

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

CASE NO.

UD540/2011

Against

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr R Maguire, B.L.

Members: Ms A. Gaule
Mr P. Trehy

heard this claim at Dublin on 25th July 2012 and 16th November 2012

Representation:

Claimant: Sean Costello & Co, Solicitors, Haliday House, 32 Arran Quay, Dublin 7

Respondent: Foley Solicitors, 7 The Plaza, Forster Way, Swords, Co Dublin

Respondents Case:

The respondent business is IT, dealing mainly with call centre and telephone equipment. A share sale occurred in September 2010.

JO director of the respondent gave evidence that the business was formally taken over by them on the 14th October 2010. The business had six employees, made up of, two in sales, two technicians, one on a consultancy basis and the claimant. There wasn't much lea-way in letting people go and no previous redundancy policy was in place. The business was making a substantial loss, much greater than was expected from the accounts presented, and it was necessary to consider all options to get it back to a break even basis. The claimant worked two and a half days a week as a financial controller. At a board meeting of 8th October a decision was taken to meet with the claimant. On 18th October a short meeting took place where the claimant was asked for suggestions on cost savings. He provided a list savings previously suggested but didn't have anything new to offer. His role was amalgamated with that of TM who was an existing financial controller with JO's other business and he was made redundant. He was paid in lieu of notice and the 24th November was his last day of employment with the respondent.

Under cross examination JO stated that he was a director of other companies, he was not aware that the claimant had prepared the accounts before the acquisition and while they didn't have full and final accounts he did not think that the business was losing as much money as subsequently emerged. He was aware that the claimant had made a complaint to the Rights Commissioner service for not having a contract of employment. As far as he was aware the complaint didn't go ahead but felt the claimant was totally within his rights to make the complaint. JO received a telephone call from the claimant on the day of the acquisition about TUPE (Protection of employees on transfer of undertakings), he didn't have any understanding of it but referred it to his solicitor who advised him that their purchase was a share sale and therefore not covered by the TUPE legislation. He did not refer back to the claimant at the time. Asked about the claimant's computer being accessed on 6th October and some of his e-mails deleted, JO stated that he was aware of it, but there was back up and everything was restored, it was no big drama. He rejected absolutely that the board meeting held on 8th October had anything to do with trying to get rid of the claimant.

TM financial director gave evidence that he worked as financial director for the company that took over the respondent business and he had taken over the role of the claimant. He gave evidence of doing due diligence and of being surprised at the fall off in revenue by September 2010. TM works five days a week and thought it important, for day to day follow up, to be there. At the meeting of 8th October it was agreed to re-locate to the parent company offices and consider redundancies. It was not discussed to make the claimant redundant but to meet with him on 10th October and look for cost saving measures and advise him that his job would be up for consideration.

TM denied that the meeting was heated but did say that the claimant moved back and sat behind his desk, he had to lean forward to see him and speak to him. He also denied that the claim to the Rights Commissioners in any way influenced the decision. The claimant replied by e-mail on 14th October outlining savings he had made to date, and making allegations about personal expenditure of the former managing director. These were taken seriously and after investigation he was assured by the former M.D. that the allegations were unfounded.

Claimant's case:

The claimant gave evidence that he began as financial controller in 2004. In September 2010 all staff were informed by e-mail of a takeover. While he was aware of auditors in the respondent business mid-year he had no involvement in the due diligence. He was totally shocked and worried at the e-mail notification which stated that the new owners would be in, within the hour. JO and TM walked in and talked to everyone. TM followed the claimant to his office and asked for to see management accounts. They looked for access to the computers. The claimant asked about his job and was told "it depends on how you get on with me".

It was the claimant's evidence that the company had made profits from 2003 and had large cash reserves in August 2010. The former managing director had taken monies out of the business for personal expenses and other things.

On 6th October the claimant could not access his computer, it appeared his password had been changed. TM said he didn't know anything about it. When IT became involved, the claimant rang TM back, he did remember and gave him a new password but everything had been deleted.

When the respondent was moving premises the claimant had already been sent home. At the meeting of 11th October the claimant asked for a witness to be present. He was told to come up with a cost saving plan to save his job as financial controller by Friday. The claimant didn't work on Fridays. No mention was made of any other position being made available. He was brought to an empty shell of a building on 18th October and asked to sign an RP50 form. The decision had absolutely been made.

Under cross examination the claimant denied that anybody would have needed access to his password for payroll while he was on sick leave. He did not attend on the Friday with cost saving measures as he worked for another company on Fridays and the respondent was fully aware of that.

Determination:

The Respondent has an obligation in relation to redundancy situations to show that the situation in fact meets the criteria laid down for a valid redundancy in the Unfair Dismissals Acts. In this case, the Tribunal is not happy that the respondent justified the dismissal on the grounds of redundancy and on that basis the Tribunal finds that the claimant was unfairly dismissed. There was no evidence of any alternatives to redundancy being proposed or considered. It was not shown that the termination had the required level of impersonality, and indeed the Tribunal finds that the termination was based on the claimant as an individual and not the role he was fulfilling.

The Tribunal is however not satisfied that the claimant adequately mitigated his loss. In all circumstances, the Tribunal awards the claimant €10,000 for his unfair dismissal, this is in addition to any sum already paid to the claimant by way of redundancy.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)