EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:	CASE NO.
EMPLOYEE	UD402/2010 MN376/2010

against
EMPLOYER
under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms N. O'Carroll-Kelly BL
Members: Mr D. Peakin
Mr. J. Dorney

heard this claim at Dublin on 3rd June 2011 and 31st August 2011

Representation:

Claimants:
Miley & Miley, Solicitors, 35 Molesworth Street, Dublin 2

Respondents:
David Walsh & Co, Solicitors, Bagenalstown, Carlow

Respondent's Case

The respondent is a Public Relations company. (SP) Managing Director, gave evidence on behalf of the company. She has over 20 years experience in public relations. The respondent is a small company with two full time and two part time employees. The company adheres to standards within the industry. The claimant commenced working for the company in February 2007. She was employed as an account manager and had responsibility for day-to-day activity on various accounts. She worked with an accounts director and had daily contact with the witness.

The Public Relations industry is a highly pressurised business and over a period of time the company lost a number of clients. This was due to the recession and the fact that the company was not successful in pitching for a number of contracts. The company also lost a contract with a major client because the claimant did not put in the work to prepare for the pitch. She did not perform other smaller tasks properly, which left some clients unhappy. Two major clients also removed their public relations in-house to the UK which was indicative across the industry due to the recession. Turnover in the company dropped from €55,000.00 per month to €22,000.00 per month and in November 2009 the company was advised by their accountants that costs had to be reduced by €5,000.00 per month. The accountants advised that staff numbers were too high and should

be reduced.

Following this advice the witness spoke to the claimant on 9 November 2009. She outlined the position to her but did not tell her that she was going to be made redundant. Subsequently two days later she informed her that if the company was successful in landing pitches that it had made for work it would be in a breakeven situation. She asked the claimant for her thoughts on how to contribute to securing new business but got no response to this request. The claimant then went home from work due to sickness and stress. The company then received a medical certificate dated 11 November 2009 stating that the claimant would be unfit for work for the coming two working weeks after which time her condition will be reassessed. The nature of the claimant's illness was not conveyed to the company. Her absence from work resulted in the witness progressing the outstanding pitches for work. The pitches looked very weak, as the company did not have an account manager when the pitches were made. The witness gave further evidence that she never treated the claimant differently to any other employee.

Subsequent correspondence between the claimant's legal representative and the respondent's legal representative was exchanged in December 2009 in which the claimant alleged that she was subjected to bullying and harassment. As the claimant had not utilised the company's grievance procedure and the grievance related to the Managing Director the company proposed that an independent third party carry out an investigation. The company requested the claimant furnish them with a full written complaint to allow them deal with and respond to the complaint. In January 2010 the company wrote directly to the claimant seeking that they be furnished with a written complaint so that they could deal with the complaint but the claimant did not engage with the company. Ultimately the claimant was made redundant, as there was no indication from her that she would be returning to work and there was no work for her. The witness took on the claimant's previous workload and the claimant was not replaced. The claimant was given her statutory notice entitlements.

Claimant's case

The claimant was given only one reason for being made redundant and this was simply that she was the highest earner next to S.P. and since S.P. could not be let go it was the claimant who was made redundant. However there were other employees, with less service than the claimant, who were doing the same work as her. The claimant was never asked to take a pay cut or offered any alternative to redundancy. There had been no question mark over her ability and in fact the claimant had been put forward for an industry award in relation to a project she had been involved in shortly before her redundancy.

The claimant had been absent due to illness on two separate occasions, for a total of 6 days, in the months preceding 9th November 2009, which was the date she was informed of her impending redundancy.

There were a number of different accounts being handled by the respondent and these generated different amounts of income. Some of these accounts had ceased doing business with the respondent because of the downturn in the economy and the claimant felt that there was nothing she could do about that. The claimant had worked on the pitch for N.I.T.B. but she felt that they were never going to win that business and it ultimately went to a P.R. company based in Northern Ireland.

Determination

The Tribunal has carefully considered all of the evidence adduced over the two-day hearing together with the documentation submitted.

SP gave evidence that she was the individual responsible for creating the selection criteria for the redundancy. She stated that she had taken professional advice from her accountants who advised that she would have to reduce the salary count by one. She stated that the categories under review were:

- Salary
- Clients accounts
- Sick days
- Ability

No evidence was given that any other employee was reviewed under the selection criteria or any other criteria.

The Tribunal is satisfied that the claimant was on the highest salary (excluding SP) however that particular criteria on its own was not sufficient to justify the selection of the claimant's position for redundancy.

The tribunal is satisfied that the claimant, on the balance of probabilities, did have the least number of clients however no evidence was given in relation to the financial value of these clients and the size of or length of their accounts. Given that the object of the redundancy was to reduce the company's financial outgoings the Tribunal finds that it was incumbent on SP to evaluate the financial situation of each of her employees' client accounts. That was not done.

Evidence was adduced, by SP, that the claimant had the highest number of sick days. No evidence was adduced in relation to any other employee's sick leave days. Under cross examination SP conceded that she did not look at any other employee's sick leave record until some date between the first and second day of this hearing.

Under the category of "Ability" SP gave evidence that towards the latter part the claimant's employment she questioned her ability. In particular she had an issue firstly, with her performance in relation to a launch, which was held at the Residence club and secondly, in relation to the failure of the N.I.T.B. pitch.

Following the aforementioned launch SP put the claimant forward for a P.R. award. The tribunal find in this regard that there is an inconsistency between SP's evidence and her actions around the time of that launch.

Both the claimant and SP were allocated the N.I.T.B. pitch. That pitch was unsuccessful. The claimant was on certified sick leave during a portion of the time leading up to the pitch. Other than the claimant's non-attendance at work to help prepare the pitch, no specific evidence was given as to her lack of ability in relation to that pitch. Furthermore, no evidence was adduced to show that SP evaluated any other employee's ability.

An employer can select whatever criteria it sees fit to meet the objective of the exercise. However, when and employer does create a selection criteria it is incumbent on them to apply that criteria objectively and equitably to each employee. The respondent failed to do so.

It was common case that the claimant was paid two weeks notice and although evidence was adduced in relation to contractual notice of six weeks the Tribunal can only make an award in accordance with the Minimum Notice And Terms Of Employment Acts, 1973 to 2005. The Tribunal is satisfied that the claimant received her statutory entitlement and therefore the claim under the Minimum Notice And Terms Of Employment Acts, 1973 to 2005 fails.

The Tribunal finds that the claimant was unfairly selected for redundancy and accordingly awards the claimant €17,500.00 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)