

## EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:  
EMPLOYEE  
- *claimant*

CASE NO.  
UD2175/2010  
WT973/2010

Against

EMPLOYER  
-*respondent*

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007 ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr C. Corcoran B.L.

Members: Mr D. Peakin  
Mr J. Jordan

heard this claim at Dublin on 13th March 2012  
and 4th May 2012

Representation:

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Claimant: Ms Michelle Cronin, Michelle Cronin & Co, Solicitors,  
Kennedy Building, 24 Main Street, Tallaght Village,  
Dublin 24

Respondent: Mr Larry Brennan, Arthur P. McLean & Co, Solicitors,  
31 Parliament Street, Dublin 2

### **Respondent's Case**

The respondent Managing Director. (Mr. B) gave sworn evidence. The respondent company commenced in 1984 supplying heating and plumbing supplies to 'trade'. There were two premises in Dublin and a third was opened in Kildare. As a result of the economic downturn there was a 50% decrease in business. In order to survive, the respondent had to move away from trade supply and into selling tiles, bathrooms and bathroom refurbishments; they had never been involved in this business before.

The claimant was employed on the 4<sup>th</sup> of May 2004 as a van driver. He worked 7.30am to 5pm Monday to Friday and every second Saturday. The staff on the trade counter, the warehouse and the drivers all had the same hours of work. The office and showroom staff worked on a different schedule.

In March 2006 the claimant's position changed. The respondent had two trucks on the road and they needed someone to manage the trucks and the goods going into them from the warehouse. The claimant was offered and accepted the position of warehouse manager in one of the Dublin locations. The claimant had an assistant in the warehouse. The letter of the 14<sup>th</sup> of July 2006 sets out the claimant's new duties as warehouse manager. In 2007 it was decided to open a new warehouse in Kildare; this was to facilitate creating a showroom in one of the Dublin locations. The claimant's position re-located to Kildare when the move was made in January 2008.

The downturn 'really kicked in' and the respondent made a number of cost cutting measures. These measures were detailed in an e-mail dated the 6<sup>th</sup> of October 2008 sent to all the staff. On the 12<sup>th</sup> of November 2008 a letter was sent to all staff stating that no additional money will be paid weekly i.e. overtime and that the company was trying to 'trade through the period.' The letter also stated that,

*'If staff Member's do not co-operate then we will not succeed and we will have to lay people off, reduce hours, wages and salaries.'*

A staff meeting was subsequently held on the 6<sup>th</sup> of May where a 15% pay cut was proposed as the cost cutting measures had not been entirely successful. A letter was sent to the claimant dated the 7<sup>th</sup> of May stating that the reduction in pay would come into effect from the 11<sup>th</sup> of May 2009. This arrangement would be reviewed in October 2009. Parallel to this measure staff duties were reassigned and reorganised; by letter of the 8<sup>th</sup> of April 2009, the claimant's new duties were outlined to him.

The claimant was on sick leave from August 2009. The respondent continued to pay the claimant for an additional six weeks sick leave which was not the respondent's normal practice. The cessation of the sick pay upset the claimant.

The claimant attended the respondent premises on the 12<sup>th</sup> of April 2010 stating he was fit to come back to work. He was informed that business was so difficult that another member of staff would have to be made redundant to facilitate his return to work so two weeks' notice would be required. Given his experience the claimant was offered a warehouse/driver job. The claimant was anxious to return to work and said he was willing to do any job. On the 13<sup>th</sup> of April 2010 the claimant provided the respondent with a certificate stating he was fit to return to work.

On the 29<sup>th</sup> of April 2010 the claimant arrived at the respondent premises. He did not arrive to work, but to state he was unfit to do the type of work the respondent had offered him and that it did not suit him to travel to the Dublin location the job was based in. The claimant queried what had happened to his previous role and was informed that all his old duties were spread out among all the remaining staff at no extra cost, as business had deteriorated significantly since he was last working. Extensive evidence on the division of duties was given. The claimant produced a second fit to return to work cert from a different hospital stating he was only fit to work at a desk job. The respondent told him there would be lifting but no heavy lifting in the new role but there would be some driving; the claimant was asked for suggestions. The meeting was adjourned as neither party knew how to move forward and the claimant was upset and aggravated.

Later that day the claimant phoned the respondent office suggesting he should be made redundant if there was no suitable position available for him and that this would be a viable option for him.

The respondent wrote to the claimant on the 10<sup>th</sup> of May outlining the events to date and stating that,

*'we are at a loss as to how this impasse should be resolved in a fair and equitable manner for all...we shall be seeking professional advice in this matter as previously stated, and we shall revert to you when we have done so.'*

The respondent arranged a meeting with the claimant for the 18<sup>th</sup> of May 2010. At that meeting the claimant was informed that they had taken his suggestion on board and that they were now making him redundant, as his position no longer existed within the company and he was unable to take up the alternative position offered to him. The claimant's employment was due to terminate on the 2<sup>nd</sup> of June. There was an issue as the claimant refused to sign a disclaimer stating that the cheque received covered any outstanding issues for resolution.

Mr. B was recalled to give direct evidence on the 4<sup>th</sup> May 2012. He was not aware of the claimant's epilepsy in 2007/2008. In 2009 the claimant's wife telephoned him to inform him that the claimant had a seizure. The claimant drove a forklift and employees should have a licence to drive a forklift.

In cross examination Mr. B stated that the respondent endeavoured to keep staff morale up. It endeavoured to leave employees with their basic salary and it discontinued fuel cards and mobile phones. In 2010 the respondent did not acquire any new computers. It took two trucks off the road and provided a three and a half ton truck. RK was let go as he was not producing the sales. A number of other employees left. DW undertook work on Saturdays and holidays. JB was made redundant and he did not know how old he was. PC left the respondent on the 16<sup>th</sup> October 2010 and his position was still there. The claimant could have been trained to do his job over a period of time. One person was redeployed to Finglas and one to Ballymount. The claimant's position was assimilated by existing staff.

He had a discussion with the claimant after he had undergone his final treatment. He had no knowledge that the claimant's password was removed from his PC in October 2009. The claimant did not discuss the issue of a pay cut on several occasions with him. He did not dictate the letter signed by MD (Administration) to the claimant dated the 16<sup>th</sup> October 2009 which stated that under the Health and Safety Acts and the respondent Insurance Company rules that it was not feasible that the claimant should return to work while he was undergoing treatment. He told MD that the claimant could pay the insurance policy and the respondent would reimburse him. He had an impromptu meeting of circa ten minutes with the claimant on the 29<sup>th</sup> April 2010. Mr. B took a minute after the meeting. He disagreed that the claimant had delivered a letter dated 13<sup>th</sup> April from his Consultant Oncologist on the 13<sup>th</sup> April 2010. He visited the claimant in hospital.

In answer to questions from the Tribunal regarding a seniority list where the claimant worked and the type of work he did replied it was a small company. G and the claimant did the same work and the claimant was qualified to drive a bigger vehicle. The claimant and Mr B discussed making G redundant and the claimant told him he wanted to go.

In re-examination he stated that the bathroom area of the store was a very technical area with numerous variations. This knowledge was acquired over a long period of time. The claimant told him he was not physically able to do G's work. The claimant did not want to travel to Finglas as he was physically not able.

He did not have a discussion with the claimant regarding PC's job, it was a specific requirement. The trade side had collapsed. The claimant had a good relationship with the respondent. The claimant's position was not filled.

The second witness for the respondent, the administrator MD told the Tribunal that she dealt with personnel issues. She was employed with the respondent for seventeen years. The sales were decreasing. She was aware that a number of companies had difficulties in paying the respondent and there were a number of payments outstanding. The claimant was ill in 2009 and his duties were taken up by others. She undertook goods returns from customers and credit notes. The respondent relocated to Maynooth in August 2009. From August 2009 to April 2010 the claimant's duties were assimilated.

The respondent changed to a new accounts package and all employees had to be trained. This was introduced before the respondent moved to Maynooth before April 2009. The official policy in the respondent was that sick pay was not paid to employees who were absent on sick leave and employees were aware of this. The claimant was paid for a period of six weeks while he was ill. The tax and insurance was paid on the claimant's vehicle even while the claimant had not been working. By letter dated the 16<sup>th</sup> October 2009 she informed him that she had ceased paying him sick pay after six weeks, the claimant told her he was not fit to return to work. She felt if anything happened to the claimant in work that the respondent would be in trouble.

She signed the minutes of the meeting of the 12<sup>th</sup> April 2010 some days after the meeting. The claimant had been offered a job as a driver/warehouse person and G would have to be let go. She received a letter dated the 13<sup>th</sup> April 2010 from the claimant's medical oncologist the day after the meeting with the claimant, she would have it on her file. The claimant must have given it to her. She received a fax sheet dated the 22<sup>nd</sup> April from the oncology department of the Mater hospital. The claimant brought a letter dated 28<sup>th</sup> April 2010 to a meeting on the 29<sup>th</sup> April. The claimant and Mr. B had a meeting on the 12<sup>th</sup> April 2010. Mr. B told her that he offered the claimant a job as a driver/warehouse person and he would have to let G go. The respondent needed a note that the claimant was able to return to work.

The meeting on the 29<sup>th</sup> April 2010 was not a formal/scheduled meeting. The claimant brought a letter dated 28<sup>th</sup> April from his orthopaedic surgeon to the meeting. Mr. B told her that he had offered the claimant a job in Finglas but the claimant said it would not suit him. The claimant stated he would not travel to Finglas. The claimant became aggressive and Mr. B asked the claimant for the keys of the premises.

Later that day the claimant contacted her and left a message. She contacted him and he told her that he forgot to return his telephone. At no stage did she mention redundancy to the claimant. The claimant told her that he had contacted an Employment Office who informed him that if he was not entitled to his old job back he would be entitled to redundancy. She made Mr. B aware of this. This was the first time that the claimant raised redundancy. The claimant accepted redundancy and received all his entitlements. The claimant never mentioned he was unfairly selected for redundancy and he was involved in calculating his redundancy.

In letter dated 10<sup>th</sup> May 2010 Mr. B informed the claimant that he was required to give a minimum of two weeks' notice of his intention to return to work. The claimant received an amount of €10,539.44 in respect of his redundancy and he was not due any holiday pay. She asked the claimant to sign to say that he had received all his entitlements and had no

outstanding issues. The claimant would not sign it. The claimant eventually signed the RP50 on the 13<sup>th</sup> July 2010.

She was recalled to give evidence. She stated that the claimant told her on the 29<sup>th</sup> April 2010 that he was not going to work in Finglas. In 2009 she discovered that the claimant had epilepsy when the claimant's wife contacted her to inform her that he had a seizure.

In cross examination she stated that she was an administrator as well as a director of the respondent. She made decisions but not all decisions. She agreed that the claimant gave her social welfare payments for three weeks. An employee who was undergoing chemotherapy was not prevented from working. It was not true that the respondent decided the claimant was not going to return to work when he was ill. In 2006 the claimant was based in the office, he had a company vehicle and the respondent covered tax and insurance. The respondent paid the insurance and tax for this vehicle.

The purchase of a premises in Maynooth had nothing to do with problems the respondent had. It was not an erroneous financial move. It never happened the claimant visited Finglas/Ballymount branch biweekly. The claimant had inspected stock, was familiar with stock and the claimant produced purchase orders. When the accounts package was introduced accounts were more efficient and reduced the number of staff. It took a few months to become familiar with the accounts package.

All employees were aware that they were not paid for sick days she did not know if the claimant was given a copy of the policy.

She was present at the meeting on the 29<sup>th</sup> April 2010. The claimant never mentioned to her that he had epilepsy. The claimant was actively involved in the calculation of his redundancy.

The claimant asked if he could be made redundant. Mr. B asked the claimant if he had any suggestions, the claimant could have asked if he could be redeployed. Mr. B offered to let G go. The claimant came in to sign the RP50 and he would not sign the file note.

In answer to questions from the Tribunal he stated that the terms and conditions were the same as he had previously.

### **Claimant's Case**

The claimant told the Tribunal that in May 2004 he commenced employment with the respondent and he drove a van/truck until March 2006. He had a full truck licence. Five drivers reported to him. He was approached by Mr. B and he was asked if he would be interested in managing the warehouse. He purchased a car in March 2005 and worked as a warehouse manager. The previous manager was from Pakistan and he went home at the end of October until the New Year. The claimant was asked to deputise for him while he was on holidays and he was given two to three weeks training.

He undertook work in the showroom and the trade counter was familiar with bathroom equipment. In 2007 he developed epilepsy which affected him for a couple of seconds every two to three weeks. He went to his local GP who sent him for an MRI scan. He recalled an occasion where he had a severe seizure. His wife had to call an ambulance, he was placed on restricted driving. The respondent was well aware that he had epilepsy in 2008. In July 2009 he was diagnosed with a rare form of cancer and he had to undergo chemotherapy. He had

major surgery in November 2009. He had a prosthetic shoulder implant and has no movement in his left arm.

He spent fifteen to seventeen years touring Europe on a motorbike and he had to give it up. He is unable to change a light bulb at home. He is unable to lift items. MD in administration was very good to him when he was ill and she always texted him. The respondent was well aware of his condition. Mr. B did not visit him in hospital.

In May 2009 he called to the office in Maynooth. He went to Mr. B's office and told him that he objected to a pay cut. He asked for and he obtained a copy of his job description and Mr. B came to the office. He told MD that Mr. B was transferring him to Finglas. The claimant stated that he would not be insured to work in the warehouse and drive. He told Mr. B that it was not recommended that he drive at night. He could not drive or unload a van. The respondent was well aware that he had a problem with his shoulder. Mr. B asked him where he was going and he told Mr. B that he had not accepted the job. Mr. B told him that he problem was that he did not want to find work, the claimant was quite shocked.

The claimant stated that he had a meeting on the 27<sup>th</sup> April 2010. He had a medical appointment on the 28<sup>th</sup> April 2010 and his orthopaedic surgeon compiled a letter to the respondent in which he outlined that the claimant was not to undertake heavy lifting or any kind of heavy manual work. He asked if he would be facilitated and work in a desk job capacity. On the 13<sup>th</sup> April 2010 his medical oncologist stated that the claimant's scans were clear and he was fit to return to work.

He has found alternative work with a motor cycle firm in a supervisory capacity. He was out of work for four months and is on a lesser salary than when he was employed with the respondent.

In cross examination he agreed that the respondent experienced a downturn in business. Sometimes customers looked for advice and he had gained knowledge on the job. Customers came in with drawings and he was qualified to deal with them to a certain extent. In 2008 the claimant's wife informed Mr. B that the claimant had suffered a grand mal seizure. He first went to a solicitor on the 25<sup>th</sup> June 2010.

In answer to questions from the Tribunal he stated that there were at least twenty employees with the respondent. When asked why the job was not a suitable alternative he replied the work entailed lifting and carrying. He would not be able to lift stuff. He was never subject to disciplinary proceedings. The meeting on the morning of the 28<sup>th</sup> April or 29<sup>th</sup> April did not go very well. The only place he could work was in the show rooms and there was no vacancy at the time. The medical advice he got was he could work in an office but as far as he was aware there was no job at the time in the respondent.

## **Determination**

The respondent did not sufficiently engage with the claimant regarding the exceptional circumstances that prevailed and the potential alternative that might have existed in his situation.

The Tribunal awards the claimant compensation of €9,000.00 under the Unfair Dismissals Acts, 1977 to 2007 and in making this award takes account of the fact that he received a redundancy lump sum payment.

The Tribunal is satisfied that the claimant received all outstanding holiday monies due to him and his claim under the Organisation of Working Time Act, 1997 fails.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

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