

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

EMPLOYEE

- claimant

CASE NO.

UD1827/10
RP2459/10
MN1780/10

Against

EMPLOYER

- respondent

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005 REDUNDANCY PAYMENTS ACTS, 1967 TO 2007 UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr N. Russell

Members: Mr J. Browne
Mr F. Dorgan

heard this claim at Waterford on 22nd May 2012 and 12th September 2012.

Representation:

Claimant: Mr. Cyril Cawley, Kinsella Heffernan Foskin, Solicitors,
Otteran House, South Parade, Waterford

Respondent: Neil J Breheny & Co, Solicitors, 4 Canada Street, Waterford

Respondent's Case:

The respondent is engaged in the newspaper industry. The Managing Director, PG and his wife are the company's two Directors. The newspaper was started twenty three years ago and is community based. Advertising is generated by sales staff and by word of mouth.

In 2009 a journalist had to be let go. Pension contributions were frozen. Staff had to take a 10% pay cut. Production staff were put on a three day week. Due to the economic climate there was a shift downwards in the business. Both the claimant and her colleague D agreed to job share from early 2010 and PG had hoped that this would be a temporary measure. Both he and his wife invested 60% in the company. PG spoke to his auditor in advance of meeting the claimant and D on 21st June 2010. He explained that the company was in a crisis situation and that one of the two of them would have to be let go. The following Friday, 25th June 2010 he

arrived at his decision. The claimant was chosen to be made redundant. The redundancy took effect on 25th June 2010. It was a very difficult decision for him which he made in the best interest of the company. PG contended that the company would not survive if he had not made that decision. While the claimant and her colleague D were doing the same job PG contended that D had the edge and was doing a better job for the company going forward. The company did not operate last in first out. In hindsight PG contended that he handled the redundancy badly and should have been more understanding.

PG spoke to his daughter MR about the situation. She was on maternity leave from her own job at the time of the claimant's redundancy. MR felt that her father had made an incorrect decision and said she would ask the claimant to return to work. A decision was made to offer the claimant a position in the advertising area of the company. PG was surprised the claimant did not return to the company.

MR agreed to help out the company for a few weeks. She spoke to the Accountant and subsequently the claimant on 12th July 2010 and asked her to come into the office on 13th July 2010. Initially they discussed the manner in which she was let go and the claimant was very upset. MR offered the claimant a part-time role with different duties which included sales targets. The claimant enquired if there would be consequences if targets were not met. MR responded that they were realistic targets and that it should not be a problem. The claimant said she would think about the offer and the next day MR telephoned her. The claimant asked if she was coming back on a new contract or on her old contract and who was going to look after the General Manager's clients.

MR rang the claimant on the 15th of July and told the claimant that if she returned to work it would be on a new part time contract, a full day Monday and three half days. It was made clear to the claimant that this was a new role. MR contended that the claimant wanted her full time job back and her full time wages and contract and she also wanted arrears of commission. The claimant's demands could not be met. The claimant said her original role was not a job sharing agreement as it was forced upon her to either work part time or have no job.

The claimant's replacement commenced working a two and half day week then progressed to a four day week.

The General Manager left on 2nd July 2010 after the claimant was made redundant. He was not made redundant.

The company's accountant gave extensive evidence on the financial state of the company. He contended that it was a genuine redundancy situation necessitated by the poor financial position of the company.

Claimant's Case:

The claimant commenced employment on 5th September 2005 and worked in the sales area of the company. Her job entailed selling advertisements. She reported to NM, her manager. She built up a number of clients over the years. In the first few years of her employment she was in receipt of an 8% sales commission which was calculated weekly. She always reached the targets set down for her. Her colleague D worked in the same area as her.

In November 2009 it became apparent that the company was in financial difficulty and both the

claimant and D agreed to go on short time and this commenced in January 2010. The claimant did not want to lose her job. Her commission was then reduced to 4%. Official emails were redirected to her own personal email address during the days she was not working in the company and she spent about two hours working on these.

On 20th June 2010 the Managing Director (PG), came into the claimant's office. He explained that the company was not doing well and that he would have to make reductions in staff. The claimant was very stunned and enquired as to how this was being done.

At about 11.30 on the following Friday, 25th June 2010 PG spoke to the claimant and said 'there was no easy way to do this, here's your P45'. Later that day the claimant spoke to PG and told him that she was entitled to one month's notice. He said that she was a part time employee and was due a half day holiday entitlement. She enquired as to why she was being let go and PG responded that he did not have to explain. The claimant contended that she deserved an explanation.

The following Monday, 28th June 2010 the claimant again spoke to PG who said he would not be reconsidering his position. He told her the company had to pay off €50m in debts.

On 13th July 2010 MR offered the claimant a part-time role in the company. MR contended it was a new position. The claimant thought about the offer. She wanted continuity of her service with the company maintained. She wanted her full time job back as per her original contract of employment. She also wanted arrears of sales commission since she commenced short time in January 2010. This could not be guaranteed. The claimant subsequently declined the offer of a part-time role. The job was advertised and subsequently filled.

The claimant contended that there was no discussion prior her termination of employment as to how her redundancy was to be implemented and matters could have been handled better. She contended that she could have taken a further pay cut if it had been discussed with her. The claimant enjoyed working for the respondent and never had any intentions of leaving the company.

The claimant did not accept the redundancy payment offered to her by the respondent. She contended it was incorrectly calculated.

The claimant secured initially six months work after the termination of her employment. In March 2011 she secured part time work and she works two days per week.

Determination:

Under the terms of her contract dated 25th January 2008 the claimant was entitled to one month's notice. There is no contractual entitlement to make payment in lieu of notice. The claimant was advised on the 25th of June 2010 that her employment was to terminate. Accordingly, the 'Date of Dismissal' was the 25th July 2010.

On the 12th of July 2010 prior to the 'Date of Dismissal' the claimant was offered a position with the respondent which to all intents and purposes was the same as her existing position but on terms that were not on a par and were disadvantageous to her.

The Tribunal is satisfied that a redundancy situation existed. Further, the Tribunal is satisfied that the respondent did not dismiss the claimant with the intention of re-employing her on less advantageous terms for her. The Tribunal is satisfied that the respondent was not motivated by any such objective.

The Tribunal accepts that a set of circumstances arose which led to the respondent making a fresh offer of employment to the claimant having previously informed her of the termination of her employment.

The Tribunal is of the view, however, that as the claimant's position effectively became available once again prior to the 'date of dismissal', there was no basis for that dismissal to proceed. The claimant could simply have returned to work on her existing terms and without loss of continuity.

Further, the Tribunal is of the opinion that the respondent acted unfairly in selecting the claimant for redundancy in the first place. A reasonable employer would have approached the matter in a different fashion.

The claimant and a co-worker carried out identical duties. The claimant had greater longevity of employment. Having dismissed 'Last in First Out' as a selection criteria, the respondent was unable to satisfy the Tribunal that he had used any other objective selection criteria. There was no evidence to suggest that he carried out any meaningful evaluation against a skill matrix or otherwise.

There was no consultation with the claimant. She was refused any explanation as to why her position was selected for redundancy or as to the criteria applied by the respondent in arriving at its decision. The respondent simply refused to engage with the claimant.

Considering all aspects of what occurred, the Tribunal is satisfied that the claimant was unfairly dismissed. In awarding compensation, the Tribunal has had due regard to the absence of tangible evidence of the claimant's efforts to mitigate her losses.

The claimant is hereby awarded €9,000.00 in respect of her dismissal under the Unfair Dismissals Acts, 1977 to 2007.

The entitlement to compensation for unfair dismissal and to a redundancy payment being mutually exclusive, the claim for a redundancy payment is disallowed.

No order is made by the Tribunal under the Minimum Notice and Terms of Employment Acts 1973-2005.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)