EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:		CASE NO.
EMPLOYER	*– appellant*	UD664/2010

against the recommendation of the Rights Commissioner in the case of

EMPLOYEE *– respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr M. O'Connell

Members: Mr P. Pierce
Mr G. Whyte

heard these claims at Dublin on 23rd August and 7th November 2011

Representation:

Appellant: Ms Caoimhe Scollard, IBEC, 84/86 Lower Baggot Street, Dublin 2

Respondent: Mr Óisin Scollard BL instructed by Mr William Joyce of Hughes & Liddy Solicitors
2 Upper Fitzwilliam Street, Dublin 2

The determination of the Tribunal was as follows:-

This appeal came before the Tribunal as an appeal by the employer against the recommendation of the Rights Commissioner reference number r-079949-ud-09/DI.

Appellant's Case

The managing director gave evidence. The appellant is a supplier of specialist machine tools to manufacturers. In 2000 there were 54 staff members now there are 27. Business declined substantially in 2008 and as a result a redundancy/cost cutting program had to be instituted. Unfortunately the savings were insufficient and further cost cutting measures were required early in 2009.

A memo issued to all staff on 2nd March 2009 informing them that further action was required to cut costs. Voluntary redundancies, pay cuts and short time working were all options for consideration. No voluntary redundancies were agreed. The majority of staff accepted a 10% pay cut that is still in place. 5 people were placed on a 3 day working week. In the accounts section the options were to put the respondent and her colleague on short time or make one of them redundant.

Due to the nature of the work redeployment is rarely an option. In one case only a person was moved to another area. An accounts clerk was moved to Service. She had 5 years' service with the appellant and had spent half her working week answering the phone. When she moved to the position of service coordinator she already had experience of customer facing on the phone. The salary for both roles was comparable. When the accounts clerk was redeployed the person performing the service coordinator role was still on probation and he was let go.

The respondent had said that she was not prepared to work a 3 day week. The managing director did not consider giving the services coordinator role to the respondent. The services coordinator earns less for a 5 day week than the respondent would earn for a 3 day week. He was also concerned that if the respondent was given the service coordinator role that would be effectively constructively dismissing her.

The respondent and one other person were made redundant at that time. The respondent was not replaced. The headcount at the appellant company did not increase. The managing director informed the respondent of the decision to make her redundant before sending an email to all staff. She asked to be paid in lieu of notice. She was paid redundancy and a gratuity. The respondent felt aggrieved and asked for a larger payment. The managing director accepted that the respondent had been a valued employee.

The financial controller gave evidence. The respondent and 3 others reported to him. In 08/09 there was a huge upheaval. Customers stopped investing in machinery and the company relied on selling spare parts. Business continued to decline month by month.

The financial controller discussed redundancies with the managing director. When business had declined by 40% changes were needed, hard changes, in the accounts section. They were faced with short time working for 2 people or one person would have to be made redundant. He would have preferred short time work for 2 people because skills would be retained.

After the memo issued to all staff on 2nd March 2009 the respondent came to him and rejected the option of short time working. She also rejected the option of a pay cut. The respondent did ask whether the short time working would get diluted. The financial controller could not give any guarantees. He did not know whether the 3 day week would go back up to 5 days or go down to 2 days. The financial controller did not discuss the implications of working a 3 day with the respondent but he did this with 3 other staff members. Neither did he explain to the respondent that she would be better off working 3 days as an accountant than working 5 days as service coordinator. She is an accountant and she ran the payroll. A hard decision had to be made to protect the remaining jobs.

Respondent's Case

The respondent employee commenced employment with the Appellant as the company accountant

in September 2000. She looked after accounts payable, accounts receivable and some data entry.

On 2nd March 09 all staff members received a letter stating that 8 – 10 redundancies would be needed together with a salary cut and a claw back of the last pay increase. This was the second time that redundancies were proposed in a short space of time. She discussed the position of the accounts department staff with the financial controller. In his view two staff would be put on a three day week or one would be made redundant. The managing director would make the decision. She wasnever offered a 3 day week. She was the company accountant and could work out the financial implications for herself of working 3 days. She did not press the issue because if 8 or more peoplewere made redundant she would be gone.

The managing director claimed to have offered her the position of service coordinator 4 years previously and at that time he understood that she refused the position. This was not the position. The respondent told the Tribunal that she was not offered the position. She would have accepted the position because any job is better than no job. In her role as company accountant she had contact with many of the company's customers. She had the skills to fill that role. She accepted that if she had been given the service coordinator position, the then person in the position would have been made redundant. The respondent had shorter service than this person. The respondent was upset when she learned that 8 – 10 people were not made redundant, she was the only one.

The appellant had on occasion redeployed people in particular the service coordinator had been relocated from the accounts department.

If she had been given the option of a 3 day week she would have taken it. A 3 day week would have been better than no job. It took her 14 months to find another position. The managing director made the decision.

Determination:

In this case, the parties agreed that the appellant company was encountering grave financial difficulties in the years 2008 and 2009. The respondent employee conceded in evidence that redundancies were needed but she thought that the accountacy department should have been exempt. She declined to give details.

The key issue in the case related to the whether the respondent was offered the chance to work short-time, (three-day week). The appellant maintained that an offer was made explicitly in writing and also verbally. The first offer was made by letter dated the 2nd of March, 2009 and subseqeuntly, the offer was made verbally by the managing director and by the financial controller. The appellant said that the offer was rejected by the respondent. The respondent insisted that the offer was never made to her and that if the offer was ever discussed, it was in the context of other employees of the company. However – and crucially – the respondent accpeted that as the company's accountant, she was aware of the financial implications of a move to short-time working.

On balance, the Tribunal believes that the appellant company did offer the respondent the option of working short-time. It also accepts that given her position in the company, she was fully aware of the financial consequences. However, she declined and had decided that she would instead initiate legal proceedings agains the appellant. She informed the appellant of her intentions before she left

the company.

The option of moving the respondent to an alternative role within the company was also considered by the Tribunal. Specifically, the respondent claimed in evidence that she wanted to move to the cutomer service department. The appellant ruled this possibility out on the basis that another employee – albeit one with a little less service in the company – had been moved to the customer service department in October, 2008 in an earlier round of cost-saving measures. In addition, this other employee had greater experience in dealing with the company's customers than did the Respondent. Furthermore, the appellant gave evidence that the respondent would have beenfinancially better off working as an accountant on a three-day week than as a customer servicedepartment employee on a five-day week.

The Tribunal, having carefully considered all of the documentary and oral evidence, accepts that there was a genuine redundancy situation in the appellant company.

On the issue of the reasonabless of the conduct of the Appellant company, regard was had for Section 6(3) of the Unfair Dismissals Act 1977 as amended by Section 5(b) of the Unfair Dismissals Act 1993. It states states: "… in determining if a dismissal is an unfair dismissal, regard may be had, if the rights commissioner, the Tribunal or the Circuit Court, as the case may be, coniders it appropriate to do so- (a) to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal…"

Nothwithstanding some shortcomings in the ways the appellant dealt with the difficulties with which it had to deal, the Tribunal is satisfied that the appellant acted reasonably. A period of consultation passed before the issue of redundancies was addressed and a realistic alternative to redundancy was floated by the appellant but was rejected by the respondent. The Tribunal believes that the appellant was left with no option but to make the respondent redundant.

In the circumstances, the Tribunal allows the appeal and finds that the respondent was not unfairly dismissed. The Recommendation of the Rights Commissioner is duly set aside.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)