EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	**CASE NO.**
EMPLOYEE *- First named claimant*	UD1990/2009 RP2242/2009
MN1874/2009	
	WT844/2009
EMPLOYEE *- Second named claimant*	UD1991/2009 RP2243/2009 MN1875/2009
WT845/2009	
EMPLOYEE *- Third named Claimant*	UD1992/2009 RP2244/2009 MN1876/2009
WT846/2009	

against

EMPLOYER
- First named respondent
EMPLOYER
- Second named respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. E. Kearney B.L.

Members: Mr T. Gill
Mr T. Kelly

heard this claim at Nenagh on 10th December 2010 and 21st June 2011

Representation:

Claimant: Kiwana Ennis B.L. instructed by Mr Brendan MacNamara, Devitt Doorley MacNamara, Solicitors, Mountrath Road, Portlaoise, Co Laois

Respondent: Kate Kennedy B.L. instructed by M.G Ryan Solicitors, Abbeygate House, Abbeygate Street Upper, Galway

The claims under the Redundancy Payments Acts 1967 to 2007 and the Organisation of Working Time Act 1997 were withdrawn at the commencement of the hearing for the first and third named appellants.
The first and third named appellant received their statutory redundancy payments while the second named appellant refused her redundancy payment.
The second named respondent was let out of proceedings as a transfer of undertakings had occurred.

Respondent's Case:
The claimants were working for the second named respondent when it was taken over by the first named respondent. The business is a franchised store and the HR manager of the franchisor JG gave direct sworn evidence. She explained that as part of their service to the franchisees' they provide HR and marketing advice. In March 2009 the second named respondent sought to hand back the franchise store that he operated. They had been aware that he was having cash flow problems and that he was running his store at a loss. One of the reasons for this was his staff costswere running at 40% of net sales and this was too high as the average staff costs per store is 26% ofnet sales. They contacted the first named respondent to see if he would be interested in taking overthis store. The parties reached an agreement with the proviso that some changes would have to bemade and all staff would be facing redundancy. There were six managers employed in this store, itwas top heavy. Most stores would have a manager, assistant manager and a supervisor.

On the 12th March 2009 JG advised staff that the first named respondent was hoping to takeover and run the store. She informed the six managers that they would be made redundant on the 22nd March 2009 and that the other staff members would retain their jobs. The first named respondent and his partner would assume the role of management within the store. A letter was written to all three claimants on the 16th March 2009 seeking details to enable the first named respondent to pay their correct statutory redundancy payment. JG's only other involvement was when the redundancy cheques were being collected on the 27th May 2009 where she was present. The first and third named claimants collected and signed for their redundancy pay while the second named claimant did not collect her cheque. The other three managers who were made redundant at the same time accepted their redundancy.

Under cross-examination it was suggested that while two of the claimants accepted their redundancy money they did not accept the validity of the redundancy. The witness explained that the claimants had accepted their redundancy pay in good faith.

The first named claimant was employed for 8 years, the second named claimant 14 years and the third named claimant 9 years. The other three managers had less service than the claimants. One of these three managers was on long term sick leave for two years at the time of the redundancy while another was on maternity leave for six months. The team members retained their jobs and she accepted that some of them would have less service than that of the claimants.

The decision to make the claimants redundant was made by the first named respondent and by the franchiser. It was obvious where the problem lay, staff costs were too high. If they could have redeployed the claimants they would have, they were protecting the other jobs there by making them redundant.

She was not aware if it was a condition of the transfer that the managers would be made redundant,

however this was included in the discussions on the lead up to the takeover. Things had happened so quickly that they had no time to consult with the staff. She was not made aware at the time that the claimants would have been happy to stay on as team members. The first named respondent did not have the option of redeploying the claimants.

The director of the first named respondent gave evidence. He has been involved with the franchiser for 20 years. He knows the second named respondent well and was aware that he was having problems operating the store. He was approached by the franchiser to see if he would take over the store. The second named respondent had told him that his labour costs on average was 43% and because of his long time in the business he knew this would have to be addressed. He considered his options and as he had another store in close proximity he would be able to run this store also. He envisaged that he and his partner would be the manager and assistant manager of the store. He spoke with the franchiser and informed them that to bring costs down he would be making the six managers redundant. He had four other stores at the time and had no positions available for managers in them. It was never made known to him that the claimants were willing to be demoted to team members however this would have led to other team members being made redundant.

The claimant's solicitor had advised him that the claimants would not be accepting their redundancy pay. He had telephoned the claimants on the day before they were due to pick up theirredundancy pay, as he was not sure if they were going to attend. They informed him that they would need to consult with their solicitor and would not attend. Then on the morning of the 27th May 2009 the first named clamant telephoned him and said that she and the third named claimanthad changed their mind and would be in to pick up their payment. They both signed a receiptstating they had received their pay, no conversation took place around their solicitor, and the partiesshook hands.

When he had taken over the store business was down. The store needed hands on approach and he was working all the time. When they initially started he and his partner were doing alternative shifts. The store is open seven day and operates 14 shifts over the week. From Monday to Wednesday inclusive they require one manager and one team member for two shifts. Thursday to Sunday one manager and 2/3 team members for each shift is required.
The manager from the Carlow store would provide cover from time to time while he was seeing to his other stores. The turnover of the store has gone down a bit however the labour costs are now in and around 26 to 28 % of net sales on average.

Under cross-examination he explained that he did have access to the second named respondent's books at the time of the takeover and would have seen documents at the time supporting that the labour costs were at 40%. However as he was not taking on the second named respondents debts he did not get to keep these books. He had to let go the managers to reduce costs and as he had other managers in his other stores to cover for him there was no need for managers in this store. It was a tough decision at the time, as he had known some of these managers for years, however he did not want to follow the second named respondent footsteps. He had to take the cost of redundancy at the time of the takeover rather than the store going under in the future. He had selected the managers for redundancy as he and his partner were going to be there. They had hourly paid staff that they could use; the managers were on a salary and worked shifts. It would not have been viable to takeover the store if the managers were still in place. The second named respondent traded up to close on the 22nd March 2009 and he took over on the 23rd March 2009.

He and his partner worked all the shifts when they took over however he could not neglect his other four stores so the manager from his Carlow store would cover for him occasionally. He has not

taken on any new managers since the takeover, one team member was promoted to supervisor in April 2009. He did advertise shortly afterwards for a delivery driver. He was not aware that any new floor staff had been taken on. He was not aware that they had advertised for a manager through FAS for this store in June 2009 and explained that the franchiser normally places these advertisements. The claimants had never raised with him that they would be willing to take a pay cut or that they would be willing to become a team members. He was not at the meeting on the 12th March 2009 with the staff as he was only considering taking over the store at this point. He could not recall if the first named claimant had telephoned him seeking a position in the store before he took over. The last date of employment for the claimants was the 22nd March 2009. He was referred to the claimants T1A forms lodged with the Employment Appeals Tribunal where each of them had named three employers, and this showed that they were not aware of who had made them redundant. He disagreed with this as the claimants' solicitor had approached him before he paidout the redundancy. He accepted he had never personally told the claimants that it was him makingthem redundant.

LS first named claimant in her sworn evidence stated that she worked in the store for eight and a half years on a part time basis. She was told by NM to take her redundancy and she would be brought back, sign the RP50 and re-apply for the job. LS didn't sign it because there was no dates on it, and she was watching other staff being brought upstairs for interviews. On 12th March 2009 LS met a manager in the street who said they had got their cheque, she was broke and needed the money. She rang the company and signed RP50, got redundancy cheque in May 2009.
LS loved her job and would have done anything given the opportunity.
She went on a CE scheme which ended in June 2011 and is currently looking for work.
Under cross examination LS stated that she was a supervisor, jobs shouldn't be made redundant when the jobs were still there, she had no choice but to sign the RP50 even though she didn't want to. The business had been taken over before and people had not lost their jobs, she wanted her job, even the cleaning ladies job if it had been offered to her.

EOR second named claimant sworn into evidence. She worked for the store for 14 years and was working a forty hour week. The last 7/8 years was as an assistant manager.
She was gutted to lose her job and did not accept her redundancy.
After consideration this claimant withdrew her claims under the Unfair Dismissals Acts 1977 to 2007, the Minimum Notice and Terms of Employment Acts and the Organisation of Working Time Act, 1997. Her claim for Redundancy was attended to on a separate T1A and a decision has already been provided by the Tribunal.

Third named claimant BM sworn into evidence. She began work for the business in September of 2001 as a general worker. She worked full time, and had supervising duties but no banking duties.
She received a telephone call from her boss NH on 5th March 2009. An urgent meeting of managers was called and he told them he was leaving and so were they. It was happening straight away. The employees at the meeting did not accept this. They told him they were entitled to notice NM couldn't afford the redundancies but said the parent company would pay. The employees did not sign the RP50 redundancy forms as they did not contain all relevant details.
A date for redundancy was then given as 22nd March 2009. The claimant finished work on Saturday 21st March. She collected here redundancy cheque.
Under cross examination she stated that she felt unfairly selected for redundancy, somebody else was doing her job, no other position was offered to her and it would not be possible for the respondent and his partner to cover all of the work.

Majority Decision:
The Tribunal by majority decision (with Mr Kelly dissenting) found that the claimants were not unfairly dismissed.

Dissenting opinion of Mr Tony Kelly,
The reasons for my dissension are as follows:

The first named respondent JTE failed to recognise the claimant's service and was also negligent in exploring options for the claimants in terms of offering alternative work at a lower rate.

It is my view that the claimants were unfairly selected for redundancy and were not afforded fair procedures.

Determination:
After carefully considering the evidence tendered in this matter, by majority the Tribunal make the following findings; That, the redundancy situation as alleged occurred in the context of transfer of undertakings situation from the 2nd named respondent to the 1st named respondent. In those circumstances by agreement the 2nd named respondent was let out of these proceedings.
That; it is accepted by the majority on the evidence presented that the redundancy situation occurred for organisational and /or economic reasons and consequentially find a valid redundancy situation existed.
That; that majority are satisfied on the evidence heard that the 1st named Respondent had all appropriate discussions and consultation with staff members, and considered all reasonable options regarding re deployment.
That; the Claimants sought and obtained independent legal advice prior to agreeing to sign the RP 50 forms, and prior to accepting the redundancy payments.

The majority consider there was valid selection for redundancy.

Therefore the claims under the Unfair Dismissals Acts 1977 to 2007 fails.

The Tribunal award the following amounts under the Minimum Notice and Terms of Employment Acts 1973 to 2005.

First named claimant €1,500
Third named claimant €1,500

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)