

## EMPLOYMENT APPEALS TRIBUNAL

### CLAIM OF:

EMPLOYEE - *Claimant*

Against

EMPLOYER - *Respondent*

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms K.T. O'Mahony B.L.

Members: Mr J. Browne  
Ms S. Kelly

heard this claim at Portlaoise on 2nd November 2012

### Representation:

Claimant: Mr Ger Kennedy, S I P T U, Connolly Hall, Churchwell, Tipperary Town, Tipperary

Respondent: Eversheds O'Donnell Sweeney, Solicitors, One Earlsfort Centre, Earlsfort Terrace, Dublin 2

The determination of the Tribunal was as follows:-

### Summary of Evidence

The respondent company was the landlord of a retail outlet centre which opened in 2002. It was the first of its kind in Ireland. The claimant commenced employment with the respondent as a security/customer service officer in October 2007.

Between 2006 and 2008 the respondent began to sustain financial difficulties due to the completion of the building of the motorway and a major competitor entering the market. In 2008 the company had no option but to restructure the operations of the centre. This impacted on all staff at all levels within the respondent's business. Around this time there were three security staff and two cleaners working in the centre.

In 2010 the centre was under continuing financial pressure and all internal running costs were reviewed, including the cost of cleaning the centre, which was a major cost. After some unsuccessful negotiations with the cleaning company it was decided to bring the cleaning back in-house. The company sought cost saving measures from all areas before looking at the workforce. Due to the reduction in the footfall in the centre the same level of security was not required. The company wrote to all employees on 9<sup>th</sup> September 2010 advising that the cleaning function and

security function within the centre were to be merged and as a result the position of security officer would no longer be available. The new position of a “security/cleaning operative” was to be created. The centre would have one cleaner working five days per week. In the new system the claimant would maintain 80% of his original role and would only have to perform both roles one day each week.

The company entered into dialogue with its three members of staff, including the claimant, who were to be affected by the change. At a meeting on 14<sup>th</sup> September 2010 the three members of staff raised concerns about health and safety and about the ability to divide their time between the duties of a security operative and a cleaning operative.

Further consultation took place on 21<sup>st</sup> September 2010 with the staff and their trade union representative (TU). TU enquired if a risk assessment had been carried out in respect of the company’s proposals and sought firm details of the proposed new roles and rosters. The company provided the information requested. The respondent received a positive reaction from the other two employees but the claimant had reservations. The respondent’s financial position was deteriorating as some tenants were paying minimal or no rent. The respondent’s Development Director (the director) advised that CBRE had carried out a full assessment on fire risk and Health and Safety and assured the respondent that there was no risk to staff or customers.

On 24<sup>th</sup> September 2010 it was indicated to the company that the claimant intended to cooperate with the changes. The company were happy to be maintaining their original team of employees. However, the claimant subsequently refused to undertake the revised duties.

On 27<sup>th</sup> October 2010 the director wrote to the claimant reiterating the company’s position with regard to the restructuring and revised duties and informed the claimant that, due to his refusal to undertake the revised duties and the company’s inability to accommodate him in an alternative role, his current role would become redundant. The letter gave the claimant four weeks’ notice of the termination of his employment. The claimant was informed of his right of appeal.

The appeal hearing was conducted by the respondent’s managing director (MD) on 16<sup>th</sup> November 2010 and the claimant was represented by his trade union. The director was present to outline the reason for the restructure and the proposed solution to the respondent’s position. MD wanted the claimant to remain in the company. MD’s function was to examine whether the earlier process had been properly carried out and to consider any new proposals. The claimant’s position was that it was necessary to have three workers on site every day. The claimant felt concerned that his then role would be compromised if he had to deal with an incident in a store and clean up a spillage elsewhere. He also had concerns about compliance with the fire policy in the proposed restructuring of roles. It was confirmed to the claimant that health and safety would take precedence over any cleaning requirements and that disciplinary action would not be taken if he put up signage in an area where a spill had occurred while dealing with another security problem. The claimant did not put forward any alternatives to his position being made redundant. MD left the offer of the new position open to the claimant until 22<sup>nd</sup> November 2010, to give him time to reflect on the offer. On 23<sup>rd</sup> November 2010 the claimant confirmed his decision not to accept the new role. The company paid the claimant his statutory redundancy entitlement but the claimant did not return a signed RP50 and the company could not claim the 60% rebate from the Social Insurance Fund. The claimant was replaced by a part-time employee whose hours were increased to full-time. The respondent’s position was that this employee was not as experienced in the role as the claimant.

CBRE (the respondent's managing agent and Centre Management) confirmed to the respondent that combining three roles into two would provide adequate cover on site and would, therefore, not be in any breaches of Health and Safety. The claimant was also provided with this assurance.

The claimant's position was that as a security officer he also had responsibility for ensuring the fire evacuation procedures were implemented correctly and followed when necessary. In order to process the evacuation plan effectively it required three personnel. The new role of security/cleaning operative would reduce the number of available personnel to two. The claimant was not provided with an alternative evacuation plan to take account of the reduction in personnel nor was a fire drill conducted based on the reduction. During the consultation process, he had tentatively agreed to take on the new role and carry out the revised duties; however, a security incident, which had occurred on the site and was reported to management by the Gardaí, made him reluctant to take on the new role. The claimant felt that if he took on the revised duties he would be carrying out dual roles. He was concerned that if a health and safety incident occurred he would not be able to deal with it effectively if he was carrying out cleaning duties.

The claimant spoke to a colleague about the possibility of working three days per week in his current role as security officer and sharing his fourth day of cleaning duties among his colleagues. His colleagues were agreeable to this arrangement but the company did not provide their approval.

The claimant accepted that towards the end of his employment the centre was less busy than when it first opened in 2002. He agreed that he did not suggest alternatives to being made redundancy at his appeal hearing but that was because he had raised possibilities previously with a colleague whom he trusted but nothing was done about these. There was a dispute as to whether the claimant was made aware that the other two employees whose roles were also changing offered to do the claimant's cleaning duties.

## **Determination**

Due to a number of factors the respondent was undergoing serious financial difficulties and took the decision to combine the role of security with some cleaning duties. The role of security/customer service officer was made redundant. The respondent made an offer of reasonable alternative employment to the claimant. The position offered left 80% of his role in tact and required him to undertake the dual role involving both security and cleaning duties only one day per week. During the consultations process with the claimant and his trade union representative and at the appeal hearing the respondent addressed and provided fair reassurances to the claimant in respect of any misgivings he had about the dual role. In the circumstances the Tribunal unanimously finds that the dismissal was fair and the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)