EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.
EMPLOYEE ***- Claimant*** UD1938/2009

Against

EMPLOYER ***- Respondent***

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan

Members: Mr M. Murphy
Mr F. Barry

heard this claim at Navan on 19th November 2010 and Trim on 1st April 2011

Representation:

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Claimant: Mr. Daragh McNamara B.L. instructed by Shaffrey & Co., Solicitors, 1 Aspen Court, Cornelscourt Village, Dublin 18

Respondent: Ms Sarah McKechnie instructed by Eamon Murray & Company, Solicitors, 6/7 Sheares Street, Cork

Preliminary Issue

Counsel for the Respondent made an application that the Respondent named, is notthe claimant's employer. The Respondent claims that the claimant was assignedand/or transferred to a second company (which is a subsidiary and/or sister companyof the named respondent) on the date of her promotion to Bakery Manager inNovember 2007, and that this company is now in liquidation.

Counsel for the claimant informed the Tribunal that the claimant never received a contract of employment from either company in her four years of employment. Both companies worked in the same location and same premises until March 2007.

The claimant maintains that she never received notification in writing of the transfer or assignment to the second company by either the respondent or the second sister company.

Under the European Communities (Protection of Employees on Transfer

of Undertakings) Regulations 2003 (hereinafter referred to as "the Regulations") theTransferor and the Transferee of an Undertaking have a number of specificobligations to comply with. Under Regulation 8 of the Regulations the originalEmployer and the new Employer must inform the Employee/Employees (or theirrepresentatives) affected by the transfer of the following:

1. The date of the proposed transfer;
2. The reason for the transfer;
3. The legal implications of the transfer for the Employees and a summary of any relevant economic and social implications of the transfer for the relevant Employee.

This information must be given to the Employee not later than 30 days and "in good time" before the transfer occurs.

Preliminary Determination

The Tribunal is satisfied that the respondent has breached its statutory duty to the claimant under the Regulations and is therefore estopped from claiming that the named respondent did not employ the claimant.

The respondent filed a Notice of Appearance (T2) and therein described the Employer as 'the named respondent'. The T2 clearly alerts the Respondent in bold print thus:
"N.B. If the employer's name is different from above, please give employer's correct legal name"
No reference was made to the second company being the employer. No reference was made to the second company being in liquidation.

The Tribunal further noted that the claimant was not furnished with a P60 from 2005 to 2009. If she had been furnished with a P60 she would have been alerted to the change of identity of her employer although this would not have remedied the employer's breach of the Regulations referred to above. The claimant cannot be penalised for bringing the proceedings against the named respondent. To do so would allow the respondent to benefit from breaching the claimant's rights under the Regulations.

The Tribunal is satisfied that the Respondent is correctly named in this case.

Respondent's Case

The respondent is a large bakery with a main bakery and, during the claimant's employment, operated two additional bakeries. The Managing Director (JS) gave evidence that the claimant was employed in January 2005 as a Quality Assurance Manager with the respondent. A specialist brand within the company commenced production in 2003. In 2007 this brand separated into a new company and a new location. The claimant was offered, and accepted, the position of Bakery Manager. As part of this new role the claimant continued to manage the quality assurance as well as managing the staff and production. The claimant was responsible for the specialist confectionary and dessert bakery.

In the space of 12 months the business doubled and the new location was unable to cope with the volume. The respondent was in negotiations for a large supermarket bread contract and leased an additional bakery and equipment for this specialist work in late September 2007. As part of the new leased bakery the respondent employed the previous owner/bakery manager in order to retain his expertise. This particular employee was made manager of the 'bread' bakery in April/May 2008.

The specialist confectionary and dessert sales hit its peak in May 2008, stabilised and then rapidly declined as the respondent lost a major contract in October 2008. By April 2009 there was very little being produced. Due to the high costs the company that produced the confectionary and dessert brand never made a profit. The respondent took the decision to close the confectionary and dessert bakery in April 2009. The respondent's evidence was that he was in constant discussion with the claimant regarding the dire circumstances the company was in. Throughout the claimant's employment the respondent gave evidence that he visited her bakery regularly.

After taking the decision to close the confectionary and dessert bakery the Respondent informed the claimant that she was being made redundant. The respondent also offered her an alternative position doing part-time quality assurance work in the leased bread bakery. The respondent had consulted with the bread bakery manager about an alternative role for the claimant. There was no opening for a Quality Assurance Manager in the main bakery where the claimant had started her employment. The part-time position was the only one available but the claimant declined the offer. The claimant asked why she was being made redundant and not the 'bread' bakery manager who was employed after her, to which he responded that the other manager was more experienced. Of the 5 employees, the claimant and the head confectioner were made redundant and three dessert makers transferred to the alternative bread bakery.

Claimant's Case

The Claimant worked as the Quality Assurance Manager in the main bakery until March 2007, where she took on the role of Bakery Manager in the new specialist location. The claimant was informed that the additional manager was employed to assist her in her role.

The claimant worked well with the respondent and the new manager for the next 12 months. In approximately November 2008 the Respondent stopped visiting the claimant's bakery and ceased all contact with her. The claimant had no input into the financial details of the company so was unaware how bad the business was doing. The claimant was aware that the company was not making a profit and that there was a possibility that the bakery might have to close.

A meeting was held at the bread bakery, which the claimant was not invited to attend. After this meeting she received a phone call from the bread bakery manager informing her that the respondent was on his way to see her and that the news was very bad. The claimant presumed she was going to be asked to take a pay cut.

The respondent met with the claimant and informed her that business was very bad

and that all production was now transferring to the 'bread' bakery. The respondent informed her that she was being made redundant. The claimant asked why she was selected as she had longer service than the other bakery manager. The respondent said that the other bakery manager had more experience.

The claimant recollects the respondent saying that, 'if there was an alternative position available it would be part-time "so you wouldn't be interested". The claimant was shocked. She wasn't given any time to think about the redundancy or made a formal offer of an alternative position. The claimant would have accepted the alternative position.

Determination

Having considered the totality of the evidence the tribunal is not satisfied that the respondent acted fairly and reasonably when addressing the need to reduce the number of employees. Where an employer is making an employee(s) redundant, while retaining other employees, the selection criteria being used should be objectively applied in a fair manner. While there are no hard and fast rules as to what constitutes the criteria to be adopted nevertheless the criteria adopted will come under close scrutiny if an employee claims that he/she was unfairly selected for redundancy. The employer must follow the agreed procedure when making the selection. Where there is no agreed procedure in relation to selection for redundancy, as in this case, then the employer must act fairly and reasonably.

The Tribunal does not accept that the Respondent acted fairly and reasonably in this case for the following reasons:

1. there was no serious or worthwhile consultation with the claimant prior to making her redundant;
2. there was no prior indication of the very serious financial difficulty in which the respondent found itself although the claimant was aware that the confectionery and dessert bakery was not making a profit; (The Tribunal acknowledges of course that an employer can make a position redundant even if the said employer is making a profit so long as the employer acts fairly);
3. no discussion in relation to the criteria used for selecting the claimant;
4. no discussion with her about the claimant's suitability for an alternative position other than the part-time position which the respondent unilaterally decided that the claimant would not be interested in.

The Tribunal finds that the claimant was unfairly selected for redundancy and is satisfied that the respondent has contravened Section 6 (3) of the Unfair Dismissals Act 1977 which states:

> '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—
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> (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.'

Employers must act reasonably in taking a decision to dismiss an employee on the grounds of redundancy. Indeed Section 5 of the Unfair Dismissals (Amendment) Act 1993 provides that the reasonableness of the employer's conduct is now an essential factor to be considered in the context of all dismissals. Section 5 , inter alia, stipulates that:

".....in determining if a dismissal is an unfair dismissal, regard may be had……to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal"

The selection criteria, which should be impersonal and objective, were not discussed with the claimant and neither was there any meaningful discussion on alternative positions in the company. She was just told that her position was "gone".

Accordingly the Tribunal determines the claimant was unfairly selected for redundancy under the Unfair Dismissals Acts, 1977 to 2007. The Tribunal further determines that compensation is the most appropriate remedy and awards the claimant €45,000.00.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)