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REDUNDANCY OR UNFAIR DISMISSAL?

Notwithstanding the economic turmoil Ireland has and is experiencing where redundancies are inevitable, employers must be able to show that a genuine redundancy situation exists. The case of **JVC Europe Limited v. Ponisi** demonstrates the risk employers face when they attempt to disguise a dismissal as heavy penalties can follow where a dismissal is found to be unfair. This article provides an overview of the case and how the employer was found to have unfairly dismissed its employee albeit arguing that the dismissal (redundancy) was justified in the circumstances.

In what is believed to be the highest award for an action for unfair dismissal in Ireland, in a reserved judgment in the High Court, Mr Justice Charleton has awarded €298,000 to a former employee of JVC Europe Limited trading as JVC Ireland, part of the Japanese Victor consumer electronics group.

“Redundancy can be a devastating blow,” wrote Mr Justice Charleton at the beginning of his judgment delivered on July 27 in a case entitled: JVC Europe Limited, (Plaintiff/Appellant) and Jerome Ponisi, (Defendant/Respondent), The High Court 2010, Record No. 125CA.

What is the difference between “redundancy” and “dismissal”? Each has implications where employees are concerned. A job becomes redundant not the individual performing the job. In the words of Mr Justice Charleton “Redundancy is entirely impersonal”.

In contrast, a dismissal is personal to the employee performing his or her job. It is the employee who is dismissed but the job remains to be performed. Redundancy in itself is not unfair but a dismissal can be deemed to be unlawful in certain circumstances.

In a claim for unfair dismissal the burden of proof rests with the employer to demonstrate that the dismissal was a genuine redundancy and not disguised as an attempt by the employer to rid the workforce of someone for reasons other than the existence of a genuine redundancy situation.

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The law governing unfair dismissal is the Unfair Dismissals Act 1977 (as amended), which details those circumstances where a dismissal is deemed both fair and unfair. Some of the grounds under which an employee cannot be dismissed include:

- religious or political beliefs he or she holds ;
- being a member of a trade union;
- an employee's race, colour or sexual orientation;
- their age or on health grounds; or
- by being a member of the travelling community.

So, if an employee is dismissed on any of these grounds the dismissal is unfair. On the opposite side some of the reasons which deem a dismissal to be fair include:

- redundancy;



- the employee's conduct, or
- the capability, competence or qualifications of the employee in performing the work he was engaged to do.

Jerome Ponisi was appointed general manager of JVC Ireland in September 1991. Though his job title suggested a position governing a wide range of duties, the majority of his time was taken up with sales though he had other duties that were closer to a general manager's role. The Irish operation of JVC under his stewardship was performing well and was profitable between 2000 and 2004.

Towards the end of 2006 continuing into 2007 Ponisi noticed his health deteriorating. He had notified his employer in early 2007 that he felt unwell and that he was undergoing numerous tests to find the cause. It was not until November 2007 that it was confirmed he was suffering from a blood disorder. However, he was not prevented from carrying out his duties and this clearly demonstrated his loyalty towards the company since he began working for JVC in 1991.

In August 2007 JVC Ireland Limited hired a national account manager named Thomas Dillon who reported to Jerome Ponisi and who was many years his junior. Dillon's role was in sales. When the matter concerning unfair dismissal came before the Circuit Court in June 2010 Dillon in evidence referred to Ponisi as a "father figure" in view of the help and assistance Ponisi gave to Dillon on joining the company.

On March 4 2008, Ponisi attended a meeting in London during which he was informed that the sales division was to be restructured by incorporating the mobile entertainment unit and JVC Ireland into the key account/areas sales teams. This meant that Ponisi's job as general manager was potentially being made redundant. He was given a letter during the meeting signed by the human resources manager confirming their discussion and the letter went on to provide that there was no longer a need for these roles:

- General Manager, Mobile Entertainment
- General Manager, Ireland
- National Independent Sales Manager

The company proposed creating three new positions "...for reasons which were not at all apparent during the hearing," wrote Mr Justice Charleton. The new roles were:

- Sales Manager, Key Accounts, Independents and Ireland
- Sales Manager, Ireland
- Area Sales Manager

The job descriptions for two of the posts, but not for the sales manager Ireland role, were attached to the letter. Ponisi did not receive the third job description for at least seven days after the March 4 meeting. In his judgment, Mr Justice Charleton stated that he believed the job description for the new position of Sales Manager, Ireland closely mirrored the job Ponisi had been doing prior to his departure.

On March 7 Ponisi spoke by phone with the HR manager as part of the consultation process. During the call Ponisi stated that the HR manager made what he believed to be a Freudian slip by mentioning the first half of the name of the individual identified to take the position of sales manager, key accounts, independents and Ireland. The HR manager denied this in evidence. In addition, Ponisi suspected that Dillon had been earmarked for this role of sales manager Ireland.

General Managers met every Monday in London. Ponisi attended these meetings usually every four to six weeks. The Court heard that at the general managers' meeting on March 10 2008 (which Ponisi did not attend), John Welbourn, General Manager Sales,



requested that the issue of the three new posts within the sales division and those who had been identified as taking up those posts would not be minuted. Witnesses on behalf of the company denied that such a request was ever made or the restructuring within sales was discussed but the former company secretary confirmed in evidence that it had been and that the matter was discussed and individuals named.

Even after the discussion at the meeting on March 10 2008 a consultation process continued. In his evidence in the High Court Dillon explained that on April 10 2008 he received a phone call while on holiday from Kevin Crossland Vice President of Sales, informing him that an email had issued on that day advertising the new position of Sales Manager Ireland. When he asked if he should apply Crossland replied: "I am speaking to him". Dillon took this to mean that the job was his, though he was asked to submit his CV for completeness. Dillon took up the position of sales manager Ireland in July 2008 staying until April 2010, when he was headhunted to take up a position with a competitor firm.

Ponisi found out he was to be made redundant at a meeting in London in April 28 2008. This was also confirmed in a letter of the same date which it stated that "...it had not been possible to find any solution other than tomake your role redundant." Ponisi appealed the decision and an appeal hearing took place in London on June 4 2008. The decision after the appeal hearing confirmed his dismissal by reason of redundancy. Meishi Tsuya, (president of JVC UK at the time) who chaired the appeal hearing, admitted during cross-examination in the High Court that he authorised the restructuring process in early 2008. While there was no impropriety alleged on the part of Tsuya during the appeal process in June 2008, JVC had allowed a situation to arise whereby the person who authorised the restructuring of the sales division which targeted Ponisi's position as redundant also chaired the appeal hearing.

It may have been more prudent for an independent person to have conducted the appeal hearing other than someone who was involved in the decision to make the role redundant.

Not satisfied with the decision reached by JVC, Ponisi filed a claim for unfair dismissal with the Employment Appeals Tribunal (EAT) in August 2008 claiming compensation for unfair dismissal. The matter was heard over three days in December 2008 and April 2009 with the decision of the EAT delivered on April 24 2009. The EAT accepted that there had been a downturn in business but did not accept that Ponisi had been fairly dismissed. The EAT awarded Jerome Ponisi €161,420.

JVC appealed the decision of the EAT to the Circuit Court. The appeal was heard before Judge Linnane over three days in June 2010. The Circuit Court affirmed the decision of the EAT and increased the award to €207,540 plus a sum in the amount of €7000 for a shortfall arising for pay in lieu of notice.

In his judgment Mr Justice Charleton referred to the usual situation where a litigant is entitled to just one appeal hearing and that is the end of the matter. However, in claims for unfair dismissal there is a possibility of four full hearings beginning with a claim lodged with a rights commissioner which can then be appealed to the EAT and then further appealed to the Circuit Court concluding with an appeal to the High Court. In this case Ponisi filed a successful claim with the EAT which the company appealed to the Circuit Court and appealed further on to the High Court. This has resulted in three full hearings of the case with Ponisi winning at each stage. Mr Justice Charleton specifically referred to this in his judgment noting the procedure to be "...cumbersome and redolent with potential for unfairness."

In summary, Mr Justice Charleton was not satisfied that JVC had discharged the burden of proof resting on it to demonstrate that a genuine redundancy situation arose. According



the Mr Justice Charleton “The accumulation of evidence proves as a probability that the dismissal.....was not a genuine redundancy.”

Ponisi’s €298,000 award in the High Court represented two years’ salary (the maximum allowed under statute), less a sum already paid on dismissal. The value of the award clearly demonstrates the court’s disapproval at the appellant’s attempt to present Ponisi’s dismissal as a genuine redundancy situation. As Mr Justice Charleton succinctly stated: “Redundancy, cannot, therefore be used as a cloak for weeding out of those employees who are regarded as less competent than ones or who appear to have health or age related issues.”

The case has important implications for employers, even in difficult economic circumstances. Not alone should an employer be careful not to single out an individual because of age or health but in instances where an appeal process is available, the appeal hearing itself should be carried out by a person not involved in the decision to make the position redundant in the first instance.

Lessons to be learned:

- Caution needs to be exercised by employers where redundant role to be conducted by new person albeit under a different title.
- If new job description is issued it must be distinguishable from the job description of person whose role was made redundant.
- Potential for four full hearings of the claim which is very unusual in the normal litigation process.
- The Irish courts willing to award maximum amount allowed under the law.

Julian P. Cunningham is a solicitor who represented Jerome Ponisi in the EAT, the Circuit Court and High Court hearings. For advice in the area of unfair dismissal law and employment law generally please contact Julian on email: juliancunningham@fod.ie or by telephone: 01 642425.