

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee

UD546/2005

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K T. O'Mahony B.L.

Members: Mr G. Mc Auliffe
Mr. S. O'Donnell

heard this claim at Dublin on 19th December 2005, 16th May 2006, 17th May 2006
and 29th August 2006.

Representation:

Claimant: Mr. John Donnelly BL instructed by Mr. Gerry Doyle Rutledge
Doyle, Solicitors, 8/9 Store Street, Dublin 1

Respondent: Mr. Alex White BL instructed by Ms. Laura Wyse A & L
Goodbody, Solicitors, IFSC, North Wall Quay, Dublin 1

This claim is one of two claims heard together by the Tribunal.

Dismissal was not in dispute in this case.

The determination of the Tribunal was as follows:

Respondent's Case

The respondent company commenced its business in March 1999. It had an exclusive licence from a UK company to operate as a website hosting provider for virtual shop fronts, selling goods online. The company's product was known as XXXX and it was known as XXXX when Eircom sold it on behalf of the respondent. As a result of the virtual shop fronts the company was also involved in creating software for online payment for the goods.

The claimant commenced employment with the respondent as Technical Manager in October 1999. The claimant's salary was £30,000 per annum and £15,000 worth of ordinary shares to be issued to him within 30 days of the anniversary of his commencement or such earlier date as the company may at its sole discretion determine.

The e-commerce business had not taken off as expected and by the end of 2001 the company business had accumulated losses of close to €2million. The company was funded by venture capital and funding would only be available if the business was profitable. In early 2002 a consultant was hired to do an evaluation of the business and advise the investors. In April 2002 he set about refocusing the company to develop a payment processing system which would focus on the larger end of the market by targeting large volume customers. Eircom and Ryan Air were targeted. Different skill sets were needed for the new business and, based on management's assessment of its employees' skills, six employees were made redundant in May 2002. The claimant was not made redundant as his skills were critical to the company going forward. By October 2002 the Eircom project had gone live and the company also had heads of agreement with Ryan Air for payment processing.

When the board adopted the consultant's proposal for the refocus of the business the company had to go back into a developmental role to develop the payments engine and support the customer as it went live and in the live environment. A shift in skills was necessary; the number of employees in the Prague office was increased to ten. As the business was evolving there were further redundancies and the number of employees fell to twenty-one. In December 2002 the consultant was invited to become the Executive Chairman (EC) of the company. At the end of 2002 the company's accumulated losses rose to over €4million. The company decided to disengage totally from its original business, the XXXX product, and focus exclusively on payments processing. However, the company did not want to leave existing customers in the lurch so it took about eighteen months to wind down the old business; the claimant was involved in this work. During the evaluation process and prior to his becoming EC, the consultant spoke to all the employees including the claimant and they all knew what was happening and that the company would only be funded if it had available business going forward.

At a meeting on 24 March 2003 the employees were formally informed about the company's change of direction and that it would hitherto be involved in internet payments processing. A chart showing the restructure of the organisation was presented at the meeting. The chart set out the four management areas and their new teams going forward. The four areas were: sales, development, technical operations and finance/administration. The claimant, CM (who was also dismissed in similar circumstances to the claimant) and two others were in the technical operations team reporting to the Director of Technical Operations (OT). The claimant attended this meeting. Opportunity was given to staff to make comments and ask questions. The boundaries of the roles were defined and the importance of everyone's role was emphasised. Morale was high at the meeting as the change was happening at a time when e-commerce was in sharp decline. No undertakings had been given to the claimant or anybody else when the company changed direction. All employees were kept informed about the company's position and what it was trying to achieve. The claimant had no grounds for believing that he was performing his role on a temporary basis.

As a result of the change of direction the company increased the claimant's salary from €38,092 to €44,000 and backdated it to January 2003. There could not have been any doubt about the refocus and that XXXX were being phased out. EC had regular contact with the claimant after this and neither he nor anyone on his behalf raised any issues. Prior to September 2004 the claimant and the others in the team were actively involved in helping the company to develop the support role. From March 2003 there was some residual work being done in the original business. The disengagement process from the XXXX and XXXX products was completed by September 2003. The tasks performed by the claimant were critical to the company.

Management also convinced the board to agree to replace employees' share entitlement in EIS with ECCS employee share options, which were much more valuable and a much better option for the employees. ECCS is the holding company of EIS, which was retained to capture its losses going forward. The claimant was a valued employee and management wanted to keep its employees keen and motivated. The company held a company communications meeting on 26 September 2003 in order to update the staff on where the company was and to inform them that the board had agreed to an ESOP. While the claimant was offered a generous number of shares he was dissatisfied. ECCS was responsible for the payments processing engine and EIS had been responsible for XXXX products.

EC did not undertake an evaluation of employee skills in the company but knew what was available from his conversations with management. It was obvious to him that with the change of focus the company did not have some of the necessary skills. Neither the claimant nor CM had the skill sets to fill positions that arose in marketing and software development. Software development is different from input to product development. For software development the company needed someone who had a record in developing deliverables. It became necessary to hire in staff. SC was hired as Director of Operations; she had done large systems and start-ups in the Far East and was process driven. AM was brought in for a marketing role; she had experience

in dealing with large enterprise customers and brought professional management skills to the company. EW, who had twenty-five years experience with Reuters, was hired in as a Development Director in the design team and he had vast experience and knowledge. These had much greater level of experience than the claimant and the company needed people with their credentials and knowledge. On the other hand the company retained the claimant because he had always been involved in support work and was very good at it. In the changed structure he was providing support but it was to bigger clients. The claimant was working as part of the Technical Operations Team, liaising with customers on issues and problems that might arise as well as testing and doing integrations.

In the respondent company, like in many other IT companies, the title “manager” or “director” indicates that the individual is the manager or director of a function and not of the company. The claimant had not been demoted as he alleged. He had never been a director of the company. He had not been present at board meetings; the meetings he attended at the golf club were not board meetings. A prospectus that had been prepared in earlier years was based on the company’s future growth but that had never happened and thereafter the company had changed focus. His role with XXXX product had gone by September 2003. Initially, he had been employed as a technical manager and he considered the new role offered to him to be demeaning. If he continued in the new role, which he had already been performing for around eighteen months since early 2003, he would have been liaising with large clients. Accepting the role would improve his position rather than demean it. The claimant was present at staff meetings, which took place on a regular basis, and issues relating to business were discussed. Management meetings were held to discuss issues regarding legalities. CFO identified to the Tribunal who attended the management meetings. There was a standard company contract for employees and a different one for management. The claimant did not ask why he was not required to attend at board meetings. If the claimant had complained about not being present at the board meetings the complaint would have gone through to CFO. Prior to the change in direction the claimant used to go out to a client’s site once a week and he received IRE€300 per month expenses. With the disengagement from XXXX this payment was no longer made to the claimant.

The claimant’s Performance Review (for 2003) was done in early March 2004. The claimant had spent a year in the operations support team at that stage. While he flagged some concerns, as is in the nature of such reviews, he did not indicate that he would not continue in the operations support role. The claimant’s title was now Customer Facing Support Team Member. EC met with the claimant following his review. The claimant made it clear that he was very unhappy with a number of issues and was particularly agitated about the shares. However, the claimant did not indicate either to EC at their meeting or at the review that he would not continue in the support role.

The Ryan Air contract went live in May 2004. The company won the Hibernian Insurance contract in July 2003 and it went live in March 2004. The claimant’s duties included development testing, bringing the system live, providing online support for the customer once it had gone live and doing integrations.

The company had to organise around the new business plan. It was now dealing

with bigger clients and the support role was more important. In May 2004 SC replaced OT as Operations Director. She charted the course for the company in its new role in order to meet the demands that would arise in the new business. SC and her staff produced a document, the Support Plan. It was a step-by-step guide for employees on how to support customers, how employees were to orient themselves towards customers with different requirements. The whole operations team, including the claimant, was involved in crystallising the support role and moving it on. It was concerned *inter alia* with support procedures, sources of support, staffing and business continuity and it covered out of hours service and fail-safe responses for emergencies. The Support Plan was also given to customers to inform them as to what they could expect from the respondent. Developing the support role was part of the natural evolution of the company.

In July 2004 BC took over from SC as Director of Technical Operations. He was responsible *inter alia* for customer support, service level agreements with existing customers and for the development of strategies to support the company going forward. SC took him through the Support Plan and its objectives and how the role would evolve in the business going forward. The Support Plan document was not produced with a view to outsourcing the customer support role. Outsourcing was not an option for the company as the software application that processes credit cards is written internally. The infrastructure that supports it is also developed internally and would need internal expertise.

In the brief hand-over period BC had with SC she did not alert him to any complaints from either the claimant or CM about their roles. BC received a copy of the claimant's and CM's appraisals and assumed the issues they raised at the appraisals had been addressed. BC did not raise these issues specifically either with the claimant or CM but he did say to them a number of times that if they had any issues they could raise them with him. The claimant did not raise any questions at that stage.

BC met with the members of the support team, a number of times in July and August 2004 to find out what their day-to-day roles involved and to gain knowledge of the whole process. He met them both individually and as a group and discussed their day-to-day activities and the whole process with them. Yet, over all that time they never mentioned any difficulties. He could not understand why it took them three months to raise the issues with him. It was not until late September 2004 that the claimant mentioned a problem.

BC held meetings with the operations/support team as to how they saw the company moving into the future. One such meeting was held on 24 September 2004 to discuss working hours. At this meeting the claimant stated that the operation support role was not his full-time role and that he was only doing it on a voluntary and temporary basis. BC had understood from the time of the handover to him that the members of the operations team had been in the role for a few years. He told them that he understood it to be their full-time role and that it was a matter between the company and them and that as far as he was aware there was no other vacancy in the company. The team requested a written job specification from BC. In response to the request BC produced the Operations Support Role - a two-page job specification – outlining the various duties of the employees involved. The document was merely a summary of what they themselves had already told him they had been doing. While they had not

got a job description on 24 March 2003 some one had obviously told them what to do.

A job specification of the Operations Support Role was opened to the Tribunal. The functions performed by the operations team were critical to company in order to fulfil its contracts for clients and the claimant and his colleague had the knowledge, skills and experience with the integration process. While some of the tasks were repetitive they were not menial. Some customers wanted extra features and once the software had been made the claimant had to test it and later support it when given to the customer.

BC e-mailed the document to the claimant and to CM on 29 September 2004 and invited any feedback by 4 October 2004. The claimant returned from sick leave on 6 October 2004 and told the respondent that he was not accepting the role. CM also indicated that he would not accept the role. While management had been aware of “grumblings” about the allocation of the shares, they were amazed that the claimant and CM had an issue about their roles. In an e-mail dated 8 November 2004 the claimant raised questions with BC about his salary, shares, pay for on-call periods, his role in the company and his directorship. In the e-mail the claimant also stated that his position in the company was being diminished and eroded, that others in the organisation were carrying out his role and that he was “being ignored and frozen out”.

On 9 November 2004 EC and BC met the claimant to discuss his issues. The company’s responses to those issues were also outlined to the claimant by letter dated 11 November 2004: the respondent did not accept that the claimant’s salary was below the market rate and reminded him that in March 2003, at the time the company changed direction, he had been given a salary increase of around 16% backdated to 1 January 2003 and a further increase of 2% had been given from January 2004; his share entitlement was explained as set out above and furthermore the option to have a third party to do a comparative assessment of the value of the two share entitlements (those in EIS as compared with those in ECCS) remained open to the claimant or in the alternative a representative from the company would meet his representative to discuss the benefits of sharing in the ESOP as opposed to the original offer; the payment for on-call was in the process of being calculated; the new business plan was being implemented over the previous two years and he had been kept informed of and participated in that change and had been performing the duties as outlined in job specification; he was not a director of the company and there was neither documentation nor a company resolution (as required by the company rules) to support his claim in that regard; and finally, the claimant was informed that if he did not perform the duties of the operations support role the respondent would have to consider taking disciplinary action. In similar fashion a meeting was held with CM on 9 November and EC wrote to him outlining the company’s responses to his issues.

The claimant and CM were out sick on a number of occasions from 30 September 2004 including a spell of two weeks from 12 to 26 November 2004. On 2 December 2004 the claimant attended the company doctor who diagnosed him to be suffering from work related anxiety and agitation. The claimant would not accept the role and was not willing to continue in it. When at work the claimant and CM were not as proactive as they had been prior to September 2004; they would answer the phones and do what was asked of them but due to their absences and the fact

that tasks generally take a few days they were not asked to do much. Correspondence was also exchanged between the parties' solicitors on the issues between the parties.

The claimant was invited to attend a disciplinary meeting 30 November 2004 and chose his colleague CM to attend with him. CFO and BC were in attendance on behalf of the respondent. At the meeting CFO again referred to the company's changed business plan over the previous two years, the claimant's input to the development of the operations support role, that since early 2003 he had performed the functions of that role as it had evolved and that the company was entitled under the claimant's contract of employment to make reasonable changes to his terms of employment. The claimant made no comment other than to say that he was not accepting the role.

By letter dated 3 December 2004 to the claimant, CFO reiterated the respondent's position and issued the claimant with a final written warning for his refusal to carry out his duties in the operations support role. In this letter the claimant was given until the close of business on Friday 10 December 2004 to confirm that he would carry out the duties of the operations support role, in default of which the respondent would terminate his contract of employment.

In an e-mail of the same date (which crossed with CFO's letter) the claimant stated that: he had been employed as a Technical Manager; his duties had been broken up and given to others; he had never agreed to the operations support role on a permanent basis but that he had been flexible and had been performing the support role on a temporary basis until the company could replace those junior members of staff who had been made redundant and he had agreed this with OT in September 2003.

The claimant was absent due to illness for the week commencing 6 December 2004. CM was also absent for some days around this time.

Letters of dismissal were issued to both the claimant and CM on the 13 December 2004. The company had no alternative but to dismiss them; their roles were mission critical to the payments processing system and the company and they were refusing to accept that role which they had been performing for nearly two years. The company could not consider suspension, as 50% of the support team were not carrying out their roles. The claimant did not exercise his right of appeal.

The claimants' knowledge, skill and experience were missed. The Network Manager and BC worked extra hours, carrying out the claimant's and CM's roles in the support operation, from November until the company got support staff in January 2005. It was not sustainable for the company to create roles that were not required at a time when the company was still losing money. The team worked in an open plan office where BC, who was approachable, was accessible to the claimant and CM and they could have raised their issues with him if they wished.

BC confirmed that the claimant and CM did not refuse to work but they did refuse to accept the job description and their role and said they had only been doing it on a temporary basis. BC understood that the claimants wanted issues addressed but he did not know why they had left it to the point of September 2004 to raise them. He had

told them he was their line manager and they could address issues with him and he had held individual meetings with them.

At the time the claimants refused to carry out their roles the company did not have a grievance procedure. Employees could raise any issues they had through appraisals or by talking to their line manager.

Claimant's Case:

The claimant was offered the position of Technical Manager in the respondent company in October 1999. The respondent was aware of his technical, managerial and people skills. The respondent agreed to pay him a salary of IR £45,000. When he asked to solidify his contract one month later he was told that the company could not meet £45,000 and he was asked to take part of his remuneration in shares. It was ultimately agreed that he would get IR£30,000 and the remainder (IR£15,000) in shares. He was to receive his full salary of IR£45,000 the following year. However the claimant accepted that the wording in the relevant paragraph in his contract of employment did not suggest that the IR£15,000 would be paid more than once.

While the claimant had the title of Technical Manager he had no specific job description. CFO told him to discuss it with the Managing Director (MD). XXXX was the company's sole product at this time. He was sent to Leeds to become the main expert on the product. He promoted the product, provided information on it, held seminars for people interested in having a website, gave demonstrations on its ease of usage and explained the benefits of e-commerce to clients. Eircom.net had agreed to sell the product (under the brand name XXXX) on the company's behalf.

The claimant reported directly to MD. In 1999 and 2000 he shared a room with members of top management and they had impromptu meetings with regard to company goals. Later they had more structured meetings in the boardroom on how to develop the product and take it forward. He was at technical meetings with colleagues. Various documents were sent out to potential investors on which he was identified as a member of the board.

He did work with Baltimore Technologies, which was a rising star in the internet business, and as the product was not sufficiently sophisticated steps were necessary to advance it. The claimant met and liaised with some of the bigger banks and other big clients about product integration.

In early 2001 MD told him he was making him a director of the company. Another employee, Ms. L, was also made a director at the same time. He was not asked to complete a B10 form. He enquired what would be involved in being a director and he was told he would have to attend board meetings. The claimant's title on his business cards was changed to Technical Director. He attended offsite meetings on the progress of the business and he believed these to be board meetings. The Fas workers did not attend these meetings. Any requirements or changes would be communicated to other staff after the meetings.

By mid 2001 the XXXX product was still the main focus of the business but a payments engine was being developed in the background and new people, including

CM were brought in to develop it. A payments system was being provided into XXXX. The claimant was linking banks into the product. The Bank of Ireland decided to suspend its involvement with the product. The respondent decided to develop its own payment engine.

The claimant first met the consultant (who later became EC) in mid 2002. There was no formal assessment of his work.

At a general meeting on 24 March 2003 EC informed the staff of the change of focus in the company's business. The claimant did not specifically recall the organisational chart being presented at this meeting. He had never got a paper copy of the organisational chart but it may have been part of a series of slideshows. Specific roles were not discussed at this meeting. He was surprised that he had not been given a title on the organisational chart, which was presented on 24 March 2003. He had been reporting to members of senior management and was amazed that he was now to report to OT. He felt he was losing rank. He was disappointed that he did not get this role; he had more experience in the company and with payments processing than OT did. The claimant agreed it was for management to make the decision as to who should head the team.

The claimant approached EC about his directorship and he informed the claimant that as far as he was concerned he was not a director. EC reverted to him later and informed him that if he was a director he would have been identified as such in the company's office. The claimant raised questions with his superiors about his title (director), position, salary and shares but he was passed from one person to another.

By mid to late 2003 the claimant was aware the company was disengaging from XXXX. Eircom had its own billing system and he was still trying to get it to take on the respondent's payments system. Others tested and supported the system but he worked mainly with Eircom. The claimant was still travelling to companies and he still had business cards describing him as Technical Director. He considered himself a director as he was giving directions to other members of staff in the company on what changes to make and how to make them. OT told them all to remain flexible and proposed that the claimant take up other duties including testing. The claimant did not want to do this because it was not really his role. OT said everyone should help since the Fás staff had been let go and they had been providing first level support. The claimant had never been involved in first level support up to this time. There were items in the job specification that a junior would do.

In August/September 2003 OT had asked the claimant and some others to do out of hours/on-call support work, which was the work done by the Fas staff (at first level support) before they had been let go. The claimant's change of title had not been mentioned on that occasion. The claimant pressed for a review. He had been the first employee of the company and had helped build it up. OT was brought in, over him, as Director of Technical Operations and was now doing lots of what the claimant had been doing. The company did not invite him to apply for any positions. Discussing the situation was very difficult for him.

The claimant had his annual performance review for the year 2003 in early March 2004 and that was the first time he learned that he had been ascribed the title of

Customer Facing Support Team Member. In the review he raised a number of issues including the removal of his previous title, his status, his director's stipend and the company's failure to address those issues and indicated that it was difficult to be proactive in an environment where there was lack of clarity as to his role and a poor HR response to his issues. He also indicated his desire to attain to a managerial role and to attend a management training course as he thought it might alert the company to his interest in regaining the ground he had lost.

The claimant continued to visit Eircom and liaised with banks. Some days he was in the office and on other days he was out. He did some testing in the office if a project was going live.

SC replaced OT as Director of Technical Operations. The claimant had discussions with her concerning his job specification. The claimant and others met with her to outline their position. They had previously put their concerns and issues to OT. She asked how they could support clients. They wanted to help but they did not want to just answer phones and be on outside hours. They organised a rota to support clients when a project was live. They did this on a voluntary basis and there was nothing about payment at first. The claimant considered himself a manager and a manager normally takes on extra duties. SC did not resolve their problems.

BC replaced SC as Director of Technical Operations in July 2004. Prior to September 2004 the claimant and others met BC and explained their history to him and that they felt that their roles were being diminished and that although they were managers they were being asked to do a customer facing support role. They asked BC for a job specification and he invited them to help him to put it together. Prior to this he had two meetings with EC about his salary, shares and his role in the company but he was told that there was no other role available for him. Over the previous months his role was being done by OT, SC and BC. The claimant asked the company for the remuneration for the out of hours work. He was now travelling less to meet with clients as others were now carrying out this work.

The claimant was taken aback when he received the job specification for the operations support role. He regarded it as a demotion and objected to it. It was not a managerial role but was a junior role and bore no resemblance to his original role. The company could train someone to carry out the role for less pay. The claimant did not agree to it. It was being forced on him. He had no title, was answering the phone and was deskbound. No one ever told him this was where his role would end up. While he agreed it reflected what he and everyone on the team had been doing, it also included some tasks he had not been doing over the previous two years such as logging all support issues and items that juniors had been doing. He refused to accept the role. He could have been given OT's position. In an e-mail to BC on 8 November 2004 the claimant set out his refusal to accept the role as well as his ongoing problems with the respondent in relation to his salary, shares, directorship and the payment due to him for on-call work.

EC called a meeting on 9 November 2004 to sort out the issues. The claimant was absent intermittently due to illness but when he was present in the office he was doing his regular work. He received the disciplinary code on 24 November 2004.

A disciplinary meeting was arranged for 30 November 2004. The claimant did not think that this was a disciplinary matter. He hoped that the issues could be sorted at the meeting but there was no middle ground regarding his role; it was the role offered or nothing else. As a result of the meeting he was issued with a final written warning on 3 December 2004. By letter dated 13 December 2004 the respondent gave him four weeks' notification of his dismissal.

In cross-examination the claimant accepted that when he first started as technical manager he did not have a team to manage; his expectation was that there would be a team. He attended management meetings in 1999 and 2000, which dealt with management issues. FAS workers were not at these meetings. He accepted his name was not on minutes of meetings held in 2002 and 2003.

Up until 2003 the claimant was under the impression that he was a manager and director of the company. Management had got him to present himself as a director to customers. He was now handling minor jobs. The role he was being offered had the same title as those of other junior members of staff. However, he acknowledged that the junior members of staff had been made redundant.

The claimant agreed that the job specification for the operation support role was an accurate job profile for the tasks he had been performing over the previous eighteen months to two years but it was not his original role.

EC brought friends of his into the company as consultants and these later became employees and were performing duties which he had previously been doing. He should have been appointed the Director Technical Operations position; he could do as well as those who had been appointed to the position as he had three to four years' experience with the company as well as background experience in payments but EC did not afford him the opportunity to apply; he should have been allowed to compete for the position.

While he did receive an increase in salary of about 16%, the respondent deducted the €300 director's stipend. The claimant contended that this sum was not referable to GoSell expenses as the respondent had not fully disengaged from the product at the time of the withdrawal of the payment.

He was not refusing to do his job but he was refusing to perform the new role. The respondent should have given him the job specification in March 2003. He wanted to be recognised as manager of the company and be part of running the company. He accepted there was no managerial type role in Operations Support.

The problem CM and he had regarding their shares jaundiced management's view of them. It was their way of getting him out of the company. EC told him if he did not play ball he would not get his shares. He was not aware that the shares were still available to him as a former employee; he thought the offer had elapsed. He felt he was being forced into taking ECC/ESOP. He thought if he accepted the shares it would have been as full and final settlement of his problems with the company.

The claimant accepted that while his solicitor wrote to the respondent in July 2004 about the respondent's failure to issue shares he had not raised any other issues in that

letter. The claimant also accepted that he did not escalate the issues he had regarding his role by making a formal written complaint. However, he constantly raised the issues he had with OT who told him he would have to speak to EC.

He refused to carry out the duties of the operations support role as outlined to him in September 2004. He wanted a management role, not to be excluded from meetings, to have his salary brought up to what it should be and not to be offered this particular job specification. From the time of the offer of this role to him he knew he no longer had management status in the company.

BC met with a group of them when he started and they raised their issues with him. The claimant had a problem with what was being offered to him as his permanent role. He agreed that he had accepted the role for almost two years although he was maintaining that he was performing it on a temporary and voluntary basis.

CM was the claimant's colleague at his disciplinary hearing on 30 November 2004. The claimant said very little at the meeting. He told the Tribunal that this was because he had felt bullied at previous meetings and had been stonewalled. He again raised the issue of his share entitlement and reiterated his refusal to accept the role, which he found demeaning.

Subsequent to the disciplinary meeting the claimant e-mailed CFO on 3 December 2004 stating *inter alia* that he had been employed as a Technical Manager; his duties had been broken up and given to others; he had never agreed to the operations support role on a permanent basis but had been flexible in performing the support role until the company could replace those junior members of staff who had been made redundant as had been agreed with OT in September 2003.

He had tried on many occasions to talk to the company but to no avail. He accepted he had not raised issues at the disciplinary meeting but said that he had raised them previously with EC.

Determination:

The Tribunal notes that the parties agreed that the issue relating to the shares does not fall to be determined by the Tribunal.

The Tribunal is satisfied from the evidence adduced that in the earlier years of his employment the claimant had been a manager and later a director of a function in the company rather than of the company itself.

At the time of the refocus of the respondent's business and the restructure in 2003 the respondent, although abandoning its original business (the XXXXproducts) for which the claimant had been responsible, did not make the claimant redundant. He was retained because the company needed his skill-set going forward and because he had already been doing support work. In his evidence the claimant agreed that since the change in business focus in 2003 he had been performing the functions as set out in job specification for the operation support role for between eighteen months to two years. The claimant failed to satisfy the Tribunal that he had at

any time communicated to the respondent that he was performing the support role on a voluntary and temporary basis or that he objected to the role; in particular no such points were made at the general presentation, on 24 March 2003, or in his performance review which was at a time when he had been performing that role for about a year, or to his immediate superior BC, the Director of Technical Operations, from the time he took over the position in July 2004 until late September 2004. Nor did his solicitor raise any issue about the claimant's role in his letter of 4 July 2004. Furthermore the claimant had participated in the profiling and crystallisation of the operations support role as part of the evolution of the company based on the work of the team. In relation to the above whilst the claimant did indicate at his performance review on 2 March 2004 that there was a lack of clarity about his role he did not indicate that he was unwilling to continue with it.

The respondent was entitled in accordance with clause 12 of the claimant's contract of employment to make reasonable changes to the claimant's terms of employment by way of general notice and in any event the claimant had acquiesced in the role.

In circumstances where half the operations support team was refusing to accept their roles the Tribunal finds that the disciplinary steps applied were appropriate and fair.

For the above reasons and in particular in the context of the evolving nature of the respondent's business the Tribunal finds it was unreasonable of the claimant to refuse to accept the role he had been doing for some considerable time. Accordingly, it finds that the dismissal was fair and the claim under the Unfair Dismissals Acts, 1977 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)