EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:		**CASE NO.**
Employee	- ***claimant***	UD1523/2008
against		
Employer	- ***respondent***	

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. O. Brennan B.L.

Members: Mr. F. Cunneen
Mr. G. Whyte

heard this claim at Dublin on 8th May 2009

Representation:

Claimant(s): Mr. Paul Finnegan B.L. instructed by Steen O'Reilly, Solicitors, 31/34 Trimgate Street, Navan, Co. Meath

Respondent(s): Mr. Eddie Farrelly B.L. instructed by Ms. Denise Fanning, Solicitor, DAS Group, 12 Duke Lane, Dublin 2

The determination of the Tribunal was as follows:-

Opening statement:

Counsel for the respondent stated that the case being made by the claimant was that he had been unfairly selected for redundancy. The respondent's position was that a redundancy situation existed due to a slowdown in trade. In October 2008, the respondent had sixty-three employees. Three had taken voluntary redundancy and the employment of six other employees had been terminated by way of compulsory redundancies.

Section 6(3) of the Unfair Dismissals Act, 1977 provides that "*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—*

(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
(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, then the dismissal shall be deemed, for the purposes of this Act, to be an unfair dismissal."

Counsel for the respondent contended that Section 6(3) of the Act did not apply in this case as the criteria of "last in, first out" (L.I.F.O.) was not applied by the respondent.

There was no union within the respondent company.

Respondent's case:

In her sworn evidence, Suz confirmed that she was H.R. and training officer. She had seven years H.R. experience and had been employed by the respondent for two and a half years.

On 24 September 2008, a decision was made that redundancies had to be effected. Accordingly, Suz contacted a legal representative of the respondent who advised that either a selection criteria process or L.I.F.O. should be used for redundancy selection. On the advice of the legal representative, the decision was made to go with the selection criteria process. (*The selection criteria for redundancies and the scoring guidelines for same were opened to the Tribunal*). The criteria in the selection process included productivity, proficiency, length of service, teamwork, responsibility, adaptability, communication, initiative and quality of work. The scoring of 1 to 5 was outlined as follows…

1 = weak
2 = only satisfactory – room for considerable improvement
3 = average
4 = good – minor points could improve
5 = very good

Suz met with line managers on 2 October and informed them that the respondent was implementing redundancies. The line managers were told that they would have to score the employees. It had been decided that between six and nine employees would be made redundant. The line managers would decide on same. The respondent's department that were earmarked for redundancies included accounts, customer services, warehouse general operatives and purchasing. Only the purchasing manager volunteered for redundancy. The claimant was scored by his line manager and Suz made no decision on the claimant's selection for redundancy.

A copy of the "Information for Managers on Redundancies" was opened to the Tribunal. In same was stated in part…

- "Affected departments need to nominate one person from their departments to be their spokesperson
  - All spokespeople will then meet an discuss any suggestions staff may have
  - One person will then be nominated from the spokespeople to meet with the Directors to discuss staff suggestions
  - (*the managing director*) will then get back to the nominated spokesperson as to weather any of these suggestion are viable

- All employees who had been selected for redundancy will be informed at a meeting on Oct 23rd by their Dept Manager, (*and other managers*) and given their required notice period.
- When you consider staff for redundancy you need to
  - Have a genuine reason for selecting a particular person
  - Keep a detailed written account of your private assessment of all of your employees
  - Use the spreadsheet…to record your scoring of each of the selection criteria
  - Ensure that your reason for selecting a particular employee does not discriminate against this person in any way as employees who are made redundant and feel that they were unfairly selected for redundancy may have a claim under the Unfair Dismissal Act
- Management may not
  - Discuss the selection process or criteria for selection with any employees
  - Do not speak to individual staff or say anything like "**you'll be ok**" or "**it wont be you**" no matter how worried the employees are as these statements could lead to an unfair dismissals case from another employee." (*sic*)

Once line managers were informed that some employees were going to be made redundant, they in turn informed all the employees. The employees had to nominate a spokesperson from each of their departments and the drivers nominated X. Once a spokesperson was nominated, the employees were informed that they had to come together and discuss ideas on how to eliminate the need for redundancies. By the time Suz returned from annual leave on 15 October, a few ideas had been suggested. The spokespeople had wanted the date of the redundancy decision brought forward to 17 October. The only input the employees had was on how to eliminate the need for redundancies. They had no input on the criteria for redundancies.

The claimant was selected for redundancy by his line manager on the basis of the lowest score he received within the total group of drivers. He was the only driver who was made redundant. He was met and informed of same on 17 October. The meeting did not go according to plan. The claimant had been unhappy about his selection for redundancy and had tried to leave the meeting. However, he was prevailed on to stay and the process was explained to him.

In cross-examination, Suz explained that she personally had not considered any other criteria, as it had not been her decision to make. However, all ideas were considered.

Voluntary redundancies had been offered to employees and two people had volunteered for same and left at their own behest. Staff were not made aware of the selection criteria except line managers and those who were ultimately selected for redundancy. However, the staff who were selected for redundancy were not informed of the criteria in advance of selection.

Replying to the Tribunal, Suz confirmed that the voluntary redundancy package that had been offered to the employees had only been statutory redundancy and same was made available to all staff.

The employees had no input into the selection criteria. The criteria had only been issued to the line managers and these managers had no experience in the scoring of the criteria. The function of the department spokespeople had been to produce the staff's cost cutting ideas and there had been some ideas. They also had no input into the selection criteria.

Suz confirmed that all employees have written terms and conditions of employment but there was no mention therein for redundancies.

In sworn evidence, the claimant's line manager (*hereinafter referred to as Gra*) confirmed that he had four years service with the respondent as the warehouse manager. He got on well with the claimant and all the other employees and all were very good.

The criteria "production" related to the amount of work that was done by an employee in their particular area. The criteria "length of service" was scored in relation to a person's length of service with the respondent. Among the drivers, the claimant had one of the longest services with the respondent at eight years. Another employee had twelve years service with the respondent.

In relation to the criteria of "teamwork" and "communication", the other drivers had been willing to help when colleagues were busy, while the claimant had not been willing to offer to help. Also, the standard procedure of the respondent was to deliver orders to customers before lunch. However, with the claimant, this sometimes did not happen until after lunch. Though these issues never raised disciplinary actions, the claimant lost one point in these categories in the selection process. The claimant got the lowest overall score of 31 points.

Gra confirmed that the respondent had also used a courier service, but with the downturn, the courier contract was not maintained. The suggestion of employing the drivers on a three-day week had been considered by the respondent but if the drivers had been kept on under this plan, the same productivity would not have been achievable.

In cross-examination, Gra confirmed that the only alternative suggestion that was considered was a three-day week. However, this had not been told to the staff. At the general meeting in the warehouse, which the claimant had attended, the option of taking voluntary redundancy had been put to the staff. When put to Gra that the criteria that was used was subjective and not easily quantifiable, he replied that it was open to his opinion but that he knew his staff well.

The claimant was never addressed in relation to the matters of teamwork and communication. He always got his work done and in fairness, if pushed, he would do extra work, but he would push back against this. The claimant did his deliveries well but the other drivers performed better. He gave out and moaned and if he was busy, he would off-load to the other drivers. However, the issues never came to a head with the claimant where disciplinary procedures needed to be invoked.

It was put to Gra that performance reviews were conducted over time and in one conducted in June 2008, some months prior to the claimant's redundancy, the general performance of his role was rated as very good with a 100% rating and no comment for improvement, a result that did not tally with the decision to make the claimant redundant, and which was a contradiction. In reply, Gra said that the claimant preformed to the required minimum standard and others performed better.

The criteria for redundancy selection were not put to the employees. It had been management ideology that the criteria not be discussed with the staff. However, the claimant was dealt with fairly in the selection criteria.

Replying to the Tribunal when asked how the claimant's performance reduced from 100% between June to October, Gra stated that the claimant was argumentative. Though no reference was made to

it in the performance reviews, the claimant only performed at the respondent's minimum standard and made his deliveries to customers. All the other drivers also received reviews of 100%.

Gra confirmed that four drivers had worked for him. All the drivers had attended the meeting in the warehouse and all had been offered the option of voluntary redundancy.

The criteria were scored on a scale of 1 to 5 and one driver was facing redundancy. All of the drivers scored very well in the criteria but some did better than others and Gra had to make the decision. Gra described the criterion of teamwork as the relationship between the drivers. He agreed therefore that the interpersonal relationship between the drivers was the problem.

In sworn evidence, the respondent's financial director outlined the fall in turnover from 2007 to 2009 as €17.5 million, €14.1 million and €10.7 million respectively. It was not anticipated that the respondent would enjoy a profit in 2009.

Enhanced redundancy packages had not been offered to employees. As staff had been aware that some employees would inevitably choose to leave the company, it was hoped that if such employees volunteered to opt for redundancy and leave, their decision could save a colleague from their department being chosen for redundancy.

The respondent was a family business and since December, the family directors had taken a 50% pay cut. Since February, it had been considered putting employees on a three-day working week but management knew that this proposal would not work in every department. Accordingly, sixteen employees had been put on a three day week and, where this proposal could not be implemented, the remainder of employees had taken a 10% pay cut.

In cross-examination, the financial director confirmed that it had been the instruction to line managers that they were to offer voluntary redundancy to the employees. She believed that this instruction had been done.

Replying to the Tribunal, the financial director stated that he believed that the respondent would still be in operation next year on a lower cost base. Prior to the implementation of redundancies, all luxury items and events had been cancelled, such as bonuses, Christmas party, etc.

The financial director confirmed that voluntary redundancy had been offered to the employees through their line managers. The line managers had passed on the offer to the employees. The average salary of those employees who were made redundant had been €30,000.00 annually.

Claimant's case:

In his sworn evidence, the claimant confirmed that he commenced employment with the respondent in April 2001 as a van driver.

The claimant was first notified about redundancies around September. He was called to a general meeting in stores when he and other employees were informed about what was going to happen. No offers of voluntary redundancies were made. A request was made that the redundancy decision be made sooner so as employees would not be left in a state of uncertainty.
On Friday 17 October 2008, the claimant arrived for work at 8.25am. He was called to the boardroom at 8.30am and told what was going to happen. He knew what was going to happen

when he was called to the boardroom. The claimant stated that he could have been offered a store job.

The claimant did not accept that he had been selected for redundancy. He was called by Suz to go through forms. After this, he went on to the corridor for a smoke. Gra came out and asked the claimant for his fuel card and telephone. He told the claimant that he – *the claimant* – could take the van home and the respondent would collect it on the following Monday. The claimant asked for his file.

It was when he got his file that the claimant became aware of the criteria that had been used in the selection for redundancy. He did not have representation at the meeting in the boardroom nor had he previously received reprimands in relation to elements of the criteria.

The claimant established his loss for the Tribunal. He had applied for lots of jobs but had only secured eight weeks work. He had also completed a lifting course, a health and safety course and he had re-secured his forklift licence.

In cross-examination, the claimant confirmed that Gra had asked him for his fuel card and his telephone. When put to the claimant that he received one months pay in lieu of notice, the claimant replied that he had not refused to work out his notice period. He had wanted to continue on working until his fuel card was taken from him.

The claimant did not accept that the redundancy selection criteria used by the respondent was fair. 5 points was the maximum score. When put to the claimant that length of service was scored pro-rata, he highlighted that services of eight and twelve years had each receive a maximum score of 5 points. All of the criteria that had been used were unfair. All drivers helped each other and he had helped the other drivers. Routes were swapped between drivers and as this swapping happened in the yard, management did not always know about it.

The claimant confirmed that he received a redundancy lump sum of €9,500.00 from the respondent. He had only worked once since his employment with the respondent ended and had earned €3,500.00.

Replying to the Tribunal, the claimant confirmed that he was called to a meeting on the Friday and informed that he was being made redundant. He had not been made an offer of voluntary redundancy, and in any event, if it had been offered, he would not have taken it.

The claimant secured alternative employment from late January until the end of March 2009

The claimant was aware of the respondent's grievance procedures whereby he could go to any manager in a different department. He did not think about appealing against the redundancy decision. There was no point in appealing against the decision when the managers had been in attendance at the meeting. He had no intention of leaving the respondent and had wanted to work on. He had arrived for work on that Friday dressed in his work clothes. However, his fuel card and telephone had been taken from him and he had been told that his van would be collected from him the following Monday.
The respondent was not unionised and accordingly, the claimant had no union representation at the meeting on 17 October 2008.

Closing written submissions:

The respondent's written submission stated in part…

1. the respondent's turnover dropped in excess of 50% between May 2007 and May 2009 thus it was clearly the case that cuts were necessary and the respondent was obliged to make redundancies.
2. the redundancy selection criteria was not devised by the respondent's management with a view to getting rid of an individual employee, or by way of any ulterior motive but was obtained from the respondent's legal advisors and was applied fairly by the respondent.
3. the claimant was one of four drivers. No issue had arisen with any of them that would cause the respondent to single one out for redundancy. The claimant's line manager, who had the redundancy selection, gave every driver 100% and all drivers were considered by the respondent to be good employees. Nonetheless, a choice for redundancy had to be made between the four drivers.
4. the most successful driver scored 35 points out of 45 points and the least successful driver scored 31 points out of 45 points. Investigations had showed that putting the drivers on a three-day week was not a feasible option. The respondent dispensed with the use of a courier service, except for unusual circumstances. The offer of alternative employment within the company had not been possible as employee numbers had to be reduced for the respondent to survive. The respondent had been unable to afford to offer an enhanced redundancy package. Volunteers for redundancy had been sought but no driver opted to volunteer.
5. the proposed redundancies were announced on 2 October 2008 and consultation with staff representatives was given until 23 October 2008. The drivers appointed X as their staff representative. The staff representatives asked that the redundancy decision date be brought forward to 17 October 2008 due to the uncertainty the same was causing to all employees, and this was done.
6. the respondent did not use the criteria of "last in, first out" for the selection for redundancy. Having regard to section 6(3) of the Unfair Dismissals Act, 1977 as amended, there were not obliged to do so, and no representation was made to the respondent that they should do so.
7. the length of service criteria was marked in the same manner as all of the other criteria. There had been no suggestion in evidence that the claimant line manager had a difficulty with the claimant. The driver's line manager had previously given all drivers excellent performance reviews. He was put in the unfortunate position of having to choose between the drivers. He made notes in respect of his selection on the nine criteria that were used. The claimant was one point lower that the other relevant party in respect of teamwork and communication. The reason for this, per the evidence of the line manager had been due to the other drivers being more flexible in relation to doing other runs and of taking deliveries off busy drivers, and the claimant occasionally not reaching a standard of performance which involved delivering by a certain time in the day. These issues arose only by way of comparison with the other drivers.
8. On 17 October 2008, the claimant met with management in respect of redundancy. He was advised of the selection criteria. However, the meeting was cut short due to the claimant's objection to same. There was no advanced consultation in respect of developing the criteria to be used in redundancy selection as management did not want to encourage the canvassing of managers in respect of the selection, and this provision was set out in the guideline procedures document used by management. The

redundancy criteria were only discussed with those being made redundant, and with managers. There was consultation with those who were made redundant and they were informed of the criteria on the date of their selection. There was no obligation on the respondent to conduct a general consultation. Furthermore, in United Kingdom decided law, general consultation may be necessary in a large unionised workplace but the same considerations do not apply to a smaller non-unionised one. The case of Gray –v– Shetland Norse Preserving Co Ltd [1985] IRIL 53 was cited.

9. "*where there is no agreed procedure, custom and practice relating to employment, and selection for redundancy does not result wholly or mainly from one of the grounds deemed unfair in Section 6(2) of the Unfair Dismissals Act, the EAT will be asked whether the employer has acted reasonably in the light of all the circumstances*" **(** *"Dismissal Law in Ireland", Second Edition, Mary Redmond, Paragraph 20.45, Page 425***)**. The respondent was obliged to select one of four drivers for redundancy. The respondent had no complaints against any of them. The respondent applied objective criteria, which is got from an external source, in its redundancy selection. The selection was fair and reasonable in all the circumstances.
10. Those selected for redundancy were given the opportunity to meet management to discuss same. However, the meeting with the claimant on 17 October 2008 was cut short by the claimant; alone of those who had been selected for redundancy. In this regard, no issue arose which was a disciplinary issue but the respondent accepts that elements of the selection may be described as "faulty" elements insofar as the respondent chose to retain the most flexible drivers. That does not make it a situation where a disciplinary procedure or warning was required. "*If, notwithstanding this riskan employer takes fault reasons into account it is not incumbent on an employer toadminister warnings to an employee, for example an employee whose attendance is lessthat satisfactory, that in the event of a redundancy situation he will be the first to go*" **(***"Dismissal Law in Ireland", Second Edition, Mary Redmond, Page 428* and *Gray –v–Shetland Norse Preserving Co Ltd [1985] IRIL 53* **)**. This is a case where therespondent applied objective criteria in order to select the employees who could assistmost in the economic circumstances.
11. the claimant's dismissal was not in breach of section 6(3)(a) and (b) of the Unfair Dismissals Act, 1977. The respondent was reasonable in all of the circumstances or the decision it made. While the decision to make the claimant redundant was exceptionally difficult on the claimant, the decision was clearly an economic necessity on the part of the respondent and there was no ulterior motive in the selection.

By way of reply to the above, the claimant's written submission stated in part…

1. it was accepted that the respondent's turnover had dropped considerably in the short to medium period.
2. the claimant's direct evidence complained about the criteria used in the selection for redundancy and he illustrated its inefficiency with the example of "length of service". This example was used to highlight the "incongruity and seemingly haphazard, unsubstantiated and irregular criteria used by the Respondent for the purpose of effecting redundancies".
3. the evidence of the claimant's line manager was that he never raised any issues in respect of the claimant's employment in advance of affecting the redundancies. Despite this, the claimant scored lower that the other redundancy candidates.
4. voluntary redundancy was not offered to the claimant.
5. the respondent was not obliged to use the policy of "last in, first out" in effecting

redundancies. However, the respondent was obliged to use "fair selection criteria implemented in a proper, objective and impartial manner in electing candidates for redundancy".

6. the selection criteria used by the respondent were "vague, unambiguous and subjective." The respondent's evidence had been that the claimant scored lower in the areas of teamwork and communication. The claimant denied the contention that he had not been as flexible as the other drivers in the areas of assisting on other runs, taking deliveries off busy drivers, and of not reaching a standard of performance which involved delivering by a certain time each day. These issues were not addressed with the claimant prior to his redundancy, despite the opportunities to do so. Indeed, the claimant's line manager consistently provided the claimant with 100% in his overall regular performance reviews. The most recent review was four months prior to the claimant being made redundant. In this review, the claimant's strengths and successes were stated as being "delivered" and "done quickly and efficiently" and culminated in a 100% overall review. These issues were only raised with the claimant when he was told he was being made redundant.
7. the disciplinary procedures in the respondent's handbook expressly provide for disciplining for poor work performance/capability through engaging an employee in an informal pre-disciplinary discussion. Despite these provisions, no criticisms of the claimant's work performance were made until he was informed that he was being made redundant.
8. at the meeting on 17 October 2008, the claimant was informed that he was being made redundant. It was the claimant's belief that no redundancy procedures had been in place. Once this was the situation, the procedures employed by the respondent had to be fair, reasonable and objective. The case of Jones –v– Brady [UD979/1988] was cited.
9. The case of Boucher & Others –v– Irish Productivity Centre [UD882/1990] was cited. In this case, the Employment Appeals Tribunal held that employees had a right to natural justice in the selection procedures for redundancy and that this right includes being informed of the selection criteria and invited to make submissions in respect of these criteria. In relation to the present case, the claimant was not informed of the selection criteria and given an opportunity to make submissions on same. The evidence of the claimant's line manager, and the respondent's guidelines to its managers in relation to the redundancy selection, expressed the intension that employees were not to be informed of the criteria or invited to comment on same. The meeting of 17 October 2008 was the first time the claimant was informed of the redundancy procedure and at no stage was the procedure or criteria discussed with him. The only opportunity give to the claimant to discuss the criteria was subsequent to being informed that he was being made redundant. Accordingly, the claimant's redundancy was not in line with the principles established in the case cited above.
10. due to the selection criteria used by the respondent and the lack of fair procedures or consultation with the claimant in advance of the implementation of the redundancy, the claimant was unfairly dismissed within the meaning of the Unfair Dismissals Acts.

Determination:

Having carefully considered all of the evidence adduced on the day of the hearing and the subsequent written submissions, the Tribunal finds that the claimant was unfairly dismissed due tohis unfair selection for redundancy. The selection criteria used to effect the claimant's

dismissal was not in accordance with the principles of natural justice. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds and the Tribunal awards the claimant compensation in the sum of €15,000.00 under the Acts.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)