EMPLOYMENT APPEALS TRIBUNAL

Claim Of: Case No.
Employee UD115/2008

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. B. Garvey B.L.

Members: Mr. W. Power
Mr. P. Trehy

heard this claim at Dublin on 29th May 2008

Representation:

Claimant: Ms. Dorothy Donovan B.L. instructed by Ms. Shirley Ann Kells, McDonald, Solicitors, 12 Skeffington Street, Wexford

Respondent: Mr. Tom Mallon B.L. instructed by Mr. Brian Dunne, Matheson Ormsby Prentice, Solicitors, 30 Herbert Street, Dublin 2

The determination of the Tribunal was as follows:

Respondent's Case:

Giving evidence the Human Resources Manager (hereinafter HR) stated that the claimant's role was that of Account Development Executive (hereinafter ADE) which formed part of the respondent's commercial function. The claimant was responsible for a geographical area of Ireland for a particular brand and she reported to the Regional Business Manager (hereinafter RBM).

HR stated that 40% of the claimant's role was involved with make-up; the other 60% was concerned with skincare. The claimant developed customer accounts by setting up make-up and skincare events, identifying training needs and utilising her product knowledge.

The respondent had a number of product launches throughout each year. It was part of the claimant's role to provide support to the respondent's account base during this time. If there was an event in a pharmacy the claimant, as ADE, was present for at least the first day of the event and would receive commission for products sold.

The respondent had four employees carrying out the function of ADE. In 2004 one of the four ADEs left the respondent's employment and another ADE resigned. Neither of them were replaced by the company. The claimant and her colleague were the remaining ADEs.

The director for Europe questioned the viability of having ADEs as their role was unique to Ireland. The director requested a review. The claimant and her colleague were both informed in September 2006 that this review was taking place and the rationale behind the review. The result of the review was that the claimant's position was redundant from the 8 December 2006.

From April 2006 the claimant was absent on a pregnancy-related illness. After the review was completed the Acting HR Manager and the claimant's line manager met with the claimant in November 2006 and told her that her position was not viable and that she was being made redundant. They told the claimant that she did not have to make a decision to accept redundancy or an offer of alternative work until after her leave. This was also outlined to the claimant by letter dated 15 January 2007. HR also wrote a letter to the claimant dated the 30 January 2007 offering to discuss "options for the future" with the claimant. HR was not aware of any reply the claimant might have sent to this letter.

The claimant was paid her full salary for eight months, although the company was not required to pay her this. The claimant's commenced her maternity leave in January 2007. The claimant was due back on the 3 September 2007; but with unpaid leave and holiday leave her return date was the 7 October 2007. The claimant did not return on this date but she had contacted her line manager on the 3 September 2007 and told him that she did not want to return to work but wanted to discuss the redundancy package.

HR and the claimant's line manager met the claimant on the 26 September 2007. The claimant told them she had decided that she did not want to return to work and that she wanted to avail of the redundancy package. The claimant enquired about changes in the organisation and the future of the organisation. HR told the claimant they would be willing to consider her for roles in the future. The claimant enquired about the company's policy for paying a 30 % lump sum for an employee who returns to work and remains with the company for six months after maternity leave. HR told the claimant that she would raise this matter for authorisation and revert back to her. HR provided the claimant with a copy of the compromise agreement concerning the ex-gratia payment offered which outlined this was in full and final settlement of her employment and a copy of the redundancy package.

HR contacted the claimant on the 8 October 2007 and confirmed to her that she would receive the 30% lump sum payment. The claimant told HR that she was reviewing the compromise agreement. HR told the claimant that as the return to work date had passed the company would treat the time until they resolved matters, as unpaid leave.

On the 9 October 2007 the claimant telephoned HR and said the redundancy package as outlined was not sufficient. HR told the claimant that the package included her statutory redundancy and an ex-gratia payment from the company. HR told the claimant that she did not have to choose redundancy as other roles could be discussed. HR offered to meet the claimant to discuss other possible roles.

A meeting was organised for the 24 October 2007. Present at this meeting was HR, the claimant's line manager, the claimant and her solicitor. HR stated that the purpose of the meeting was to outline the redundancy situation and discuss alternative positions. The claimant's solicitor stated

that the claimant was not accepting a valid redundancy situation existed in relation to her employment. HR confirmed that the claimant's role was redundant and her colleague had also been made redundant. The claimant's solicitor put it to HR at the meeting that a freelance artist carried out the claimant's duties while she was absent on sick leave. HR replied that freelance artists had carried out some of the claimant's role during her sick leave to fulfil obligations outstanding with some of the company's customers. HR told the Tribunal that it was very difficult to offer an alternative role to the claimant at this meeting, as it was evident that the problem was the redundancy package on offer.

HR wrote a letter to the claimant on the 1 November 2007 outlining why the role of ADE was not a viable commercial option for the company. The letter outlined the claimant's two options; to accept the redundancy package offered or to consider re-deployment to a lesser role at a lesser income. A specific alternative in a Department store was offered to the claimant. HR received areply from the claimant's solicitor by letter dated the 19 November 2007 outlining the difficulty with the options offered. HR replied through letter dated 23 November 2007 to the claimant. HR'sletter stated that the offer of an alternative role was still open to the claimant until the 3 December2007 and in the event that the claimant did not wish to take up the alternative role, that the companywould process the claimant's redundancy from the 8 December 2007. HR received a reply from theclaimant's solicitor. HR wrote again to the claimant on the 14 December 2007 stating that the company *" has no option but to assume you do not wish to take up the alternative role as offered"* and that the claimant could expect to receive her redundancy payments. HR received by way ofreply, letter dated 19 December 2007 with letter dated the 14 December 2007 attached. HR received a letter dated the 11 January 2008 from the claimant's solicitor stating that the claimant'sredundancy payment and the ex-gratia payment were being returned to the company by bank draft. Holiday monies and the 30% payment were not returned to the company. The claimant has not been replaced nor is there any intention by the company to replace her.

During cross-examination HR stated that the company has used freelance make-up artists over a period of time. HR was aware from April 2005 that the claimant intended to start a family and the company was supportive of her. It was put to HR that the claimant was essentially a make-up artist. HR replied that this was part of her role but she was also trained on skincare. The freelance artists only work with make-up products not skincare. In the early stages the freelance artists did some skincare work but this did not continue after the ADE redundancies, this was a conscious decision by the company.

The company decided that the role of ADE was not commercially viable as the nature of its industry is to restructure due to the aggressive and competitive nature of the industry. The company found that to animate key product launches with freelance artists were cheaper than employing ADEs. The option of freelance work was offered to the claimant. In 2007, 228 days was worked between six freelance artists. Other than the redundancies of the ADEs there were no further redundancies in the company in 2006. In 2007 the company re-structured but there were no resulting redundancies. At the meeting in September 2007 HR offered freelance work to the claimant.

Answering questions from the Tribunal, HR stated that when considering an alternative role for the claimant she examined any available and suitable options. The claimant could have accepted the redundancy package and also performed a freelance role.

The Commercial Director for the company was also the claimant's line manager. Giving evidence

he stated that at the direction from the directors he carried out a profit and loss analysis of the retail benefit from the role of ADE. There was a key difference between employing an ADE with a full-time sales function and freelance make-up artists. He confirmed that the claimant's role was 40% make-up. The claimant also performed skincare analysis with a laptop that had a diagnostic programme. The freelance artist applies make-up only and does not have an involvement in skincare.

During cross-examination the Commercial Director confirmed that the company made substantial savings in 2006 and 2007 from the use of freelance artists.

Answering questions from the Tribunal, the Commercial Director stated that the claimant's role was 100% field based. In her role as ADE she supported the salesperson that was responsible for the customer accounts.

Claimant's Case:

Giving evidence the claimant stated that she commenced work with the respondent in July 2000. The claimant is both a skincare consultant and a make-up artist. The claimant performed her role by using both skincare and make-up products on customers. The freelance make-up artists, as used by the company, are trained in skincare. The company have utilised freelance artists since 2005. The claimant provided training to the freelance artists on skincare. The claimant stated that her role is ongoing but is now carried out by the freelance artists.

In November 2006 the claimant was told her position was redundant and that the redundancies were effective from the 8 December 2007 but that this did not apply to her.

When the claimant met HR and her line manager in September 2007 they enquired about her pregnancy and whether or not she would be returning to work. They also enquired if she was returning whether or not it was on a full-time or part-time basis. The claimant told them that she intended to return to work full-time. The first time the claimant was provided with two options concerning her redundancy was in November 2007.

The claimant stated that make-up artistry consisted of more than 40% of her role. The claimant believes because she had to tell the company she was planning to start a family that she was made redundant. The company may have thought she would not have been as committed in the future.

During cross-examination the claimant confirmed that she had expressed unhappiness about the redundancy package offered by the company. When the claimant received the offer of redundancy in writing it was the first time that an alternative had been offered to her.

The claimant stated that in the latter part of the meeting in September 2007 she was told that her position was under review. It was put to the claimant that it had been communicated to her in November 2006 and in January 2007 that her position was under review.

The claimant considered her role to be a managerial role but the alternative offered to her in the Department store was a demotion. She was not offered the option of freelance work.

Answering questions from the Tribunal, the claimant confirmed that she had telephoned her line manager, as she wanted to discuss her options. However, she did not say that she did not want to return to work. If the company had offered freelance work as an option the claimant would have

asked for a meeting to discuss it and she would have considered it.

Giving evidence the claimant's husband stated that the claimant had intended to return to work after her maternity leave. The issue of redundancy was first raised with the claimant in November 2006 but they were not unduly concerned as they were under the impression that the claimant would be offered a comparable alternative. However, the claimant increasingly returned from the meetings with the company with an offer of redundancy but without an offer of an alternative job.

Determination:

The Tribunal carefully considered the evidence adduced at the hearing. The Tribunal finds that a genuine redundancy situation existed in relation to the claimant's employment. The Tribunal does not find that the claimant's dismissal, through a redundancy situation, was in anyway created because of the claimant's impending pregnancy or subsequent pregnancy but that the redundancy situation existed as a result of re-structuring. The claimant's redundancy was fair, reasonable and genuine and the company offered her alternative work. Therefore, the claim under the Unfair Dismissals Acts, 1977 to 2001, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)