EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	CASE NO.
EMPLOYEE,	UD207/2011

against

EMPLOYER
under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan

Members: Mr. F. Moloney
Ms. P. Ni Shéaghdha

heard this case in Dublin on 22 June 2012

Representation:

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Claimant(s):

Respondent(s):

The determination of the Tribunal was as follows:-

Grounds of Claim

The claimant commenced employment with the respondent in July 2000 and, at the date of termination of his employment, he was employed as the Group Environmental Compliance and Planning Manager.

Allegedly without prior warning or notice the claimant was called to a meeting on 28 April 2010 with the Managing Director and the Human Resource Manager of the respondent and informed that the Compliance Department had been targeted, that the compliance structure was being flattened and that his role would cease to exist.

On 30 May 2010 the claimant was furnished with a formal notice of redundancy and a Form

RP50.

The claimant did not believe that there had been a genuine redundancy.

Further or in the alternative, the claimant believed that he had been unfairly selected for redundancy and that fair procedures had not been applied.

GK [former managing director] gave evidence that the company decided at the meeting in a hotel in County Louth on the 23rd April 2010 that the decision was taken to dismiss the claimant and another employee by reason of redundancy. GK said he was sure of this and that "the decision was made at the [named hotel]... Their names were on the board"

The claimant gave evidence that he was not invited to, or even aware of, the meeting held in the Louth hotel.

In those circumstances the claimant believed that the termination of his employment constituted an unfair dismissal.

Grounds of Defence

The claimant was made redundant by the respondent from his employment as part of a company restructuring which justified the termination of his contract such that the claimant had no claim against the respondent under unfair dismissals legislation.

The claimant was a director of the respondent and he resigned from his directorship on 28 May 2010.

It was accepted that the claimant had commenced employment on 10 July 2000 in the position of Group Environmental Compliance and Planning Manager but, following an extensive review of the business, the decision was made to restructure the Compliance Department due to a decline in turnover and ongoing losses coupled with a reduction in waste tonnage processed due to the loss of contracts. As a result of this, the role of Group Environmental Compliance and Planning Manager would cease to exist.

The claimant was formally notified of the redundancy on 26 May 2010 and, following a lengthy consultation process which involved three meetings, it was agreed that the claimant would cease working on 26 September 2010.

The claimant was advised in writing on 30 May 2010 that he had the right to appeal the decision to make him redundant. This right was not exercised by the claimant.

AD (Operations Director) gave evidence that the directors in charge of each section were tasked with reducing numbers in their section and that the company was not happy with the effort made by the claimant to reduce numbers.

The owner of the respondent agreed with the claimant at a meeting on 11 June that the claimant would only be required to work two days per week for the remainder of his time with the respondent. In addition, the claimant was due to have a surgical procedure and it was agreed following this procedure on 17 August that he would not be required to work out the remainder

of his notice period.

Determination:

For a redundancy defence to succeed it must result from, as Section 7 (2) of the Redundancy Payments Acts 1967, as amended, provides, "reasons not related to the employee concerned". Redundancy is impersonal. Indeed impersonality runs through the five definitions of Redundancy set out at Section 7 (2) of the Redundancy Payments Act 1967, as amended by Section 4 of The Redundancy Payments Act 1971 and Section 5 of The Redundancy Payments Act 2003, provides:

"For the purposes of Subsection (1) an employee who is dismissed shall be taken to be dismissed by reason of redundancy if for one or more reasons not related to the employee concerned the dismissal is attributable wholly or mainly to-

(a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased or intends to cease, to carry on that business in the place where the employee was so employed,

or,

(b) the fact that the requirements of that business for employees to carry out of a particular kind in the place where he was so employed have ceased or diminished or are expected to cease or diminish,

or

(c) the fact that his employer has decided to carry on the business with fewer or no employees, whether by requiring the work for which the employee had been employed (or had been doing before his dismissal) or to be done by other employees,

or

(d) the fact that his employer has decided that the work for which the employee had been employed (or had been doing before his dismissal) should henceforth be done in a different manner for which the employee is not sufficiently qualified or trained, or

(e) the fact that his employer has decided that the work for which the employee had been employed (or had being doing before his dismissal) should henceforth be done by a person who is also capable of doing other work for which the employee is not sufficiently qualified or trained.

The Tribunal must be satisfied that where an employee is dismissed by reason of redundancy that there must be a redundancy and the redundancy must be the main reason for dismissal.

Was the claimant dismissed by the respondent for performance issues, under the cloak of redundancy?

The dismissal of an employee under the cloak of redundancy is considered by Charleton J in clear, concise and unambiguous terms in the case of **JVC Europe Limited V Jerome Panisi 2011 125CA** wherein he states "it has been made abundantly clear by that legislation [Unfair Dismissals Act 1977] that, redundancy, while it is a dismissal, is not unfair. A dismissal, however, can be disguised as a redundancy; that is not lawful"..... He goes on "Redundancy, cannot, therefore be used as a cloak for weeding out of those employees who are regarded as less competent than others.....if that is the reason for letting an employee go, then it is not a redundancy, but a dismissal".

The Tribunal noted the evidence of AD (Operations Director) that the directors in charge of each section were tasked with reducing numbers in their section and that the company was not happy with the effort made by the claimant to reduce numbers. This is a performance issue and should be dealt with as such, if appropriate. In this Tribunal's view this is what Charleton J had in mind when he referred to a "dismissal being disguised as a redundancy..[which is]..not lawful"

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The Tribunal does not accept that the Respondent acted fairly and reasonably in this case for the following reasons:

1. the decision to make the claimant redundant was taken at a meeting in a hotel in County Louth on the 23rd April 2010. This meeting was attended by chairman of the company (SD) and directors other than the claimant;
1. the Tribunal is critical of the fact that the claimant was excluded from the meeting of the board, which took the decision to make his position redundant, when he was entitled to there as a director of the company. This was not handled in a fair and transparent way. The employee/director should have been allowed to attend the board meeting and afforded an opportunity raise objections to the proposed redundancy. The fact that he was excluded reinforces the view of this Tribunal that the claimant was dismissed for performance rather than the redundancy of his position..
1. there was no serious or worthwhile consultation with the claimant prior to making him redundant. The consultation should be real and substantial. The decision to make the claimant's position redundant was taken before the consultation process commenced. This is the reverse of what should have happened;
1. no suitable or substantial consideration was given to alternatives to dismissing the claimant by reason of redundancy;
2. there was no worthwhile discussion in relation to the criteria used for selecting the claimant. The selection criteria should apply to all employees working in the same area as the claimant but should also consider other positions which the claimant is capable of

doing.

3. the only avenue of appeal was to the chairman of the board but since he was at the meeting which took the decision to make the claimant's position redundant it would be inappropriate to appeal to him;

The Tribunal finds that the claimant was unfairly selected for redundancy and is satisfied that the respondent has contravened Section 6 (3) of the Unfair Dismissals Act 1977 which states:

'Without prejudice to the generality of subsection (1) of this section, if an employee was dismissed due to redundancy but 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, and either—

(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

(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 the dismissal shall be deemed, for the purposes of this Act, to be an unfair dismissal.'

Employers must act reasonably in taking a decision to dismiss an employee on the grounds of redundancy. Indeed Section 5 of the Unfair Dismissals (Amendment) Act 1993 provides that the reasonableness of the employer's conduct is now an essential factor to be considered in the context of all dismissals. Section 5 , inter alia, stipulates that:

".....in determining if a dismissal is an unfair dismissal, regard may be had……to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal"

The respondent falls well short of proving that a redundancy situation existed and that redundancy was the main reason for the dismissal.

The Tribunal is unanimous in finding that the claimant was unfairly selected for redundancy under the Unfair Dismissals Acts, 1977 to 2007. The Tribunal deems compensation the most appropriate remedy and, having regard to all the evidence, including the claimant's efforts to mitigate his loss, awards the claimant Thirty Thousand Euro (€30,000.00). For the avoidance of doubt this award is in addition to the all other payments made to him including his redundancy payment.

Sealed with the Seal of the

Employment Appeals Tribunal

This ______________________________

(Sgd.) ______________________________
(CHAIRMAN)