

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE
- *claimant*

CASE NO.
MN687/2011

UD639/2011
WT261/2011

against
EMPLOYER - *respondent*

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997
UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms J. McGovern B.L.

Members: Mr C. McHugh
Mr D. Thomas

heard this claim at Dublin on 22nd November 2012
and 3rd April 2013

Representation:

Claimant(s) :

Respondent(s) :

Respondent's Case

The respondent company is an international security company providing services to the security industry. The company employs 160/170 people in its Dublin office. The Group General Manager known as (O) gave evidence that from 2008 onwards the company was haemorrhaging money. It had lost a substantial amount of market share and business had decreased by 28%. The company had to introduce cost savings measures and all options were considered. As part of this process it was necessary to make some employees redundant. The witness in conjunction with the group chairman (Mr R) made all the decisions in relation to the positions selected for redundancy and a total of five employees including the claimant were made redundant in 2010. The company did not have a programme for the implementation of the redundancies and decisions were made as they happened on an ongoing basis. None of the positions that were made redundant have since been replaced except for the appointment of a temporary accountant

position.

The claimant was employed as the control room manager and was responsible for the operational work of the control room and customer services. The claimant had been absent on sick leave for a period of time in or around October/November 2010 and during this time his responsibilities had been carried out by his line manager known as (G) who was employed as the general manager. The witness gave evidence that he had a conversation with the group chairman concerning the possibility of (G) subsuming the claimant's responsibilities on a permanent basis. He then spoke with (G) concerning this possibility and (G) felt that he could take on the claimant's responsibilities on a permanent basis. The claimant returned to work in December 2010 and was told at a meeting on 16 December 2010 that his position was at risk of being made redundant and he was subsequently informed at a meeting on 20 December 2010 that he was being made redundant.

The witness accepted that the company has been profitable since 2008 and was profitable at the time of the claimant's dismissal. He told the Tribunal that the claimant would not have been aware of the possibility of him being made redundant until the 'at risk' meeting took place in December 2010. The Tribunal heard further evidence in relation to two job advertisements placed by the respondent company on a job advertisement website. The position of assistant control room manager was advertised in or around 12 September 2010 but this position was never filled. The position of assistant operations security manager was also advertised on 16 February 2011. This position had been held by employee (K) who had not successfully completed his probationary period but this position was never subsequently filled. The claimant had held this job for a period of time and had been promoted out of this position.

The Tribunal heard further evidence that the claimant had received a written warning in September 2010 from (G) for his failure to submit weekly reports in accordance with a direct request from (G) to do so. The claimant appealed this disciplinary sanction and in or around the same time the claimant made a complaint of harassment and intimidation by (G). The witness accepted that these matters were inextricably linked. The witness was appointed to conduct the appeal hearing and investigate the complaint of intimidation and harassment but his impartiality was questioned and Mr. (L), a senior executive was subsequently appointed to conduct the hearing. Ultimately, following exchanges of correspondence the parties could not come to an agreement as to who should hear the appeal and no decision was reached as the matter did not proceed to a hearing.

The next witness (G) gave evidence that he is employed as the general manager of the respondent company and was the claimant's line manager. He gave evidence that he recalled the claimant expressing surprise at his (the witness's) appointment and he (the claimant) was not comfortable with his appointment. However he had a professional working relationship with the claimant and there was no open friction or animosity between them. He gave evidence that from July 2010 he requested weekly reports from the claimant. The claimant initially provided a number of weekly reports but failed to provide reports following his return from holidays in August 2010. This resulted in him taking disciplinary action against the claimant in the form of a written warning. The witness was aware that the claimant had raised allegations of bullying against him and he provided a written response to (O) in relation to the allegations.

The witness gave further evidence that he was asked if the claimant's responsibilities could be fitted into his portfolio of work on a permanent basis and he replied that they could. He

adsubsumed the claimant's workload during the claimant's absence on sick leave. He was subsequently asked by (O) to implement the claimant's redundancy and while this was unpleasant to do so it was a relatively straightforward process. He conducted two meetings with the claimant and his notes of those meetings were provided to the Tribunal. He gave evidence that the claimant commented sarcastically "surprise, surprise" when told that his position was being made redundant. The claimant was advised that there was no suitable alternative position for him in the company. The claimant left the premises immediately after the meeting escorted by (ML) who was part of the senior management team. This was done from a security aspect as the claimant was privy to all sorts of information and to keep him buffered from other staff. He further told the Tribunal that he did consider the claimant for the position of operations manager but the company had a very capable operations manager at the time. He gave evidence that the claimant lacked business maturity and having him interact with clients would have a detrimental effect on the company.

The witness told the Tribunal that the senior management team had daily meetings each morning. These were attended by the witness, the claimant, the previous witness (O), (M) and (D). He gave evidence that he received weekly reports from (M). He did not request weekly reports from (D) and the claimant had an issue with that. He accepted that the claimant had queried why he was the only one being asked for weekly reports and denied that he replied "that's none of your business". He denied that he used an expletive or said "just do it". He told the Tribunal that the reports were required for record purposes and statistics as he had to submit reports to his manager which are demanded by the chairman. As a senior manager he did not feel it necessary to go into vast explanations as to why he needed the reports from the claimant. It was a simple requirement and he denied that he was aggressive or used bad language. He recalled the claimant saying that he did not want to be micro-managed. He did not recall excluding the claimant from senior management meetings. He accepted that at no stage did he inform the claimant that there was a problem with him interacting with clients but he did speak with him on one or two occasions concerning his manner when dealing with people.

The next witness (M) gave evidence that he is employed as a financial accountant by the respondent company. He reports to (G) and the chairman (Mr R). He worked with the claimant for 3 years and they had a good relationship. He gave evidence that the company has struggled over the past 5/6 years experiencing a 30% reduction in turnover. From 2007/2008 onwards it was necessary to introduce cost cutting measures including redundancies. As a result of the implementation of redundancies a saving of €700,000 per annum was delivered. A 10% reduction in salaries was also introduced. He had no involvement in the claimant's selection for redundancy apart from being asked of the financial implication for the company.

He gave evidence that he attended the 'at risk' meeting at the request of (G) when the claimant was told that his position was at risk of being made redundant. He accompanied the claimant to his office after that meeting and the claimant made a phone call and took some personal items. He offered to leave when the claimant made the phone call. He was trying to give his support to the claimant as a colleague. He accompanied the claimant off the premises and shook hands with him. He had carried out the same actions when other employees had been made redundant and his actions were not unusual in any way. He also attended the meeting on 20 December where the claimant was made redundant. The meeting was polite and the claimant did not make any comment concerning alternative positions that could be filled by him.

He told the Tribunal that he submits daily, weekly and monthly reports to (G) and the chairman

and he had no difficulty in submitting these reports as he understood the need for them. These reports are an intrinsic part of his work. He gave evidence that in February 2011 the company was moderately profitable.

Claimant's Case

(D) gave evidence that she joined the respondent company as a personal assistant to the chairman in 2005. She was subsequently made office manager and later promoted to the senior management team in December 2008. She gave evidence that she was part of a project team in Summer 2009 that was tasked by the chairman to undertake a review with an aim to introduce savings and cut costs. This team came up with innovative ideas and reported that savings of €350,000 could be achieved if the ideas were introduced. (G) was not part of that team as he had just joined the company. The ideas included 2 redundancies and a 5% pay cut across the board and these were introduced although she, herself did not take a pay cut as she had recently been promoted and had not received a salary increase following that promotion.

She told the Tribunal that the claimant was a great colleague and was a fountain of knowledge. She never had any question over his level of business maturity or professionalism and disagreed that he did not communicate well. She was aware that the claimant had made an allegation of bullying against (G). She gave evidence that (G) asked her for opinion on this and she told him that she had witnessed his behaviour towards the claimant and could understand why the claimant had made the allegations. She concurred with the claimant's claim of bullying and harassment. She had also experienced similar behaviour from (G) towards herself on occasions. She told the Tribunal that (G) used bad language towards herself and the claimant. She did not make a formal written complaint about his behaviour. She gave evidence that senior management meetings could be very fractious and the claimant was also excluded by (G) from operational issues. She saw no evidence of the claimant resisting (G's) appointment to his position as general manager in the company.

She was made redundant in November 2010 and was very surprised by this as she had only received a pay rise a couple of months previously. (O) had informed her of the decision that she was to be made redundant and (M) was also present. She was not escorted out of the building and no alternative options were put to her. She asked to be considered for two vacant positions but was told that there was no suitable position for her. She gave evidence that she had a really good working relationship with (O) but thought that (G's) behaviour was insidious and she spoke to (O) about (G's) behaviour. She told the Tribunal that senior management meetings became less transparent and this had not been the case previously. Operational issues were not discussed at senior management meetings and when she raised this with (O) he said he had not got around to it.

At the outset of his evidence the claimant withdrew his claims under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and the Organisation of Working Time Act, 1997.

The claimant (MB) commenced employment with the respondent on 3rd April 2000 and was dismissed by way of redundancy on 31st December 2010. However he contended that he was unfairly dismissed because he had, inter alia, made a complaint of bullying and harassment against G.

The claimant was promoted in May 2003 and became part of the senior management team in November 2004. He had a good working relationship with this group. His last performance

review with the respondent was in 2006 and he did not get the extra training recommended on foot of that review. His job involved his control room duties together with managing a team of people. Following the death of one of the members of the senior management team the team was reconstituted to address certain managerial issues. After about a year (G) was appointed. The claimant felt that the dynamic of the team changed after that as well as his relationship with (O). (O) took a step back in terms of management and let (G) take charge. That said, the claimant felt his working relationship with (O) was still good. The claimant felt that the (G)'s management style was unprofessional. He did not communicate well with staff and was dismissive of issues staff may have had. When asked if he was uncomfortable with (G)'s appointment the claimant said that he had no difficulty with it although he understood that the position was not to be filled for another couple of months.

As control room manager the claimant said that his area was the communications hub of the company - the heart of the operation. From the control room information was sent to the rest of the departments and he felt it was vital that he would be kept in the loop for all new information. He felt that sometimes however he was not privy to information he considered important for the smooth running of his job.

In July 2010 (G) had requested the claimant to provide weekly reports to him and although the claimant could not see the reason for such reports he did so with the exception of a week while he was on holidays in August 2010. The claimant questioned the need for such a written report as he gave the information verbally on a weekly basis. He asked (G) whether other colleagues were required to do the same and he was told to just 'get on with it'. On 30th August 2010, on his return from holidays (G) asked the claimant for the weekly report and the claimant again questioned G as to the reason why this report was necessary. G then used expletive language and told the claimant to mind his own business. Later that day the claimant indicated to (O) that he wanted to make a formal complaint about (G)'s behaviour. (O) told the claimant that he was already aware of the incident and asked the claimant to reflect on whether or not he wanted to pursue the complaint. If so he should make the complaint in writing.

On return to his office (G) demanded that the claimant provided this report by 10:00 am the following morning. The claimant felt threatened and intimidated and went to (O) on the 1st September who the said, told him he had no valid claim and didn't want to enter into it. Regardless the claimant sent a typed copy of his report to (O) and on the same day received a letter from (G) regarding a disciplinary matter. The claimant ultimately attended this meeting on the 27th September 2010 following a period of sick leave. He was issued with a formal written warning and indicated that he wanted to appeal it and asked (G) who the appropriate person was but (G) did not know. On 30th September 2010 MB wrote to (O) indicating he wanted to appeal and asked for the company hand book. MB was on certified sick leave from 1st October to 15th October. On his return to work on 18th October the claimant found his duties reduced. Matters progressed regarding his appeal but confusion arose as to when it was to be heard and by whom. MB's legal advisors were supposed to meet with the respondent's representatives but no date was agreed. MB was on certified sick leave between 20th October and 9th December for stress related illness. On his return to work MB said that the codes and passwords were changed on his computer and he felt this was unnecessary. The matter of the appeal was progressing but there was confusion regarding the terms of reference and whether or not the issue of MB's own complaint against (G) was also to be heard. No agreement was reached between the claimant's legal advisors and the respondent.

On 16th December MB attended work and nothing unusual occurred until late afternoon when

he was notified by (G) that his role was 'at risk/under threat'. He was told that he could stay at work or take the following three days off. MB understood that he was being dismissed at that juncture and he had no choice but to finish up on the 16th December. MB gave evidence that (G) instructed (ML) to 'escort' him to his desk and collect his belongings. MB called his legal team and left the building as requested. On 21st December he attended a meeting to discuss alternative positions as his position was being made redundant. MB was in shock and was surprised this was happening. He also felt frustrated about the progress of the disciplinary matter. He felt the decision to make him redundant had been made in advance of the 16th December.

As part of his evidence MB was taken through a list of other redundancies made in the company and asked for his comments but he was not directly involved in the redundancy process for any of the persons mentioned.

The claimant gave evidence of loss.

On cross examination MB was asked whether he thought he should have been given (G)'s job. MB stated that he never held that view but understood that the position was not going to be filled for a number of months so he was surprised at (G)'s appointment. In terms of the weekly report, MB was asked if he thought it was a reasonable request. MB stated that he thought he should have been given a reason why it was necessary and if he was asking a team member to do such a report he would have said why it was necessary. He indicated that the report took about twenty minutes to prepare and was he not happy having to repeat information already given verbally in the weekly meeting. MB did not report his initial dissatisfaction about the report to (O) as he has lost confidence in him due to a previous occasion and did not go to the Mr. R as he feels any complaint would not have been entertained by him,

When asked about providing the report to (G) on 30th August MB stated that he had no difficulty with (G) requesting it but he still had a problem with the necessity of the report as other colleagues were not asked to do one. It was put to him that ML had to do a report also but MB believed that report to be of a different type.

MB was asked why he went to (O) about his bullying and harassment complaint against (G) but did not go to him about the report issue if he had lost confidence in him. MB stated that he had no where else to go with his complaint. It was put to MB that he was aware of the Company Handbook as he had an input into drafting a portion of it. MB had no recollection of this but did say that he was aware of a code of conduct for disciplining hourly paid staff if necessary. He did not know this document related to salaried staff. Any appeal that lies under the code of conduct is referable to Mr. R and MB was asked why he did not appeal to Mr. R? MB was not happy with the lack of clarity regarding any appeal in his case. When he asked (G) where he should appeal to (G) said that he didn't know. On re-examination the claimant then indicated that he understood the appeal should be made to (O).

When asked why he thought he was dismissed on the 16th December when he was given the option to stay at work for the following three days MB stated that he was 'told' to come back in three days and then escorted from the building. He did not feel he had an option. MB did not look for or ask about alternative positions in the respondent company as he felt there was no point and the situation was a 'done deal'. MB confirmed that he believed there was no alternative position in the company on his level.

ML gave further evidence concerning the financial position of the company and the company's market share. He commented on the redundancies made in the company and confirmed that none of the positions made redundant have been replaced. He confirmed that he was involved in the redundancy process.

Determination

The Tribunal considered the evidence of both the claimant and respondent carefully and taking all matters into consideration the Tribunal believes that a real redundancy situation existed in the respondent company in December 2010. Furthermore, the Tribunal does not feel that the claimant was unfairly selected for redundancy.

The Tribunal accepts the evidence of ML that the respondent needed to make savings and as part of that, a series of redundancies were necessary. A company can be profitable and at the same time still need to make savings by way of redundancies. Of all of the positions made redundant none of them have been replaced or refilled. The claimant's position as control room manager has not been replaced. This is a fact that was not disputed or displaced by the claimant in evidence. While there were some issues between MB and (G) the Tribunal accepts the respondents evidence that the instances that arose did not impact on the redundancy or MB's selection for redundancy. While the respondent could have handled the situation better the material fact in this case is that the claimant had a very specific role as control room manager and this role was made redundant. Evidence was given that alternative positions for the claimant were not considered to any great extent by the respondent but the claimant himself gave evidence that he did not believe there was a suitable alternative position at his level available within the company.

Accordingly the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)