

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

EMPLOYEE
– *claimant*

UD1677/2010

Against

EMPLOYER
– *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. M. Gilvarry

Members: Mr. D. Morrison
Ms. R. Kerrigan

heard this claim in Letterkenny on 7th February and on the 30th March 2012

Representation:

Claimant: Ms. Fidelma Carron, Assistant Branch Organiser, SIPTU, Port
Road, Letterkenny, Co Donegal

Respondent(s): Mr Terry Cummins, IBEC,
Confederation House, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

The respondents are suppliers of breads, confectionery, pastries, hot food savouries and coffee to the foodservice market.

Respondents Case:

MB began working as the Human Resource Manager in 2006. In February 2010, the business began a restructuring process. A review of the sales performance resulted in cuts to sales specialists.

All staff were invited to a presentation on the 25th February 2010, by AS the Sales Director. The presentation looked at the current process and the future direction. A new structure was outlined and a process of how staff would be selected for the roles was explained. Staff would have a competitive interview which would also score performance to date. If unsuccessful the company would look at other opportunities in the business or there could be potential redundancies. An information pack was given to staff including their job description, a Q & A document and a letter of confirmation to include interview times. In total, forty two positions were in danger and a number of different sessions were held. At the end of the process ten staff were made redundant. The respondent is a large business and they asked staff who were leaving if they wished to apply for any vacancies in the business. Two expressed an interest and one got a new job.

The interview was competitive based, which looked at job performance and retention of key skills. A matrix to score the results was used. The weighting given was: - interview 70%, job performance 20% and skills retention 10%.

BE interviewed the claimant. Each panel consisted of two people, HR and Sales. After the interview process, senior management met to discuss the final selection for redundancies. Each person who was unsuccessful had a face to face meeting.

She met the claimant with BE on the 26th March and wrote to the claimant on the 30th March given him a breakdown of his interview marks. The claimant replied to her letter on the 31st March via e-mail.

On the 2nd April she wrote to the claimant, saying she was disappointed he did not feel her response addressed his queries. The letter also informed the claimant that MD her manager, would be the person to formally investigate his grievance.

On the 9th April, MD received a letter from the claimant which he has also copied to SIPTU. Offers were made to meet the claimant and to pay any expenses incurred but the meeting did not happen. Standard company procedure is that staff can bring a work colleague with them to a meeting. Every effort was made to meet the claimant and the decision was made to make him redundant. He received statutory redundancy plus an ex-gratia payment.

Under cross-examination MB said they wanted all staff to attend for interview. The company did not offer voluntary redundancies. The company does not recognise Trade Unions and she would have told the claimant that during meetings.

BE was the National Sales Manager and is now the Territorial Sales Manager. He said the respondent had to cut the number of category specialists and a manager for each group. As National Sales Manager he went through the restructuring process. The staff have a speciality in their area such as baking French bread and training staff in supermarkets. Their role also includes a sales function. The forty two staff selected had the same level of experience.

CD has specific skills and went to Canada and received training to a higher level than the other staff.

The claimant was one of ten staff he interviewed with LS from HR. The interviews lasted about forty five minutes. Two staff he interviewed were unsuccessful. A number of managers who were displaced because of the restructuring were moved into the category specialist role.

The feedback meeting was to inform the claimant that he was unsuccessful and to let him know his options which included possible van sales representative. The claimant was angry and disappointed. The other staff accepted the redundancies.

The respondent had expanded during the boom years and at one stage you could have had six category specialist staff in a small town on any one day. It had to be restructured.

Under cross-examination BE confirmed there was a vacancy in Donegal three months after the redundancies. One of the staff who left, gave BE his personnel number and asked if a vacancy arose to be considered. BE phoned him but was not sure if he interviewed him for the post. The claimant did not apply for the position.

CD was not part of the forty two because he was trained to a higher degree and also worked in Northern Ireland. CD was the person to go to if something could not be fixed.

In relation to the interview score and the below average marks, BE said he was not the claimant's manager and did not know if under-performance was raised with him over the years.

BE said due to the boom, the claimant got his performance related bonus like everyone else.

The interview score reflected the level of knowledge on the day of his interview. The whole management structure was gone. When the senior management met to agree on the redundancies, they debated the results and answers to the questions.

MG was a category specialist from 2001 – 2003. She moved to a bakery and back to the respondent. She was one of the forty two and attended the presentation. If you wanted a job, you had to apply for the position. She went through the process.

CD gave evidence on behalf of the respondent. In 2009 and 2010 he was mainly dealing with Coffee Z. He was in charge of a few sites in the Donegal area which carried Coffee, also areas in Dublin, and north of Galway. His title at this stage was business developer. He was dealing with all other aspects of business as well bread, hot food etc. There were two of them specialising in Coffee Z. He had spent time in Canada where he received training in Coffee Z. He passed on his knowledge to his colleagues. He installed the coffee Z machines and was unique to his position with one other colleague. However everyone sold Coffee Z to their sites. He also dealt in Northern Ireland and the claimant had accompanied him to some of these sites but would not have been aware of all his customers. The claimant had accompanied him to the golf outing but the claimant was not involved in the arranging of same. He confirmed he was not called to attend the restructuring meeting.

Under cross examination he explained that his role was different to that of the claimants, he was trained up as the business developer for Coffee Z. He was with the company for 10 years while the claimant was there for 2 years. He dealt with the coffee Z installations, the power, water,

wastage and the engineers. Once Coffee Z was installed the other category specialists would maintain and deal with the sites. As far as he was aware the claimant had never installed Coffee Z to a site.

Claimant's case

The claimant gave direct sworn evidence. He commenced employment as a category specialist in 2008, maintaining bread sales, merchandising and training. In 2009 their roles were changed in to different categories as the company wanted specialists for a group of customers they supplied. He and CD were part of this new team. He explained that CD was not the only Coffee Z representative; all six on this team were trained on this. He maintained there was no difference between him and CD. An outside company installed the coffee Z machines. Then the respondent staff including him would train the staff in the shop on the maintenance of the machines. He had done one of these installations with CD. He had been brought to Northern Ireland by CD as he could cover for him in his absence. The regional manager also sent him to the golf day to get to know these customers in case CD left the company. Everyone knew each other's role within the respondents.

He had previously worked for another large supplier to the food service market and as he was causing sales damage to one of the respondents range while in this role they had poached him. He had negotiated his starting salary with the business unit director who had told him what was on offer and the claimant had in turn told him what he wanted. He had asked him for €38,000 per annum and the business unit director had given him €34,000 per annum plus bonuses and the company car.

At the meeting in Dublin on the 25th February 2010 they were told about the restructuring which would result in some redundancies. They were informed that they would have to attend for interviews and if they did not attend they would assume they did not want a job.

He was interviewed by BG and LS. He thought the interview had gone very well which lasted about 45 to 50 minutes. However CD was not in attendance at the meeting of the 25th February nor did he have to attend an interview to retain his job.

On the 4th March 2010 he received a telephone call at 11.00am from BT informing him to be in Dublin by 1.00pm to attend a meeting. On the way to Dublin he was receiving telephone calls from other category specialists informing him whether their jobs were safe or not. He knew from these calls by the time he got to Dublin that he would be made redundant. The respondents told him that there were other jobs available in Dublin and Mullingar but he had previously told them he was not willing to relocate. In his position he had covered south Donegal and Sligo and he had informed the respondents that he was prepared to go as far as Carrick on Shannon.

He requested a copy of the interview notes and information based on his job performance by email on the 9th March 2010. He received the interview notes but never received the information regarding his job performance despite numerous requests. He was never told his job performance was below average and in fact three months before his redundancy the director had told him that his sales figures showed he was doing his job. He was never marked down on any appraisals.

He referred to his interview notes and specifically to the scoring of his “Negotiation Skills”. He had understood that the interviewees had discussed the questions and answers and he was puzzled why both could write different answers to this question. In his opinion the interview scoring was not fair or accurate, the questions were hypothetical and there was no right or wrong. BG was not aware of his performance within the company. In respect of his sales figures, he would have done very well during the summer months and throughout the year his bonus fluctuated but he always did okay.

He wrote to the respondents on the 25th March 2012 instigating the grievance process, raising the issue that he was upset and seeking clarification on a number of matters. He received a reply on the 30th March 2012; following this he submitted his 2nd stage grievance to the company. He required his union representative or his solicitor to accompany him to this meeting; however he was told he could only bring a colleague. His colleagues were not willing to attend with him. He received a reply to his second stage letter on the 14th April 2010 which stated that category specialists from Coffee Z were not affected by the redundancies; he argued that these were also part of this team.

The respondents advertised a vacancy for a category specialist in July 2010 for the same area he had covered with them, he did not apply.

Under cross examination he confirmed he had two years’ service with the respondent, he was not aware who would have joined the company before him. As part of his role he covered Coffee Z as well. He did not accept that CD was a Coffee Z specialist. He did not apply for the job advertised in July 2010 as he felt he would not be welcomed. It was an unfair process as everyone was not called for interview.

Determination

The Tribunal accepts that there was a genuine reorganisation within the Respondent Company that necessitated redundancies and a genuine redundancy situation arose.

The claimant is now seeking to claim for Unfair Dismissal based on what he submits was an unfair selection for redundancy.

Claims of this nature are based on the requirement on the employer to act reasonably in making a selection for redundancy. This follows on from Subsection (7) of Section 6 of the Unfair Dismissals Acts 1997 to 2007 as amended provides;

“in determining if a dismissal is an unfair dismissal, regard may be had, if the Rights Commissioner, the Tribunal or the Circuit Court, as the case may be, considers it appropriate to do so.....

- (a) to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal”.

However the provisions of section 6 (3) of the Unfair Dismissals Acts 1997 to 2007 as amended applies to dismissals for redundancy where ‘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’.

The first question for the Tribunal to determine is therefore whether the circumstances constituting the redundancy applied equally to one or more employees in similar employment. From the evidence adduced it was clear that they did, and that several employees in similar employment were retained and indeed that more than one employee in similar employment was made redundant. The claimant's complaint was partially based on the protection from consideration for redundancy of CD, rather than on a case being made that he himself was not in similar employment to other employees who had been retained.

As the Tribunal is satisfied that section 6 (3) of the Unfair Dismissals Acts 1997 to 2007 as amended applies in this case it falls to consider that section.

The section states; if (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 if (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 employee 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", then his dismissal shall be deemed to be an unfair dismissal.

The Tribunal was satisfied from the evidence heard that the respondent carried out a fair and equitable process in determining who to select for redundancy, and that none of the circumstances outlined in section 6(3)(a) were a factor in his selection. The Tribunal was further satisfied that section 6(3)(b) did not apply to his selection for redundancy.

In the circumstances the Tribunal were satisfied on the evidence heard that the employer acted reasonably and equitably in the circumstances and the claimant's claim for unfair dismissal is hereby dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

