EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	CASE NO.
Employee-appellant	UD346/2009
	RP346/2009

against

Employer -respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. Hurley

Members: Mr. T. Gill
Dr. A. Clune

heard these claims in Ennis on 29 June 2009

Representation:

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Claimant(s) :
Ms. Caitriona O'Connor,
Kerin, Hickman & O'Donnell, Solicitors,
2 Bindon Street, Ennis, Co Clare

Respondent(s) :
No legal representation

The determination of the Tribunal was as follows:-

The claims to the Tribunal were in respect of a retail sales assistant who began working in a shop at a filling station on 23 February 2004. At that time the shop was run by a couple (JG and CG) who left the shop around July 2007 whereupon the lessor, the respondent, took over the running of the shop. The respondent employed a manager (DC) around December 2007. The claimant continued to work on the same employment terms as before.

On 13 November 2008 the claimant received a voicemail message on her phone advising her to attend a meeting at 10.00 a.m. the following morning with DC and the respondent. The claimant attended as per DC's request but the respondent did not attend. At the meeting the claimant was

advised that all staff members were being made redundant with immediate effect. DC told the claimant that he would be the only staff member to remain employed and that it would be up to him to perform the functions of all the various employees. This made no sense to the claimant who advised DC that he could not possibly do everyone else's work by himself. However, DC insisted that he did not have any choice and that he would have to let all the staff go. The claimant was very shocked and distressed to find herself made redundant with immediate effect.

On 18 November 2008 the claimant returned to the shop with her son-in-law (who was a practising accountant) to advise DC of her entitlement to redundancy pay. The claimant then noticed that one of her former colleagues (P) was working in the shop. She later discovered that she was the only employee let go by DC on that date (14 November 2008) and that P was now working seven days per week in the shop including the shifts that had been worked by the claimant. P had less service in the shop than the claimant but was now carrying out the very same role as the claimant had performed before she was made redundant. It was very clear to the claimant that her job continued to exist and was still being performed albeit by a different employee. The claimant understood that her hourly salary was greater than the salary being paid to P to perform the same job.

The claimant had not received a redundancy certificate or any redundancy payment despite repeated requests. Neither had she received her two weeks' minimum notice.

In all the circumstances, the claimant believed that she had been unfairly dismissed, on the purported grounds of redundancy, although her job continued to exist and was simply being performed by another employee for less remuneration.

Asked why the Tribunal had not received any written defence from the respondent, DC (the abovementioned manager) said that he did not know and that RL was "stuck in traffic" but was aware of the hearing, had asked DC to attend and had asked DC to speak at the hearing.

Giving sworn testimony, DC said that he was aware of the claimant's claim. He confirmed that in July 2007 RL had taken over the running of the shop where the claimant had worked. He stated that the claimant had been given a P45 by her previous employer (CG) and that there had not been a transfer of undertaking. Asked if he could show a P45 from 2007, DC said that he could not but that the claimant had "finished up" at the end of June 2007 and that she had worked "a week in hand" for her new employer, RL. Asked if there had been any break in service, DC said that he did not know but that CG had "finished up" and RL had taken over. DC said that he was there in December 2007 to learn from the "old manager" (PR).
A bypass road opened. There were two other petrol stations. Business decreased and the respondent was making a loss. DC rang the claimant on 14 November 2008. The claimant's hours had been cut from forty to twenty. It was the same with DOR (another employee). DC told the claimant that she could go in two weeks but she wanted to go straight away. DC gave names of other employees to the Tribunal and said that seven employees (including the claimant) were let go. Also, DC broke his ankle. RL "supplemented losses" from other sources and tried closing the deli. The claimant was a shop assistant who would open the shop and serve. DC took over the claimant's job. P opened in the morning then.

Asked about all this, DC said that he came in on crutches, P helped out and DOR "did a few extra hours". DC rang the claimant and offered her her job back but she declined.

DC told the Tribunal that the claimant finished on Monday 17 November 2008. He had said that she could "stay on for one or two or three weeks" but she wanted to stop straight away and did not want to talk directly to the respondent's accountant (SH). SH gave information and money to DC for the claimant. DC just gave the claimant what SH said to be the claimant's entitlement.

DC stated to the Tribunal that his instructions were that there had been a break (in the claimant's service). He did not know if the shop had closed down for a period. It had closed down when CG (the abovementioned lessee) had been there and had then opened up again. DC conceded that he did not know about this closure. When it was put to DC that the difficulty was that RL was not at the hearing DC replied: "I presumed we'd have a solicitor here." Regarding the claimant, DC said: "I wouldn't know what she would be entitled to. I can't comment on what I don't know."

Regarding the ultimate termination of the claimant's employment, DC told the Tribunal that he had rung the claimant to drop the keys back but had subsequently rung her with an offer of work which she had declined. There were some hours available. At that time all employees who had done forty hours were doing twenty hours.

DC told the Tribunal that the claimant had been "a great shop assistant" and that everybody had been able to do everybody else's job at the respondent's premises.

Giving sworn testimony, the claimant said that her employment started on 23 February 2004. The abovementioned CG was running the petrol station. CG rented it from the respondent. All staff were "held over" when the site reverted to the respondent. The claimant "helped with the fit-out". The petrol station "carried on business as usual". The claimant's duties did not change. She "was still the till operator".

The claimant worked from 6.30 a.m. to 3.00 p.m.. Her hours were reduced to 7.00 a.m. to 2.30 p.m. and later to 7.00 a.m. to 1.00 p.m.. Then RL started changing people's hours. DOR (an abovementioned employee) was working fifty to sixty hours per week. The claimant was told to go home. She "was the most expensive there" and was the first to get let go. Nobody else had their hours reduced.

On 13 November 2008 the claimant was in Limerick when she got a message on her phone. On 14 November just DC was there when she arrived. DC said that she was finished that day and that he could run the shop. The claimant told him that this would not be possible. DC said that he would have to do it. No other employee was let go.

The following Monday or Tuesday the claimant went back with her son-in-law having been to a citizens' information centre. She was told that RL wanted it like this. P (an abovementioned employee) was working from 7.00 a.m to 7.00 p.m. and the claimant's job was gone. DOR was doing fifty or sixty hours. All the part-timers were still there. DC said that he would discuss redundancy (for the claimant) with SH (the abovementioned accountant).

However, the claimant never got a RP50 or redundancy pay. There were twenty other people working at the petrol station when the claimant left. She was the longest-serving member of staff. She had done nothing wrong and had never rung in sick. Other people had had this done to them but had not challenged it.

Asked why she had been let go, the claimant replied that RL had offered her DC's job "because he

said he was not getting the result the wanted". The claimant said that RL was "a difficult man to deal with". DOR "was the only full-time person there". Part-timers left because "they just got sick of it". P was working for seven euro per hour. The claimant had been on €460.00 per week but had never had a contract of employment with RL.

Around February 2009 the claimant heard from DC. She was asked at the Tribunal hearing if she would have taken her job back if she had been given all documentation as to terms and conditions of employment. The claimant replied that she would have done if all had been in order and that it was not true that she would not have gone back.

After the claimant's sworn testimony DC stated to the claimant that he had had "no issues" with the claimant who had been "a very good employee". He said that she "even came when she had a funeral" and that he "never had a problem" with her. He stated that he did not dispute "most of what she said" but he said that DOR "would not do fifty to sixty hours" and that P "would not do 7.00 a.m. to 7.00 p.m." because he (DC) "would send him home for a few hours".

When the claimant was questioned by the Tribunal she said that she had "eventually" got a P45 after a few weeks but that she had got no P45 when CG (the departed lessee) had left. The claimant's representative stated to the Tribunal that the only P45 the claimant had got was after November 2008.

The claimant told the Tribunal that P had been there when she had been working and that "he ended up doing my job also" although, for health and safety reasons, one was "not supposed to operate like that". She added: "I had to do petrol some times too. You had to be flexible. I was the first one let go. I don't know if others were let go. People were constantly coming and going. No-one can open at 7.00 a.m. and work till 10.00 p.m. on his own. There was a staff rota there."

DC said to the Tribunal that: only DOR had left of her own accord; that he had wanted all employees to be able to do all jobs; and that he had been told to let the claimant go and to do an extra twenty-five hours himself. DC added that RL had spoken of closing the place down and that he (DC) kept being asked to do more.

When it was put to DC that the claimant had said that P was doing her job, DC replied that P could not do everything but that DC had broken an ankle. DC told the Tribunal that he had taken over the claimant's job but that P had "helped out as best he could".

Determination:

The claim under the Unfair Dismissals Acts, 1977 to 2007, fails because the Tribunal finds that there was a genuine redundancy.

Under the Redundancy Payments Acts, 1967 to 2007, the Tribunal finds that the claimant is entitled to a redundancy lump sum based on the following details:

Date of Birth:	04 May 1952
Commencement Date:	23 February 2004
Termination Date:	14 November 2008

Gross Weekly Pay: €460.00

This award is made subject to the claimant having been in insurable employment under the Social Welfare Acts during the relevant period.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)