EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:		**CASE NO.**
EMPLOYEE	- claimant	UD763/2011
		RP1070/2011
		MN829/2011
		WT318/2011

Against
EMPLOYER - 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 D. Donovan B.L.
Members: Mr J. Horan
Mr A. Butler

heard this claim at Carlow on 16th October 2012 and 17th December 2012.

Representation:

Claimant: Ms Clare Bruton BL, instructed by Ms. Kathryn Matthews, Malcomson Law, Solicitors, Iceland House, Arran Court, Smithfield, Dublin 7

Respondent: Mr. Robert Beatty BL instructed by O'Mara Geraghty McCourt, Solicitors, 51 Northumberland Road, Dublin 4

At the outset of the hearing the claims under the Redundancy Payments Acts, 1967 to 2007 and the Minimum Notice and Terms of Employment Acts, 1973 to 2005 were withdrawn.

Summary of evidence:

The respondent is a general accountancy practice. PMc set up the business. PMc is an accountant and a second accountant EP works part-time being fifteen hours per week. EP chose to reduce her full-time hours to part-time during the course of 2010. In 2008 another accountant resigned his position. The claimant (an accounting technician) together with another accounting technician AD and a receptionist were employed by the respondent.

In the years 2008/2009 the main focus of the business was on compliance work for clients. The claimant's role entailed doing tax returns, book-keeping, vat returns for five clients, payroll and some auditing. The bulk of the claimant's work was doing accounts for a bar and this ceased trading in 2008.
Due to the downturn in the economy the respondent lost many clients. Throughout 2010 PMc endeavoured to replace the business lost through client closures. PMc saw the main growth

area to be in the insolvency/liquidation area. AD had acquired a certificate in computer science and co-ordinated a website for the respondent. Her main focus was to keep the website up to date. PMc trained AD in on insolvencies and liquidations. AD attended creditors' meetings. It was a specialised area, filing documents with the Companies Registration Office and dealing with creditors.

The claimant commenced a period of sick leave in April 2010. PMc did not pursue the claimant with a view to returning to work as the workload had decreased. He had no issue regarding the claimant's sick leave. In 2010 PMc was hoping to turn around the business but to no avail. For the business to survive he had to reduce the wage overhead. In November 2010 he sought guidance from NERA regarding procedures for redundancies. He had an obligation to be fair and objective.

He had to make a decision on redundancy as between the claimant and AD. The claimant had commenced her employment with the respondent in 2001 and AD had commenced in 2003. He had no preference for either employee. It was purely based on experience. On advice from NERA he devised a matrix. The insolvency area of the business had increased and AD was experienced in that area. The focus was on insolvency, the website and IT. PMc was objective.

The claimant telephoned the respondent in or around 6th /7th December but he was unavailable. She told AD that she was returning from sick leave on 8th December 2010. PMc spoke to the claimant on 8th December 2010 and told her that he sincerely regretted having to terminate her employment. PMc made it clear to the claimant that redundancy was being considered by him prior to December 2010 due to the decreased workload. He also made it clear to her that she was not being let go because of her illness. The claimant had the opportunity to raise alternatives such as a three-day week or job-sharing but PMc told her these alternatives were not suitable for the practice and would be overly disruptive to the business. The claimant was formally notified by letter dated 10th December 2010 that she was being made redundant. The claimant has not been replaced since the termination of her employment.

During cross-examination it was accepted by PMc that the claimant had received €100 cash per week and that tax should have been applied to this payment.

It was put to PMc that the claimant had completed more work on revenue auditing than AD and details of this work were outlined. PMc disputed this and stated that the claimant did not have experience of the work required for a full tax audit. However, he accepted that the claimant did have some revenue audit experience but AD had greater experience in this area. For example the claimant did not have the experience of meeting with Revenue Inspectors as part of an audit but AD did.

It was put to PMc that the letter of dismissal did not set out the selection criteria. PMc replied that when he met with the claimant on 8th December he had explained to her that he had examined the skill levels in relation to the needs of the business. AD was the more suitable employee to retain given her relevant experience. It was put to PMc that the claimant had not known in advance what the meeting was about. He accepted this but stated that the claimant would have seen a decline in the practice over a number of years.

It was put to PMc that he contacted NERA following the communication from the claimant that she was fit to return to work as he wanted to dismiss the claimant. He replied that the claimant's job had been kept open for her while she was on sick leave and he had hoped that

business levels would increase but this did not happen.

It was AD's evidence that she commenced employment with the respondent as a trainee. At that time she held a certificate in computing and had previous book-keeping experience. AD completed AITI exams and is currently in the process of completing ACCA exams.

In January 2010 she was involved in setting up the website for the business and spent three full weeks working on this as she drafted the content and worked on the design of the website. The claimant was not involved in this work. In March 2010 AD undertook a blogging course and she subsequently placed blog content on the website in summer 2010.

When the claimant was absent on sick leave AD carried out any work that was required including accounts, tax and insolvency work. However, it was evident to AD that the work had decreased and she found that she could manage her workload without assistance.

While the claimant had worked at preparing files for audits AD had actually attended meetings with inspectors in addition to carrying out the preparatory work. The practice received numerous enquiries regarding insolvency work and PMc intended to develop the practice in this area. In relation to this AD worked with PMc on an investment scheme that was winding down. When the claimant was leaving on sick leave there was a creditors' meeting regarding a voluntary liquidation in 2010 and AD received training from PMc on this. Subsequently, in 2010 there were a further two liquidations and AD completed these. By November/December 2010 AD was confident to attend any other creditors' meetings.

During cross-examination it was put to AD that prior to the claimant's sick leave she had sought her advice about a creditors' meeting. AD confirmed that she had asked the claimant about it as the claimant had previous experience of a creditors' meeting.

In reply to questions from the Tribunal, AD stated that the only change in the nature of her work when the claimant was on sick leave was that she began to carry out the work on the liquidations.

Giving evidence the claimant outlined her experience to the Tribunal and that she also undertook to complete the ACCA exams. The claimant was employed by the respondent as a trainee and at first she completed basic book-keeping but latterly she prepared accounts and filed VAT returns. The claimant stated that she had as much revenue audit experience as anyone else in the practice and that she had attended audit meetings and had experience of a full audit just like AD. There were less and less tax-based schemes but the claimant accepted that AD had experience of such schemes while she did not. AD did have stronger IT skills.

Prior to the period of sick leave PMc had asked the claimant to research the area of liquidations for the business as he was aware that she had experience of a company entering into liquidation. The claimant was aware that PMc wanted to expand into this area. She was subsequently surprised when work in this area was not allocated to her as she was interested in this work and had mentioned that to PMc. Any work which AD carried out the claimant was capable of doing and she had covered for AD when she was on leave. The claimant stated that it would not have taken much time for PMc to train her in liquidations and she was capable of completing the work for revenue audits.

The claimant outlined the period of her sick leave to the Tribunal and that she was informed on

6th December 2010 that she was fit to return to work. When she met with PMc on the 8th December and was informed that her position was redundant she was not shown a document setting out the selection criteria nor did he mention AD's skills. The claimant does not believe that PMc had a selection criteria document at the time. When she asked him if she had been chosen because of her sick leave he confirmed this was not the case but stated that he could not let another employee go who had been there all the time.

The claimant confirmed that she suggested alternatives to PMc such as working part-time but he said that such an alternative would not suit the practice. The claimant disputed that a part-time role would have caused any issues for the practice as other employees had previously worked part-time hours.

The claimant gave evidence of loss and efforts to mitigate that loss. It was the claimant's case that she was due two weeks' pay for annual leave accrued while on sick leave.

During cross-examination it was put to the claimant that by December 2010 AD had completed two liquidation processes on her own. The claimant accepted AD had more experience than her of liquidations.

It was put to the claimant that she did not have experience of a full revenue audit but that AD did have this experience. The claimant replied that she carried out work for VAT audits and has completed 11 of the 14 ACCA exams.

Determination:

Having considered the evidence adduced at the hearing the Tribunal finds that a redundancy situation arose due to a downturn in the Respondent's business and due to a decision to do the work with fewer staff.

The Tribunal is satisfied that the respondent retained the employee whom he felt best suited the needs of the respondent going forward. The Tribunal notes that there was not much between the claimant and the retained employee as regards service, qualifications and experience. However, the Tribunal accepts that the respondent was in the best position to make the choice as to which employee should be retained as he worked closely with both employees.

The Tribunal acknowledges that it is preferable that procedures used in effecting redundancies include agreeing selection criteria with employees and engaging in consultation on possible alternatives to redundancy. However, taking into account the size of the respondent company and the in-depth knowledge the respondent had of his business and staff the Tribunal finds that any lacking in the procedures was not in this instance fatal. Accordingly, the claim under the *Unfair Dismissals Acts 1977 to 2007* fails.

Having considered the claim under the *Organisation of Working Time Act 1997* and the submission of Counsel for the claimant the Tribunal finds it is restricted from deciding this claim in accordance with the decision of the ECJ in *Stringer & Others v Her Majesty's Revenue and Customs* (Case No C-350/06) in circumstances where the respondent is not a public employer and where the wording of s.2 and s.19 of the *Organisation of Working Time Act 1997* cannot be interpreted in a way that is consistent with the decision in *Stringer* which held, *inter alia*, "with regard to workers on sick leave which has been duly granted, the right to be paid annual leave conferred by Directive 2003/88 itself on all workers cannot be made subject by a

Member State to a condition concerning the obligation actually to have worked during the leave year laid down by that State".

"s.19. -(1) ….. an employee shall be entitled to paid annual leave (in this Act referred to as "annual leave") equal to-

(a) 4 working weeks in a leave year in which he or she works at least 1,365 hours (unless it is a leave year in which he or she changes employment),

(b) one-third of a working week for each month in the leave year in which he or she works at least 117 hours, or

(c) 8 per cent of the hours he or she works in a leave year (but subject to a maximum of 4 working weeks):

Provided that if more than one of the preceding paragraphs is applicable in the case concerned and the period of annual leave of the employee, determined in accordance with each of those paragraphs, is not identical, the annual leave to which the employee shall be entitled shall be equal to whichever of those periods is the greater.

S. 2 of the *Organisation of Working Time Act, 1997* interprets "working time" as meaning any time that the employee is

(a) at his or her place of work or at his or her employer's disposal, and

(b) carrying on or performing the activities or duties of his or her work,

and provides that "work" shall be construed accordingly.

Accordingly, as the claimant was not at her place of work, was not at the respondent's disposal and was not carrying on or performing the activities or duties of her work, the claim under the *Organisation of Working Time Act, 1997* fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)