EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: **CASE NO.**

EMPLOYEE ***- claimant*** UD871/09

Against

EMPLOYER ***- respondent***

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)
Chairman: Ms N. O'Carroll-Kelly BL
Members: Mr C. McHugh
Ms P. Ni Sheaghdha

heard this claim at Naas on 23rd March 2010 and 15th June 2010.

Representation:
Claimant: Mr John Hubbard, Assistant Branch Secretary, Siptu, George's Street, Newbridge, Co Kildare
Respondent Mr. Andrew Smyth BL instructed by Ms. Jacqueline Kelly, A & L Goodbody, Solicitors, IFSC, North Wall Quay, Dublin 1

Respondent's Case:
The respondent company is a logistics and freight forwarding company. Its core business is freight and it has 4 sites throughout Ireland. The general manager of the Leixlip site gave evidence that the workforce on the site reduced from 70 in 2008 to a current number of 55. The site operates 24 hours per day, 365 days per year and the employees work on a shift basis. The company has a 3-year contract of work for a major I.T. multinational company dealing with all warehousing issues. The contract was initially a cost plus contract but changed to a scope of work contract in January 2009. The change to the contract type resulted in the respondent company earning €1.2 million less over a 3-year period. There is a service level agreement included in the contract and any delays by the respondent company in complying with that agreement has a cost implication for the respondent company.

The respondent company had to reduce costs and ultimately had to make 3 employees redundant. The company met with all its employees over a 2-day period on 21 and 22 January 2009 and explained the position. The redundancy procedure was involuntary but the Human Resources department would have been willing to engage with any employee if a voluntary redundancy was requested. In any event no employee expressed an interest in voluntary redundancy. A selection criteria document was devised by the operations manager and H.R. department for the purpose of implementing the redundancies. The witness oversaw this procedure to ensure that the process was fair and approved the final document.

Under cross-examination the witness confirmed that a score card mechanism was used by the company in the selection process. Last in, first out process was not used in the process because the company wished to be fair to all employees. The selection procedure was based over a 12-month

period. The company was careful that there was no double jeopardy involved taking care to ensure that no employee was penalised twice for the same issue. The company tried to ensure that the criteria was fair and transparent.

In reply to questions from the Tribunal the witness stated that a second phase of redundancies occurred in April 2009 and voluntary redundancy was given to one employee who sought redundancy.

The next witness gave evidence that he is the operations manager at the Leixlip site and oversees the day to day running of the operation. The operation is based on a safety and quality output. He had daily contact with the claimant. He devised the criteria for selection for redundancy along with N.H. from the human resources department. Safety was a key success indicator for the company and the company operated a good catch scheme. This good catch system is used to prevent injury in the workplace and has worked very well for the company. There is an expectation on every employee to raise a good catch in every quarterly period and a total of 700 good catches were raised in 2008.

This good catch system was incorporated into the document used as the selection procedure for redundancy under the heading 'Good catch and safety'. The other criteria used in the process were 'Disciplinary, Review/Performance and Reliability' and points were allocated to all employees under those four headings. The claimant was made redundant on the basis that he received the lowest total points score. Two other employees were also made redundant.

Under cross examination the witness confirmed that the claimant was involved in a disciplinary action with the company at the time he was made redundant but this had no bearing on the decision to make him redundant. The scoring mechanism devised was not weighted in any particular area. Performance, reliability and safety were key to the success of the company. The claimant had raised 24 good catches in 2007 but his performance in 2008 had deteriorated. The scoring mechanism was not in place prior to the selection procedure for redundancies. The selection criteria was not communicated to employees at the meetings on 21 and 22 January 2009 and employees were not aware of the exact criteria behind the scoring system. There was no employee involvement in devising the scoring system.

In reply to questions from the Tribunal the witness confirmed that some sick leave absences were disregarded when points were allocated for reliability depending on the nature of the illness. The company did not offer voluntary redundancy because it wanted to retain its best people.

Resumed on 15th June 2010:
The Tribunal heard evidence from the Director of HR, (also known as UH).

The witness explained that the MD of the company issued a note/documents regarding the economic situation in the company and the documents outlined the need for cost cutting measures. The list of cost cutting measures contained ten points which included pay cuts for senior management, pay freezes and redundancies. The witness explained that they followed up this note with face-to-face meetings with employees; this was to explain the situation and to mention that voluntary redundancies would be considered. There were no volunteers for redundancy on the site that they operated on for company I. There were three volunteers in Dublin and three in Shannon and the respondent accepted all these volunteers.

The witness explained the selection criteria that the respondent used for selection for redundancies.

They did not use the Last-in-first-out selection criteria as they felt that it was a "blunt instrument" and they explained this to the staff. The claimant attended the briefings that were held about theredundancies.

The witness explained that they had not, at this point, finalised the scoring mechanism for redundancy selection. She wished to be careful, i.e. "to measure twice and cut once". Regarding the reliability score for the employees, there were two elements; one was timekeeping and the other was absence. Regarding absences the staff were aware of a general 3% rule for absences. Maternity and related leave was discounted; also medical and work related leave was discounted.
The witness explained the claimant's absences and what absences he had that they took into account.

They met the staff and explained why they arrived at the decision (of redundancy selection). They met the staff and explained their scores and the staff agreed with the scores. She told staff who were selected that they could appeal the scores that they were allocated. She told the staff who were selected that they would have to go on "garden leave", this was because it would take time meet with the individuals to process the redundancy forms and the security required on the Company I site. Their pay would not be affected.

The claimant's demeanour was very very difficult. He told her that they could not do this. He told her that they could not take his job and that he would take them to a Tribunal. She told him that he had a right to appeal. She told him that he would have to leave the building and that he could appeal the redundancy. She made sure that all had her contact number.

At this point in time this company has 145 staff as opposed to 180 before redundancies.

Claimant's case:
The claimant gave evidence to the Tribunal. He was 2.5 years with the company and he worked in the receiving area, the dock area, and the wizard area. He was trained in every part of the receiving area: PC programmes and forklifting.

At the commencement of 2009 they were told that there were to be redundancies. They were told that the company needed to discuss with managers who they would make redundant. There was no discussion regarding the selection process. He did ask a question and was told that there would be no voluntary redundancies. He was told that last-in-first-out was not taken into account, there was no mention of a scorecard. There was no mention of gardening leave.

He did get a scorecard and this was only whilst he was being made redundant. He had arrived to work at 7.55 am and was asked to go to a meeting. He was not offered to bring anyone else to the meeting. UH told him that he had only thirty points in total and therefore was being selected for redundancy. He told her that he considered he was unfairly dismissed and would go to the EAT. She said that it was unfortunate to hear, and that Mr. X would escort him to the locker area and then escort him out of the building. He was marched out of the building and he felt that he was being treated like a criminal. There was no mention of an appeal. He was shocked to see the scorecard and did not agree with his point total. He was shocked to see that they had included his going to hospital as he had been in an accident.

Determination:
The Tribunal have carefully considered all of the evidence given over a two-day period, together with the documentation that was submitted and the legal submissions proffered.

Evidence was given that the respondent company was very closely regulated and scrutinized by *Company I* who were by mid 2009 the respondent's only client. The respondent's business was affected not only by the recession but also by the loss of Company D as a client in January 2009. Company D's business amounted to approximately 40% of their business. Evidence was adduced and was not contradicted that the company were instructed by their client to make cut backs, budgetary and in the number of employees in 2008. With a view to reducing the number of personnel that would be made redundant various measures were adopted and are set out in detail in the document headed "Communications Message January, 2009". Unfortunately these measures were not sufficient to stave off redundancies. The respondent called meetings and informed staff that there would be redundancies and whilst they were involuntary they would consider anyone who came forward on a voluntary basis. The Tribunal are satisfied that the employees had full knowledge of the pending redundancies, however it would have been desirable to have more consultation with the employees, to keep them informed of each stage of the process and in particular of the criteria that the respondent proposed to use for the selection process. The respondent gave evidence that they modified an existing document that had been previously use to select employees for shift work and used that to select persons for redundancy. Whilst the categories in the document (Reliability, Safety, performance History, Current Performance and Discipline) were objective, some of the scoring within each category was subjectively applied. The Tribunal takes issue with the respondent's evidence that it included some certified sick leave and excluded other certified sick leave, depending on their view of the severity of the illness or the legitimacy of the certificate. Certified sick leave is just that, certified, and it is not for the respondent to second guess the opinion of a medical professional. In this instance it would not have made any difference to the claimant's overall scoring, but if it had, the Tribunal would have to give the claimant the benefit of the doubt.

The Tribunal also note that the claimant was not notified in writing of his right to appeal the final decision to make him redundant, however we are satisfied that he was notified verbally by UH when he was informed that he had been selected for redundancy on February, 2009. It is desirable that the notification of appeal be in writing, but it not a fatal flaw, particularly in light of the communications that took place following the notice of redundancy. When the claimant's union representative was in communication with the respondent, which said communication commenced on the 24th February 2009, he never so much as requested a meeting with them nor did he request an appeal. A simple demand was made to reinstate the claimant or the matter would be put before this Tribunal. The Tribunal are satisfied that the claimant and his representative were aware of the right to appeal but choose to bring the matter to the Tribunal instead.

Having considered all of the evidence, documentation and legal submissions, the Tribunal are satisfied that a genuine redundancy situation existed within the respondent company and that the claimant was not unfairly selected.

The claimant's claim under the Unfair Dismissals Acts, 1977 to 2001 fails.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)