

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

EMPLOYEE - *claimant*

against

EMPLOYER- *respondent*

under

CASE NO.

UD2063/2009

MN1930/2009

### UNFAIR DISMISSALS ACTS, 1977 TO 2007 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. E. Daly B.L.

Members: Mr. D. Morrison  
Ms. R. Kerrigan

heard this claim at Letterkenny on 1st June and 2nd and 3rd September 2010,  
28<sup>th</sup> and 29<sup>th</sup> July 2011

#### **Representation:**

Claimant: Patricia Mc Callan BL instructed by Mr. Cormac Hartnett, Hartnett Hayes, Solicitors,  
Gweedore Road, Dungloe, Co. Donegal

Respondent: Mr. Pdraig O'Grady, IBEC, 3<sup>rd</sup> Floor, Pier 1, Quay Street, Donegal Town.

The determination of the Tribunal was as follows:

#### **Respondent's Case**

This family run business was established in 1919 and has been involved in the production, distribution and delivery of beverage products. For the past two to three decades its main product has been the production of fruit juices. Following the success of that product in the domestic market the respondent expanded into the much larger market in the United Kingdom (UK) in the 1990s. That move contributed significantly to a further growth in turnover and trade in the following decade. By early 2007 its fruit juice transactions in the UK amounted to sixty percent of its total sales for that product while the balance remained in the home market. One consequence of this rise in business was an increase in its workforce up to two hundred and twenty. New posts called supervisors were created in 2000 and those occupying that position were in charge of general operatives. The supervisors in turn were answerable to their immediate managers colloquially called function heads. Those managers reported to senior managers and/or directors. In this case the claimant as a supervisor in the goods inwards section was responsible to his production manager.

In referring to the claimant's contract of employment the managing director highlighted to the Tribunal the section on redundancy. Among other items that section stated in effect that all other things being equal the respondent operated a last in first out policy. That was prefaced by its consideration that the employment of as many staff as possible would be protected subject to the full efficient operation of the business. The witness added that a grievance procedure formed part of that contract and to his knowledge the claimant never invoked it. That contract of employment showed that the claimant commenced employment on 4 February 2008 holding the position of administration assistant operations. Some time later he was appointed as a trainee manager despite the respondent not having a vacancy for such a position. It was the first time it used that title as the claimant took up "a shadowing position" within the organisation.

While there were some indications that business was declining in the immediate aftermath of the airborne attacks on New York City and Washington D. C. on 11 September 2001 it was not until the 2007/08 period that the respondent noticeably felt a reduction in its operations particularly in the UK. The witness attributed that decline to the appreciation in the value of the euro against sterling. The rising euro became such a threat to the interests of the respondent that it did not renew some of its contracts in that market as such a renewal was deemed uneconomic. The respondent was also facing a more competitive market and these factors resulted in a big drop in turnover as the financial figures resembled "a 747 falling out of the sky". That continuing fall in sales and revenue eventually led to an announcement in December 2008 by the respondent that it was engaging in a collective redundancy process. The first wave of redundancies soon occurred as around thirty employees, mainly general operatives lost their jobs.

In February 2009 the claimant was appointed the supervisor of the goods inward section. The work of that section was divided into three separate shifts over a continuous twenty-four hour basis. Each shift had a separate supervisor and at least two general operatives. The claimant was in charge of the 08.00 to 16.00 shift only. The witness said that in hindsight this was an unusual appointment at that time considering the cost cutting situation the respondent was then implementing. However, he did not anticipate the speed of the ongoing deterioration in the fortunes of the business. That deterioration again forced the respondent to make further and deeper cuts. While he could not give a definite date as to when a decision was made to abolish the role of day shift supervisors the witness thought it was in the spring of 2009. In common with those supervisors the claimant was advised of that decision and individual negotiations ensued between them and management about severance packages. The claimant refused an ex-gratia monetary offer. The claimant's functions as a supervisor were transferred to his production manager and to the remaining general operatives. The other supervisors in that section were not directly affected by this redundancy decision.

Under cross -examination he confirmed that notification of the collective redundancy was sent to the relevant minister in December 2009. At the meeting where the claimant was made redundant the terms "phase one" and "phase two" were used and it was indicated that the claimant was part of phase two, witness confirmed he had never used this phrase. The financial director and the operations manager was in attendance at this meeting, he was not, however the redundancy programme went through a series of phases. The position of the company had deteriorated more between April 2008 and September 2008. The claimant had originally commenced as a stock controller in February 2008 and in September 2008 his role was changed to trainee manager. This change was as a result of the claimant approaching him and seeking for the company to pay for a third level part-time course he was seeking to attend. He had asked the claimant at this stage would he be interested in joining a development project as a trainee manager. At no stage did he accept that this move to trainee manager was a promotion for

the claimant. The letter dated 11<sup>th</sup> September 2008 appointing the claimant to trainee manager was read in to evidence.

As a business in respect of redundancy they took out direct labour if a production line was not running, they decided also to get rid of all day time shift supervisors, this decision was made in mid 2008 at a board meeting. Minutes in relation to these board meetings were produced in to evidence on the third day of the hearing. The minutes for August 2008 board meeting states “ Indirect employees - the concept of removing the day shift supervisor team will become a reality on the basis of the drop in volume. This will see the management team controlling the direct employees without the supervisor level and will require careful planning”. The reduction of day shift supervisors moved from department to department. The last department to be addressed was the goods inwards. The claimant at the time of his redundancy was in the role of goods inwards supervisor and was “the last man standing”, the last day time supervisor to be made redundant all of the others were gone before him. Witness explained that they had started the process of getting the truck drivers to unload and load their own trucks. Their dispatch was in their control so they were able to get the truck drivers to load their vehicles, however they had to negotiate with their suppliers to get the delivery drivers to unload their trucks, and this took some time. The implementation of this in goods inwards was brought forward while the claimant was absent on sick leave in June 2008; the goods inwards area was restructured.

All employees including the claimant were aware that redundancies were being made since December 2008. He was aware of the meeting occurring with the claimant in respect of his redundancy. He was not aware or involved in the occupational therapist report. He found it hard to believe that the claimant was never told or aware that his job was at risk. He understood that the financial director had contacted the claimant to set up the meeting on the 28<sup>th</sup> July 2009 in the hotel.

He had no consultation or dealings with the claimant in respect of his redundancy. There is a right to appeal in the contract. The decision to move the claimant to goods inwards was after the redundancy announcements in December 2008. The claimant ended up in a role that was going to be rationalised.

In reply to questions from the Tribunal he explained that he had only become aware of the occupational therapist report when the proceeding with the Employment Appeals Tribunal commenced. He had only seen the claimants email seeking a meeting while he was out sick, at this hearing. As far as he was aware it was quite some time previously that they had requested another occupational report on a member of staff. He could not recall who was the last day shift supervisor recruited.

The operations manager gave direct sworn evidence on behalf of the respondent. He commenced with the company in 1999 as a general operative and is in his current position since March 2008. He is part of the senior management team, which also includes the managing director, sales director and financial director. He was party to the decision to implement the redundancies in mid 2008 and the collective redundancies in December 2008. All department heads were responsible for informing their staff of the collective redundancies. The claimant at this time was working in dispatch and the warehouse manager (MB) would have made the redundancy announcement to the claimant and his colleagues. They had these meetings over the day to cover all shifts. They are unionised and consulted with the union and shop stewards after the announcements.

He and the financial director had a meeting with the claimant in December 2008 where they informed him that his role of trainee manager was no longer possible because of the impending

redundancies. They asked him to become responsible for goods inwards, the claimant was not too happy with this move. The claimant took over this role in January 2009, he was in the role of supervisor managing two staff and he reported directly to the production manager.

The claimant had never approached him about being harassed by a member of the respondent's family. When he had arrived back from annual leave the production manager informed him that the claimant had approached him and said he had enough and was leaving. The production manager had tried to stop the claimant but to no avail. The claimant sent in sick certificates. He and the financial director requested that the claimant attend an occupational therapist.

The decision to make the claimant redundant was made after they requested the occupational therapist report. The financial director set up the meeting on the 28<sup>th</sup> July 2009 with the claimant to inform him of his redundancy, this took place at a hotel as the claimant was not comfortable attending the respondent's premises. He had taken the minutes of this meeting and had typed them up along with the financial director on the same day. At this meeting the financial director explained to the claimant that things had moved forward in his absence and goods inwards had been restructured, they originally thought his position would be made in September but that his redundancy was now moved forward. After the claimant's departure from goods inwards they had one forklift driver, PG, covered for the claimant in his absence and up to when the truck drivers started to unload their own trucks. PG was in this position for a maximum of two months. It was not possible that the claimant was unaware of the redundancies taking place everyone knew and there had been articles in the local press. The claimant could not have thought his position was safe as even he (witness) job was at risk, 65 people had been made redundant, including 14 salaried people. The claimant was the 9<sup>th</sup> salaried person to be made redundant and the last day shift supervisor. He explained the terms phase one and two, one was general operatives and hourly paid, while two were salaried, middle management, and admin. Six of the 14 salaried employees were day supervisors. It was made clear to the claimant at the meeting that the restructuring of goods inwards was move forward as he was out sick.

The claimant did have a meeting with him and had asked him if his job was safe, so of course the claimant was aware of the redundancies. He had told the claimant that his position was the same as all employees in the company and that he did not know when the decision would be made. He had never told the claimant directly that his job was going to be made redundant.

The claimant was made redundant at the meeting of the 28<sup>th</sup> July 2009 and informed that he would be paid his notice pay and holidays owed and that a disclaimer form would be sent to him by post a couple of days later. Copies of the claimant's last payslip was produced into evidence showing notice pay and holidays. The claimant was paid 4.66 days holidays but was only due three days.

Under cross examination he confirmed that when the claimant was placed in to the goods inwards supervisor role, that this role was marked for redundancy, however they needed somebody in the role at the time. He had not told the claimant this at the time. He denied that the claimant was in goods inwards since November 2008. When the claimant was moved to goods inwards he was told that he would be staying there. He had given the claimant clarification in respect of his training in December 2008. He denied that in February 2009 the claimant had told him about the bullying and harassment that the family member was treating him to, nor when the claimant had asked if his job was safe he told the claimant that the managing director had said the team he had now was the one he was sticking with.

He had read the occupational therapist report a few days after receiving it that was when they had

carried out the redundancy. The managing director had no input into this decision and they had not brought the report to his attention. The decision to make the claimant redundant at this juncture was made between him and the financial director a couple of days before they met the claimant. They were following the policy of shedding the daytime shift supervisors. They pushed forward the restructuring of the goods inwards because of the claimants absence. They selected the claimant for redundancy, as he was a daytime shift supervisor and no longer a trainee manager. At the meeting they did not outline the selection criteria to the claimant nor inform him of his right to appeal this decision.

He was not aware of the situation between the claimant and the family member as he was on annual leave at the time. He had sent the claimant to the occupational therapist because his sick certificates had stated he was suffering from stress related illnesses. He had never assured the claimant that his job was safe. He was referred to the occupational therapist report, which recommends that a meeting should take place between the claimant and management to discuss the claimants concerns and perceptions to seek resolution to the situation and further advises that another role should be found for the claimant. Witness explained, as it was them who had asked for the report it was up to them to action it, also there was no alternative position available to the claimant. It was not a sham redundancy; everyone was on notice of redundancy including him. Many employees including the claimant had come to him with concerns about their jobs and he had given them a neutral answer.

### **Claimants Case**

The claimant gave direct sworn evidence. He commenced employment in February 2008 in stock control with the respondent. He approached the operations manager as he wanted to go on a management and leadership course and would require finishing an hour early every Tuesday to do this course. The operations manager obliged and the company paid for him to do this course. He had a meeting with the operations manager and the financial director in September and in line with this course he was attending they created the trainee manager role. He thought that this was a promotion and that he was going to be an integral part of the company. It was a fantastic opportunity. He was to shadow individuals for six-week periods to learn their roles in the different department. The first department he was assigned to was dispatch and then he went to dispatch admin. When he was in a meeting in November 2008 with the operations manager and the financial director giving his weekly report, as part of his trainee manager programme when they informed him he would be swapping with a colleague (ES) in good inwards, he thought this move was part of his training. His next meeting with the operations manager and financial director was in December he requested to move on from goods inwards but they informed him that he would be staying in goods inwards for the foreseeable future and would return to the trainee manager role when things had settled. He knew this was not a permanent move as his trainee manager role was to be continued it was only suspended. He left this meeting knowing he was still a trainee manager. He would have considered being appointed a supervisor as a demotion and had never received a letter to this affect. He thought he was in a better position than most other staff, as he would have been crossed trained in other departments.

The managing director had witnessed an incident between him and a member of the managing directors family and had taken him aside afterwards and offered him some advice about not pissing this person off. The managing director was aware of the tension between him and this person.

He was not in dispatch in December as per the operations manager's evidence he was in goods inwards since early November. Therefore the warehouse manager (MB) had not informed him of the collective redundancies. He was never called to any of the meetings in respect of the

redundancies but was aware of them. Any information he received in respect of redundancies was second hand.

He arranged a meeting with the operations manager in February 2009 through his line manager as he was in the company for a year and he wanted clarification as to his role. At this meeting the operations manager told him he was doing a good job, and explained that everyone was under stress and informed him that he should let any events that happened between him and the family member wash over him as things were too tight out there. He further informed him that as he had just come from a meeting with the managing director he could tell him his job was safe as the managing director had told him that the team he had in place now he was keeping.

He went on sick leave on the 25<sup>th</sup> June 2009. The financial director wrote to him requesting he go to an occupational therapist and he obliged. He received a copy of the occupational therapy report. He knew from this report and from speaking with his doctor he needed to get back to work or his illness could deteriorate, so he emailed the financial director to organise a meeting. He had no contact from the company from the 7<sup>th</sup> July to the 20<sup>th</sup> July 2008. A number of telephone calls followed between him and the financial director resulting in a meeting being arranged for the 28<sup>th</sup> July 2008 in a hotel.

He thought that this meeting was going to be about his return to work and had no inkling he was to be made redundant and had never heard of the phase two redundancies. He was shocked when he was told, there was no mention of selection criteria nor was he advised of any appeal procedure. He was not advised either that they had looked at redeployment. He was presented with a severance agreement and he asked could he take it with him to read it. He did not sign this agreement so he did not receive his severance pay.

After the meeting he telephoned his direct line manager who asked him to come back to work as PG was making a hash of things, he told him that he had just been made redundant and his line manager was furious. He told the line manager that he was part of the phase two of redundancy and that his job was also under threat.

He gave evidence of loss.

Under cross-examination he explained he had decided to do the third level course and had approached the operations manager who in turn approached the managing director on his behalf and he obtained funding for same. He was more than happy to accept this funding and took up the role of trainee manager. During his time in the trainee manager role he still had responsibility for the KPI report. He was never moved out of the trainee manager position; he had been moved from dispatch to goods inwards as a continuation of this role. He had not shadowed anyone in his role in goods inwards. He continued to provide the operations manager and the financial director with weekly reports as provided under his role of trainee manager. There were two forklift drivers in goods inwards who did not report to him but reported directly to the claimant's line manager. He had no supervisory role at all in goods inwards. He had been unhappy going to goods inwards as it was an area known for conflict with the family member. It was put to him that this family member had no role in the business; the claimant explained that this family member was normally on the premises from 8.00am to 5.00pm daily.

He had been told in December 2008 that the trainee manager role was suspended and he was happy to have a job at this stage. He did not accept that he was a supervisor; he was stuck in goods inwards as a trainee manager. He was in charge of goods inwards but had no responsibility for the

two forklift drivers. He was in charge of logistics ensuring good came in on time and that minimum stock was kept. He did liaise with the forklift drivers and at this time they had rolled out that the truck drivers were unloading their own trucks and this had been in place before he started in goods inwards. It was put to him that this process was not implemented until he went on sick leave.

The claimant explained that the trucks would drive in and off load their goods and leave them in the car park. The forklift drivers would lift these goods. He was there to control the stock and had designed the layout of the product in the warehouse.

He accepted that in his evidence he had said the role of the trainee manager was suspended however it was still there and his training would continue at a later date. He accepted that there had been a large number of redundancies however he had hope that business would improve so he could continue his training. It was possible that some with short service would be vulnerable to redundancy in the company. He was referred to his contract of employment and the redundancy terms “ in selection, regard will be paid to the Company’s service needs, skills, suitability and adaptability of employees. All other things being equal, length of service will apply”. He explained it had not come, as a surprise to him when the operations manager had told him his job was safe as he was a key person and a member of a team. He was in a role that no one else was and the company had paid for his education, the company had plans for him, had created a role for him and they could drop him in to any department that needed him. It was suggested to him that the operations manager informing him that his job was safe was all fabrication. The claimant responded that he had organised the meeting in February 2009 with the operations manager through his line manager and this meeting was initially about the family member bullying him and it was at this that the operations manager had told him that his job was safe. When the operations manager said even his own job was not safe he was referring to December 2008 in February he had assured the claimant that his job was safe and that there would be no further redundancies.

The respondent’s representative informed the claimant at this stage that approximately 30 redundancies were made after February 2009, they had no documentary evidence to back this up at the hearing. The respondents had provided a list of salaried employees made redundant and had not included general operatives or waged employees. It was the claimant’s position that no redundancies that he was aware of had taken place between February 2009 and July 2009. He would only be aware of salaried employees.

Incidents with the family member had occurred 7 to 8 times between January 2009 and July 2009 and he had raised this with his line manager and the operations manager. The abuse had happened in November 2008 when he had moved to good inwards but he did not report it at the time. He had left the company on the day that he had another altercation with the family member he was stressed at the time and could not take any more. He had gone to his line manager and told him he was not going to be the family member’s plaything anymore and he had to get out. He had left and went to his GP.

While he accepted that the respondent had the right to make him redundant as a trainee manager however they did not adhere to proper procedures.

In reply to questions from the Tribunal he confirmed he was reporting to his line manager while in goods inwards and was no longer supplying weekly reports to the operations manager and financial director on a weekly basis. He considered the trainee manager position to be a promotion however he did not receive a salary increase.

## **Determination**

The Tribunal carefully considered the evidence adduced over the three-day hearing and noted there was a conflict of evidence between both parties. The respondent notified the proper authorities of a collective redundancy in December 2008 and consulted with their employees. However the respondent accepts that they could not confirm who informed the claimant.

Having considered the evidence the Tribunal finds that the claimant was unfairly dismissed. However it also finds that the probability was that the claimant would have been made redundant in September 2009 after the restructuring of goods inwards. Therefore the claimant's loss is limited to this period. The Tribunal find in favour of the claimant and award him €4360.00 under the Unfair Dismissals Acts 1977 to 2007.

The claim under the Minimum Notice and Terms of Employment is dismissed.

Cases considered

Paula Daly –v- Hanson Industries Limited UD719/86

John Edwards –v- Aerials and Electronics Ireland Limited UD236/85

Dermot Boucher, Desmond O'Neill, Bernard Kelly and John A. Harris –v- Irish Productivity Centre (1994) ELR 205

Michael O'Brien –v- Smurfit (Ireland) Ltd t/a Master Hammond UD640/92

Junk –v- Kuhnel (2005) IRLR 310, (2005) EUECJC 18803

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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