy S C

Members: Mr. R. Prole
Mr A. Butler

heard this claim at Dublin on 5th December 2011
and 28th February 2012
and 20th April 2012

Representation:
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Claimant(s): Ms. Pauline Codd BL on the 5th December 2011 and 28th February 2012 and Ms. Clare Bruton on 20th April 2012 instructed by Ms. Aileen Fleming, Daniel Spring & Co, Solicitors, 50 Fitzwilliam Square, Dublin 2

Respondent(s): Mr. Conor O'Connell, Construction Industry Federation, Construction House, 4 Eastgate Avenue, Little Island, Cork

The determination of the Tribunal was as follows:-

The claims under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and the Organisation of Working Time Act were withdrawn.

Claimant's Case

The claimant's case was that he was unfairly selected for redundancy and indeed was not redundant at all as his work was being done by other employees.

Counsel for the claimant outlined that he had long service since 1998. He was employed as a site clerk in 2000 and he was promoted in 2006. Over 2009 his duties changed and he reverted back to finishing foreman and undertook snagging. Mr. C who was a snagger had health problems and was out sick for six months. In early March 2009 a series of meetings took place with various groups. In the first group five employees were given notice that they were going to be made redundant, this was not followed through. Only three were made redundant. The remaining two MC a snagger and MK a finishing foreman now undertook snagging and continued to work a five day week. The second group which included the claimant were told the news was not as bad and they were being placed on a three day week. The claimant accepted this. The claimant had longer service than MK who was still on a five day week. AF finishing foreman and snagger, PC ganger, and AM engineer were also placed on a three day week. JF who was a finishing foreman with shorter service was told he was going on a three day week but this never happened. The respondent had constantly changed roles. The claimant was suitable as he had worked as a finishing manager. A review of the three day week was pencilled in but this never happened. The claimant and LD asked for a meeting during the summer in 2009 to discuss the position with the construction director at which they offered to do snagging. They also pointed out that MF who had lesser service was on a five day week and two who were informed they were being made redundant were still on a five day week. The construction director told them he would revert back to them regarding their queries but he never did.

On the 4th of November 2009 the claimant was informed by the construction manager that he was being made redundant. This was the first contact since summer. At this meeting the claimant was told that the contracts manager and site manager would be filling his role. The claimant objected strongly and there was no appeal. The claimant asked to meet JF director of the respondent on the 9th November 2009. The claimant told him he was shocked. JF director was not prepared to engage in conversation. JF told him that the decision had been made by the construction director, JF made a comment that his wife was still working and had rental property. At a meeting with the construction director on 12th April 2009 the claimant raised the issue of leaving the site on the day of the redundancy. He also raised the issue of bonus, which was unilaterally scrapped. The claimant requested a copy of the selection process but never received it. On the 20th November 2009 the construction director agreed to give him an ex gratia payment.

The claimant told the Tribunal that he has a diploma in construction studies. He commenced employment with the respondent in January 1998 as a site clerk. His career progressed quite well and in 2000 he was promoted to the position of finishing foreman. As a finishing foreman he would be given a shell of a house to complete and he would organise the entire tradesmen. When this was completed the buyers and the surveyor were informed that the house was ready for snagging. Then you would meet with the buyers and organise the snag list. In 2000 he commenced on a site in Castleknock and continued to work in this location until 2005. Usually the respondent had two to three operational sites. He then went to a site in Stepaside as a finishing foreman before he was moved to Adamstown in early 2006. The site in Stepaside was still operational when he was made redundant. He was promoted to section foreman in June 2006. This was on foot of a review and he had asked to be promoted as he wanted to climb

the ladder.

As a section foreman he would be a foreman over the site. He organised tradesmen, plumbers and electricians and would be given a house with just the roof on. The construction director had told him that he excelled in any role assigned to him. In 2008 things started to change, JJ a foreman was let go and the claimant took over his role in addition to his own role. He did not have to do much snagging in Adamstown, however in 2004 JC was absent for about six months and he did the snagging. The claimant was a salaried employee and was part of the management team.

He said that the redundancy process was last- in-first-out. In summer 2008 the respondent had been building a number of units which had to be finished. Employees started changing roles. BD who was projects/contract manager (head of site) worked for approximately a year in 2008 his role changed as the respondent was no longer engaged in building. BD started to move into the finishing side of the business. BR was the site manager at the time. MR was brought in to the grounds works team to supervise them. The claimant explained how the workforce diminished over time. Redundancies were implemented in March 2009 and the claimant was informed he would be on a three day week and this would be revisited on a monthly basis. Two employees who were informed of their redundancy were kept on a five day week while JF who was informed he was being placed on a three day week continued to work five. The claimant was one of the longest serving employees on site and was aggrieved by the situation.

He received a letter from the respondent in respect of his three day week, advising him that the respondent would review the situation periodically, this never happened. He was paired up with LD who shared the working week; most of their duties was finishing work and getting show houses completed.

At first he was happy enough to agree the three day week as he thought the other five had been made redundant. He was surprised that others were on a three day week and they had less service than he had. He could have done their roles, as roles were being merged.

In cross examination the claimant stated that the respondent was fair and reasonable. The claimant had undertaken some electrical work prior to joining the respondent. In January 1998 he was a site clerk, in July 1999 a finishing foreman. In September 2005 he moved to Adamstown and in the last four years he was a section foreman. As a section foreman he was in charge of tradesmen. In September 2008 bricklayers were still on site and no new units were constructed after that. In March 2009 he signed and accepted a three day week with LK. In August 2009 RC told him that monthly meetings would take place. RC stated in 2005 and he may not have been aware of the roles the claimant undertook. He reminded RC of the roles he undertook. He undertook snagging work over a six month period. He was multiskilled and came from a building background. MK was given notice in February and JF was due to go on a three day week but these were not implemented. He mentioned to RC that he did the roles that MK and JF did. He had meetings with RC on 4th November, 12th November, 20th November and on 9th November with Mr. F. MK worked as a snagger for him, MK was a finishing foreman and then he was redeployed as a snagger. He did not have concerns that his position was about to be redundant. He agreed that he was concerned about his job. When put to him he was under the impression in 2009 that there was a role for him on a five day week he replied that Mr. F was on a five day week and Mr. K was on a three day week.

On 4th November 2009 he was shocked and upset on being given notice of his redundancy. He

had a seven minute meeting with JF. JF told him that he (the claimant) was better off than him. Mr. F told him to contact RC. He had a discussion with RC on 20th November regarding his redundancy. He agreed he accepted a sum of €5,000,00 as well as his statutory redundancy. He was unemployed for sixteen months after he was made redundant.

In answer to questions from the Tribunal he agreed that he should be offered a job as a snagger and step back from his job as a section manager. There should have been a discussion about this. He had twelve years' experience and he had more experience than Mr. F and Mr. K together. Mr. F and Mr. K were on less pay than he was. He earned €80,000 per year.

In re-examination he stated that Mr. F came from a snagging background. The claimant would have done any role on any site. He was on a three day week and he wanted to work. He would have taken a pay cut

Respondent's Case

RC told the Tribunal that his role was to manage resources of the respondent. Approximately eight hundred were employed in Adamstown. 100 were direct employees and 700 indirect employees. In early 2009 a number of redundancies were implemented and working hours were reduced for employees. Work ceased in mid-2008. At the time the claimant was made redundant there were ten on the site in Adamstown. The claimant was selected for redundancy as the skills he had did not suit the skills for the work the respondent had left. The claimant was a good operator but the respondent did not have a role for him.

In cross examination he stated that he had experience of sites since he was a youth. He disagreed that sales increased in 2008 to 2009. Sales agreed was not a term the respondent used. In early 2009 the claimant was job sharing and he undertook finishing work. Both he and Mr.D were undertaking the same job. Mr. H had no decision making role as he was a staff member in the Accounts Department and he would know who was made redundant from the paperwork. Mr. F who was undertaking snagging is on temporary lay off at the moment and has sought to be made redundant.

He disagreed with some parts of what the claimant said. The claimant was on a three day week in August and meetings did not take place. The meeting which took place on the 19th August 2009 was called by the claimant. The claimant raised a number of issues including a three day week. It was reasonable observation for the claimant to make that Mr. F and Mr. K were on a five day week. At the meeting on the 9th August the claimant did not make any suggestions. He did not revert to the claimant until November. The claimant was well placed to note the downturn. The claimant was very shocked and very distressed on being made redundant on the 4th November. The claimant explained that he had undertaken snagging. He was aware of the claimant's background as he had consultations with other managers. His function was to assess the situation and he could not be on every site. He relied on his own experience and theexperience of others. The respondent endeavoured to retain employees. The claimant wason a three day week and he did not ask him to take a pay cut.

Employees from Adamstown were transferred to Killeen in September 2009. A show house was completed in September 2009. The show house was prepared in eight to ten weeks. There is no work in Killeen since mid-last year. Approximately 4000 visited the first week-end end he was not aware that the claimant was not involved in sales. The claimant was comparable with Mr. D in terms of skills and all employees did not do the same job.

Determination

The claimant's case was he was not redundant at all, or, in the alternative that he was unfairly selected.

When activity was at its highest the respondent had about 100 direct employees, as well as about 700 others on site who were working for sub-contractors. When the claimant's employment ended the number of direct employed was reduced to about 30 and then fell to 10. The numbers working for sub-contractors were also sharply reduced.

This situation clearly falls within definition (c) of the Redundancy Payments Acts, 1967 as amended:

> "the fact that his employer has decided to carry on the business with fewer or no employees, whether by requiring the work for which the employee had been employed (or had been doing before his dismissal) to be done by other employees or otherwise,"

The claimant also argued that his work was still being done by other employees, and thus was not redundant. But definition (c) includes the words "whether by requiring the work for which he was employed to be done by other employees or otherwise". When employee numbers are reduced it would be common for the remaining employees to do some of the work formerly done by the redundant employees, as total activity is reduced.

The Tribunal finds that the claimant was redundant.

The claimant argued that he was unfairly selected in that other employees should have been chosen before him. Unfair selection is governed by section 6(3) of the Act of 1977:-

> "Without prejudice to the generality of subsection (1) of this section, if an employee was dismissed due to redundancy but 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, and either.
>
> (a) The selection of that employee for dismissal resulted wholly or mainly from one or more of the matters specified in subsection (2) of this section or another matter that would not be a ground justifying dismissal, or
>
> (b) He was selected for dismissal in contravention of a procedure (being a procedure that has been agreed upon by or on behalf of the employer and by the employer or a trade union, or an excepted body under the Trade Union Acts, 1941 and 1971, representing him or has been established by the custom and practice of the employment concerned) relating to redundancy and there were no special reasons justifying a departure from that procedure,".

For this section to apply there must be other employees in similar employment to whom the circumstances constituting the redundancy applied equally. The claimant pointed to some other people who, he said were in similar employment but were retained.

Subsection (3) also provides other conditions, and the claimant did not point to any specific reason, such as race, religion, political opinions or the like as set down in subsection (2) and thus subsection (3)(a) does not arise.

Subsection (3) (b) recognises a procedure recognised with a trade union, which does not exist in the claimant's case, or a procedure established by custom and practice in the employment concerned. He argued that this meant the "last in first out" rule applied, and that he had longer service than some of those retained.

The respondent did not agree that the "last in first out" rule applied but agreed that this was an element that would be considered in redundancy selection. Other considerations would also arise, including how the skill sets of different employees would match the declining needs of the business. We heard of different employees who did various kinds of work with various skills.

Part of the claimant's argument implies that certain other employees doing different kinds of work should have been moved to make way for him to do this work because he had done that kind of work in the past and was trained to do it. Had this happened it seems to us that such employees would have justifiable complaints.

In the view of the Tribunal the claimant was not unfairly selection within the meaning of subsection (3).

The claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

As the claims under the Organisation of Working Time Act, 1997 and the Minimum Notice and Terms of Employment Acts, 1973 to 2005 were withdrawn and no awards are being made under these Acts.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)