INDUSTRIAL TRIBUNAL

Case No. 25 of 2008

Anna Victor

Complainant

-and-

Transport Services Company Limited

Respondent

Joseph Bossano for the Complainant.
Patrick Canessa, in his personal capacity for the Respondent.

The Complainant complains of unfair dismissal based on unfair and unreasonable selection for redundancy, or, in the alternate that she was constructively dismissed. The Respondent on the other hand refutes these allegations on the basis that there never was an intention to make the Complainant redundant and/or to dismiss her.

At this stage of the proceedings we are merely concerned with the preliminary point of whether the Complainant was dismissed as is alleged in the originating application dated the 28th August 2008 or, as is contended by the Respondent, she resigned from her employment. The Complainant was given the opportunity to give evidence on this point but her representative decided not to call her or any witnesses on her behalf. Only one person has given evidence; namely Mr. Patrick Canessa on behalf of the Respondent. Both parties addressed the tribunal after Mr. Canessa's evidence.

It needs to be stated that the proper procedure was not followed with reference the preliminary point in that the Respondent put their case first. This was procedurally incorrect since the Complainant had the burden of proof insofar as the preliminary point was concerned. As Chairman I should have pointed this out when the Respondent started its case but failed to do so. Whether this would have changed what in the event transpired is debatable. What is not debatable is that no objection or submissions on this issue were made by the Respondent and/or the Complainant.

BACKGROUND

The factual background to the case is disputed on three matters but with regard to the rest it would appear that the parties are in agreement. The facts on which the parties are in agreement (i.e. they were stated by Mr. Canessa in evidence and not contested by Mr. Bossano in cross-examination or in the course of his address to the Tribunal) are as follows:-

(a) The Complainant had been employed with the Respondent for some years prior to Mr. Canessa joining the company in 1988;

(b) In 1993 Mr. Canessa had become the sole proprietor of the Respondent and on doing so he began to work closely with the Complainant;

(c) Between 1993 to 2008 the Complainant had become, figuratively speaking, Mr. Canessa's right hand man and as such they had enjoyed a very close working relationship which had blossomed into a personal and business friendship;

(d) At the time the events in question arose the Complainant was the General Manager of the Respondent;

(e) In April 2008 the Respondent was undergoing financial difficulties and Mr. Canessa became concerned about the future of the business to the extent that ceasing the business was contemplated and the liquidation of the Company feared;

(f) On some date in April 2008 (possibly the 30th April 2008 if Exhibit 2 is to be believed) Mr. Canessa and the Complainant got together, quite clearly at Mr. Canessa's instance, and discussed the Complainants' future with the Respondent. What was said at this meeting and/or the basis on which this meeting finished is the central point in dispute between the parties. What is not disputed is that the parties agreed that the Complainant was no longer required to attend work;

(g) As from the day following the end of this meeting the Complainant ceased to attend her place of work although she might have popped in now and then for a few moments;

(h) At the end of April and May 2008 the Complainant received her normal salary; possibly by collecting it herself from the Respondents' offices;

(i) At the end of May 2008 the Complainant received no monies other than her salary;

(j) At some point prior to the 4th June 2008 the Complainant requested Mr. Canessa to put in writing what had been agreed at the April 2008 meeting. Mr. Canessa did so on the 4th June 2008; Exhibit 2 refers. There is a dispute between the parties as to whether the contents of said letter correctly reflect what was agreed at the April meeting;

(k) At the end of June 2008 the Complainant received her normal salary; possibly collecting it herself from the Respondents' offices;

(l) During May and June 2008 Mr. Canessa tried to raise funds from the Bank to pay the Complainant the monies which formed the basis of whatever agreement was reached in April 2008 but was unsuccessful;

(m) On the 2nd July 2008, presumably at the Complainants insistence, Mr. Canessa wrote to the Complainant informing her that as he had been unable to obtain from the bank what he hoped the Respondent was ceasing trading at the end of July; Exhibit 3 refers;

(n) On the 4th July 2008 Mr. Canessa heard that the Complainant was going to start work with the Respondents' business rival;

(o) Between the 4th and 7th July 2008, in all probability the 4th (the 5th and 6th July being a weekend) Mr. Canessa spoke to the managing director of his business rival and received confirmation that the Complainant was starting employment with them on the 7th July 2008. It is not known whether in fact the Complainant actually started and/or continued to work for this business rival but at no time did Mr. Bossano state or indicate that she did not;

(p) On the 7th July 2008 Mr. Canessa wrote to the Complainant correcting his e-mail of the 2nd July with regard to the question of cessation of the business, confirming that he had been unable to raise funds to pay the Complainant and requiring the Complainant to go back to work with a different working week and therefore lower salary. The Complainant did not return to work for the Respondent;

(q) On the 9th July 2008 the Complainant obtained a medical certificate stating that she was unfit for work until the 9th August 2008. This certificate, or a copy of it, was forwarded to the Respondent; Exhibit 1 refers;

(r) At the end of July 2008 the Complainant received her normal salary and the Respondent did not cease to trade.

(s) At the end of August 2008 the Complainant did not collect her salary cheque.

I find as fact the above stated agreed facts.

Turning then to the issues in contention.

The first issue on which there is a material dispute concerns what was said at the April 2008 meeting. It is Mr. Canessa's evidence that at the meeting

in April 2008 he offered the Complainant what he has in retrospect called an ill conceived idea, designed to assist her; namely to pay the Complainants monthly salary, notwithstanding that she was not required to attend work, until such time as the Respondent was able to make funds available to pay the Respondent a sum which was equivalent to what she would get if she were to be made redundant. At all times Mr. Canessa stressed that the Complainant was not being made redundant and that he had made this offer to her as a result of her years of service to the Respondent and their close personal and business relationship. The Complainant, on the other hand, in her original application and through Mr. Bossano's cross-examination of Mr. Canessa, contends that at that meeting she was made redundant and that was why she was no longer required to attend work.

The second issue on which there is a material dispute concerns the contents of the letter of the 4th June 2008 (Exhibit 2 refers). In his evidence Mr. Canessa has stated that the reference to the Complainant being made redundant was a deliberate lie which had been inserted in the letter at the Complainants request in order to keep her husband happy and that he never intended to make her redundant. The Complainant on the other hand, whilst accepting that she did ask the Complainant to write a letter about what had been agreed at the April 2008 meeting, contends that the reference to her being made redundant is correct since it reflects what had been agreed.

The third issue on which there is a material dispute relates to the contents of Mr. Canessa's e-mail of the 7th July 2008. Mr. Canessa has stated in his evidence that the contents of paragraphs' 5 and 6 of this e-mail were not the imposition of inferior terms on the Complainants term and conditions of employment since the Respondent was merely putting forward negotiating terms which were yet to be discussed and agreed on and therefore would not have been implemented. I do not accept that the e-mail of the 7th July can be interpreted in such a manner. The Complainant, on the other hand, contends that she was being re-engaged by the Respondent on different terms and conditions and therefore she was in effect being constructively dismissed.

This question of constructive dismissal is quickly put to rest. In my opinion the allegation of constructive dismissal has no merit whatsoever on the basis of the evidence heard to date. Mr. Canessa's evidence, and on this point he was never seriously cross-examined and/or its truthfulness queried, was to the effect that the Complainant had by the time the e-mail was sent already accepted employment with Trident Services and, on the day the e-mail was sent, already commenced working for Trident Services. This being the case, at the time the e-mail of the 7th July 2008 was sent by Mr. Canesa, the Complainant had one way or other (i.e. redundancy or resignation) ceased to be employed by the Respondent. It follows from this, and I so find, that there can be no question therefore of constructive

dismissal. Indeed I note that the original application never raised the question of constructive dismissal and that this only became a potential issue, if the leave of the Tribunal is obtained, as a result of its being raised by Mr. Bossano in a letter dated the 17th September 2008; no application having been made by the Complainant to amend the originating application accordingly, as indeed there has been no objection to its inclusion by the Respondent.

THE LAW

The first question that has to be decided where the concept of dismissal for redundancy arises is "Has the contract been terminated?" There cannot be a dismissal unless the contract is terminated. The formal onus of proving a dismissal lies on the employee. (Morris v London Iron & Steel Company 1987 2AER 496) A dismissal must therefore be proved affirmatively by the employee.

The burden of proof will shift to the Respondent when we come to considering the issue of whether the termination is fair or unfair. In determining for the purposes of section 59 and 70 whether the dismissal of an employee was fair or unfair it is for the employer to show that the employee was redundant and that therefore he was justified to dismiss the employee from the position which the employee held.
(Section 65(1)b and 2(c) of the Employment Act)

The word "dismissal" includes termination of the contract by the employer upon notice but there is a distinction between a notice of dismissal and a general warning of impending redundancy. A notice of dismissal involves not only a communication to the employee of the employer's decision to terminate but also advance notice to him of the actual date upon which the contract will end. Thus were redundancy is concerned it is crucial to decide whether the employee received a notice of dismissal or merely a more remote warning of redundancy. There is a long line of authority on this point.

Morton Sundour Fabrics Limited v Shaw / 1966 2 ITR84
The Company told Shaw that it intended to close the velvet department in which he worked at some unspecified time in the future.
Held: that was not notice of dismissal because the date of termination was not fixed thereby.

Pritchard - Rhodes Limited v Boon and Milton1979 IRLR 19
The Company assured its workers that there jobs were secure for at least seven months and the company would write to each at least one month before termination of employment.
Held: that was not notice of dismissal.

Doble v Firestone Tyre and Rubber Co 1981 IRLR 300

The Company announced that its present intention was to close on 18th February and dismissal notices expiring on that date could be expected in due course.

Held: no notice of dismissal (1) the date given was clearly provisional only but (2) in any case the announcement could not be a dismissal notice because it indicated in terms that dismissal notices would follow separately.

Applying therefore the law to the facts of this case.

FINDINGS

The two questions that arise for termination are:-

(1) Has the Complainant proved that at the meeting of April 2008 she was informed that her contract of employment was being terminated; and

(2) Was a specified date set for the termination of that contract.

The Complainant has failed to give evidence and/or call any witnesses on her behalf. In the normal course of events if the Complainant had failed to give and/or call evidence and the Respondent either made an application to dismiss or also failed to give or call evidence that would have been the end of the case as the Tribunal would have had to dismiss the case. However, as previously stated, in this case we have the unusual situation that the legally represented Respondent did give evidence. The issue of whether I can take into account said evidence has greatly exercised me but I have concluded that however unfortunate it may be that the correct procedure was not followed I am duty bound to consider the totality of the evidence before me in determining the preliminary point. Consequently it follows that the Tribunal when considering whether the Complainant has satisfied affirmatively the onus of proving that she was dismissed can rely on (a) the agreed facts and (b) Mr. Canessa's evidence and the documentation produced. Turning therefore to consider the evidence.

It is agreed by both parties that at the April meeting the Complainant was told that notwithstanding that she was no longer required to attend work that she would be paid her monthly salary. It is also agreed that at that time Respondent was undergoing financial / business difficulties and that the Complainant never went back to work. The essence is therefore what was said at the April meeting. In this respect we only have Mr. Canessa's evidence and the exhibits produced and to these I now turn.

I have grave difficulties in accepting Mr. Canessa's version as to what was said at the meeting in April 2008. At that time Mr. Canessa was coming towards the end of his legal training and should have been well aware of

the consequences flowing from the use of phrases such as "redundancy entitlement", "being made redundant," "ceasing to trade" etc. In the correspondence of the 4th June 2008 ("I informed you that you were to be made redundant"), 2nd July 2008 ("TS will cease trading") and 7th July 2008 ("an offer of redundancy was made to you") Mr. Canessa, in one form or another, used all these phrases and he must have done so at the time in the full knowledge of what had previously transpired and the meaning to be given to what he was writing. In other words, in my view Mr. Canessa was expressing in said correspondence the reality as he saw it at that time and not merely deliberately misrepresenting the situation for the Complainants' husbands benefit. Certainly there has been no suggestion that this was the reason for the deliberate misrepresentations in the correspondence of the 2nd July and 7th July 2010. Moreover, Mr. Canessa has accepted that at the time the Respondent was undergoing business and financial hardships and that he did fear the company being liquidated or ceasing trading. That being so, and indeed the reason why he spoke to the Complainant in the first place, it is reasonable to believe that he would have wanted to reduce the Respondents' expenses by dismissing employees. If this were not the case why would the Respondent offer an employee not to return to work indefinitely? Why would you offer an employee, it is said they supposedly wished to help, the informal and less financially advantageous package of a payment equivalent to redundancy but not redundancy?

I find that at the April 2008 meeting Mr. Canessa informed the Complainant that she was being made redundant. In coming to such a finding I have taken into account the Respondents' argument's to support its contention that there was no redundancy situation; namely (1) why else would the Complainant have handed in a medical certificate dated the 9th July 2008 and (2) why would she have collected the June and/or July monthly salary if she had been made redundant.

As we have not heard the Complainant in evidence both these are difficult to explain, especially as it would appear that in July 2008 the Complainant had already commenced work for another employer. However, neither of these points causes me sufficient doubt, at this stage of the proceedings at least, to detract from my finding that at the April 2008 meeting the Complainant was informed that she was being made redundant.

Does such a finding satisfy the legal requirement that it is for the Complainant to affirmatively prove that she was dismissed in the sense of her contract being terminated. In my opinion it does even though it only just does.

Turning then to the question of whether a definite date of termination had been set. The evidence of Mr. Canessa is clearly to the effect that no definite date of termination was ever set; i.e. the Complainant was to be

paid her monthly salary indefinitely even though not required to attend work. Is there any evidence to contradict Mr. Canessa's assertions on this point?. I come back to the contents of the correspondence exhibited.

In the letter of the 4th June (Exhibit 2 refers) Mr. Canessa stated:-

> "I refer to our meeting on 30th April 2008 at which I informed you that were to be made redundant on the 31st May 2008 and that on that date settlement of your redundancy entitlement would be made ....."

If the contents of this letter are to be believed, and in my view, as stated above, they do, this is an unequivocal statement which supports the above finding as to what was said at the April meeting; i.e. that the 31st May 2008 was set as the date termination came into effect.

However, the letter further goes onto state that:-

> "I confirm that until such time as I am able to settle your redundancy entitlement you will remain in the employment of the Company ....."

It is no doubt an inconsistent statement at first glance. Does this latter statement detract statements made in the same letter from the former? I think not. The issue of "redundancy entitlement" (i.e. the amount of money to be received) does not affect the issue of whether the employee has been made redundant and an employee who has been made redundant cannot be required to continuing working until the employer decides the amount of redundancy payable and/or finds the money to pay the amount payable. Moreover, this is a statement made in a letter dated four days after the employment ceased and therefore cannot be said to be a statement which detracts from, overrules or amends the decision made at the April meeting that termination was effective on the 31st May 2008. However, even if I am wrong in this and that the final paragraph of the said letter did overrule / extend the date of termination it is in my view that the issue was put beyond doubt by the e-mail of the 2nd July which stated that "TS will cease trading at the end of this month". The contents of this e-mail are a clear statement to the effect that if not before, then on the 31st July the Complainant's employment ceased by reason of redundancy.

The Tribunal will now have to deal with the question of whether the dismissal was fair or unfair.

24th day of May 2010.

J Nuñez
Chairman

INDUSTRIAL TRIBUNAL

Case No. 25 of 2008

Anna Victor

Complainant

-and-

Transport Services Company Limited

Respondent

Present:- Joseph Bossano for the Complainant.
Patrick Canessa in his personal capacity for the Respondent

Award

In this case the Complainant complained of unfair dismissal based on unfair and unreasonable selection for redundancy, or, in the alternate that she was constructively dismissed. Initially the Respondent refuted such allegations on the basis and there never was an intention to make the Complainant redundant and/or to dismiss her and therefore by way of preliminary point this tribunal had to decide whether the Complainant was dismissed.

In a judgment dated the 24th May 2010, I determined that the Respondent had indeed been dismissed since she had been informed by the Respondent that she was being made redundant as from the 31st May 2008. At that stage the point at issue became one of whether or not the dismissal had been unfair with the burden of proof passing to the Respondent. On the 26th November 2010, Mr. Canessa informed this tribunal that he was not adducing any evidence in defence of the claim and that the Respondent was conceding the claim. I have therefore determined that the Complainant was unfairly dismissed. This then is the sequence of events which has lead us to this point. The question that now arises is what compensation is the Complainant entitled to. I would have hoped that the parties could have resolved this matter between themselves or at least come to some consensus between themselves as to applicable principles etc. However, as with all other things with respect to this case they are diametrically opposed on this question too.

Basic Award

Following on from the amendment made in 2008 to the Industrial Tribunal (Calculation of Compensation) Regulations 1992 the amount of the basic award is now fixed at £2,200. There is no longer any discretion in this Tribunal to award any amount in excess of £2,200 where the Tribunal considers the Respondents' behaviour to have been other than it should have been. I have no discretion and therefore I award the Complainant the basic sum of £2,200.

Compensatory Award

With respect to this aspect of the award Mr. Bossano seeks compensation in the total sum of £43,804.80 for the Complainant which is based on the maximum amount which at this point in time can be awarded to the Complainant following the formula contained in the Industrial Tribunal (Calculation of Compensation) Regulations (hereinafter referred to as "the Regulations"). Mr. Canessa however, whilst conceding that the Complainant is entitled to the basic award of £2,200, submits that for the purposes of this case the Tribunal should award compensation on the basis set out in the Conditions of Employment (Redundancy Pay) Order 2001 (hereinafter referred to as "the Order") and not on the basis of the Regulations. In Mr. Canessa's submission, as this Tribunal has found that the Complainant was made redundant as from the 31st May 2008 it follows that the provisions which have to be applied are those relating to redundancy and not to unfair dismissal. I therefore firstly turn to determine the validity of Mr. Canessa's submission before proceeding to determine the compensatory amount (if any) which can be awarded to the Complainant.

The starting point with reference the above is section 71 (1) of the Employment Act (hereinafter referred to as "the Act") which provides as follows:-

> "Where in any proceedings on a complaint brought under section 70, the tribunal makes an award of compensation to be paid to a party to the proceedings (in this section referred to as "the party in default") to another party (in this section referred to as "the aggrieved party") the amount of compensation shall be calculated in accordance with the provisions of section 72 and in relation to payments provided for in subsection (2) of that section shall be such amount as the tribunal considers just and equitable in all circumstances having regard to the loss sustained by the aggrieved party in consequence of the matters to which the complaint relates, insofar as that loss was attributable to action taken by or on behalf of the party in default."

The Complainant brought her complaint under section 70 of the Act and in said complaint she claimed that her dismissal was unfair for a number of reasons relating to the manner in which she had been selected for redundancy and/or the procedure followed by the Respondent with regard to the redundancy. This Complaint was conceded to by the Respondent as stated above and therefore the Respondent quite clearly conceded that the Complainant had been unfairly dismissed. The Respondent cannot now, because it would clearly benefit its financial interest, try and turn matters round and say that for the purposes of compensation the issue should be looked at from a redundancy and not an unfair dismissal point of view. Moreover, even if I am wrong in this Mr. Canessa's submission would still fly in the face of the clear statutory wording contained in the Act and/or the Order since:-

(a) in section 71 (1) the sub-section uses the words:-

> "the amount of compensation shall be calculated in accordance with the provisions of section 72"

and therefore the Tribunal has no discretion but to apply section 72 which section applies the Regulations and which section neither impliedly or explicitly refers to the Order;

(b) in paragraph 3 (1) of the Order the wording used is :-

> "Subject to sub-regulation (2) this Order shall apply to all employees in any undertaking or any branch or department of an undertaking of which no other statutory provision is made for compensation by reason of redundancy."

It is clear from this that (a) the Order only applies were no other statutory provision applies for compensation and (b) the alternative statutory provision has to relate to redundancy compensation. Clearly neither are applicable to the facts of this case.

The upshot of all the above is that I determine that the provisions of section 72 of the Act as read with the Regulations apply to this case.

As at this time the current minimum weekly wage stands at £210.60 this means that the maximum compensatory award I can make is £43,804.80.

Pursuant to sections 71 (1) and 72 (2) of the Act this Tribunal has to compensate the Complainant for losses she has sustained as a result of her dismissal bearing in mind that:-

(i) it has to be for an amount which this Tribunal considers just and equitable in all circumstances of the case;

(ii) the Complainant is under a duty to mitigate her loss;

(iii) where a Complainant has caused or contributed to any extent to her dismissal the Tribunal is obliged to reduce that loss by such amount as it considers just and equitable; and

(iv) it has to be for an amount less than the maximum amount provided for in the Regulations.

As previous stated the Complainant claims the total sum permitted by the Regulations being the sum of £43,804.80.

So then what amount do I consider just and equitable in all the circumstances of the case having regard to the evidence of the Complainant which Mr. Canessa at the hearing of the 8th April 2011 stated he did not contest as to content.

In her evidence the Complainant stated that :-

(a) her monthly net wages from the Respondent amounted to £1,511.61 and that she had last received said sum in July 2008;

(b) she had commenced to work for Trident Freight Services Limited (hereinafter referred to as "Trident Services") in early September 2008, possibly the 1st or 2nd of September;

(c) she earned the net sum of £543.12 during the month of September 2008 with the amount going upto £547.37 during October to December 2008. Thereafter, save for January and February 2009 when she had done some overtime, her net salary had increased to £609.42 during March 2009 to June 2009 and to £610.84 during July 2009 to December 2009 and to £654.43 during January 2010 to January 2011;

(c) she had received from the Respondent sickness insurance which she did not receive from Trident Services;

(d) she was getting two weeks leave per annum less at Trident Services;

(e) she had lost her occupational pension benefit entitlement which she was getting from the Respondent;

(f) she had originally intended to commence work in July 2008 but that as she was suffering from depression and anxiety at the time she postponed the commencement till September 2008;

(g) she had worked for the Respondent for some 27 years, namely as from the 13th May 1992.

None of this evidence was seriously contested by Mr. Canessa and there is nothing which occurred and/or was stated in the course of the proceedings which made me doubt the Complainants' evidence on the above and consequently I find it as proved.

There is no hard and fast rule as to how this Tribunal should exercise the discretion given to it by Parliament in determining the amount of compensation payable. Doing the best I can in all the circumstances of the case, and taking into account the facts of the case, I determine that the just and equitable amount to which the Complainant is entitled to by way of compensatory award is £24,118.43.

Thus the total amount of compensation payable to the Complainant is:-

Basic Award	-	£ 2,200.00
Compensatory Award	-	£24,118.43
		£26,318.43

I determine that the Complainant did not cause or contribute in any way to her dismissal and that once dismissed she acted in accordance with her duty to mitigate her loss.

I therefore award the sum of £26,318.43 to the Complainant.

Dated this 14th day of April 2011.

Joseph Nuñez
Chairman