EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	CASE NO.
EMPLOYEE - *Claimant A*	UD40/2010 MN37/2010
EMPLOYEE -*Claimant B*	UD41/2010 MN38/2010

against
EMPLOYER –*Respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms D. Donovan B.L.

Members: Mr J. Browne
Mr F. Dorgan

heard this claim at Waterford on 3rd March 2011

Representation:

Claimant: Ms. Betty Dillon, Divisional Organiser, Mandate Trade Union, 36 Michael Street, Waterford

Respondent: Mr. Gareth Hayden B.L. instructed by Eugene F. Collins, Solicitors, Temple Chambers, 3 Burlington Road, Dublin 4

The determination of the Tribunal was as follows:

Respondent's Case:

The Human Resources Manager (hereinafter referred to as HRM) gave evidence that the company was performing well until the massive downturn in the economy during 2008 and 2009. The respondent's stores suffered a reduction in sales and footfall numbers. The respondent company was forced to examine how it could operate its stores in a more productive manner. The overall business was examined as part of this process.

In May 2009 the company reached the conclusion that the service element needed to be improved. For example, the company realised that lunchtime was a busy time in the store but a lot of the staff were on their lunch breaks during this time. A time and motion study was carried out for all the stores and an ideal template for each store was produced. The finding was that forty-hour contracts

were not necessary to the respondent's business or to its productivity and efficiency. A lot of the company's employees worked Monday to Friday during the day but the company needed employees to work in the evenings and on Sundays.

The Wexford store was one of the stores, which was of much concern to the company. Indeed at that time it seemed likely that both the Wexford and Carlow stores would close. However, it was decided instead to try and improve the stores.

A consultation meeting was held with all of the store managers about the possibility of staff working on a "zero-based payroll." This would mean that the store manager could allocate hours tobest suit business needs. The store managers spoke to their staff and informed them of the possibility of zero based contracts. A further meeting was then held with the store managers andany suggestions put forward were evaluated. However, at the third meeting with the storemanagers the process of zero-base hours was outlined to the store managers.

At individual one-to-one meetings the store managers met with staff and explained the reason for zero-base contracts and each employee was given time to consider it and the need for flexibility was explained to all staff. A date was agreed to start the formal process.

Some staff were on existing twelve or fifteen-hour contracts. Their hours were not reduced but they were required to be more flexible with the hours they worked. If staff did not accept the zero-base contracts then their positions were made redundant. Claimant A and Claimant B worked in the Wexford store and were made redundant in October 2009.

In either late October or November 2009 some temporary Christmas staff were employed. They worked between 4-8 hours and sometimes up to twenty hours per week. All such employees had their employment terminated by mid-January and their start dates had been staggered for business purposes.

During cross-examination it was put to the Human Resources Manager that there were additional staff other than Christmas staff employed. The witness replied that other staff were not employed until June 2010.

It was put to the witness that on 29 October 2009 two individuals (JC and AF) were employed on twenty-hour contracts. The Human Resources Manager replied that JF was employed as a supervisor, which was a management role. She reiterated that other staff were only employed for the Christmas period.

It was put to the witness that the claimants were already doing late nights and Sunday work. The witness confirmed this but stated that the forty-hour contracts did not match up to the new store template. She confirmed that staff were not informed that the there was a fear of closure if the zero-base contracts were not accepted, as the company did not want to scaremonger staff.

The highest number of hours available to the claimants was twenty hours. There were selection criteria in place for these contracts as a number of staff applied for them. When their employments ended the claimants were paid in lieu of notice.

The Manager of the Wexford store gave evidence that she has held this position since May 2007. She noticed the reduction in business in the store and the figures were reviewed weekly during

conference calls. The store had ten full-time staff members and other staff on twelve and sixteen hour contracts. The store required three staff on the ground floor, one on the basement floor and one or two employees on the first floor. The difficulty was that full-time staff were working times and being paid for times that they were not needed in store. Half of the staff would work Saturdays if needed. Weekend staff were used to cover Saturdays and Sundays if required.

The Store Manager noticed a decline in sales but she was not fully aware of how bad the situation was until the initial consultation meeting with the other store managers. Following this meeting she met with all the staff of the Wexford store on an individual basis and she used the brief provided to her to inform staff. All staff members except for three accepted the new contracts.

At the next formal meeting the Store Manager outlined the different options available and the alternatives to accepting the new contracts. She did not bring the possible store closure up in the meeting, as she did not want staff to feel that they did not have a choice but she did set out the three options open to them, accept the new twenty-hour contracts, reduced hours or transfer to another store. She informed the claimants that if they did not accept the new contracts than their forty-hour contracts were at risk. The hours of work available to the Store Manager for allocation had reduced from approximately 600 hours to 475 hours.

A meeting was held on 23 September 2009 with the claimants. The Store Manager again explained that they could not retain their forty-hour contracts as these roles were being made redundant but the option was open to them to accept the alternative role of twenty hours.

At a further meeting the Store Manager again explained the risks as this was the final meeting and she asked if the claimants would like to accept the twenty-hour contracts being offered but the claimants refused this offer. The Store Manager informed them that as a result their positions were redundant. Claimant B enquired about the possibility of forty hours being available in the future and the Store Manager told her forty hours would not be available again unless huge revenues were generated.

JC was initially employed from May 2007 but she left the respondent's employment in 2008 when she became pregnant. In the approach to Christmas 2009 she requested to return to work with the respondent company and the Store Manager agreed to employ her on a ten-hour supervisor's contract.

AF was an employee who had been employed by the respondent company in Wexford. She subsequently transferred to the Arklow store. When she later returned from maternity leave she transferred back to the Wexford store under the zero-base contract options. The employees hired for the Christmas period in 2009 were all temporary employees on four or eight hour flexi contracts.

The figures for the Wexford store have improved.

During cross-examination the Store Manager accepted that both of the claimants worked late hours and Sundays.

In reply to questions from the Tribunal, the Store Manager stated that to retain both claimants on forty hour contracts would have had a huge impact on her ability to distribute the remaining hours to meet the needs of the business.

Claimants' Case:

The claimants confirmed attending a staff meeting on 27 July 2009 at which staff were encouraged to give proposals and ask questions. They alleged that the Store Manager had informed them at later meetings that if they were not agreeable to the new hours then they would be "managed" out of the company. The Store Manager disputed this when she was recalled to give evidence on this issue. Claimant A did enquire if the respondent company would allow them to work a three-day week thus enabling them to receive a social welfare payment but they were informed that was not an option as the twenty hour contract could be divided into four or five shifts of four or five hours each.

The claimants confirmed having individual consultations on 18th September 2009 with the Store Manager and that they had been informed that their positions were at risk of being made redundant if they did not accept the new twenty-hour contracts. The reduction in hours did not financially suit the claimants. A second meeting did take place on 23rd September 2009, and it revolved around the topic of redundancy. They were again offered twenty hours work per week or redundancy.

On 19th October 2009 the Store Manager informed them that their roles were redundant. Claimant A asked to stop the meeting until she could speak to her union representative but the representative was unavailable at that time and the meeting proceeded. The claimants were told that their employment would terminate that day.

The claimants gave evidence pertaining to loss.

It was accepted by the claimants that they had been paid in lieu of notice.

Determination:

Having carefully considered the evidence adduced at the hearing, the Tribunal finds that there was a decrease in the respondent's business and that there was a requirement to restructure in an effort to secure the future of the business. However, the Tribunal feels that the respondent should have acceded to the claimants' requests to work the reduced hours over three rather than four days for a trial period before proceeding to a dismissal. The Tribunal accepts that the respondent acted in good faith. The Tribunal also accepts that following such a trial period it may still have been necessary to proceed as the respondent had proceeded and this is taken into account in the level of the award. The claims under the Unfair Dismissals Acts, 1977 to 2007 succeed and the Tribunal award the claimants €1,940.00 each as compensation

As the claimants accepted they were paid in lieu of notice the Tribunal dismisses the claims under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)