EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	CASE NO.
EMPLOYEE	UD821/2010
(claimant)	

against

EMPLOYER
(respondent)

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J Flanagan BL
Members: Mr M Carr
Mr M O'Reilly

heard this claim at Drogheda on 9th June 2011

Representation:

Claimant: In person
Respondent: Mr Alistair Purdy,
Purdy Fitzgerald, Solicitors, Kiltartan House, Forster Street, Galway

The determination of the Tribunal was as follows:

The fact of dismissal was not in dispute and therefore the respondent proceeded first. Both parties availed of their statutory entitlement to make opening statements. In order to accelerate matters both parties consented to the Tribunal regarding claimant's opening statement as part of her evidence given in chief.

Respondent's Case
It was the respondent's case that the claimant had been fairly selected for redundancy. The HRmanager of the respondent company was the sole witness for the respondent. The HR managerstated that the respondent was in the business of supplying convenience foods. The respondentsupplied goods to two of the leading multiples in Ireland, and these two customers accounted for avery large part of the respondent's business.

Prior to the recession the respondent had employed over 270 staff but from 2009 onwards the supermarkets put severe pressure on the respondent to reduce costs. By October 2009 the number of employees had been reduced to 170. Redundancies took place right across the organisation. As part of this restructuring some roles were combined resulting in the elimination of jobs.

The selection method for redundancies was well established within the respondent. General operatives were selected on a last in first out basis. Members of the managerial and clerical staff were selected for redundancy based on skills.

The claimant started with the respondent as a receptionist and later the payroll work was added as part of her duties. The respondent also moved the reception area to the main gate so as to include a security duty in the claimant's job; it became part of the claimant's duties to let people in and out of the premises. The claimant was responsible for preparing both the weekly and monthly payrolls. Preparing the weekly payroll took one day and preparing the monthly payroll took a half-day.

When the claimant returned from maternity leave on 22nd September 2009 she was returned to the same job as she had before. The payroll had already been completed for that week and so that task did not need to be carried out upon her return. The reason why the claimant had no password was because everyone's password expired after three months. It was a simple matter of getting a new password from IT. The claimant still had her normal reception duties to fulfil.

The reason why the claimant did not appear on the payroll for September 2009 was because the payroll for that period had already been completed before the claimant returned to work. It was normal procedure to complete the payroll well in advance. A cheque to cover her salary was arranged and so the claimant was paid her salary when it was due.

On 28th September 2009 the HR Manager explained the financial situation of the respondent to the claimant. A decision had been made to combine the receptionist role with a telesales role and with production operative training. The claimant was made redundant and she was given one month notice.

On 13th October 2009 the claimant wrote to the respondent seeking further explanation of the reasons for her being made redundant. By letter of the same date the respondent replied. On 19th October 2009 the claimant sent an e-mail to the HR manager stating that "Please find confirmation that I will be there on Wednesday 28 th October to sign relevant paperwork regarding my redundancy and to collect my P45." The Tribunal was provided with a copy of the Form RP 50 signed by the claimant acknowledging receipt of a lump sum and dated 28th October 2009.

As regards the training aspect, the respondent required that the trainer be conversant in Russian and Lithuanian, as 80% of the workforce spoke these languages. The claimant was not qualified to carry out this duty. The claimant signed her redundancy paperwork on 28th October 2009. The HR manager denied that the respondent allowed the claimant to return to work in September 2009 so as not to break her maternity leave.

In reply to questions from the Tribunal, the HR manager stated that it was imperative that staff on the production line be trained through their native language. The respondent had been brought before the Equality Tribunal on foot of complaints that the production staff ought to have been given training in food safety in their native languages. The HR manager confirmed to the Tribunal that the respondent did employ some Polish workers but that these employees also spoke Russian and Lithuanian. The employee currently doing the training also covers reception and payroll duties. This employee had commenced employment approximately eighteen months before the claimant was made redundant.

Claimant's Case

The claimant was the sole witness on her own behalf. The claimant had outlined her case in some

detail when she had given her opening statement and was of the view that there was not much more to add to the case. The claimant felt it was relevant to mention that the employee who was retained in her stead to carry out the combined duties was in a personal relationship the HR manager.

The claimant had been unemployed until 28th February 2011 when she obtained work in a full time capacity. Her gross annual remuneration salary is now €21,190 but she had earned €27,000 perannum when employed by the respondent.

Determination

The Tribunal does not regard the fact that an employee had signed a Form RP 50 and accepted a redundancy lump sum as any bar to the making of a claim for unfair dismissal.

The Tribunal accepts the uncontroverted evidence of the respondent that the respondent was obliged to reduce costs very substantially and that in the course of doing so a large number of employees were made redundant prior to the termination of the claimant's employment. TheTribunal has had regard to the evidence of the respondent that a further seven employees weremade redundant in less than a month after the claimant was placed on notice.

Section 7 of the Redundancy Payments Act, 1967 as amended by section 4 of the Redundancy Payments Act, 1971 and section 5 of the Redundancy Payments Act, 2003 provide, *inter alia*, that a dismissal for the following reasons is a redundancy:

(c) the fact that his employer has decided to carry on the business with fewer or no employees, whether by requiring the work for which the employee had been employed (or had been doing before his dismissal) to be done by other employees or otherwise, or

(e) the fact that his employer has decided that the work for which the employee had been employed (or had been doing before his dismissal) should henceforward be done by a person who is also capable of doing other work for which the employee is not sufficiently qualified or trained,"

The Tribunal is satisfied that a redundancy situation existed in that it was possible for the respondent employer to combine the roles carried out by the claimant and another employee into a set of tasks that could be carried out by one of them.

The combined role involved carrying out the claimant's usual functions and additionally a telesales function and a food safety training function. The respondent acknowledged that the claimant would be capable of fulfilling the telesales role with a little extra training but similarly the other employee could carry out the payroll and receptionist duties of the claimant with a like amount of training. The decisive advantage of the other employee which caused her to be retained was her ability to deliver safety training to the production staff in the languages which were native to 80% of them. The claimant speaks both English and French but the language spoken by most of the production workers was either Russian or Lithuanian and these were the languages which the other employee could speak.

The other employee had been trained in delivering food safety training to the production staff but the claimant was not a qualified trainer. Although it was possible for the respondent to have provided the claimant with the opportunity to become a qualified trainer the Tribunal holds that an employer choosing between employees for redundancy on the basis of training or qualifications is not under any obligation to educate any one employee up to the level of any other but may instead select on the basis of the current differences in training or qualifications.

The Tribunal finds that the selection for redundancy between the employee's was on the basis that the claimant lacked the qualifications or training to provide food safety training to the production staff in those languages most relevant to the respondent.

The Tribunal notes the claimant's sense of grievance that she was made redundant very shortly after her return from maternity leave and that during the brief period between her return and beingplaced on notice she was not required or enabled to access the computer or carry out some of herusual tasks. The Tribunal accepts the respondent's explanation that the payroll tasks had beencarried out for that pay interval prior to her return and that her password had expired normally afterthree months while she was on leave and that a new password could have been sought from IT.

Subsection 26(b) of the Maternity Protection Act, 1994 [No. 34/1994] provides an employee returning to work from protective with the right to return to work in the job which the employee held immediately before the start of that period. However this entitlement is subject to Part IV and at section 27 it is recognised that it may not be reasonably practicable for an employer to permit the employee to return to work in accordance with section 26 and so section 27 confers a right to return to suitable alternative work. The Tribunal finds that in the ordinary course of her job prior to the taking of maternity leave some of the tasks that constituted the respondent's job would be completed and not fall due to be carried out for an interval. The Tribunal finds that the claimantreturned work during such an interval and that the other tasks of her job were still to be carried outand therefore the respondent permitted the claimant to return to her original work in accordancewith Subsection 26(b) of the Maternity Protection Act, 1994.

The Tribunal recognises that during the period of protective leave an employer may identify an opportunity to make an employee who is on protective leave redundant but the employer is prohibited from making that employee redundant or placing that employee on notice of redundancy during the leave period by section 23 of the Maternity Protection Act, 1994. However nothing in the act prohibits the employer from making the employee redundant, either immediately upon or shortly after the employee exercises her right to return to work. An employer is compliant with the relevant provisions of the Maternity Protection Act, 1994 where the employer holds off the issuance of a notice of termination of employment by reason of redundancy until the end of the leave period.

The Tribunal finds that the claimant was fairly selected for redundancy and therefore the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This ________________________

(Sgd.) ________________________
(CHAIRMAN)