EMPLOYMENT APPEALS TRIBUNAL

Appeal Of:	Case No.
Employer	UD177/2007

against the recommendation of the Rights Commissioner in the case of:

Employee

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.
Members: Ms. M. Sweeney
Mr. J. McDonnell

heard this appeal at Waterford on 14th January 2008 and 7th April 2008

Representation:

Appellant: Mr. Neil J. Breheny, Neil J. Breheny & Co., Solicitors, 4 Canada Street, Waterford

Respondent: Ms. Fiona Grogan, Hegarty & Co, Solicitors, 4 St. Andrew's Terrace, Newtown, Waterford

This case came before the Tribunal by way of an appeal by the employer against the recommendation of the Rights Commissioner ref: r-040504-ud-06/MMG under the Unfair Dismissals Acts, 1977 to 2001. The appellant/employer is referred to as the company and the employee as the respondent.

The determination of the Tribunal is as follows:

Appellant Company's Case:

The appellant company (hereinafter the company) was originally incorporated in 1835. Around 1998/1999 the company was taken over and became a fully-owned subsidiary of the Mount Salus Group. In 2002 due to encroaching technology and intensified competition in the print market a number of the companies in the group were in danger of going into liquidation. In an attempt to ensure the solvency of the company there was management: buy-out by three directors, each having an equal shareholdings in the company. The buy-out had a dramatic effect on the company's working capital; many members of management left the company and the company did not have the finance to do a radical cost restructure. However, because it was an old company it had the

support of the banks and creditors. The management buy-out occurred around nine months into the company's financial year and in both 2002 and 2003 the company made some profit but it was substantially overdrawn and in negative equity. The company's situation worsened dramatically in 2004: it was unable to pay its creditors or tax liabilities. In the summer of 2005 the company was insolvent and in danger of trading recklessly, the bank was seeking personal guarantees and moved the company's account to Cork because it was regarded as a high-risk account, and the landlord, who was owed substantial rent arrears, was threatening an action in the High Court. The Tribunal was furnished with financial figures for these years.

In September 2005 there was a second management buy-out: one of the directors (hereafter MD) bought out the other two directors. Not having to pay those directors' salaries was a substantial cost saving for the company. FC, who had joined the company as financial controller, was by this time performing different duties: he was dealing with banks and creditors. Hitherto, pursuing debtors was part of his function. Following the buy-out FC became a director of the company but was not a shareholder. He and MD set about developing a survival programme to carry the company through the crisis. At a meeting with three senior bank officials the directors explained the position of the company and pointed out that there would be nothing in it for the bank if it pulled the plug on the company, which it was considering. MD asked the bank for a six-month period of grace to turn the company around and if they did not succeed by then they would close down the company. The company agreed with the bank to implement a cost-restructuring programme. The measures adopted included implementing redundancies, moving premises, agreeing instalment payments with creditors, reducing the work being sent to outsiders to print. The bank wanted MD to sign a personal guarantee and he became personally liable for the company's debts. FC also gave a personal guarantee to the bank.

The Revenue Commissioners agreed that the company could pay its arrears on a monthly basis. Of the company's top twenty suppliers, all but one agreed to support the company and MD set out a schedule of payment for those supporting the company. While changing premises involved a saving in the region of €126,000 for the company its obligations under a full-repair clause in the original lease cost it close to €100,000 to restore/repair the premises. High Court and Circuit Court proceedings were instituted against the appellant company respectively in January 2006 and June 2006.

The Board of Directors (comprising of FC and MD) reviewed all the positions in the appellant company to decide which positions could be made redundant. Selection for redundancy was on the basis of cost and job description. Where some of the tasks relating to a position could be eliminated and the remaining duties dispersed among those employees remaining in the respondent's employment that position would be made redundant. LIFO did not apply. The respondent was anexperienced employee with an excellent record. She held a unique position in the company andworked mainly in customer service, on order inputting and customer delivery schedules. Both FCand MD could take over most of her duties and the respondent's remaining duties could be dispersed. On this basis the respondent was selected for redundancy.

The respondent was absent on sick leave from September 2005 until 9 January 2006. The directors of the company felt it was inappropriate to inform her of her redundancy while she was on sick leave. When she returned on 9 January 2006 MD invited her to his office where he explained that the company was in a crisis and informed her that she was being made redundant. The respondent's response was: "Give me my cheque and let me get out of here" and she added words to the effect that she would not lose any sleep about it. When MD began to explain about the notice period to

her she just wanted her money and to be gone. MD had the paper work prepared in advance of the meeting and she signed it. He paid the respondent her notice entitlement as well as her redundancy payment. The respondent's position no longer exists in the company. In cross-examination MD denied saying that he told the respondent that there was no place for her in the new company. The door to the company's premises was locked to prevent creditors from entering the premises.

Between September 2005 and early January 2006 four employees, including the respondent, were made redundant, a further two were made redundant in late 2006 and three more around mid 2007. The respondent's direct manager was the first to be made redundant after the buy-out in September 2005; he was selected because MD who had wide experience in printing could take over his duties. The workforce has been reduced from forty-three in 2001 to twenty-five in 2007. Redundancies were necessary for the survival of the company.

JX, who had a later commenced date than the respondent with the company was kept on; she worked full-time in the office and was paid €9 per hour, which was lower than the respondent's rate of pay. While JX had some customer-relation duties her workload was different from the respondent's and did not increase while the respondent was absent on sick leave; MD and FC hadbeen carrying out the respondent's duties throughout her absence. In October 2005 the companyemployed RF, a school leaver, on the minimum wage. Her main function was debt collecting, which had formerly been done by FC, and her other duties were accounts oriented. She (RF) doesnot perform any of the duties formerly performed by the respondent and she had no experience onproducts or with customers and the service they would expect. FC spoke to the respondent on anumber of occasions subsequent to her redundancy but she never conveyed to him at any time thatshe had any interest in RF's position. Around April 2006 a new sales representative was employedto replace a sales representative who was leaving. The sales representative divided her time between visiting customers and working in the office. She performed some of the respondent's duties, which were not already being performed by both directors.

There had been a previous redundancy situation in the company in 1991. On that occasion the company had negotiated a redundancy programme with the trade union but the company was not in the same crisis situation then as it was in the late 2005 and early 2006. In 1991 the respondent opted for a voluntary redundancy package and it was reluctantly given to her. In late 2005 and early 2006 the directors were under severe pressure to turn the company around within a short period. They both worked long hours. MD only saw his family at weekends. FC worked between 70 and 80 hours a week and ultimately became ill. The company survived and 25 jobs were saved

Respondent Employee's Case

The respondent had originally worked for the company from 1976 to 1991 when she accepted a voluntary redundancy package. She was invited back to the company in 1999 and commenced with the company in a more senior position. She ensured that the information she inputted onto the computer was accurate so that production could be completed to the required standard; in performing this task she had to have a superior knowledge of materials and it was not a job that someone could just walk into. She had lots of customer contact and managed some big customers in conjunction with her manager. She checked customers' credit status before allowing an order. She was involved in purchasing and also outsourced printing work that could not be done in-house. She had never been involved in pursuing debtors.

Within two weeks of the management buy-out in September 2005 the respondent underwent

surgery and was out of work for three and a half months. The company did not communicate with her during her absence. Two colleagues visited her during her recuperation but they did not mention redundancy and it was not mentioned at the office Christmas party either. She was unaware that her job was at risk and naively believed that she was in a strong position in the company because she had shown her worth.

She submitted a return-to-work certificate in mid December and telephoned the company around 6 January 2006 to inform the directors that she would be returning to work on 9 January 2006. When she arrived for work on Monday, 9 January the front door was locked and she had to wait at a side entrance until someone let her in. When she entered the office MD "grunted" something at her. Her desk had been cleared except for a computer screen and keyboard. When she could not log-on to the computer FC told her that the system must be down but it was not because other computers were working. She had a foreboding something was wrong and felt uncomfortable
.
Some minutes later MD called her to the boardroom. There, he told her that the company had changed a lot and that there was no place for her in the new company and that she was being made redundant. She was shocked but did not want him to see this and told him that she would not lose any sleep over it but this was just bravado. The cheque and form were on the desk and she relented and signed the redundancy form. She got her handbag and left. She had longer service than two others working in the office. She did not accept that the company was over-staffed; the three employees who had been working with her in the office were always busy.

In cross-examination the respondent accepted the company's evidence regarding its financial state but she did not think that it was significant. She could not say that drastic measures were required after the buy-out in 2005 because she was not privy to company information. When it was put to her that the door had been locked to keep creditors out she replied, "If that's what you say." But she felt that it was part of a conspiracy to intimidate her. She did not disbelieve FC's evidence on the solvency of the company.

RF confirmed to the Tribunal that she commenced employment with the company in mid October 2005. She worked forty hours per week on the minimum wage, which at the time was €7.50 per hour. Her duties include pursuing debtors, job costing, sending invoices and statements as well as some administrative duties including accounts if things were busy. She did not process orders. She works under FC. Presently, she is paid €10.00 per hour.

Determination

The Tribunal is satisfied that the respondent was not singled out for ill treatment by the two directors and that there was not a conspiracy against her, as alleged.

The respondent accepted that a redundancy situation existed in the company. It was not a collective redundancy. LIFO did not apply. Selection for redundancy was based on cost and job description in that where an employee's duties could be eliminated or dispersed among others in the company that position was made redundant. The respondent held a unique position in the company. Both directors took over the majority of the respondent's duties and her other duties were dispersed. TheTribunal is satisfied that the respondent's selection for redundancy was fair.

There is a minority view that in failing to discuss redundancy with the respondent or give her prior notice of her redundancy that the procedures followed by the company were unfair. The majority is satisfied that the company's reluctance to inform the respondent about her redundancy while she

was absent on sick leave was reasonable in the circumstances. It is further the majority view that it was the respondent's eagerness to leave the premises on the morning of 9 January that precluded a discussion on her notice period.

Accordingly, by majority decision, the appeal by the company under the Unfair Dismissals Acts 1977 to 2001, against the recommendation of the Rights Commissioner, succeeds and the recommendation of the Rights Commissioner is set aside.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)