EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:	**CASE NO.**
Employee	UD863/2008
	RP737/2008
	MN794/2008

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001
REDUNDANCY PAYMENTS ACTS, 1967 TO 2003
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. P. McGrath B.L.

Members: Mr. R. Murphy
Mr. O. Nulty

heard this claim at Drogheda on 22nd December 2008

Representation:

Claimant: Mr. Arron Shearer B.L. instructed by Mr. Conor G. Breen, McDonough Breen, Solicitors, Distillery House, Distillery Lane, Dundalk, Co. Louth

Respondent: Ms. Marguerite Bolger B.L. instructed by Ms. Emma Richmond, Whitney Moore, Solicitors, Wilton Park House, Wilton Place, Dublin 2

The determination of the Tribunal was as follows:-

Opening statement:

Counsel for the respondent stated that a redundancy situation existed in the company and the claimant was fairly selected for redundancy. The respondent had never had a redundancy situationprior to making the claimant redundant so there were no formal procedures or criteria in place forsuch an occurrence. Prior to making the claimant redundant, reductions in employee numbers hadbeen achieved through natural wastage. However, due to the downturn in the industry, the respondent had been forced to make cuts and the claimant's position had been selected for redundancy. The criteria used in the selection of the claimant for redundancy had been lawful andwithin the meaning of the Redundancy Payments Acts.

Respondent's case:

In sworn evidence, the production manager (*hereinafter referred to as PMc*) said that he had been employed by the respondent since 1996 and has been the production manager for the last two years. He reports to the chief executive.

The respondent is a manufacturer of domestic devices and had 230 employees on the clock. From 2006 to 2008, no one had been made redundant and staff reductions had been achieved through natural wastage. During the last twelve months, business has been very poor due to demand for cheaper products, which are supplied from elsewhere. Due to the reduction in demand for the respondent's product, there was a reduced need for the number of staff employed by the respondent. From February to April of 2007, the respondent had operated a three-day working week and the claimant had been one of those on short time. During 2007, the respondent had employed thirty temporary staff but in 2008, only twelve temporary people had been employed.

The respondent recognised and realised in December 2007 that, going forward, they would have to look at the situation. In February 2008 a decision was made by senior management to target areas in the company for redundancy. PMc was involved in the decision as to which areas of the company to target. The final decision was made in March. The respondent was going on short time in April.

Senior management decided that the toolroom would be targeted for redundancy. Three employees worked in the toolroom. Due to the growth in the use of plastic components over and above metal components, it was recognised that there was only a need for two toolmakers. It was also recognised that there was no opportunity for natural wastage of employees in the toolroom so it was decided to make one toolmaker redundant.

PMc met the toolmakers on 14 April 2008 and informed them that one of them was going to be made redundant. They were not told which one was to be made redundant at this meeting. All of the toolmakers had concerns as to which one of them was going to be made redundant but none of them voiced their concerns at the meeting.

The criterion used in the selection for redundancy was based on a toolmakers total years of experience as an employee of the respondent. It was not based on an employees experience as a toolmaker. Based on this criterion, the claimant was made redundant. His sick leave record and his work performance had nothing to do with his selection for redundancy nor were there any personal issues between PMc and the claimant involved in the redundancy criteria. In an agreement with the union, the criterion of "last in, first out" (L.I.F.O.) existed in relation to the temporary employees only.

On 21 March 2008, PMc met the claimant and informed him of the redundancy decision. A letter of the same date outlining the position was read to the claimant and handed to him at the meeting. (*A copy of this letter was opened to the Tribunal*). The claimant was shocked and said that he did not accept the decision. He thought it was wrong and wanted to appeal against it. He made this appeal to Mr. F by letter dated 25 March 2008. (*A copy of this letter was opened to the Tribunal*). The appeal meeting took place on 1 April 2008 with Mr. F, Mr. D a union shop steward, the claimant and PMc in attendance. There had been no issue with the attendance of the union representative despite the claimant not being a union member.

Mr. F upheld the redundancy decision. Replying to the union representative's argument that

L.I.F.O. procedure should have been applied, Mr. F had said that as no redundancies had ever been made by the respondent prior to the redundancy of the claimant, the respondent had determined the criteria for determining redundancy, and this had not involved L.I.F.O., the claimant's attendance or the quality of his work. The claimant's redundancy took effect from 18 April 2008 and this was communicated to him at the meeting on 1 April 2008.

The claimant was given two cheques for notice pay and for redundancy. While he accepted the cheque for notice, the claimant refused the redundancy cheque and he refused to sign the RP50 form. The redundancy cheque was subsequently sent to the claimant by registered post but was returned by the claimant's legal representative. PMc confirmed that this cheque is still held for the claimant and is available to him.

In cross-examination, PMc confirmed that it was himself, and Mr. F as part of the respondent's senior management, who had made the decision to make the claimant redundant and it was also himself and Mr. F who had heard the claimant's appeal against the redundancy decision. The decision to uphold the redundancy had been given verbally to the claimant at the end of the meeting on 1 April 2008.

The claimant had been an indirect employee and not involved in the direct manufacture of appliances. On 17 March, the decision had been made to reduce the number of indirect employees based on the criterion of years of experience working for the respondent. It had been hoped that this reduction would have been achieved through natural wastage. Despite L.I.F.O. being a standard practice, there had been no redundancy procedures within the company because no full-time employees had ever been made redundant before. L.I.F.O. had only been applied to temporary employees.

The application of redundancy to the employees of the toolroom had been case specific. It had been recognised that the number of toolmakers had to be reduced from three to two and this was not going to happen through natural wastage. A persons years of experience with the respondent was considered important and relevant because experience and knowledge of the operation and tonnage of the presses was required. The other two toolmakers had more experience than the claimant. The maintenance requirement of the tools, going forward, was going to be a lot less as less metal was now being used in products. PMc rejected the suggestion that using this criterion as the basis for the decision to make the claimant redundant was flimsy.

While agreeing that the respondent had sought to avoid making employees redundant in the past and that the claimant's redundancy had been the first, it had not been possible to retrain the claimant or to find an alternative position for him within the company. The respondent was working a three-day week at the time of the claimant's redundancy. Though the claimant had skills that could not be utilised within the company, they could be utilised outside the company. The claimant had been given a good reference and had been successful in securing alternative employment in a sister company in Northern Ireland. At the time of the claimant's redundancy, the respondent had not been aware of the availability of this alternative position in the Northern Ireland company.

PMc confirmed that the claimant had been out sick for a period of three years. He had wanted the claimant back to work. The claimant's doctor had said that the claimant should be eased back into work on his return so the claimant had been given the standard 39 hours work per week but no overtime. This had been done to ensure that the claimant was fit to do the job before overtime was offered to him. There had been nothing personal or animus in PMc's failure to give overtime to the

claimant.

PMc maintained that it was purely coincidental that the claimant had mentioned to someone that he was not a union member the day before the issue of redundancy was raised in the toolroom. He had not known that the claimant was not a union member nor had he been told about same.

Voluntary redundancy was not discussed or offered to any of the three toolmakers. If any of them had wanted voluntary redundancy, they could have approached the respondent about it.

PMc confirmed that since the finish of the three-day week, overtime of seven to nine hours per week is now being worked. However, seven to nine hours per week did not equal a full time job. The three-day week had ended in April or early May, which was shortly after the claimant had been made redundant.

Only one job – a jig that did not work – had been contracted out to the company in Northern Ireland. This jig had been manufactured while the claimant had still been in the employment of the respondent.

The redundancy selection criterion which best suited the respondent, going forward, had been based on an employees years of service with the company. Three toolmakers were not required. In three years, the respondent's workforce had been reduced from 295 to 230.

During re-examination, PMc confirmed that both the claimant and another toolmaker had had breaks of service from the respondent. The claimant had been absent from January 2004 until February 2007. During that period of absence, PMc had regularly written to the claimant to facilitate his return to work. The claimant had attended the company doctor and the medical report had said to ease the claimant back into work and this had been done.

PMc had spoken to all three toolmakers and advised them that one was being made redundant. All were concerned at this news but none of them had expressed an interest in getting voluntary redundancy.

In relation to the overtime that was worked in 2008, it was no different between it and what was worked in 2007. When the company was busy and as the need arises, additional hours are worked, as overtime. Redundancy had been decided on the best needs of the respondent, going forward.

Replying to the Tribunal, PMc confirmed that because of the reduction in the amount of metal going into their new range of products, there was no requirement for three toolmakers. At the meeting, the toolmakers had accepted that there was not as much work available. They were in shock at the meeting and had not made any suggestions as to how the redundancies could be handled, nor had they made any suggestions subsequent to the meeting.

There was no possibility of offering the claimant alternative employment in another part of the company because the respondent already employed a sufficient number of general operatives. Had an alternative position been available, demarcation would not have been an issue.

PMc agreed that because a practice of L.I.F.O. existed in the company, the three toolmakers would have had an expectation that this practice would have been applied to them. The suggestion of sharing the workload of the toolroom had not been suggested.

Claimant's case

The claimant explained that he had learned about redundancies affecting the toolroom at the meeting with PMc. He had learned that due to the downturn, the respondent had too many toolmakers. He had specifically asked if this meant a move to a new area of work and had been specifically told no. His colleague had asked about the redundancy package on offer and had been told that this had not been decided. In a subsequent discussion, the three toolmakers had noted the existence of the practice of L.I.F.O. and had therefore figured which one of them should be made redundant based on this criterion.

PMc had taken control of the meeting on 21 March and had read the letter, which had informed the claimant about his redundancy. The claimant had been shocked by the news. He did not believe he had asked about the selection process for redundancy at this meeting. No explanation was offered as to why he had been chosen for redundancy.

Following this, the claimant had written to Mr. F to appeal against the redundancy decision. The appeal was granted and a meeting took place. Mr. F and PMc were at this meeting but it was Mr. F who took control. The claimant attended with a colleague. At this meeting, the claimant was informed that he had been chosen for redundancy because his experience with the respondent was not as great as the other two toolmakers. When he asked as to which areas of knowledge he was lacking in, he was told that it was his knowledge of the presses. The practice of L.I.F.O. was raised at the meeting but the claimant was told that it was not being pursued because it did not suit the company. At this meeting, Mr. F informed the claimant that the redundancy decision was being upheld and that ten to twelve others were also being made redundant.

The claimant established his loss for the Tribunal. Alternative employment had been secured on 7 May 2008 in a company in Northern Ireland but there is ongoing loss between the two jobs.

In cross-examination, the claimant agreed that he and the other two toolmakers had discussed the situation during the time between the two meeting of 14 March and 21 March. They had expected and anticipated redundancies in the company but had not expected that the toolroom would be affected. At the meeting on 21 March, the claimant had been informed that he was being made redundant. The criterion used in choosing the person to be made redundant had been the cumulative length of service with the company. The claimant had thought that the criterion would have been L.I.F.O. Had this criterion been used, it would have been one of the other toolmakers who would have been made redundant.

When put to him that either criteria – L.I.F.O. or length of service with the company – had not been personal, the claimant said that he had felt that the criterion used had not been fair because no one else had been made redundant.

The claimant agreed that he had appealed against the redundancy decision to Mr. F and a colleague had accompanied him to the appeal meeting. However, the appeal process had not been fair because an independent person had not been present. The claimant agreed that he had not sought to have an independent person present for the meeting but had made his written appeal to Mr. F.

The claimant's experience was never criticised but the other two toolmakers had greater experience. He agreed that at the end of the meeting on 21 March, he was aware that the criterion being used for the selection of the person to be made redundant was the persons experience with the company. The claimant contended however that this was irrelevant because the nature of the work had changed from what was done in the past. The way forward now was in plastics and not metal and

he had tremendous experience with plastics.

In securing alternative employment, the claimant now gets substantial overtime but he would have gotten overtime had he been able to remain working for the respondent. His loss between the two jobs was compounded by the current euro to pound sterling differential. While agreeing that he had left the respondent in good standing, he had not been aware that he had gotten a good reference which had assisted him in securing alternative employment. He had experienced no difficulty in securing this alternative employment.

Replying to the Tribunal, the claimant said that he had vast experience as a toolmaker while the two toolmakers that remained in the employment of the respondent only had the experience that they had gained while in the respondent's employment. His departure from the respondent company meant that the remaining two toolmakers were working more hours, and there were some shortcomings in the skills and experience that remained.

The claimant was not aware of any appeals procedure or of any independent person that he could make an appeal to. Any issue that he ever had was directed to Mr. F.

Determination:

The Tribunal has carefully considered the evidence adduced. There was no evidence to suggest that the company was not entitled to make a redundancy in the tool room. It seems that the claimant understood that in circumstances where the 'last in first out' criterion were to be applied his job would be safe.

Ultimately, the company made the decision based on cumulative longevity of service together with the experience acquired. The Tribunal cannot find that this criterion was fundamentally unfair and/or unreasonable. The Tribunal cannot interfere with the selection process where same is not unfair, and therefore, a legitimate redundancy was made.

Much was made of the appeal process, but again, the Tribunal cannot find fault with this process, which was effectively run in accordance with the wishes of the claimant. This process was not unfair.

Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2001 fails, as the claimant was not unfairly selected for redundancy. It is noted that the redundancy package under the Redundancy Payments Acts, 1967 to 2003 has still to be paid, and the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 has been dealt with inter parties.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)