

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIM(S) OF:  
EMPLOYEE - claimant

CASE NO.  
UD1432/2008  
RP1280/2008  
MN1381/2008

against  
EMPLOYER  
under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007**  
**REDUNDANCY PAYMENTS ACTS, 1967 TO 2007**  
**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms M McAveety

Members: Mr W Power  
Mr P McAleer

heard this claim at Cavan on 6th May 2009, 6th July 2009 and 7th July 2009

Representation:

Claimant(s): Mr Breffni Gordon BL, instructed by:  
Ms Dorothy Walsh  
Garrett J Fortune & Co  
Solicitors  
11 Church View  
Cavan

Respondent(s): Mr. Adrian Kelly  
A B O'Reilly Dolan & Co  
Solicitors  
27 Bridge Street  
Cootehill  
Co Cavan

The determination of the Tribunal was as follows:

**Respondent's Case**

The respondent's representative submitted that there had been a redundancy situation, that the respondent had commissioned an independent report, that there had been no issue regarding pregnancy and that there had been no unfair selection for redundancy.

Giving sworn testimony the Chief Executive Officer (CEO) of the respondent company said that he was familiar with the claimant but that the independent report had been done by a consultant. The CEO said that, on foot of a letter to management by a number of employees, the company had been “sparked to look at itself”.

The company reviewed its employment of staff. Turnover had decreased in previous years. The company employed a firm (DD and associates) to do a report. Over a year DD did so. The company had meetings with all staff about what was going on. Questions were “firmly batted”. The report was completed.

The company decided to act on the report by making people redundant. It was decided to make the accounts section redundant on a LIFO (last in, first out) basis. The company looked at a recommendation in the report pertaining to decreased turnover. It looked at its mapping and title section. The CEO stated that the company carries out thirty to forty per cent of the private tree planting in Ireland.

The title section worked on paperwork regarding evidence of ownership. Somebody was employed to do this. This work entailed the processing of title documents for land. A trail of paperwork was needed for a grant application. That role was made redundant. It was then left to foresters themselves to do it. That saved costs for the company. The company had a team of foresters on the ground who did all aspects of forest management. The office was back-up work. The company made that role redundant.

Asked what options had been looked at the CEO said that the company had looked at re-employing in other elements of the scheme. There had been a desire expressed by the other employee made redundant, who had a master’s degree in forestry, not to go back to the mapping section. The company had invested in a G.I.S. system, which had improved the quality of the company’s operation. MT (a staff member) was in mapping at that time. The company eventually (i.e. on the Tuesday prior to this first E.A.T. hearing) employed someone with a qualification in G.I.S. from a northern university. That was on foot of MT leaving and a true vacancy appearing.

In the accounts section there were two people working on an overlapping three-day week (i.e. both worked on Wednesdays). Asked if accounts work was less skilled, the CEO replied that it would not have needed a master’s degree.

Asked if the redundancies had anything to do with the fact that both employees were pregnant, the CEO replied that this was “absolutely not” the case saying that the age structure in the company made it likely that there would be pregnancies. He said that the two employees made redundant “just happened to be pregnant” and that the company had “had pregnancies before and since”.

The CEO stated that the company had contacted the Small Firms’ Association for advice and had been told that the company had to pay statutory redundancy but that anything more was a matter for the company’s discretion. The company offered statutory redundancy and a discretionary three thousand euro to the claimant and the other employee made redundant.

Asked if there had been an option to reduce days worked rather than redundancy, the CEO replied that the other employee made redundant was already on a four-day week and that cutting to a three-or-two-day-week would not have achieved what the report said. This went for both posts.

The CEO stated that the report was very clear. There was only one employee on title check and

therefore that person was selected for redundancy. The company felt that that employee was over-qualified, due to having a master's degree in forestry, to be asked to go to mapping section. In the accounts section it was clear to management that the claimant was the last in, and therefore, she was selected for redundancy. In 'Forms 1 and 2' area one of the staff members had already indicated his intention to take up work with another company.

The CEO explained that the company was not necessarily aware that redundancies were required until the report was produced. The CEO stated that sometimes it is necessary to bring in an external consultant to show you what is 'staring you in the face' and that the report had raised the requirement for redundancies to the surface. The CEO disputed that the report had been commissioned to produce a redundancy situation that did not exist. The company contacted the Small Firms Association on how to calculate the redundancy payments. He did not believe that the selection process for redundancy was unfair.

The CEO stated that MC is now handling the forms in the office, however the role had changed, and it was now a handling rather than processing role. 'Title check' is being completed by foresters and posted to the office where it is opened in reception.

The only correspondence that the CEO ever received from the trade union was a letter stating, but not naming, that some employees had become members. He stated that while he could guess who was in the union, he had never asked. The CEO disagreed that the claimant, and the other employee made redundant, had 'led the charge'.

The CEO stated that, as the company had implemented the first report they felt they had to implement the second report regarding pay scales. The CEO, the Managing Director, and the Office Manager decided where on the scale each staff member should be. When calibrating staff into the new scale it resulted in a pay increase for all but one of the administrative staff members. MC, who works in accounts, did not receive an increase as she was already at the top of her scale.

The largest pay increase was for the receptionist, as the result of where she fitted into the scale. The large increase was due to a low starting base, and that she did not simply answer phones, but had also become involved in advertising and projects. The receptionist had been with the company for two years. The CEO stated that the company implemented the report without questioning and slotted people into the pay scale levels.

DD, the author of the independent report gave evidence that the managing director contacted him in January or February 2008. There had been a lack of communication between management and employees in December 2007, concerning the non-payment of the usual Christmas bonus, and there was no meeting until January 2008. It had not been explained to staff why the staff bonus had not been paid in 2007. The company decided that they needed to reward staff and to put a structure on their pay scales and decided to bring in an outside consultant to guide it. The managing director sent DD the terms of reference, which were also sent to all staff prior to DD's arrival in March 2008.

The terms of reference for the report were:

- Review present utilisation of resources in light of current and emerging demands
- Identify and make recommendations on structure, resource requirements and pay/reward structure.

DD met with each staff member in the office and discussed his or her role, however he did not evaluate the performance of individual staff members. In the report DD divided the staff into different functions in the office and numbered how many staff worked in each area. However, DD explained that the titles that he assigned each staff member did not necessarily describe all the tasks that an individual carried out. DD was aware that the employee made redundant from the area entitled title check also had responsibility of IT and software.

He also met some foresters and regional managers. DD came to the conclusion that there were too many staff members. It was not the intention to have two reports, but when he concluded that the level of activity did not support the staff numbers, he decided it was best to firstly reduce staff numbers and then to implement a pay increase.

Point one of the report's conclusions stated the 'the structure of the company is adequate to meet current and emerging needs'. He also noted that 'activity levels based on current and projected figures indicate that there is not sufficient work to support nine administrative staff'. The report recommended that the office staff numbers 'should be reduced to six, excluding the office manager'.

DD recommended disbanding title check and a reduction of one staff member in 'Forms 1 & 2' as, if foresters collected the Form 1 information correctly, work would be reduced in that area and could be done by other staff. DD believed that some foresters were less diligent than others and relied more on head office to have the forms filled correctly. DD was unaware whether the foresters were carrying out the Form 1 work as recommended.

DD recommended a reduction in accounts staff, by one staff member, as there would be less activity going on there. DD also queried why the two work-sharing employees required an overlap day on Wednesdays when it was not required at the weekend.

The issue of trade union membership was never an issue for DD. He knew the issues of bonuses and pay scales had been raised by staff, but he did not know which staff members. DD was aware that one of the employees made redundant was pregnant, but was unaware that both were. DD recommended that three staff members be made redundant and which areas they should come from, but it was for management to decide who should go.

DD stated that the company was successful, and that there was no question that the company might be in trouble. DD did not see the company's accounts and was unaware whether the company profits had increased or decreased. DD made his conclusions based on the planting forecast, which was available for the end of the season. The level of activity had been down for some time and there was not enough work to warrant bonuses. When the report was completed it was given to all staff and DD went through it line by line with them.

DD did not recommend whom the company should choose to make redundant only that the company should make the decision based on competence. The company did not implement a change in the area where the work sharers overlapped on Wednesdays. Following the reduction of staff numbers DD submitted his review on the salary and payment structure. He designed the pay structure based on local and national pay rates.

## **Claimant's Case:**

The claimant commenced her employment with the company in July 1996. She mainly dealt with sub-contractor accounts; dealing with their pay, entering invoices, ensuring that they had the correct insurance, sending notifications if insurance was due to expire, costing for materials, and Revenue forms. The claimant also looked after all company mobile phones. The claimant had lengthy experience with the company and could cover all tasks in the administration office except mapping.

The claimant was a part of a group that had joined a trade union in December 2007 and had signed a letter addressed to the company seeking an implementation of pay scales and regularised system of bonuses. The group of employees had taken the step to join a trade union as they had spoken to company management and felt their requests were not being taken seriously. The claimant contacted the trade union organiser to organise a meeting and notified staff in the office. A number of the staff joined the trade union at that meeting.

At a meeting in January 2008 the managing director arrived holding the letter sent by the staff and told them that he was commissioning an independent report. The managing director told them that, 'it's not as if you have a union to help you out'. The claimant did not believe that DD's report was intended to look at pay scales and the bonus system, as the terms of reference specified.

In the DD's report the claimant's position was defined as being in the account section. The claimant was listed as one of three staff in the account section. The other two staff listed as working in the section were: MC, who joined the company in approximately 1991 and was a part-time member of staff and the office manager, who left the company to work for herself for two years and came back in early 2000.

At the meeting on 21<sup>st</sup> April 2008, when the managing director announced the impending redundancies, he opened the meeting by saying that the staff had brought it on themselves, and that he had paid so much for the report that he was going to implement it. The managing director said they should 'look on the bright side, as the people remaining would be getting a pay increase'. The claimant did not believe a redundancy situation existed and believed that it was used as a threat. The managing director told the claimant that she was being selected for redundancy, as she was last into the section. The claimant was shocked, as her maternity leave was due to start on 23<sup>rd</sup> April. It did not occur to her that the office manager was included in the account section and had less continuous service than she did.

The claimant received her letter of notice on 22<sup>nd</sup> April 2008 with a termination date of 30<sup>th</sup> May 2008, however, the claimant was on maternity leave from 23<sup>rd</sup> April 2008 and claimed that she should, therefore, have received six weeks minimum notice.

The claimant believed that if redundancies were being made in the company, and a last in first out process was being used, then employees with less service and experience should have been selected. The claimant was one of the longest serving staff members. The claimant believed that joining the trade union was the reason she was selected for redundancy.

While two other signatories to the letter had remained with the company, and one had received a pay rise, the claimant believed that she was selected, with another colleague, as they were the most active with regard to the trade union. The remaining employees had left the trade union after the claimant and her colleague were made redundant. The claimant disputed that the company did not

know who wrote the letter and organised joining the union.

**Determination:**

Having heard all of the evidence and considered same in great detail, the Tribunal find that there was no conclusive evidence adduced before that the Tribunal that a genuine redundancy situation existed. The Tribunal further find that even if such genuine redundancy situation were to exist, the respondent company failed to engage with the claimant and consider all other possible alternatives to redundancy.

Furthermore, even if the Tribunal were to accept that such a redundancy existed, and having heard evidence adduced by them that the selection process applied was the LIFO policy, the Tribunal finds that that procedure if properly applied would have resulted in the Office Manager been made redundant. Hence the Tribunal finds that the selection process was not applied correctly.

The Tribunal have also considered the evidence adduced regarding the claimants trade union membership and are not convinced that that was not a consideration in the mind of the company when deciding whom to make redundant. The Tribunal also consider it inappropriate that the managing director was not present at the hearing of the action, being the person who made the final decision as to who was to be made redundant, to offer evidence to the Tribunal as to how his decision was reached.

For all of the foregoing reasons, the Tribunal finds that the claim under the Unfair Dismissals Acts, 1977 to 2007, succeeds and accordingly awards the claimant €50,500 (fifty thousand, five hundred euro). Therefore, the Tribunal dismisses the claim under Redundancy Payments Acts, 1967 to 2007.

The Tribunal finds in favour of the claimant with respect to the Minimum Notice And Terms Of Employment Acts, 1973 To 2005, and accordingly awards the claimant €4,448.52 (four thousand, four hundred and forty eight euro, fifty-two cents).

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)