

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

EMPLOYEE – *claimant*
RP1272/2011

UD920/2011

MN1054/2011

Against

EMPLOYER – *respondent*

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P O'Leary BL

Members: Mr R Murphy
Mr J Dorney

heard this claim at Dublin on 1st October 2012 and 19th December 2012

Representation:

Claimant(s): Mr John Curran BL
Law Library, Distillery Building, Church Street, Dublin 7

Respondent(s): Mr Robert O'Mahony
Hamilton Turner, Solicitors, 66 Dame Street, Dublin 2

The determination of the Tribunal was as follows:-

Background:

The dismissal was in dispute. The claimant was employed as an Operations Supervisor of a fitness club in Dublin city centre. The club was part of a chain of fitness clubs. During a restructuring process the claimant's position was made redundant. The company contended that the claimant was offered a higher position as Fitness Manager, but that he turned it down. The claimant contended that he was only offered to apply for the Fitness Manager position and that this manager expressed reservations about his ability to do the job. After the Fitness Manager position was filled he was given a role as Fitness Instructor. The claimant refused to sign the contract and brought a grievance regarding his pay which had been reduced to €20k. His pay was confirmed at that rate. The claimant considered that he had no option but to resign.

Claimant's Case:

The claimant gave evidence that he commenced his employment at the fitness club in 2005 as a fitness instructor. He was promoted to Operations Supervisor in 2008 and was given a salary of €25k. In May 2010 he agreed to a 10% pay cut along with other employees as the company was in financial difficulties. His pay was then approximately €22.5k. There were no issues with his performance.

In September 2010 he was informed that there was a possibility of redundancies in the company. In November 2010 he was informed that his position was being made redundant. His was the only role made redundant at the club he worked in. His manager told him that he could apply for the position of Fitness Manager. His manager told him that she had confidence in him for the job, but on previous occasions she had said that she didn't. She had reservations about whether he had the ability to fulfil parts of the role like payroll, stock and staff training. The claimant declined to go for the job. He did not consider it a reasonable alternative. The role was also advertised internally. He questioned why he would have to do three months' probation in the role. He believed that he had already proven himself. He was never offered the role.

He had personal difficulties working with his manager. After he was married and had a baby his manager had asked him if he was having a relationship with a receptionist at the club. The claimant was grossly offended by this. That he would have to work with the manager on a daily basis if he took the role of Fitness Manager was a determining factor in him not going for the role. He agreed that he was nervous of taking on the responsibilities that came with the new role. There were also new rosters which didn't allow the claimant sufficient rest and required him to take a taxi to work due to the earliness of the shifts.

He was offered the position of Fitness Instructor. The claimant covered the Fitness Manager role in January and February while the company awaited the new appointee. The claimant was promised reimbursement for this time but he did not receive it. He thought his salary would remain at €22.5k when he took the position of Fitness Instructor but it was reduced to €20k.

He did not sign the contract for Fitness Instructor. He invoked the grievance procedure over his reduced pay. He was under huge financial strain due to the cut in his wages and his growing family. He was upset at having been demoted. The result of the grievance procedure was that his pay would remain at €20k and he was requested to sign the Fitness Instructor contract. He appealed the result, but the decision was upheld by letter on 31 March 2011. He was advised in the letter that if he did not sign the new contract the company would consider that he no longer wished to stay with the company. The claimant replied that he had never been offered the Fitness Manager role as had been suggested in the correspondence. He then resigned from his employment. He would have taken statutory redundancy but it was not offered. He gave evidence of his loss.

During cross-examination the claimant agreed that he had been confident in his abilities in the role of Operations Supervisor. He felt that some of the responsibilities of Fitness Manager were outside his scope. Also he had a personal issue with the Club Manager. He did not raise this issue with the company as he was dealing with her at meetings and he believed that the CEO and District Manager would believe the Club Manager over him. He believed that he would have been shown the contract for Fitness Manager if they were going to offer the job to him. He agreed that he had been given training in the new computer system and software. He denied that the Club Manager was merely doing her job in assessing his abilities. He denied that recently becoming a father had led him to decline the role of Fitness Manager.

He could not see how he possibly had the skills for a fitness manager role. He was never given an outright offer and he was not informed that the position was his. He agreed that he was subject to a pay cut in 09/10. He could not recall if he spoke to anyone about his grievance from November 2010 to February 2011. He maintained that he did not have to take training in spin for his shift to be changed to an early shift. He was not told that there may be an opportunity to undertake work as a personal trainer. CB told him that there were rumours circulating that he was spending a lot of time with a particular member of staff and that his wife may have concerns about this. He was happily married and his relationship with staff was friendly and had nothing to do with the job he undertook.

After he resigned he applied to various companies for jobs including education, and graphic design as he wanted to try and earn some money. He left the respondent as he came to the conclusion that nothing was going to be resolved.

Respondent's Case

CB, Club manager gave evidence that she was assistant manager in November 2008. She left in 2011 to pursue another role. Once JD came on board she was involved in the role of reorganisation. New operations systems were introduced and a better service was offered to customers. It looked at all clubs to ensure that employees were trained in the relevant roles. All employees were trained individually to enable the respondent to restructure clubs. She was asked to examine current roles, monitor current employees and prepare them for the new roles.

She met the claimant and she felt that he was an ideal candidate for the position of fitness manager. The claimant outlined his concerns to her and she told him that training would be provided. She met the claimant a second time and she asked him to think about it, he asked her about bonus and commission. The claimant asked for more time to consider it. At the third meeting the claimant explained that he had a monetary concern and he felt the role of fitness manager was not right for him. She asked him if he was sure and he told her he was not accepting the role. She told him that her role was changing from club to general manager. She had confidence that the claimant would be able to undertake the role.

It was untrue that her management style was demeaning and if this were the case she would have liked if it was brought to her attention. She never accused the claimant of having an affair. A number of staff brought it to her attention that the claimant was spending a lot of time with a member of staff at the reception area. She told the claimant to behave in a professional manner and it was about being available to customers.

She did not offer the fitness manager role to any other employee. By letter dated 30th October 2010 the claimant confirmed that he was not accepting the role. The respondent handbook was in reception for all staff to view if they had concerns. She was in hospital in 2011 and when she returned she thanked the claimant for taking on extra responsibility in her absence. Numerous changes were being implemented and employees got involved as a team.

The claimant addressed his concerns to her in February 2011. The claimant would revert to the position of fitness instructor if he did not accept the new role he was offered. The claimant was offered to do spin training; a high proportion of clients went to the gym early in the morning. The claimant could have done the morning shifts. The claimant decided not to go forward for

spin training. The role of a personal trainer was to provide individual training for a customer and he/she could charge €35 to €40 per session.

In cross examination she stated that if the claimant accepted the role of fitness manager he would receive confirmation in writing. The role of operations manager no longer existed. She met with the claimant and explained to him that restructuring was an opportunity for a new role.

She did not perceive this as a redundancy meeting; it was an opportunity for promotion. She was of the opinion that a number of employees were happy with the salaries even though it was reduced. The role at €22.5k was different than the role at €20k.

JD gave evidence that he had worked in the health and leisure area for forty two years. He retired in 2007. In May 2010 the JK group was placed in examiner ship. The CEO of the respondent asked him if he would take it over as it had lost a considerable amount of money. He was asked to undertake an overview and come up with a structure for the respondent. It had 124 franchises in the UK who were in a similar situation.

The respondent paid the going rate to its employees. Its objective was to provide a quality service for its customers and guarantee success. The role of fitness manager was to liaise with the customers. He was familiar with the claimant's role and obtained existing terms and conditions from all employees over ninety days and analysed it. There was no great difference between the role of operations supervisor and the role of fitness manager. He had a clear objective to avoid redundancy. There were no redundancies in the administration department. He organised ninety days training at the clubs. The respondent was bringing in cash at this time and the board of directors offered him a position as chief executive. He spoke to staff and was available and could be contacted at any time. Changes occurred in the context of the overall business and it avoided shedding staff.

He found the claimant very affable and no one else was offered the role that he was offered. He was aware that the claimant lodged a grievance and management had to deal with this grievance. The respondent did not have time to write a grievance procedure for every club. He received a number of emails from the claimant and he told him he could not answer his question at the time and he would have to reserve his judgment. He issued a letter to the claimant on the 31st March 2011 whereby he outlined the various options that the claimant had been offered to address his grievances. The claimant was asked to sign and return his contract to CB within 48 hours of receipt of this letter or the respondent would consider that the claimant no longer wished to continue in the respondent.

All employees were given the opportunity to provide personal training and they could use the respondent's facilities. The claimant was offered alternative employment and he was surprised when the claimant had not considered it. He was more surprised when the claimant declined and submitted a grievance.

The business was in deep financial difficulty. All the positions that were on offer necessitated some legal knowledge. The respondent had made errors in that the claimant worked late and started early and he had demands with his new family. The respondent operated during other people's leisure time and employees worked some late nights.

In cross examination he stated he did things in accordance with the law and did not have redundancies. A contract of employment issued in error to the claimant on the 6th December and it was re issued in January. The claimant was given sufficient time to consider his position and

sign a contract. He had no direct involvement in offering the claimant a job.

Determination

The letter of 31st March 2011 in the last paragraph gave the claimant an ultimatum

“With the grievance investigation now concluded, I ask that you sign and return your contract to CB within 48 hours of receipt of this letter or we must consider that you no longer wish to continue in the company’s employ.”

The Tribunal noted that the notice on the letter of the 31st March 2011 expired before his letter of resignation and therefore the effective date of dismissal was the 31st March 2011 which would be some days before the claimant resigned. This is in essence a dismissal.

In the circumstances the claimant’s position of operations supervisor was no longer in the company and the alternative employment offered to him was as a fitness instructor on a salary of €20,000.00 which the Tribunal considers not to be suitable alternative employment. The claimant did not feel that he was capable of performing the duties of fitness manager. Therefore the Tribunal awards the claimant a redundancy payment under the Redundancy Payments Acts, 1967 to 2007 based on the following criteria:

Date of birth	10 January 1978
Date employment commenced	15 th December 2005
Date employment ceased	3 rd April 2011
Gross weekly pay	€432.69

This award is made subject to the claimant having been in insurable employment during the relevant period under the Social Welfare Acts.

As the Redundancy Payments Acts and the Unfair Dismissals Acts are mutually exclusive, no award is being made to the claimant under the Unfair Dismissals Acts, 1977 to 2007

The claimant is entitled to four weeks gross pay in the amount of €1,730.76 (€432.69 per week) under the Minimum Notice and Terms of Employment Acts, 1973 to 2005

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)