

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee

UD31/2008

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr E. Murray

Members: Ms M. Sweeney
Ms. P. Doyle

heard this claim at Cork on 2nd October 2008

Representation:

Claimant :

Mr Byron Wade B.L., instructed by John Henchion & Co., Solicitors,
The Bakehouse, Waterloo Road, Blarney, Co. Cork

Respondent :

Mr Eoin Clifford B.L., instructed by David J O'Meara & Sons, Solicitors,
Bank Place, Mallow, Co Cork

The determination of the Tribunal was as follows:-

Evidence was heard from the financial controller of the Respondent Company (BTH) and Charleville Plant Hire Limited (CPH). He gave evidence that in June 2007 BTH went into examinership. It was bought out of examinership by CPH on the 17th of September 2007. The purchase was based on a due diligence report prepared on behalf of CPH by a firm of forensic accountants and who concluded that the turnover of the business for the 10 month period ending on the 31st of October 2006 was €1.9 million. He did not wish to postulate as to how this figure was arrived at or whether non factual representations were made to the Accountants and did not make any such allegation, however, his own post-purchase examination indicated that the turnover for the 3 month period thereafter was €186,000.00 which bore no relationship to the figure that emerged from the due diligence report.

The nature of the Company business was the rental and sale of diggers, mixers, dumpers etc. They were also trying to break into the “height for hire” industry and CPH had a significant retail element to it. They had hoped to introduce this to BTH.

The witness said that his investigations indicated that the Respondent Company was contracting approximately 16 machines per day in the month after the purchase. This was with 19 staff on the payroll. The parent Company, CPH was contracting 95 pieces of equipment per day with a staff of 12. He was satisfied from his examination that the Company could not survive with the wage cost, repair costs and lease costs that it had and he recommend to the Board of CPH that there be rationalizations within the business. As a result of that recommendation the dismissal occurred. He blamed the situation on the synergies involved in the takeover and the fact that the BTH was in a far more grave financial situation than they had originally realised. The operations manager in CPH was in a position to comfortably takeover the rental and sales business in BPH in addition to his own duties, and did so. This created a situation whereby the claimant was effectively rendered redundant. Because of his PRSI status he was not entitled to redundancy but nonetheless the Company paid him €2600.00 by way of severance payment.

The witness emphasised that at all times he wanted to recreate a Charleville model in Blarney and to see it succeed. He realised however when he did a detailed analysis of the business that this was not possible with its level of overhead.

On cross-examination he was referred to an advertisement placed by the Company in the Irish Examiner on the 9th of November 2007 seeking a “hire sales representative, artic truck drivers and a hire controller”. He explained however that these were essentially sales jobs and did not in anyway measure up, either in salary or responsibility to the role that the claimant had been playing and was expected to play in BPH before the examinership and thereafter. Also this add was placed as part of a different strategy. He said that the claimant’s role was a much more in-depth role and that the individuals employed as a result of this advertisement were to work under the operations manager who now had overall responsibility for both the Blarney and Charleville operations. He said that the claimant did not apply for any of these positions.

A director of CPH also gave evidence. He said that based on the information received from the financial controller he and a co-director had informed the claimant of their decision to make him redundant. This occurred at the premises of BTH. The dismissal was based on the sustainability of the business having regard to cost; and commercial criteria were the only criteria that they applied in the decision to make the claimant redundant. Everybody in the yard knew that the business was not sustainable and that the operations manager in CPH had no difficulty taking on the management of the Blarney operation in addition to his work for CPH. He said that the decision was made for commercial reasons to save the business and for no other reason.

The claimant gave evidence on his own behalf. He described how the Company, which he founded, got into difficulties after diversifying into builders providers business in the year 2000. The tool hire business was deprived of cash because of this division. This lead to the non-viability of the business and ultimately to its examinership. The reason it went into examinership was because it was felt that the tool hire division of BTH was viable and KPMG who were the examiners were satisfied that this was the case. He did not accept however that the reasons for his dismissal were good and commercial ones. He said that the creditors of the Company received seven cent in the euro in the examinership but he didn’t accept that this state of affairs would have been likely to lead to rationalization within the company. He said that he founded another tool hire company in 2002, Tralee Tool Hire Limited and after his dismissal he went to Tralee to try and

save this business. When he went to Tralee he found that his 2 staff there had given in their notice and that the persons who had dismissed him had effectively started a new business in Tralee, with his staff. They both ended up working for CPH. He moved the Tralee business to Blarney where he is now just breaking even. He said that he understood from the director of CPH that he was going to be the key man in the new business after the examinership and was taken aback to be dismissed after such a short time.

A colleague on behalf of the claimant gave evidence of the management structure within the business after the claimant's dismissal.

Determination:

Having considered the evidence it appears to this Division of the Tribunal as follows:

The claimant in this case was the founder and director/proprietor of BPH from April 1990. The Company got into insurmountable difficulty and on the 20th of June 2007 it went into examinership.

In September 2007 the Company was bought by CPH from the examiner and the claimant was retained in his former role of General Manager.

On the 19th of November the claimant was dismissed for redundancy. The redundancy was based on a decision by the BTH that the Company was non-viable with its then level of overhead. The Tribunal accepts the evidence of the financial controller and of the director of CPH as to the financial viability of BTH. The Tribunal is satisfied that the unfortunate decision to make the claimant redundant was made for good commercial reasons and that the CPH operations manager was comfortably able to subsume his responsibilities into his apparently more onerous role in Charleville. The Tribunal is satisfied that the Respondent acted in good faith and for good commercial reasons and is satisfied that a legitimate redundancy situation did exist. Consequently, the claim under the Unfair Dismissals Acts, 1977 to 2001 in this regard fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)