

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
EMPLOYEE

-claimant

CASE NO.
UD205/2010
RP413/2010

against
EMPLOYER

-respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan

Members: Mr. N. Ormond
Mr. J. Dorney

heard this claim at Dublin on 28th July 2011
and 4th November 2011

Representation:

Claimant: Ms. Tara Flynn, Attain Consulting Limited, Fitzwilliam Business Centre,
77 Sir John Rogerson's Quay, Dublin 2

Respondent: Mr. Tiernan Lowey B.L. instructed by Tom Conlon Solicitors,
14 South Leinster Street, Dublin 2

Preliminary Application

The respondent made the application to the Tribunal that this claim was taken outside the time limit as prescribed in the Act. The claim was lodged with the Tribunal on the 18th of December 2009. The claimant's P45 records a finish date of the 15th of July 2009. The claimant's position is that he received 2 weeks' pay in lieu of notice but it was not by agreement.

Preliminary Determination

Having listened to the evidence and submissions from both parties the Tribunal determines that it does have jurisdiction to hear this case.

Respondent's Case

The Managing Director (JF) and the Technical Director (BM) of the respondent gave evidence. The respondent's business is in the area of providing IT solutions to companies on a contract basis. The claimant was employed as a dedicated person for a specific role. This role was to look after all the respondent's existing maintenance contracts, to seek additional contracts and agreeing figures on existing contracts. Prior to the claimant's employment these duties were carried out within the existing sales team. The sales team report to the Sales Director and the claimant reported directly to JF. The claimant's contract of employment describes his job specification in the following terms: '*You would be responsible for contract renewal business, new contract wins and spin off sales in line with below stated target.*' The job title on the contract is, '*Sales Manager/New Business Development*', this title was only inserted to give the role status – the job specification details the role accurately. The claimant was not involved in a great deal of 'sales' work. The claimant's key strength was in 'relationships'; he did not have the in-depth technical knowledge that some of the sales team would possess. The claimant was involved as part of a larger team in securing some big contracts for the respondent. Any sales opportunities that arose during the claimant's interaction with clients were passed directly by the claimant to the sales team.

The contractual health of the respondent was very good when the claimant was employed but in 2009 the business decreased by 33%. All sales and professional services decreased across the board. As a result of the decrease in business several redundancies were made within the respondent. The dramatic decrease in figures was discussed regularly at monthly sales meetings, at which the claimant was present, any possible solutions were also discussed. The claimant was selected for redundancy as he held a unique role within the respondent. This role had been created to manage contracts and contract renewals but as the contracts had significantly declined it was no longer necessary to employ a dedicated person for the role. All of the claimant's duties have reverted back to the sales team.

On the 12th of June 2009 the respondent met with all of the sales staff and consultants on a one-to-one basis to inform them that business was bad and they were looking at making redundancies and inviting any views on the matter. The prospect of redundancy was well established within the respondent. JF and BM made the decision over the weekend to make the claimant's position redundant. The respondent called the claimant to a meeting on the 15th of June 2009 and informed him that he was being made redundant and offered the right to appeal this decision. The claimant accepted the offer of payment in lieu of notice. At a subsequent meeting all the figures were finalised and the claimant's future prospects were discussed.

Of the remaining staff, two of them are comparable to the claimant and this was accepted by the claimant. The respondent maintains that the claimant's technical abilities are not comparable to the other two staff members. The respondent provides staff as part of their service. At the same time as the claimant's redundancy, three other staff were made redundant. A comparable employee who was made redundant at the same time as the claimant was re-hired by the respondent within three months. He was re-hired to be seconded to a company as part of a contract. The service user has the ability to veto a prospective staff member. As the only viable

alternative to redundancy the claimant was put forward for this position but was unacceptable to the service user. There was no sales role available within the respondent for the claimant.

Claimant's Case

The claimant commenced employment with the respondent in July 2006. As there was an existing Sales Director the claimant was given the title of Sales Manager. The claimant's background is in technical sales. The claimant's role within the respondent was maintenance and new business sales of any type. If the technical specifications for the contract were high, the claimant would bring a consultant in to design the IT solution, as did the other members of the sales team. The claimant carried out the account manager duties as a side-line to generating and selling new business. The claimant gave evidence of the large contracts he secured on behalf of the respondent. The claimant does not accept that his role was unique as he carried out all aspects of a sales role not just maintenance contracts.

There are two comparable employees that were not made redundant by the respondent. The claimant's position is that his technical skills were on the same level as the two employees. Consultants were brought in by all sales staff to design the I.T. solution, so a high level of technical knowledge was not necessary. The claimant mentored some of the junior staff in cultivating sales relationships.

The claimant disputes that a one-to-one meeting took place on Friday the 12th of June 2009; it was a general staff meeting. At this meeting the staff were informed that one person would be made redundant and that a decision would be made over the weekend. A few of the staff requested that the claimant find out more details; the claimant spoke to JF and was told that he had not yet reached a decision. The claimant was informed on Monday the 15th of June that his position was being made redundant. There were no alternatives discussed. He was not informed as to what the selection criteria was and had no notice that his role was being considered for redundancy. The claimant was informed that maintenance contracts were down and his role would be taken over by BM.

The claimant gave evidence of Loss and his attempts to mitigate his Loss.

Determination

The respondent is a supplier of copiers, digital technology, office furniture and interiors for the modern office environment. The claimant commenced employment with the respondent on 31st July 2006 within its sales department. His employment was terminated by reason of redundancy on the 15th July 2009. The claimant has claimed that he was unfairly dismissed because (i) a genuine redundancy situation did not exist and, if it did, (ii) he was unfairly selected for redundancy.

(i) Redundancy is defined in Section 7(2) of the Redundancy Payments Act 1967 (as amended) as follows:

“An employee who is dismissed shall be taken to be dismissed by reason of redundancy if 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 work 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 has been employed (or had been doing before his dismissal) - to be done by other employees or otherwise, or*
- (d) the fact that his employer has decided that the work for which the employee has been employed (or had been doing before his dismissal) - should henceforward 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 has been employed (or had been doing before his dismissal) should henceforward be done by a person who is also capable of doing other work for which the employee is not sufficiently qualified or trained.”*

Redundancy is impersonal. In **JVC Europe Limited V Jerome Panisi 210 125CA (2011)** Mr Justice Charleton states that "Redundancy is not, however, a personal choice. It is in essence the external or internal economic or technological reorienting of an enterprise whereby the work of employees needs to be shed or carried out in an entirely different manner. As such redundancy is entirely impersonal. Dismissal on the other hand is a decision targeted at an individual".

Section 6 (1) of the Unfair Dismissals Acts 1977 to 2007 provides that the dismissal of an employee shall be deemed to be an unfair dismissal *“unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal”*. Section 6(4) of the Unfair Dismissals Acts specifically provides that an employee may be dismissed if that dismissal results wholly or mainly from *“the redundancy of the employee”*. The burden of proof is on the employer to establish the legitimacy of any redundancy dismissal. As set out in Section 7(2) of the Redundancy Payments Acts 1967 to 2007, 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 number of listed factual circumstances which arise in business closures, general

restructuring, changes of business location, reductions in workforces, changes of job functions, changes in the manner in which work is to be done or changes in requirements for particular jobs.

The Tribunal is satisfied that a genuine redundancy situation existed and that no one has replaced the claimant in the role which he formerly held. The Tribunal accepts that the claimant's job was no longer sustainable and since he left, no one has replaced him in that role and further, that the claimant's duties have been redistributed among other staff in the sales team. The Tribunal also accepts the evidence of the respondent, that the claimant's technical skills were not as well developed as two other comparable employees.

(ii) Having decided that a genuine redundancy existed the Tribunal had then to consider if the claimant was unfairly selected for redundancy. This was the subject of a great deal of discussion and debate by the Tribunal. Justice Charleton opines [in the Panisi case] that, "It may be prudent, and a mark of a genuine redundancy, that alternatives to letting an employee go should be examined". A comparable employee, who was made redundant at the same time as the claimant, was re-hired by the respondent within three months. He was re-hired to be seconded to a service user as part of a contract. As the only viable alternative to redundancy the claimant was put forward for this position but was unacceptable to the service user. The service user has the ability to veto a prospective staff member.

Section 6(3) provides that a dismissal shall be deemed an unfair dismissal:

"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 [as amended by the Industrial Relation Act 1990], 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 ..."*

The Tribunal has no reason to doubt the evidence of the respondent that it tried to place the claimant with one of its service users. This brings the Tribunal to consider the very contentious situation where third party interference led to the claimant not being retained in his employment. The respondent was reluctant to name or give any details of the service user but eventually agreed to divulge this detail while emphasising that it did not want to put the business relationship with the service user in jeopardy.

Following exhaustive deliberation the Tribunal reluctantly accepts that commercial

considerations prevented the respondent from publicly naming (the Determinations issuing forth from the Employment Appeals Tribunal do not identify the name of any Third Party referred to at the hearing) the third party service user or putting someone from that company into evidence. [This is not to be taken as a precedent for any future cases where third party interference lead to the clamant not being retained in employment or indeed being dismissed at the behest of a Third Party in circumstances where the Third Party did not appear before the Tribunal to give evidence.] Every case must be considered in the light of its own particular facts. The dismissal of an employee brought about through pressure from third parties whether customers, clients, fellow employees or others may be justified provided the employer acts fairly and handles the procedure and investigation properly. The Tribunal's view as stated in **Merrigan –v- Home Counties Cleaning Ireland Limited** is that “the job of an employee cannot be at risk on the mere whim of a third party to the employment relationship.”

The Tribunal is satisfied that the service user had no input into the original decision of the company to make the claimant's position redundant. As referred to above the service user did veto the claimant being re-employed.

The employer will be expected to show that it has conducted an investigation into the reasons for the pressure. If the enquiry reveals no valid reason for the pressure to try and persuade the party exerting the pressure to change their mind.

Section 6(3) of the Unfair Dismissals Act 1977 as amended by Sections 5(b) (a) of the 1993 Act states that,

“in determining if a dismissal is an unfair dismissal, regard may be had, if the rights commissioner, the Tribunal, or the Circuit Court, as the case may be considers it appropriate to do so to the reasonableness or otherwise of the conduct (whether by act or by omission) of the employer in relation to the dismissal”.

In relation to selection for redundancy, the case of **Boucher v Irish Productivity Centre R92/1992** is instructive. In *Boucher*, the Tribunal stated that in addition to proving the genuineness of a redundancy, the employer had:

“to establish that he acted fairly in the selection of each individual employee for redundancy and that where assessments are clearly involved and used as a means for selection that reasonable criteria are applied to all the employees concerned and that any selection for redundancy of the individual employee in the context of such criteria is fairly made”.

The Tribunal determines that for the reasons stated the respondent did act reasonably. It made a genuine effort to place the claimant with a Third Party User. The respondent considered all other options, including lay-off and short-time. However, these options were ruled out in circumstances where the respondent was not in a position to guarantee that there would be any work into the future for the claimant. The claimant also considered re-training the claimant but it was decided that it was not feasible to re-train the claimant in all the circumstances. Furthermore, the respondent was aware that it would be facing into further redundancies in the near future and

that further change and reduction in staff numbers would have to take place. Having regard to all the circumstances the Tribunal determines that the dismissal was fair. The claims under the Unfair Dismissals Acts 1977 to 2007 and the Redundancy Payments Acts, 1967 to 2007 are dismissed.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____