**EMPLOYMENT APPEALS TRIBUNAL**

| **APPEAL OF:** | **CASE NO.** |
|---|---|
| EMPLOYEE | UD1320/2010 |
| *(appellant)* | |

against the recommendation of the Rights Commissioner in the case of:

EMPLOYER
*(respondent)*

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey B.L.

Members: Mr E. Handley
Mr G. Whyte

heard this appeal at Dublin on 26th October 2011and 16th January 2012

**Representation:**
Appellant: Ms. Rosemary Mallon B.L. instructed by Smyth O'Brien Hegarty, Solicitors, 24 Lower Abbey Street, Dublin 1

Respondent: Mr. Eddie Keenan, Construction Industry Federation, Construction House, Canal Road, Rathmines, Dublin 6

The determination of the Tribunal was as follows:

This case came before the Tribunal by way of the appellant appealing the recommendation of the Rights Commissioner ref: r-082671-ud-09/SR.

**Respondent's case**
Giving evidence, the General Manager of the Commercial Development Division (GM) stated that his Division manages the property assets of the respondent company. In 2009 there was 12 staff in the Division. The recession had a huge impact on the company and its business. In 2009 turnover was down 24% and 34% in 2010. As the workload had diminished, the company had to re-align its costs.

The GM was instructed by the Board to reduce costs. On Tuesday 16th June 2009, discussions were held with staff, who were asked to come up with ideas by Wednesday evening 17th June 2009. No staff member came back with any ideas. Other Divisions had to let people go.

Memo dated 10th June 2009 from the respondent to all staff in relation to cost cutting measures

was opened to the Tribunal. The respondent looked at part time options but decided against it as the company needed consistency for efficiency. The GM stated that he was not proposing any redundancies at this stage. Staff were told at the meeting on 16th June 2009 that redundancies may be necessary. Two people were proposed for redundancy and were met individually on 18th June 2009.

The respondent wrote to the appellant on 23rd June 2009 outlining that the appellant was entitled to statutory redundancy. The letter was opened to the Tribunal. Each of the Project Managers had a degree – two had engineering degrees and one had a QS qualification. The company needed to retain the Quantity Surveyor in order to maintain a diversity of skills. The decision came down to a choice between the two engineers. The other engineer, Mr. L had longer and better experience than the appellant and had also completed a course on windenergy. A course in Dundalk IT was also completed by Mr. L.

Mr. L had more service than the appellant and commenced working with the respondent on 17th January 2007. The appellant commenced on 5th March 2007. An appeal was exercised by the appellant on 2nd July 2009. The representative for the appellant stated that the witness could not say what happened at the meeting as he was not present today.

The GM stated that a statutory redundancy package was offered to the appellant plus €500 per completed year. The redundancy was not accepted by the appellant but is still available. It was stated that the appellant raised a number of issues which the company failed to address. The GM stated that there was an issue about the appellant not being invited to a golf outing. He did not invite her as she was on study leave and annual leave at the time of the outing and he did not think it appropriate to ask her. The GM confirmed that the company have a grievance procedure.

Under cross-examination, the GM confirmed that he is a qualified quantity surveyor. He has a degree in BSE surveying and a diploma in construction economics. He is not a chartered surveyor. The other quantity surveyor, McG has the same degree as the GM and stage 1 of accountancy. He also has a certificate in Construction Technology and started in January 2005 and also had prior experience of 5 years in QS with some project management. The other engineer, Mr. L has an engineering degree and a BSE in Management and Law from D.I.T. He joined the company in January 2006. The GM denied that this employee had no project experience.

The GM stated that the appellant started in March 2007 with 5 years engineering experience and 2 years with project management. She also has a masters in project management. CS has completed courses in estate agency with a role as property manager. He joined in January 2007. It was put to the GM that the appellant will say CS started in August 2007. January 2007 was in relation to maternity cover only. The GM did not agree that there was a break in service.

Explaining the role of a Project Manager, the witness stated that this role entails making planning submissions, liaising with consultants, representing clients. The job description of a Project Manager was opened to the Tribunal dated February 2007 and the GM confirmed that it reflected the role of the appellant. In relation to the property portfolio listed in the job description, the GM stated that this included property management tasks but not the complete property management role.

The witness confirmed that the decision in relation to the redundancy of the appellant fell to

him. A detailed analysis had to be made and this was done on the Wednesday evening after the meeting with the employees. The staff were not furnished with the analysis. The GM confirmed he had stated at the meeting on 16th June 2009 that there may be redundancies. He believed the staff had sufficient time between 16th and the evening of the 17th June 2009 to come up with ideas.

On the evening of the 17th June 2009 the GM looked at the costs of the business and came to a conclusion that redundancies had to be made. Project Management had to be reduced by one post and administration by one post. Diverse skills were needed. With regard to the Engineers, both had degree qualifications. Mr. L had longer experience, good project experience and wind energy course. The appellant's experience was not as good as Mr. L.

Although the witness completed a matrix, he confirmed that this was not shown to the appellant. He still has these documents. The GM consulted with HR in relation to the completion of the matrix. He also consulted with a staff member in roofing. The matrix was an aid in order to make a decision and the appellant scored the lowest points.

In relation to the consideration of performance of staff, the GM stated that informal conversations were conducted and everyone was performing well. As regards suitability for projected workload, the GM accepted that the appellant could have completed a wind course if given the opportunity. When questioned on the academic record of candidates, the witness stated that these would have been recognised under competencies. He could not remember what score the appellant received under this heading. He thought the appellant scored highest under that category.

The GM confirmed that regardless of the score of the Quantity Surveyor, he would have been kept in order to maintain a diversity of roles. A Quantity Surveyor brings a different skill to the table. The Quantity Surveyor had more service than the appellant. The GM stated that service was not included in points. The representative for the appellant stated that today is the first time they became aware there was a matrix. The GM stated that the Quantity Surveyor had project experience. Although the GM is a Quantity Surveyor, he would not have the time to step into this role.

When asked was any consideration given to the fact that the appellant had carried out property management functions, the GM stated that the appellant was never in the role of property management and it had been decided that the property manager was best suited to this role. That full time role was not being made redundant. It was put to the GM that the role of property management was included in the course the appellant had completed.

The witness stated that one of the Managers in HR helped with the matrix.

The GM confirmed that on the 18th June the appellant requested the list of criteria used for the selection process. He told the appellant that he would get back to her because he wanted to put the information in writing in order to provide her with an exact record. He also recalled that the appellant asked about the possibility of being relocated to another role in the company but as other managers were also making spending cuts there was no possibility of getting the appellant a transfer within the company.

The GM told the Tribunal that when he spoke to the appellant on 18th June he did not tell her that her position was redundant but rather that her position was proposed for redundancy. On

22nd June he confirmed to the appellant that her position was being made redundant. There were two working days between the 18th and 22nd June. The GM spent these two days looking at alternatives to the appellant's proposed redundancy. He had invited staff to make proposals in relation to any cost saving options that he may not have considered. The GM considered using lay-off to cut costs but ultimately decided that this was not a practical option for the company.

The appellant appealed the decision to make her position redundant and the GM was not present at the appeal hearing. The GM had a meeting with Mr. A, who heard the appellant's appeal, and provided him with a copy of the matrix to show his reasoning behind his decision to make the appellant's position redundant. He did not give copies of this information or the score sheets to the appellant.

The GM told the Tribunal that he allocated work based on the workload and the resources available. He did not agree that the appellant was being side lined. When an invite for 3 people arrived to the company for a luncheon with a client the GM decided to send the other two project managers because they were working on live projects for that client at the time. The GM said the appellant was satisfied with this explanation. She did not ask him if she had not been chosen because she was a woman.

The GM explained that when he put all of the information into the matrix the other candidates had more experience.

At this stage of the hearing the Tribunal requested that the Matrix be submitted into evidence because it has become an important aspect of the case and is conspicuous by it's absence. It was first provided to the appellant and her representative. This was the first time the appellant had seen the matrix.

The appellant's representative questioned the GM on the information contained in the Matrix and raised issues about the distribution of scores among the criteria. The lower the score received by an employee the higher the possibility of being chosen for redundancy. The appellant had never received a verbal warning in respect of timekeeping and attendance yet she scored lower than a colleague who had received a verbal warning. The GM maintained that the appellant had taken a half day for study. The appellant also scored lower than her colleagues in "suitability for projected workload.

The GM explained that he used the Matrix as an aid for his decision. He based the scores on his experience of the staff involved. The 2 other employees had longer service than the appellant. He also wanted to retain a mix of skills and felt that these employees had more skills and experience than the appellant.

The GM agreed that when he wrote to the appellant on 23rd June 2009 explaining the selection criteria used for the matrix he did not include qualifications as one of the criteria and this was an omission on his part. The 3 employees, including the appellant, all received the same score in respect of qualifications because the GM felt that they all had sufficient qualifications for the envisaged workload even though one of the appellant's colleagues, SL, did not have a post graduate qualification and she did.

One of the criteria used in the matrix was "suitability for projected workload" and when asked how this was different to "qualifications" the GM explained that the other 2 employees had

been involved in projects for longer than the appellant and were therefore more suitable. The appellant scored a 3 for "suitability for projected workload" because the GM felt that she had average suitability for the projects.

The GM confirmed that the appellant was a good engineer but the work was not there for her. The other two employees had developed projects from inception to development to handover. He told the Tribunal that he marked all 3 fairly.

**Appellant's Case**

The appellant told the Tribunal that she worked for the respondent company from 2007 until 2009. Prior to working with the respondent company most of the appellant's work had been as a project manager.

On commencing employment with the respondent the appellant worked on a quarry site and attended all design team meetings. She researched market values and demands in the area. She carried out feasibility studies.

In June 2008 the appellant was not being included in circulations of certain information relation to other jobs and there were design team meetings taking place that she had not been informed of. There were a number of files that the appellant was involved in but not receiving circulations on. She approached the GM about this and he did not do anything about it. There were a lot of areas that the appellant felt she could be better utilised in. She followed up on this by email in November 2008.

The luncheon that the appellant was not invited to was an annual networking event and when she queried why she would not be in attendance the GM told her that it was more important for the other two employees to network with the attendees. He assured the appellant that she was not junior to these employees.

On 10th June 2010 the GM issued a memo to all staff explaining that due to the downturn in the industry it was necessary to introduce pay cuts. The appellant felt that is was an appropriate measure and as a result did not expect redundancies to happen. At the meeting on 18th June 2009 there was no mention of redundancies.

At the meeting on 18th June 2009 the appellant found it hard to grasp what she was being told because firstly she was told that it was a proposal to make her position redundant and then she was told that she was redundant. She asked the GM if she had a job or not and he replied that she did not. He then backtracked and told the appellant that he had to talk to other members of staff. The appellant asked him again if she had a job and he told her that she did not have a job.

The GM gave the appellant 3 documents and she asked how she had been selected. She also asked about the option of relocation and specifically asked about arbitration. She asked the GM about the possibility of working reduced hours. When the appellant received the letter of the 23rd June this was the first time she became aware of the selection criteria used.

On the evening of 18th June 2009 the appellant attended college and her lecturer was a retired Managing Director of the respondent company. He had retired in March 2009 but still provided consulting for the company. The appellant approached her lecturer and asked him or guidance on the situation. She told him that she had been let go form the company that day and he said

that he could see this was coming and that she was for the chop.
On the 19th June 2009 the appellant attended work and received commiserations from her colleagues and staff in the canteen. She was shocked that her redundancy was common knowledge.

In respect of the Matrix, which the appellant viewed at the hearing, she told the Tribunal that she had never received any warnings in respect of timekeeping. Any study leave she availed of was always preapproved by the GM but mostly she took annual leave to study.

The appellant told the Tribunal that her educational qualifications are specifically post graduate and construction specific. She thought that in relation to construction her academics would be of higher calibre than the other two employees.

During her employment with the respondent company the appellant was never told that she should improve her performance. She also never had a performance review. It was suggested that the scores allocated to some of the selection criteria in the matrix was based on the fact that the other employees had seen projects through from start to finish and the appellant felt that if she had been given these projects she would have seen them through to the end, and this came down to the allocation of work. Prior to working in the respondent company the appellant had 4 years experience as a project manager.

In relation to the Matrix the appellant was surprised that she did not receive the highest score in any of the selection criteria and if she had been aware of this and the existence of the matrix at the time of her appeal hearing she would have queried it.

The appellant received the result of her appeal hearing by letter on 13th July 2009 which stated that there was no reason to overrule the decision.

During cross examination the appellant accepted that the company and its management had the right to keep a mix of skills depending on how the skills were chosen. She also agreed that other project managers had longer service with the company than she did.

The appellant maintained that she was not consulted about redundancy by the company prior to her meeting with the GM on 18th June 2009 and if she had been consulted the end result may have been different.

The appellant felt that her qualifications, and specifically her construction qualifications, would have placed her as the strongest of the 3 candidates within the matrix, yet they all received the same scoring under this heading.

The appellant argued the distribution of scores within the matrix. In respect of skills the appellant was of the opinion that her skills were more diverse than those of Mr. L, and yet they received the same scoring in the Matrix. In relation to competencies the appellant was not sure what competencies were applied for scoring but she had never been told during her employment that she lacked in any competency. She did however accept that the GM had the right to choose competencies but felt that this was subjective. The appellant told the Tribunal that to score highly in the performance category of the Matrix would have been dependant on the allocation of jobs.

The appellant gave evidence pertaining to loss and her efforts to mitigate that loss.

**Determination**
The Tribunal is satisfied that the procedure was flawed by denying the appellant sight of the matrix and not allowing her the opportunity to comment or disagree. Having examined all of the evidence, including the matrix, the Tribunal is satisfied that if the procedural defect had not occurred the outcome would not be any different. Having taken all of this into account the Tribunal upsets the recommendation of the Rights Commissioner ref: r-082671-ud-09/SR and decides that the appellant was unfairly dismissed and that the appropriate award in this case is €30,000.00 compensation under the Unfair Dismissals Acts 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)