

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:
EMPLOYEE

-appellant

CASE NO.
UD574/2011

against the recommendation of the Rights Commissioner in the case of:

EMPLOYEE,

-appellant

-v-

EMPLOYER

-respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. McGrath B.L.

Members: Mr. E. Handley

Mr. J. Jordan

heard this appeal at Wicklow on 12th November 2012

Representation:

Appellant: In person

Respondent:

Background:

This case is before the Tribunal by way of an employee appealing a recommendation of a Rights Commissioner ref: r-083906-ud-09/MMG. The employee is referred to as the appellant and the employer as the respondent. The respondent is a work placement IT company that supplies IT employees to clients.

The appellant contends that the respondent made him redundant because of reorganisation as stated on the form RP50 and this never existed and was not genuine. The respondent would not have wanted to reduce staff like him because they are a work placement agency and makes profits by placing employees with clients. The respondent contacted him after the redundancy and offered him several positions. The position that was made redundant always existed and it was a false redundancy. He would have been re-hired if the clients had picked him for a position. Assuming the redundancy was valid he was unfairly selected.

The respondent contends that they are in the business of providing contract IT professionals in three separate areas of employment; 1 as a recruitment agency, 2 through contract work, 3 on

the basis of open tenders. The availability and continuation of work as a result of a project or tender is not at the discretion of the company but is that of the client.

The appellant had been engaged for a project with a client company and this project wound down over a period between August 2008 and March 2009. Over this time the number of staff placed with the client reduced from eleven to none. The appellant was informed in November 2008 that his role with the client would cease in December 2008.

From the time that their client informed the respondent that the appellant's work would cease until the time of his departure the respondent attempted to secure alternative external project that would match the appellant's skills and expertise and no such project became available. Even after the appellant was made redundant the respondent still tried to assist him to find another position.

From the time of the ceasing of the project with the client company until the date of the appellant's redundancy in March 2009 the appellant was paid by the respondent whilst attempted to secure an alternative project role for the appellant.

During the period the appellant was made redundant from November 2008 to March 2009, eight employees were made redundant.

No employee with a comparable skillset was retained at the time the appellant was made redundant. Other employees were engaged on external projects that had not yet been completed or were awaiting placement on a project for which the appellant did not have the necessary technical skillset.

Respondent's case:

The Tribunal heard evidence from the managing director of the respondent. He explained that they engage IT people and place them on client sites. The site or the client company that they placed the appellant with was in the credit card payment arena. The client company (also known as CI) engaged them in 2008/2009. Then financial troubles happened and in October 2008 CL told them that they would not need the staff that they had placed with them. The respondent told the appellant was told in December 2008 that he would not be needed with CL.

The respondent told the appellant that they would try and secure another project for him. The respondent in trying to obtain another project for him went to existing clients and looked for new clients and they proposed the appellant to these.

The witness explained that it was the clients who decide who to use on projects and it was not the respondent who decided.

They did phone the appellant and ask him if he was interested in being put forward for projects and he declined. He was asked if he wanted to be put forward for two roles and he declined because of the locations.

The appellant was let go and no one else was kept on with that client. They continued to look for placements for the appellant.

It was put to the witness that the appellant would say that his role was being advertised. The witness explained that it was not his role being advertised it was "Oracle" jobs that was

advertised.

Appellant's case:

The Tribunal heard evidence from the appellant. He explained that he was hired from abroad by the respondent. He was offered a two year job. The appellant contends that his job is still advertised and that his job has not ceased or diminished. That the respondent failed him because they had many roles he could have done. The appellant gave evidence as to his green card and other work visas or permits. It was put to the witness that the evidence was that the respondent put him forward for roles and the clients did not want him and he agreed.

The appellant gave evidence as to his loss.

Determination:

The Tribunal has carefully considered the evidence adduced in the course of this fulsome hearing. The appellant comes before the Tribunal on appeal from the Rights Commissioner finding, ref: r-083906-ud-09/MMG, dated the 14th of January 2011.

The appellant came to Ireland in 2006 on foot of a contractual agreement with the respondent employer. The parties are in agreement with respect to the basis on which the appellant was employed and in particular it was accepted that the appellant's computer skills and expertise were required by the employer for placement with a third party finance company. There is no doubt that the employer/employee contractual arrangement between the appellant and the employer subsisted for the duration of the period when the appellant was on placement in this third party company. It is also accepted that the appellant was obliged to be the subject of a work permit held by the employer whilst working in Ireland.

The appellant's contract was renewed and extended to two years on the 01st August 2007. The permit changed slightly insofar as the appellant held a Green Card permit.

The appellant therefore worked for the best part of three years on the premises of the said third party finance company. Towards the end of 2009, in light of the economic downturn the said third party company indicated that it no longer required a number of the employees that had been placed on its premises by the employer company. The appellant's period of secondment with the third party therefore ended at the end of December 2009.

There followed a period of time wherein some attempts were made to place the appellant. This continued for a period of some six weeks after his return from secondment. Unfortunately the appellant's skill set was not picked up by any potential clients and eventually the appellant was made redundant in March of 2009.

It is worth noting that the employer had actively been trying to place the appellant from November 2008 through to February 2009 and the appellant continued to be paid as an employee of the respondent employer company.

The appellant believes that his redundancy was unfair because he could have qualified for many of the positions advertised in 2009. However the employer makes the case that it cannot be responsible for the decisions made by third party clients as to who they eventually select to fill

positions for which the employer might have put up several candidates.

The employer pointed to a number of comparators of the appellant who were let-go at this time in response to the downturn in the market place.

The employer states that the appellant was made redundant as it could secure no placement for the appellant within a reasonable period after the original third party had pulled its requirement for the appellant.

On balance, the Tribunal whilst sympathetic to the appellant accepts by majority that a genuine redundancy situation existed such that the employer was entitled to make the appellant redundant. The appellant was not unfairly selected as his co-workers on the third party site all lost their jobs at the same time. The employer did try and secure alternative employment for the appellant but without success. The Tribunal accepts that the employer had no influence over its clients own selection process when it comes to picking successful candidates and cannot extend the employers duty of care to include this process of selection.

In a minority finding by a member of the Tribunal:

The appellant was employed by vantage resources on a fixed term contract that was due to expire on the 20th august 2010.

The grounds on which the contract could be terminated before the 20th august were very clearly laid out in the contract and these grounds did not include the appellant being made redundant.

Based on the contract the appellant had a reasonable expectation that if he complied with all of its terms he would remain in the employment of the respondents until the contract expired on the 20th august 2010.

Therefore I hold that the respondents were wrong in terminating the appellant's employment before the date set out in the contract and that he was unfairly dismissed.

By a majority determination of the Tribunal the claim under the Unfair Dismissals Acts, 1977 To 2007, fails.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

