EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF	***CASE NO.***
EMPLOYEE	MN1198/2010
	UD1250/2010

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: Mr T. Taaffe

Members: Mr C. Lucey
Mr J. Jordan

heard this claim at Dublin on 1st November 2011 and 4th January 2012
and 5th January 2012

Representation:

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Claimant: Mr. Alastair Purdy, Purdy Fitzgerald, Solicitors, Kiltartan House, Forster Street, Galway

Respondent: Walker O'Carroll & Hogan, Solicitors, 11 Pearse Street, Athlone, Co. Westmeath

Background:
The claimant TB began work for the respondent Section 39 organisation in February 2008 as an Assistant General Manager. She went on maternity leave in 2009 and on her return to work in February 2010 she was informed that she was being made redundant by a new interim General Manager hereafter known as TH. The claimant was not required to work her notice period.

Respondent's Case:
The acting general manager (TH) gave evidence. He explained that the respondent organisation was a voluntary body providing disability services in the midlands. It was mainly funded by the H.S.E. and run by a voluntary board of directors (mainly parents).
The organisation was set up by JG whose untimely death had led to the board seeking TH's expertise as a consultant until a new Chief Executive was appointed.
The post of assistant general manager was created by JG as he felt he needed more support, mainly in human resources. The requirement was also highlighted in the Wolfe Report – a report created by a management consultant of the H.S.E.

Funding was confirmed for the new post by MM (a H.S.E employee) and the claimant was appointed to the post.
The claimant went on maternity leave in June of 2009. JG (the general manager) passed away in early July 2009.
Without a general manager the board took on the responsibilities of the organisation and recruited TH as acting general manager until a successor was appointed.
His terms of reference, apart from the day to day running of the organisation was to access the organisation and management structures already in place, look at re-organisation and also recruitment of the new general manager/ C.E.O.
A sub-group was put in place to guide him with existing processes. They met on a regular basis and before board meetings regarding any confidential issues.

The H.S.E requested a meeting in early September 2009, MM was in attendance. It was proposed that the respondent organisation amalgamate with another organisation and the board undertook to consider the options. MM was aware of the review being undertaken but alliances with other organisations was high on the agenda, she had no outstanding issues, the budget was not to be exceeded and the organisation was to come back with its views on the alliance.

It was agreed that a successor would not be appointed until a review of the organisation was completed.

The review of day to day operations began and TH looked at the shortcomings of the organisation.
The budget was announced and it was clear that there would be cutbacks, possibly in the order of 7%. Services had to be maintained at the same level and as funding comes in one block, reductions would have to come off the top.
In 2010 all staff wages were reduced in order to maintain the same quality front line services.

The tasks of the assistant general manager (the claimant) were mainly HR and project based. There were no substantial tasks. The accounts had been computerised and all done by a house accountant.

At a sub-committee meeting on 1st February 2010 TH recommended to them that there be a tender issued for transport and also the elimination of one post.
Tasks had been re-allocated, unit managers were empowered to deal with issues, a new computer package was in place and human resources absorbed a lot of the claimants work.TH dealt with the rest himself.
At the conclusion of the meeting his recommendation was endorsed.

The claimant returned to work after maternity leave on 1st February 2010. TH requested a meeting with her on 2nd February and advised her that she was being made redundant.
The claimant became upset and left the meeting. She wasn't asked to work her notice.
TH issued a letter to the claimant on the same day advising her that the post had been abolished and asking her to contact him at her convenience to make final arrangements regarding her redundancy and any outstanding payments.
The claimant appealed the decision in a letter to FC (chairman of the Board of Directors) and he replied on 8th February upholding the decision and outlining the reasons for the post being abolished.
The claimant then wrote to the HSE and the Minister of State. Various meetings and correspondence continued with the HSE and they expressed their disappointment at the decision to dismiss the assistant general manager and sought reassurance of safe structure and governance.
The claimant received her statutory redundancy payment in June 2010.

Under cross examination TH stated that he was recruited on an interim basis to "fill in" while a replacement for the general manager/CEO was found. He accessed the organisation and its structures. He did not decide a redundancy was required straight away. He stated that a picture builds up over time and he may have decided sometime in early 2010 what was working and what wasn't.
He did not prepare a written report but had on-going discussions with the board sub-group.
The only person considered for redundancy was the claimant. It was his recommendation and the board approved it. The claimants name was not divulged at the board meeting for fear of leaks of information.
Asked why it was necessary to remove her immediately on her return to work TH said that he was not sure her presence would have contributed positively. He stood over his business decision. A new CEO was not appointed but a manager was put in place.
TH did not want to extend his time in the position, he wanted to get in and get out.
In hindsight prior discussions should have taken place and an appeal been allowed.

CW an independent accountant gave evidence of income and expenditure for the respondent organisation.
She stated that the funding was received in block and that there was no separate funding for the claimant.

BB the new manager of the organisation stated that there is no position in the current structure for re-instatement of the claimant. The board of directors had considered it but it is not possible, any monies have been reallocated to front line services. The post no longer exists.

Claimants case:

The claimant TB said that she was employed by the late JG as assistant general manager/deputy manager to co-ordinate all aspects of the facility. She telephoned TH in December advising of her return to work following her maternity leave on 19th January. He advised her to wait until February as he had budgets to work on. The date of 2nd February was agreed on. TB felt it was an odd response to her telephone call.
The meeting on 2nd February took place in TH's office. There was no small talk. He said there have been lots of changes here, your post is surplus to requirements, no need to work your notice.
It was very brief; she got upset and went to pack up her things.
TB wrote a letter of appeal to the chairman of the board, she would have done anything to have had a meeting with them.
There have been no other redundancies to her knowledge in approximately 62 similar organisations with 15,000 staff. Evidence was produced of efforts made to gain employment.

Under cross examination she stated that the first time she met TH was when he invited her in to his office sometime in September 2009. It was a short introductory meeting and they discussed on-going projects. There was no mention or indication that her post was in jeopardy. She spoke to him again about her returning to work and the next time she spoke to him was 2nd February when he told her role was redundant. TB would have considered anything and would have done anything to remain in a job.

MM acting general manager H.S.E. in her evidence said that her recollection of the appointment of an assistant to the general manager arose because at some time when the late JG was on holidays a situation occurred where there was great difficulty in identifying someone to provide assistance in a

crises. Funding was provided for safe governance and TB's appointment followed.
MM was unsure of who had first told her of the redundancy but she sought legal advice at the time because of her concerns over liability.
It was confirmed to the H.S.E that they were indemnified as per the Service Level Agreement.

She called a meeting on 26th March because of her concerns regarding the governance issue. The H.S.E had funded the post but she was not concerned about the in-house running of the organisation.

Under cross examination MM stated that the H.S.E could not interfere with redundancies. She was surprised that TB had been let go. Normally an organisation would come back to them and things would be worked out. It did not happen in this case.
The money is provided by block allocations so there is not a separate amount of money provided for each individual post.

IMPACT general secretary for the area in his evidence stated that no other redundancies had occurred in any other agency and that the Croke Park agreement was being accepted and applied by voluntary organisations.

Determination:
The Tribunal carefully considered the evidence adduced and the submissions made. For the purpose of clarity the following is confirmed;

(a) The claimant commenced her employment as assistant general manager on the 6th February 2008 following the sanctioning of the appropriate funding for her position from the HSE.
(b) The sanctioning of this funding arose as a result of a report known as the "Wolfe Report" which in essence addressed the question of the provision of safe governance by the respondent.
(c) The employment of the claimant was terminated on the 2nd February 2010 without notice on her return from maternity and annual leave.
(d) A payment of €3,384.00 was made to the claimant on the 3rd July 2010 in respect of the termination of her employment.

The Tribunal firstly addressed the question as to whether a genuine redundancy arose and considered the stated reason of the respondent for it. It accepts, as is evidenced by correspondence from the H.S.E. that prior to its decision to implement this redundancy that it was informed that budgetary cuts would be made to its grant allocation and that it should address this as it saw fit, while seeking to maintain front line cover.
The Tribunal therefore accepts that there was an imposed necessity on the respondent to implement a response to proposed cutbacks in their grant allocation and that this response incorporated, along with transport and wage reductions, one redundancy. The Tribunal is therefore satisfied and determines that a genuine redundancy situation arose.

The Tribunal then considered the procedure engaged in, by the respondent in deciding to make the position of the claimant redundant. It firstly finds that the procedure was en-acted in the absence of any written assessment of the alleged criteria which the acting CEO claims he took into account when deciding to make the claimant redundant. It finds secondly that a sub-committee was formed at the instigation of the acting CEO and that this sub-committee met to discuss and consider matters that it deemed to be of concern to its board of directors. It finds thirdly that this sub-committee met on 1st February 2010 prior to the board of directors meeting of that date and is satisfied in the

absence of evidence to the contrary to accept the evidence of the acting CEO that he proposed and obtained acceptance of his proposal to make the position of the claimant redundant.
It is found that this proposal was subsequently proposed to and approved by the board of directors.
The Tribunal finally finds that the acting CEO in making this proposal was not conflicted in any way and was entitled within the terms of his management contract with the respondent to act as he did, since the duties that he was discharging were directly related to this contract.

An examination of this procedure has satisfied the Tribunal that the process engaged in by the respondent was procedurally defective in that (a) the claimant was clearly and deliberately denied any opportunity by the respondent to engage in any aspect of the process and was therefore by definition precluded and prevented from contributing in any way, resulting in the respondent proceeding to a redundancy without any consideration of or any discussion with the claimant of any alternatives whatsoever to this redundancy. (b) having implemented the redundancy refused the claimant the right to appeal it and proceeded with its implementation having so done.
The Tribunal therefore determines that the claimant, since she was unfairly selected for redundancy because of the reasons set out herein, was unfairly dismissed.

The Tribunal notes that the only remedy sought by the claimant is her re-instatement to the position of assistant general manager.
Having carefully considered the submissions made and the evidence given the Tribunal is satisfied that

(a) The provision of funds which were at the time of their provision used to create the post of assistant general manager were provided to ensure the continued safe governance of its services by the respondent, which at the time were a matter of concern
(b) The manner in which these funds, which subsequently formed part of the annual block grant to the respondent, are used is a matter for the respondent who is clearly accountable for the manner in which this grant is applied as a result of the provisions of the service arrangement entered into between it and the HSE. The Tribunals interpretation of these provisions insofar as they relate to the funds in question is that since they were provided so that safe governance would be present in the operations of the services of the respondent that a supervision of their use in this regard would and does apply.
(c) Since the extinguishment of the role of assistant general manager the respondent has provided governance of its services in a re-organised manner which involved insofar as the position of assistant general manager is concerned the reallocation of certain functions to others and the subsuming of other functions in the role of the acting CEO who has now been replaced by a new manager who now discharges these functions.
(d) The Tribunal therefore finds that the use of these funds are not confined to the provision of a post of assistant general manager only and that to interpret this narrow and confined use of them in the circumstances of the case is not substantiated by the evidence presented.
(e) Since the re-instatement of the claimant is therefore not the only remedy that the Tribunal may apply, the Tribunal gave consideration to the remedy that it should apply.

The Tribunal notes that the respondent is satisfied to have applied and to apply safe governance to its services through a re-organisation which excludes the position of an assistant general manager, such governance being subject to contractual supervision.
It therefore determines that the remedy of re-instatement in the circumstances to be not applicable or appropriate.
The Tribunal therefore proposes to exercise the inherent jurisdiction that it has to award damages to the claimant and awards her the sum of €116,616.00 having allowed for the payment of a sum of €3384.00 already made and having accepted from the evidence presentedby the claimant that she made a reasonable and sustained effort to mitigate her

loss and the Tribunal so determines.

It was common case that the claimant was paid notice at least equivalent to her statutory entitlement and therefore the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)