EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:	**CASE NO.**
EMPLOYEE - claimant	UD714/10 MN673/10

Against

EMPLOYER - respondent

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 D. Donovan B.L.

Members: Mr J. Browne
Mr F. Dorgan

heard this claim at Carlow on 14th July 2011, 3rd April 201, 4th April and 8th June 2012.

Representation:

Claimant: Ms Cynthia Ni Mhurchu BL, instructed by Michael Lanigan, Poe Kiely Hogan Lanigan, Solicitors, 21 Patrick Street, Kilkenny

Respondent: Mr. Kevin Langford, Arthur Cox, Solicitors, Earlsfort Centre, Earlsfort Terrace, Dublin 2

The determination of the Tribunal was as follows:-

Respondent's Case:

On 31st December 2008 a merger took place between two companies, company C1 and company C2 to form a new legal entity, namely the respondent company. The respondent company is funded from the national exchequer of the European Commission and is responsible for the strategic management and delivery of a range of economic and social development programmes and initiatives to individuals, enterprises and communities.

The claimant worked previously for company C1 and held the position of LDSIP Administrator and on her transfer to the respondent company on 1 January 2009 retained the position. ON held the position of Rural Development Finance Officer. MW was appointed CEO several months before the merger of the two companies.

MW furnished a memo to all staff outlining management's priorities for January 2009 and company priorities for February/March 2009. Streamlining of administration/financial procedures across all programmes was listed as a priority.

MW attended at a team meeting on 4th March 2009. She outlined financial difficulties and challenging times ahead. She indicated that this could give rise to restructuring and ultimately redundancies. Streamlining had already commenced in the administration area and the finance area was next.

Priorities for March/April 2009 included streamlining administration/financial procedures across all programmes. All staff were notified of this in a memo dated 4th March 2009.

Following a meeting on 26th March 2009 MW sent a memo to all finance employees attaching agreed integrated financial procedures for the company. MW stated in her memo that the implementation of the integrated financial procedures should commence on 1st May 2009. All documents needed to be in one place for auditing purposes and the key areas under which implementation would occur were payroll, computerised accounts and centralising all documents and so forth. A proposal was tabled to staff and agreed.

A not-for-profit organization (P) with charitable status manages various funding programmes on behalf of the Irish Government and the EU. P liaises between the Department and the respondent. P advised that the LDSI programme (LDSIP) funding allocation for 2009 had been revised downwards. Operating costs were to be minimized and projects maintained.

A vacancy for Assistant Co-ordinator in a Jobs Club arose. MW notified staff in a memo dated 12 May 2009 that given the budgetary constraints faced throughout the company it was recommended that staff undertaking administration and/or finance duties would carefully consider the specifics of the position to determine their interest in same.

Having regard to budgetary constraints MW sent a staff memo on 20th May 2009. Phase 1 of the restructuring of Human Resources was to commence immediately and would concentrate on the administration and finance function of the company. Redundancies were not envisaged however some staff members would have new role/responsibilities and/or would have their working hours reduced to a part-time basis.

A decision was made to consolidate the existing financial and associated administration function to create a new position of Company Finance Manager and when filled would result inthe claimant's position and the SI Administrator positions being made redundant. MW invitedboth the claimant and ON to submit their CVs before 27th May 2009 in order to be consideredfor this new role. Both were on the same salary. MW in her letter dated 20th May 2009 alsopointed out that a part-time position of Company Finance Executive may be offered to theunsuccessful candidate as an alternative to redundancy. A role profile for the new position wasattached to her letter.

By letter dated 25th May 2009 to MW, the claimant outlined that she was on annual leave from 26th May until 8th June 2009 and requested the closing date for receipt of her CV be extended to 12th June 2009. MW was prepared to extend the date of 3rd June 2009 to both applicants for receipt of their CVs with interviews scheduled for 9th June 2009.

The claimant restated for the record that her letter of 25th May 2009 still stood as she was on annual leave until 8th June 2009.

In MW's letter dated 4th June 2009 she agreed to 12th June 2009 for receipt of CVs and for interviews to be held on 25th June 2009. She subsequently confirmed this to both applicants in an e.mail dated 9th June 2009.

MW telephoned the claimant on 16th July and informed her that she was unsuccessful at the interview. In her letter dated 17th July 2009 MW offered the claimant a part-time finance related role as an alternative to redundancy. She advised her of the outcome of the interview and explained to her that the part-time position was available to her. MW subsequently took annual leave. As she had not heard from the claimant MW contacted the claimant's union representative, MB. He advised her to contact the claimant directly.

MW wrote to the claimant on 27th August 2009 stating that it had been 6 weeks since she offered her the part-time position and if she did not receive a response confirming that the claimant would take the part-time position on or before close of business on 2nd September 2009 MW would have no option but to issue redundancy notice to her.

The terms and conditions of the Company Finance Position role were as follows:

2-3 days per week from 9.30 am to 5 pm
Located in another part of the county
Salary €40,000 p/a (pro rata)

By letter dated 1st September 2009 the claimant informed MW that as she was on sick leave she could not respond to her letter.

The claimant had submitted medical certificates for several weeks. She had worked in the period 11th August to 30th August 2009. MW on her return from annual leave had e.mailed the claimant on 28th August 2009 in relation to the part-time position. Further certificates were furnished to 2nd October 2009.

Again on 24th September 2009 MW wrote to the claimant offering her the part-time position on her return to work. MW also offered to meet the claimant. MW again wrote to the claimant on 1st October 2009 following receipt of a medical certificate dated 28th September 2009. She pointed out that sick pay would cease on 2nd October 2009. MW asked the claimant for a likely date for returning to work or a likely date that she would make a decision on the offer of part-time employment. MW had not seen a letter from the claimant's solicitors received the previous day when she sent her letter of 24th September 2009. In that letter reference was madeto the claimant being harassed into submitting her CV and going for interview. MW wassurprised that the claimant said she was harassed.

On day two of the hearing, the claimant's representative confirmed that the minimum notice payment was returned to the respondent and that the redundancy payment was not accepted by the claimant. The respondent accepted that the claimant had the capabilities to perform the job.

Continuing in cross-examination, MW outlined the qualifications of ON, who was recruited in 2005. She denied that the claimant had been bullied or manipulated. She said the transfer of the bank accounts was discussed with the claimant. An overdraft facility had been created with the

bank as there was delay with the lodgment of funds. She said there was no need for havoc as a result. When asked by the Tribunal the relevance of the bank issue, the claimant's representative stated it showed the lack of communication between the parties.

MW confirmed that the payroll was transferred to suit her location. The claimant co-operated in the transfer of the payroll. She did not agree that the claimant was disadvantaged re the interview process in relation to the SAGE accounting system and did not know why the training for this package did not take place. MW did not meet the claimant until January as the claimant's Division was not her staff until then. She confirmed their ethos is to avoid redundancies and offer part-time work. She did not give instructions to the bank to only deal with herself and ON. Any instruction given may have been in relation to the opening and closing of accounts. The witness denied having a rocky relationship with the claimant.

It was put forward that there was more file management in the rural division and larger grants compared to the social division. The social division was a more manual system compared to the rural computerised system.

When questioned about LIFO, MW stated that there was no agreement with the union on this and the claimant had never stated to the respondent that she wanted LIFO. The Board felt LIFO did not apply in this case. The claimant's representative put forward the argument that it was up to the company and not the claimant to put forward LIFO taking into account fair procedures and all candidates should be treated equally. MW could not recall if LIFO was mentioned at the meeting on Wednesday 4th March 2009.

MW explained that the part-time position was to support the Finance Manager. At the meeting of 20th May 2009 the claimant was handed a letter outlining the decision to consolidate the Financial and associated administration functions. MW felt there was ample time given for candidates to complete a CV. In relation to prior consultation, MW stated that staff were aware of the integration. She had discussions with both parties on 20th May 2009. She had no re-collection of the claimant stating that there was no need for re-structuring at the time based on the announcement of budget reductions. MW denied that the claimant asked about LIFO at the meeting on 20th May 2009. The interview was a skills based interview. She did not know that the claimant had planned holidays from 26th May until a letter was received from the claimant on 25th May 2009 after which MW changed the date of the interview to 25th June instead of the 9th June 2009. The claimant did not mention being under any stress.

MW was happy with the interview process. She was aware of the claimant's sick leave during the latter part of July and onwards. ON was assisted by the receptionist and other officers from July 2009 up until mid-2010 when another employee was appointed for six months. There were three redundancies in 2009 and two in 2012. LIFO was not applied in these cases. When asked why LIFO was referred to in the company manual, the witness stated that the manual referred to the Rural Development Division. She denied that the part-time position was to avoid LIFO and also denied that ON had been groomed for the position of Company Finance Manager.

In reply to the Tribunal, MW stated that interview scoring was provided to the Board.

On day three of hearing, it was agreed by both parties that the claimant was entitled to six weeks minimum notice. A discussion took place in relation to holiday pay and as a claim was not put forward in time, the Tribunal did not have jurisdiction to hear a claim under the Organisation of Working Time Act 1997. It was confirmed by the claimant's representative that

compensation was being sought instead of re-instatement.

Under re-examination, it was put to MW that a policy was agreed at a SIPTU meeting in 2008 that there would be no redundancies. She stated that this was not correct and that with the level of cuts required redundancies were unavoidable. Consultants were appointed and the SIPTU representative was on the committee. Some work was progressed but mid-stream the Department took over.

It was also put to MW that she had stated she had difficulty with two financial officials being employed and to which the SIPTU representative had suggested finding other duties to overcome this. MW stated it would not have been appropriate for her to say that as she was not Chief Executive in 2008. She had no re-collection of saying that to the union official.

Claimant's Case:

Giving evidence, the claimant stated that she worked for company C1 since February, 1997. She said that meetings were held on and off in relation to the merger and a consultancy company was contracted in this regard. The Minister was adamant there would be no job losses. It was taken that LIFO would be implemented if there were any redundancies to be made as per the company handbook. She did not feel her position was under threat because of her long service. ON started in 2007. The new Chief Executive asked to meet staff on a meet and greet basis. She asked the claimant was she a qualified Accountant or "did she have a flair for figures". The claimant told her she had an accounting qualification.

In January 2009 there were unnecessary problems with cashing wages cheques in company C1 due to the merger. The bank told the claimant that the CEO had instructed the bank that only ON and the CEO were to have access. Wage payments were delayed each week for three weeks. The claimant went to her Manager who agreed to talk to the CEO. The claimant accepted the new banking procedures.

The first meeting with the CEO was 4th March 2009. It was mentioned that 20% cuts were likely and a possibility of redundancies. The claimant was thinking efficiencies and not redundancies as the way forward. W asked about LIFO as he was the last member of staff in the company. The CEO replied that everything would be looked at.

In a staff memo dated 26th March 2009 it was stated that SAGE and other training would take place in April 2009. This training did not take place. The claimant was familiar with SAGE payroll but had not worked with SAGE accounting.

At 3 pm after a staff meeting on 20th May 2009, the claimant's Manager asked her if she had received the e-mail from the CEO about a meeting they were both to attend with ON and the CEO in the other company location at 4 pm. The claimant stated there had been no e-mail that morning about any meeting. Her Manager did not say what it was about. At the meeting she was handed a sealed envelope and was told to open it. The claimant said she would rather read it when she went home. ON opened her letter. A discussion told place as to the contents of the letter in the envelope. CVs were to be submitted within a week and the interviews to take place on 9th June 2009. The claimant asked about LIFO and was told that would not be very fair. The claimant did not get the job as a result of the interview process. She was offered the part-time job of 2-3 days per week based on €40,000 pro-rata. She was not aware that the salary

was on apro-rata basis and said she felt she had been conned.

Before cross-examination of the claimant, the SIPTU representative gave evidence and stated that during the cohesion process it was discussed that the merger should not impact on staff in relation to job losses. One principle was that there was to be no redundancies and this was agreed in 2008 with MW. The SIPTU representative had raised the possibility of a shorter working week in order to avoid redundancies. There was no discussion in relation to the selection process for redundancy. His understanding was that the issue was referred to the Consultants and that staff would receive a document to ballot on. LIFO usually applies when redundancies take place. The company position was that both officers would apply for the job. There was no scope for the union representative to put forward an argument in relation to LIFO as the solution presented by the company was the interview process.

In relation to a conversation with the claimant as regards having to take the part-time position if she did not go for the interview, the SIPTU representative said that arose but he could not specifically state the conversation.

Under cross-examination, the witness stated that he was the staff rep on the board and the ICTU nominee but due to a conflict of interest he stepped back from the worker rep role. He was on the board in relation to the creation of the position. It was an independent group of interviewers and no internal staff formed part of the interview board. When asked if the board supported the process he said not supported it but accepted it. The position was presented as the only way forward. He was present at the board meeting when the interview result was ratified. In relation to three recent redundancies and LIFO he said one was a voluntary redundancy, another was a compulsory and he was not aware of a third.

He confirmed no letter issued on behalf of the claimant re LIFO. No alternative had been offered. The part-time post was pro-rata and a principle had been breached in that the claimant's Terms and Conditions would have been less than she had enjoyed previously.

Returning to the claimant giving evidence, it was confirmed by the claimant in cross-examination that she had no issue with the merger of the two organisations. She said that as there were still two divisions she felt that both candidates were still required. In relation to "streamlining" in the staff memo of 2nd February 2009, she took it that both would fit in equally. She did not raise the SAGE training with ON as she took it they would get it. She was not aware of the meeting of 20th May 2009 in advance and was in shock when the purpose of the meeting was presented. The claimant voiced her opinion and put forward LIFO at the meeting but was told it had to be done this way, being the interview way.

The respondent invited the claimant on three separate occasions to meet with a view to discussing the part-time position on offer. The claimant contended that she was not in a position to meet with the CEO as she was unwell. The claimant said she was on the verge of a nervous breakdown and the part-time position was not going to be a sustainable position. Initially, the claimant did not know that the salary stated for the part-time position on offer was pro rata.

The claimant felt she was being harassed into submitting her CV and going for interview and following legal advice her solicitor wrote to the respondent on 21 September 2009.

The claimant contended that she was unhappy with the selection process. It was the claimant's understanding that her union representative was engaging in the grievance procedure on her

behalf.

On 1st October 2009 the CEO in her letter to the claimant sought a likely return to work date and an indication on the offer of the part-time position.

The claimant was informed on 29th December 2009 that her position was being made redundant.

Since the termination of the claimant's employment she has applied for many positions but had been unsuccessful in obtaining alternative employment.

Determination:

Having considered the evidence adduced at the hearing the Tribunal accepts that there was a genuine redundancy due to the merger of two entities which resulted in an amalgamation of the claimant's job with that of another employee.

The Tribunal finds that this merger amounted to a transfer of undertakings within the meaning of the legislation on transfer of undertakings and accordingly the claimant was entitled to terms and conditions of employment with the merged entity no less favourable than those she previously enjoyed.

The claimant's contract of employment with the entity that employed the claimant prior to the merger contained a clause to the effect that should it be necessary to effect redundancies it would be on the basis that all things being equal "last in first out" would apply. In circumstances where the respondent conceded that the claimant was capable of doing the amalgamated job the Tribunal finds that all things were equal and therefore "last in first out" should have applied.

The Tribunal accepts that the claimant applied for the amalgamated post because she believed, in circumstances where it was reasonable for her to so believe, that there would be a suitable alternative post should she be unsuccessful at the interview for the amalgamated post. The Tribunal accepts that the alternative post was not suitable.

Accordingly, the claim under the Unfair Dismissals Acts 1977 to 2007 succeeds and the Tribunal awards the claimant compensation in the amount of €65,121.00.

The Tribunal awards the claimant an amount of €6,512.10 under the Minimum Notice & Terms of Employment Act 1973 being six weeks' pay in lieu of notice but the Tribunal notes that the respondent did pay the claimant in lieu of notice but the claimant returned it to the respondent.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)