Neutral Citation Number [2011] IEHC 279

2010 125 CA

THE HIGH COURT

DUBLIN CIRCUIT

COUNTY OF THE CITY OF DUBLIN

BETWEEN

JVC EUROPE LIMITED

PLAINTIFF/APPELLANT

AND

JEROME PANISI

DEFENDANT/RESPONDENT

JUDGMENT of Mr. Justice Charleton delivered on the 27th day of July 2011

1. Redundancy can be a devastating blow. Where economic conditions are difficult, or where the employee who is let go has aged or is experiencing health difficulties, finding alternative employment may be impossible. Years of devotion to an employer count for nothing where technology overtakes the workforce, rendering the labour of those displaced unnecessary; where new methods of work are demanded from those who do not have the skills to respond; or where a product is rendered obsolete. All these are examples of genuine redundancy. As ordinarily understood, redundancy means that a worker is no longer needed. The legal definition, as stated in the legislation which I quote later, mirrors common comprehension. Because redundancy is inevitable if there is no work for workers to do and the workers cease to be needed, it is also lawful. The Redundancy Payments Act 1967, as amended, establishes a floor of rights in compensation for redundancy; circumscribes the use to which dismissal by reason of redundancy can be put; and provides for minimum payments for qualified employees who are subject to this misfortune. In circumstances of insolvency those payments can be met from the public purse.

2. A contract of employment can involve both personal and impersonal interaction between employer and employee. 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 to be 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. Under the Unfair Dismissals Act 1977, as amended ("the Act of 1977"), the dismissal of an employee may only take place for substantial reasons that are fair. In effect, the contract of employment is protected in law and it may only be repudiated by the employer for reasons which do not amount to an unfair dismissal. This requires the employer to show substantial grounds which justify the dismissal. The burden of proof, in that regard, is squarely placed upon the employer. Sections 6(1) and (2) of that Act, in their amended form, provide:-

> "(1) Subject to the provisions of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, to be an unfair dismissal unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal.
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> (2) Without prejudice to the generality of subsection (1) of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, to be an unfair dismissal if it results wholly or mainly from one or more of the following:
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> (a) the employee's membership, or proposal that he or another person become a member, of, or his engaging in activities on behalf of, a trade union or excepted body under the Trade Union Acts, 1941 and 1971, where the times at which he engages in such activities are outside his hours of work or are times during his hours of work in which he is permitted pursuant to the contract of employment between him and his employer so to engage,
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> (b) the religious or political opinions of the employee,
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> (c) civil proceedings whether actual, threatened or proposed against the employer to which the employee is or will be a party or in which the employee was or is likely to be a witness,
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> (d) criminal proceedings against the employer, whether actual, threatened or proposed, in relation to which the employee has made, proposed or threatened to make a complaint or statement to the prosecuting authority or to any other authority connected with or involved in the prosecution of the proceedings or in which the employee was or is likely to be a witness,
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> (dd) the exercise or proposed exercise by the employee of the right to parental leave, force majeure leave under and in accordance with the Parental Leave Act, 1998, or carer's leave under and in accordance with the Carer's Leave Act, 2001,
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> (e) the race, colour or sexual orientation of the employee,
>
> (ee) the age of the employee,
>
> (eee) the employee's membership of the travelling community,
>
> (f) the employee's pregnancy, attendance at ante-natal classes, giving birth or breastfeeding or any matters connected

therewith,

(g) the exercise or proposed exercise by the employee of the right under the Maternity Protection Act 1994 to any form of protective leave or natal care absence, within the meaning of Part IV of that Act, or to time off from work to attend ante-natal classes in accordance with section 15A (inserted by section 8 of the Maternity Protection (Amendment) Act 2004), or to time off from work or a reduction of working hours for breastfeeding in accordance with section 15B (inserted by section 9 of the Maternity Protection (Amendment) Act 2004), of the first-mentioned Act,]

(h) the exercise or contemplated exercise by an adoptive parent of the parent's right under the Adoptive Leave Acts 1995 and 2005 to adoptive leave or additional adoptive leave or a period of time off to attend certain pre-adoption classes or meetings."

3. To condense this and attempt a summary: a dismissal is automatically unfair under s.6 (2) of the Act of 1977 if it results from trade union activity; religious or political opinions; actual or proposed civil or criminal proceedings; bigotry; ageism; or reasons connected with maternity or parental leave due to childbirth or adoption. An employer may nonetheless dismiss an employee, but only if a reason outside of that set of proscribed reasons is the motivation and the reason for dismissal is fair.

4. A dismissal is fair, however, only if it results from a reason within the statute. The lawful reasons for dismissal are precisely set out. Section 6(4) of the Act of 1977 provides:-

"Without prejudice to the generality of subsection (1) of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, not to be an unfair dismissal, if it results wholly or mainly from one or more of the following:

(a) the capability, competence or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) the conduct of the employee,

(c) the redundancy of the employee, and

(d) the employee being unable to work or continue to work in the position which he held without contravention (by him or by his employer) of a duty or restriction imposed by or under any statute or instrument made under statute."

5. Explanation is hardly necessary of these clear terms. Most unfair dismissal cases revolve around alleged misconduct by an employee. The issue for the tribunal deciding the matter will be whether the circumstances proven to found the dismissal were such that a reasonable employer would have concluded that there was misconduct and that such misconduct constituted substantial grounds to justify the dismissal. An employee may also be dismissed where, by reason of a change in primary or secondary legislation, it becomes unlawful for that employee to continue to work. For instance, in a pharmacy, only a qualified person may dispense controlled medication. Were legislation to provide that a large number of over-the-counter medications are to be restricted to dispensation by pharmaceutical chemists, work will disappear for unqualified assistants. An employee may be discovered not to have the capability, competence or qualifications to do the work for which he or she was employed. Such reasons for ending employment are all personal to the employee, to his or her conduct, to his or her competence or qualifications. It is made abundantly clear by that legislation that redundancy, while it is dismissal, is not unfair. A dismissal, however, can be disguised as redundancy; that is not lawful. Upon dismissal an employer can simply say that the employee was not dismissed for a reason specific to that person but that, instead, his or her services were no longer required, pointing to apparently genuine reasons for dispensing with the services of the employee. In all cases of dismissal, whether by reason of redundancy or for substantial grounds justifying dismissal, the burden of proof rests on the employer to demonstrate that the termination of employment came within a lawful reason. In cases of misconduct, a fair procedure must be followed whereby an employee is given an entitlement to explain what otherwise might amount to a finding of real seriousness against his or her character. In an unfair dismissal claim, where the answer is asserted to be redundancy, the employer bears the burden of establishing redundancy and of showing which kind of redundancy is apposite. Without that requirement, vagueness would replace the precision necessary to ensure the upholding of employee rights. Redundancy is impersonal. Instead, it must result from, as s.7(2) of the Redundancy Payments Act 1967, as amended, provides, "reasons not related to the employee concerned." Redundancy, cannot, therefore be used as cloak for the weeding out of those employees who are regarded as less competent than others or who appear to have health or age related issues. If that is the reason for letting an employee go, then it is not a redundancy, but a dismissal.

6. Section 7(2) of the Redundancy Payments Act 1967, as amended by s. 4 of the Redundancy Payments Act 1971 and s.5 of the Redundancy Payments Act 2003, provides:-

"(2) For the purposes of subsection (1), 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) 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 had 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 had 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 had 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."

7. Exceptions are provided for redundancy as a defence to a claim of unfair dismissal in s.2A of the Act of 1967. These are not relevant to this case, but encompass the protections that legislation has required in the case of collective redundancies, compulsory redundancy and dismissal for the purpose of re-engagement on less advantageous conditions. The comment on the nature of redundancy made in *St. Leger v. Frontline Distributors Ireland Ltd.*, [1995] E.L.R. 160 at 161 to 162 by Dermot MacCarthy S.C., as chairman of the Employment Appeals Tribunal, is apposite:-

> "Impersonality runs throughout the five definitions in the Act. Redundancy impacts on the job and only as a consequence of the redundancy does the person involved lose his job. It is worthy of note that the E.C. Directive on Collective Redundancies uses a shorter and simpler definition: 'one or more reasons not related to the individual workers concerned'.
>
> Change also runs through all five definitions. This means change in the workplace. The most dramatic change of all is a complete close down. Change may also mean a reduction in needs for employees, or a reduction in numbers. Definition (d) and (e) involve change in the way the work is done or some other form of change in the nature of the job. Under these two definitions change in the job must mean qualitative change. Definition (e) must involve, partly at least, work of a different kind, and that is the only meaning we can put on the words 'other work'. More work or less work of the same kind does not mean 'other work' and is only quantitative change."

8. It may be prudent, and a mark of a genuine redundancy, that alternatives to letting an employee go should be examined. However, that does not arise for decision in this case. Similarly, a fair selection procedure may indicate an honest approach to redundancy by an employer, but I do not wish to comment on matters which are outside the competence of the decision to be made in this case: see Stewart and Dunleavy, *Compensation on Dismissal – Employment Law and Practice*, (Dublin, 2007) at paragraph. 19.8.6. As a matter of contract, where selection procedures for redundancy, or a consultation process to seek to discover alternatives to redundancy, are laid down in the conditions of employment of an employee, whether by collective agreement or individual employment contract, these should be followed. Following what is on the surface a fair procedure does not necessarily demonstrate that the decision maker is taking an honest approach to a decision. As with much else, an apparently fair procedure can be used as a cloak for deceptive conduct. It may be followed in form only so as to mask an ulterior motive or with no intention of fulfilling its purpose, even should the best of reasons for not proceeding to redundancy arise during its course.

9. The contractual entitlement to a defined procedure is declared in s. 6 of the Act of 1977. This provides at s. 6(3):-

> "Without prejudice to the generality of subsection (1) of this section, 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—
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> (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
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> (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, 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."

Issues

10. The issues which arise for determination in this case depend upon the general analysis of the law set forth above. These issues are whether Jerome Panisi, as employee, was selected for apparent redundancy by his employer, JVC Europe Limited:

> (i) on the basis of a dismissal disguised as a redundancy; or
>
> (ii) pursuant to procedures which were followed in form, but not in substance.

The quantum of damages also arises for decision in the event that the answer to either question is in the affirmative.

Access to justice

11. This is the third full hearing on oral evidence of this case. Under the relevant legislation a claim for unfair dismissal may first be brought before the statutory Rights Commissioner. The determination of the Rights Commissioner may then be appealed by either employer or employee to the Employment Appeals Tribunal. The appeal is therefore from a single individual, as decision-maker, to a panel of three: a barrister or solicitor, as chairman, and one representative nominated from each of the employer's and employee's groups. The Rights Commissioner can be bypassed in favour of an initial hearing before the Employment Appeals Tribunal. Both the Rights Commissioner and the Employment Appeals Tribunal apply fair procedures equivalent to those required in a civil trial. Witnesses are heard and there is cross-examination and opening and closing submissions. Since no transcript is kept, the written decision of the Rights Commissioner may be appealed to the Employment Appeals Tribunal and the determination at that level, in turn, may be appealed to the Circuit Court. No transcript is kept in that Court. Thence, it may be appealed, as was this case, to the High Court. All of these steps involve re-hearing all of the evidence. None of the appeals are appeals on a point of law. An employee seeking the vindication of employment rights may be required by a determined employer to proceed through four full oral hearings. The costs in terms of the engagement of legal representation may be very large. Whereas the Rights Commissioner and the Employment Appeals Tribunal may not award costs to a successful applicant, the Circuit Court and High Court are obliged to award costs in accordance with the resolution of the litigation. The entire procedure may take some years. It is also a situation where the resources of an employer may militate against fairness in the disposal of proceedings brought by an impecunious employee. After all, the point of such a case is whether the employee was unfairly dismissed; consequently he or she often has no job. The costs of legal hearings has a human rights implication: see *Campbell v. MGN Limited* [2004] UKHL 22; and in the European Court of Human Rights as *MGN Limited. v. The United Kingdom*, application number 39401/04. I am satisfied that the employee in this particular dispute was so worried about the potential costs that the sum which he received in apparent redundancy from his employer has been kept untouched by him in a bank account. The timescale involved in this case is not untypical of others. The employee filled in a T1A form seeking redress for unfair dismissal and a failure to comply with the period of notice of termination of employment required by statute on the 20th August 2008. His case was heard before the Employment Appeals Tribunal on the 8th December 2008. That tribunal issued a decision on the 24th April 2009. On the 14th July 2009, that decision was appealed by the employer. It was heard by the Circuit Court on the 2nd and 3rd June 2010, and a decision was given immediately by Judge Linnane. On the 14th June 2010 the matter was then appealed to the High Court. This Court heard the case over the 5th, 6th, 7th and 8th of July 2011. Judgment is now being given after a gap of about two weeks. The entire process has taken three years and three full oral hearings.

12. This procedure is cumbersome and redolent with the potential for unfairness. Many proposals have been mooted with a view to

changing it. There are compelling reasons why change might be considered. No appeal in any court proceeding under the Constitution is ever more than a hearing and a re-hearing. Often it is less. From District Court to Circuit Court there is a full oral re-hearing in a civil or criminal case. The process is then complete. In a civil case, a Circuit Court judgment may be appealed to the High Court by a full oral re-hearing. The process is then complete. Circuit Court criminal decisions and High Court civil and criminal decisions can be appealed to the Court of Criminal Appeal or the Supreme Court on a point of law argued on the basis of a transcript. The process is then complete, barring a rare criminal appeal on a point of law of exceptional public importance from the Court of Criminal Appeal to the Supreme Court. In criminal cases the process is usually funded at public expense.

Facts

13. Jerome Panisi was employed from the 30th September 1991 as general manager of JVC in Ireland. His functions as general manager are set out in his written contract of that date. Having analysed that contract, and having heard the evidence of Jerome Panisi, I am satisfied that 90% of his work involved sales. He was not a technical person, versed in electrical engineering, but instead maintained a strong public face in Ireland on behalf of his employer as a salesman. The results of his work were impressive. In due course the employer by whom he was engaged, JVC (U.K.) Limited, became JVC Europe Limited. Nothing turns on that and I will call the employer 'JVC'.

14. The employer argues that the Court should accept that throughout the years 2000 to 2008 JVC faced a very serious situation in terms of turnover. Apparently, the company had not invested early enough in flat screen television technology. In consequence, many of its competitors overtook it in terms of sales. Tube televisions were fast disappearing and being replaced in many homes by modern slimline televisions. The television market is, in terms of sales of consumer electronics, in or around 80% of the market. For any firm in that line of commerce, a fall in sales of televisions is very serious. That is not only because of the revenue which television sales represent, but also because the brand name thereby becomes less visible and so less established in the marketplace and in the home. Whereas there has been some variation in the figures, it seems to me to be clear that turnover in the Irish and British market for JVC fell by around 50% over that time period, and for the reasons stated. The number of people operating in Ireland in sales and administration has decreased from a high point that exceeded twelve employees down to the two that are currently employed as of the date of writing this judgment in the summer of 2011.

15. On the 4th March 2008, a meeting was arranged with Jerome Panisi in Dublin and it was attended by him, by David Diamond, the human resources manager for the company, and by Kevin Crossland, the sales director. Mr. Panisi was handed a letter which told him that there would no longer be a requirement for his position, for the post of mobile entertainment in the U.K. or for the national independent sales manager in the U.K. While these three posts were disappearing, for reasons which were not at all apparent during the hearing, three new posts were being created. These would be: sales manager of key accounts and independent firms, a London position; in Ireland, sales manager for Ireland; and lastly a post of area sales manager in the U.K. Appended to the letter were two job descriptions but, curiously, the job description for sales manager in Ireland was not forwarded until a week later. I have read the job description for that post. In terms of the actual work to be undertaken it very closely mirrors the job then being done by Jerome Panisi. It is possible to describe it in different terms but, in reality, the work to be undertaken by the individual taking that post would be virtually the same.

16. Approximately a year before this development a new key account manager had been appointed in Ireland. This individual was highly competent but lived too far away from Dublin to be effective. As a recruitment brief for this post, an outside agency prepared a document on behalf of JVC. A curious passage occurred therein:-

> "JVC are a progressive company and are looking to attract a talented individual with potential to progress their career to General Management level as the current General Manager (Ireland) is due to retire in two years, ambition, drive and delivery focus is essential to the successful candidate."

17. Jerome Panisi was not due to retire within that timescale, and would not, in fact, have retired until October 2011, had matters taken their course without the intervention of what is claimed to be a redundancy.

18. At some point in the process of consultation before redundancy, provided for under the JVC employee-employer contract, Jerome Panisi became suspicious as to what was happening and began to record telephone conversations and meetings. While this is undesirable, I do not regard it as undermining his character or the integrity of his testimony.

19. The process for redundancy pursuant to the contract between Jerome Panisi and JVC, and as established as engaging rights under s. 6 of the Act of 1977, provided for a period of consultation within which the employee targeted for redundancy could put forward different ways in which the company might proceed without losing that worker. On the 26th March 2008, Jerome Panisi replied to the employer on the proposal to make him redundant. He pointed out that sales had yielded a high net profit in Ireland from 2000 to 2004. He further pointed out that the post of national account manager would be lost to the local organisation under the proposed arrangements. He referred to the peculiarities of the Irish market, whereby under the new structure of reporting proposed in the reorganisation, he would be reporting, were he to be selected as sales manager Ireland, directly to London. His first and primary reason, however, was that the duties of the new position of sales manager Ireland were practically the same as those currently assigned to him. In the result of the reorganisation for the apparent purpose of redundancy, the national account manager in Dublin, who used to report to Mr. Panisi as general manager in Ireland, would be lost and instead there would be a sales manager in Ireland.

20. The issue which thus comes into sharp focus is whether there was a plan, implemented through an apparent redundancy, for the new post of sales manager Ireland to be filled by the existing national account manager.

21. Thomas Dillon was then the national account manager in Ireland. He was recruited in August 2007 and reported to Jerome Panisi. He worked in that position, and then subsequently as sales manager Ireland when Jerome Panisi departed, up to the 16th April 2010. He then left in order to better himself by joining another consumer electronics firm. His evidence was that on the 10th April 2008 he was on holiday abroad when he received a telephone call from Kevin Crossland, the sales director, who was then the vice president of JVC for sales in Ireland and the U.K. He was informed by Mr. Crossland that an email had been sent to all staff advertising the position of sales manager Ireland. Mr. Dillon asked whether selection for the new post would be a long process, to which he received the reply, "I am now speaking to the sales manager Ireland". Mr. Dillon then sent in his C.V., but on the understanding that he had already been appointed as sales manager. As he understood the situation, it was possible that another person had also applied. It seemed to him, however, that the process was just for show. This incident provides a strong indication that the apparent plan of redundancy was a process of removing Jerome Panisi as general manager and replacing him with Thomas Dillon under a different designation. Prior to sending in his C.V., Mr. Dillon checked with Mr. Panisi as to whether, as a friend, he approved of his action in applying for the job and Mr. Panisi indicated that he had no objection.

22. It has been stated in evidence that had Jerome Panisi applied for the position of sales manager Ireland, he would have been given

the position. That evidence is difficult to accept at face value. Had Jerome Panisi been made redundant, then he would have been, had procedures been followed, in open competition with a younger man, and probably with others, had there been no pre-selection for that post. It is also difficult to see him accepting a diminution in status after seventeen years, and pay and conditions which were not advertised but which would be, as is often said, negotiable.

23. The crux of the issue as to whether the manner of dismissal of Jerome Panisi as general manager of JVC in Ireland was a genuine redundancy through a genuine process, or a disguised dismissal, hinges on a meeting which took place in London on the 10th March 2010. This was a weekly management meeting. Jerome Panisi would come from Ireland perhaps once a month and report to that meeting. He was not present on this occasion. In 2008 John Welbourne was general manger of sales for JVC. He was later made redundant. He said in evidence that he was not involved in the creation of the role of general manager of sales. He said that he was not involved in Thomas Dillon moving into the new role in Ireland and nor was he involved in the restructuring. He denied that he was recruiting Simon Hedges for one of the new positions. His view was that the new position in Ireland would involve simply sales, whereas Jerome Panisi had been "responsible for everything". In addition to this evidence, I have heard testimony from David Diamond, the human resources manager, and Meishi Tsuya, who held a very senior post in JVC at the time. Meishi Tsuya struck me as being a loyal person. He is also, however, a company man and highly motivated on behalf of his employer. David Diamond presented in the witness box as a clearly decent individual. It is obvious to me that he at all times did his best on behalf of employees, notwithstanding difficult and unpleasant duties. The person indicating most strongly that the dismissal of Jerome Panisi was a disguised redundancy was Dermot O'Rourke. His clear testimony stands in contrast to the infirmity in recollection and the qualified testimony of opposing witnesses. Dermot O'Rourke clearly had a much better recollection of the incident in question than the other persons present at that meeting.

24. On the 7th March 2008, Jerome Panisi had told Dermot O'Rourke about an indication in conversation over the phone which made him suspicious as to whether the process of redundancy was genuine. I am satisfied that, notwithstanding the sharing of suspicions, Mr. O'Rourke kept an open mind. At the meeting on the 10th March, approximately ten people were present, and Mr. Crossland was absent. At the very end of the meeting, one final item was announced by Mr. Welbourne which was stated not to be minuted. This was because, as was announced by him, the people concerned had not been told. A debate arose during the testimony as to whether previous management meetings had an off-the-record element to them. I am satisfied that they did. Further, I am satisfied that such discussions did not simply extend to things like the meals of employees, or the number of free beverages that were available at work, but encompassed important issues such as matters concerning employment. I am thus satisfied that Mr. Welbourne said that there was an item which was not to be minuted because people had not been told. The item, he said, was to be announced at the JVC sales conference, which takes place on an annual basis, and which was to be held in London some short time later. The announcement was to the effect that there was to be a restructuring across sales prior to this annual conference. Mr. Welbourne said there would be a new structure at the top of sales with two new positions. A named individual was to become the area sales manager in the U.K., another named individual was to take over in the other new post and "Thomas Dillon will report to him" from Ireland.

25. Whereas other witnesses described this announcement as unlikely, I am satisfied that it was made. The accumulation of evidence proves as a probability that the dismissal of Jerome Panisi from his job as general manager of JVC in Ireland was not a genuine redundancy. Even were that evidence to be absent, the indications in the evidence in favour of a genuine process, the burden of proof being on the employer in this regard, are not strong. I do not accept that the assignment brief prepared independently for the key account manager in Ireland could so badly misdescribe the future of Jerome Panisi, given that the person to be recruited was to be directly reporting to him. Rather, it is clear that the systems were required by someone in management to be bypassed, through no fault of the human resources manager, in favour of employing Mr. Dillon, who had neither sought nor played any part in this scheme. I do not know and nor am I obliged to make a finding as to where the responsibility within management for this situation lies.

Damages

26. Redress for unfair dismissal is provided for in s. 7 of the Act of 1977, which provides:-

> "(1) Where an employee is dismissed and the dismissal is an unfair dismissal, the employee shall be entitled to redress consisting of whichever of the following the rights commissioner, the Tribunal or the Circuit Court, as the case may be, considers appropriate having regard to all the circumstances:
>
> (a) re-instatement by the employer of the employee in the position which he held immediately before his dismissal on the terms and conditions on which he was employed immediately before his dismissal together with a term that the re-instatement shall be deemed to have commenced on the day of the dismissal, or
>
> (b) re-engagement by the employer of the employee either in the position which he held immediately before his dismissal or in a different position which would be reasonably suitable for him on such terms and conditions as are reasonable having regard to all the circumstances, or
>
> (c)
>
> > (i) if the employee incurred any financial loss attributable to the dismissal, payment to him by the employer of such compensation in respect of the loss (not exceeding in amount 104 weeks remuneration in respect of the employment from which he was dismissed calculated in accordance with regulations under section 17 of this Act) as is just and equitable having regard to all the circumstances, or
> >
> > (ii) if the employee incurred no such financial loss, payment to the employee by the employer of such compensation (if any, but not exceeding in amount 4 weeks remuneration in respect of the employment from which he was dismissed calculated as aforesaid) as is just and equitable having regard to all the circumstances,
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> and the reference in the foregoing paragraphs to an employer shall be construed, in a case where the ownership of the business of the employer changes after the dismissal, as references to the person who, by virtue of the change, becomes entitled to such ownership.
>
> (2) Without prejudice to the generality of subsection (1) of this section, in determining the amount of compensation payable under that subsection regard shall be had to-
>
> (a) the extent (if any) to which the financial loss referred to in that subsection was attributable to an act, omission or conduct by or on behalf of the employer,

(b) the extent (if any) to which the said financial loss attributable to an action, omission or conduct by or on behalf of the employee,

(c) the measures (if any) adopted by the employee or, as the case may be, his failure to adopt measures, to mitigate the loss aforesaid,

(d) the extent (if any) of the compliance or failure to comply by the employer, in relation to the employee, with the procedure referred to in subsection (1) of section 14 of this Act or with the provisions of any code of practice relating to procedures regarding dismissal approved of by the Minister,

(e) the extent (if any) of the compliance or failure to comply by the employer, in relation to the employee, with the said section 14, and

(f) the extent (if any) to which the conduct of the employee (whether by act or omission) contributed to the dismissal..

(2A) In calculating financial loss for the purposes of subsection (1), payments to the employee

(a) under the Social Welfare Acts, 1981 to 1993, in respect of any period following the dismissal concerned, or

(b) under the Income Tax Acts arising by reason of the dismissal, shall be disregarded.

(3) In this section -

"financial loss", in relation to the dismissal of an employee, includes any actual loss and any estimated prospective loss of income attributable to the dismissal and the value of any loss or diminution, attributable to the dismissal, of the rights of the employee under the Redundancy Payments Acts 1967 to 2007, or in relation to superannuation;

"remuneration" includes allowances in the nature of pay and benefits in lieu of or in addition to pay."

27. This section clarifies the consideration that is to be given to compensation for unfair dismissal. Payments under social welfare and income tax legislation are to be disregarded. In assessing compensation, the court should have regard to the implications for dismissal. My task is to assess the financial damage which the dismissal has brought about and then to place the measure of that damage against the maximum amount of compensation that is available. In the event that the compensation that is available, amounting to 104 weeks remuneration, is less than that sum, then that is the measure of damages. Where the quantum of damage is more, then the jurisdiction is limited to that maximum and the amount of damages must thus be reduced to that maximum sum. Where the measure of damages on dismissal is more than the maximum but contributory fault is found in respect of the dismissal against the employee, the reduction is on the totality of those damages, and not on the maximum award. If the result is to reduce compensation within the maximum award, that sum is appropriate. Where the reduction in total damages for contributory fault puts the damages above the maximum award, then the maximum award is the correct measure of compensation for unfair dismissal.

28. My reasoning on this matter is that it is likely, had Jerome Panisi not been dismissed, that he would have worked within JVC for approximately the same length of time as Thomas Dillon. Redundancy in a situation where employee numbers were diminishing could not have been avoided all the way to his retirement at age 65 in October 2011. During the two years lost, however, he would have achieved full remuneration and would have been topping up his pension entitlement. This would have provided for his retirement. This has otherwise proved to be impossible. He has sought many jobs since his dismissal. Those efforts have been genuine. His actual loss and prospective loss of pension therefore exceeds the maximum of 104 weeks of remuneration. One hundred and four weeks of remuneration is €298,000. On redundancy Mr. Panisi was paid the sum of €101,000. Of this, €19,800 was a redundancy payment; €18,312 was statutory notice; €9,156 was four weeks extra notice; and €51,315 was an ex gratia payment. As there was no redundancy, but as there was a dismissal, Mr. Panisi has now no entitlement to the redundancy money or the ex gratia payment. In addition, it is highly unlikely that he would have been given an extra four weeks notice by way of wages, notwithstanding his long service to the company. After submissions of counsel as to the correct figures, it is agreed that the total award of €298,000 should be reduced. Since Mr. Panisi has already been paid the sum of €101,000, the damages due are €197,000.

Result

29. In the result, there will be a decree in the sum of €197,000 against JVC in favour of Jerome Panisi.