EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:	**CASE NO.**
EMPLOYEE	UD1659/2010
- *claimant*	RP1/2012

against

EMPLOYER
- *respondent*

under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Mac Carthy S C

Members: Mr D. Moore
Mr M. O'Reilly

heard this claim at Dublin on 3rd January 2012
and 5th March 2012

Representation:

Claimant: Mr Damian Reilly, McKeever Rowan, Solicitors, 5 Harbourmaster Place, IFSC, Dublin 1

Respondent: Ms. Mairead Crosby, IBEC, Confederation House, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

Preliminary Issue – date of dismissal after date of notice of appeal.

On the first day of hearing the respondent's representative raised a jurisdictional point to the division of the Tribunal. The respondent's representative told the Tribunal that the claimant was informed on 9th June 2010 in writing of her dismissal. Her date of termination was 7th July 2010, based on the fact that she was entitled to four weeks notice and received payment in lieu for same. The claimant submitted her claim to the Employment Appeals Tribunal on 2nd July 2010. Based on this information the respondent's representative told the Tribunal that as the claimant was still in employment when she submitted her claim to the Tribunal it does not have jurisdiction to hear the claim under the Unfair Dismissals Acts, 1967 to 2007. It is the company's position that a claim filed prior to the date of dismissal is not within the six month time frame in section 8(2) of the Unfair Dismissals Acts, 1977 to 2007.

The claimant's representative told the Tribunal that the respondent informed the claimant that her date of dismissal was 9th June 2010

Determination of Preliminary Issue
The Tribunal considered the submissions made by both parties and decided that it would hear the claimant's case under the Unfair Dismissals Acts, 1977 to 2007 for several reasons. The claimant's claim was lodged and received on 2nd July 2010. The claim form showed the date of termination as 9th June 2010, a period of 4 weeks prior to the receipt of the claim. Therefore there was nothing on paper to show that there was a problem in respect of the time limit. It also appears from the papers that the claimant did not have professional advice when lodging her claim.

If, due to interpretation, the claim was premature, there is no plea by the respondent in their notice of appearance that the claim was premature. The Tribunal does not regard the form T2 as strict pleadings but if a claim is viewed as premature that is the time for the respondent to raise it. If the respondent had raised this issue in their notice of appearance the claimant would have the option to file a new claim at that time. That did not happen. The first time the respondent raised the point was when the Tribunal had sat to hear the case and the 6 and 12 month time limit had expired. The secretariat of the Employment Appeals Tribunal can see from the claim form when a claim is submitted outside the 6 and 12 month time limit and write to the party and draw their attention to it. Nobody raised this issue prior to the hearing and the claimant had no option or opportunity to amend the claim.

The Tribunal considered the purpose of the time limit within the Unfair Dismissals Act. It considered whether it was substantive, to provide redress for employees under that Act as opposed to adjectival. Looking at the scheme of the statute as a whole it includes an innovative from of redress in reinstatement. The only form of redress under common law was compensation. The Tribunal feels that reinstatement guided the setting of a time limit in order to notify an employer of a pending claim against them in reasonable time.

The Tribunal views the time limit as adjectival law in respect of lodging a claim and accordingly adjectival is procedural rather than substantive.

Therefore, for these reasons, the Tribunal rule against the position of the respondent and the case proceeds.

The determination of the Tribunal was as follows

Respondent's Case
The representative for the respondent told the Tribunal that in 2009 the company made an announcement to all employees that due to the amalgamation of a number of different businesses the respondent would be the new company.

In October 2009 the company met with the claimant to outline her new role in the company and inform her that her hours of work would be changing. At the time the claimant worked 8:30am to 5pm and this would change to shift work of 6am to 2:30pm and 2pm to 10pm. The company met

with the employee's union in December 2009 and partook in conciliation in respect of the changes in employees terms and conditions of employment. Subsequently staff accepted the transfer to the new site in January 2010. The claimant was due to move to the new site but refused to sign a new contract.

The claimant was absent from work on sick leave from February to April 2010. In March 2010 the company contacted the claimant and asked her to attend the group occupational therapist. On 12th April 2010 the claimant attended a meeting, in relation to her return to work, at which she stated that she was nearly fit to return. However, she was still refusing to work the new hours.

On 16th April 2010 the company wrote to the claimant's union advising that they needed assistance with the matter. A meeting took place in the union's office on 4th May 2010. At this meeting the claimant agreed to commence working the new shift hours. Also at this meeting the claimant's union representative enquired if the company would consider redundancy but clarified that this was her request and not the claimant's. On 10th May 2010 the claimant denied that she had made the agreement and would not accept the changes to her hours of work.

On 11th may 2010 the claimant was suspended pending a full investigation into her refusal to work the new hours. A disciplinary meeting took place on 17th May 2010. At this meeting the claimant said that the new hours would interfere with her social life. A final written warning was issued to the claimant. The claimant appealed the final warning. In the interim the company wrote to the claimant stating her start time was 6am and failure to start at 6am would result in her suspension again. The claimant refused to work the new hours and the company suspended her for a second time.

An appeal meeting took place on 28th May 2010 and the claimant said she refused to work alternative hours because of her friends and her lifestyle. She said it was not acceptable to get transport from a colleague because the colleague could be sick. The decision to suspend the claimant was upheld.

On 4th June 2010 the company held another disciplinary hearing. The claimant declined representation. The company reiterated the serious implications taking into account the final written warning. The claimant again refused to work the new hours.

On 9th June 2010 the company issued findings to the claimant that they had no option, due to her refusal to work the new hours, to dismiss her from her employment. The company advised the claimant that she would receive 4 weeks pay in lieu of notice. She was also advised of her right to appeal.

On 15th June 2010 the claimant appealed the company's decision to dismiss her from her employment for 3 reasons. Firstly she could not drive, secondly she could not rely on a colleague for a lift and thirdly she could not work late because of her social life. An appeal hearing took place on 8th July 2010 and company upheld it's decision to dismiss the claimant believing they had exhausted all options. The claimant was notified of this decision on 12th July 2010.

Claimant's Case

The claimant's representative told the Tribunal that the first time the claimant was made aware of a change to her hours of work was on 28th January 2010 and prior to this date she always started work at 8:30am. A number of months prior to this the company had asked the claimant to sign a new

contract. The claimant does not own a car and starting work at 6am would be a considerable change to her hours to which she did not agree.

In conversation with CMcH from human resources the claimant was told that there would be no changes to her hours. The claimant's only issue was with the new start time. The claimant was under pressure to sign the contract and she went out on sick leave suffering with depression because she was told the new hours of work would commence on 6th February 2010.

While the claimant was absent on sick leave the company contacted her and asked her to contact the occupational nurse. The occupational nurse contacted the claimant looking for the title of her condition. The claimant provided the nurse with this information and the claimant is not aware if the nurse went back to the company with this information.

The claimant was invited to a meeting on 12th April 2010 and at this meeting the claimant told the company that she had a medical condition due to stress and this was the reason for being unwilling to start at 6am and not due to her lifestyle and friends. At this meeting the company told the claimant that she was frustrating her contract of employment but she had not signed a contract at this stage.

The claimant was adamant that at the meeting of the 4th May 2010 she did not agree to work the new hours. She had agreed to consider the change. At this meeting, the claimant's union representative raised the issue of redundancy. However, the claimant was not offered redundancy but would have investigated this option if it was offered.

On 6th May 2010 the claimant attended work at 8:30am and was told by her manager that the company required her to commence work at 6am.

Determination

Having considered the evidence adduced at the hearing of the above case the Tribunal finds that the claimant's employment ended by reason of redundancy in accordance with section 7(2) of the Redundancy Payments Acts 1967 to 2007 and she is not disentitled by section 15(2) of the Redundancy Payments Act, 1967 to 2007.

Section 15 of the Redundancy Payments Acts 1967 covers two forms of offers of alternative employment and the relevant provision in this case is section 15(2)(b):-

> *An employee who has received the notice required by section 17 shall not be entitled to a redundany payment if in the period of two weeks ending on the date of dismissal-*
>
> *(b) the provisions of the contract as renewed, or of the new contract, as to the capacity and place in which he would be employed and as to the other terms and conditions of his employment would differ wholly or in part from the corresponding provisions of his contract in force immediately before his dismissal,*

It has been long established Tribunal case law that whether a person is unreasonable in refusing an offer it is to be judged by an objective test, but the issue of suitability it is to be judged by subjective test.

The Tribunal finds that the claimant is entitled to a redundancy payment under the Redundancy Payments Acts 1967 to 2007 based on the following criteria:

Date of Birth:	20th March 1970
Date of Commencement:	10th April 2002
Date of Termination:	9th June 2010
Gross Pay:	€486.33

This award is made subject to the claimant having been in insurable employment for the purposes of the relevant Social Welfare Acts

The Tribunal dismiss the claim under the Unfair Dismissals Acts 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)