EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.
Employee UD359/2006

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)
Chairman: Mr. L. Ó Catháin
Members: Mr. P. Casey
Ms. H. Kelleher

heard this claim in Cork on 29 May 2007 and 23 October 2007

Representation:
Claimant: Mr. Ken O'Sullivan BL instructed by Mr. Terence English,
Murphy English & Co., Solicitors, 33-34 Cook Street, Cork

Respondent: Ms Elizabeth O'Connell BL instructed by
Reddy Charlton McKnight, Solicitors, 12 Fitzwilliam Place, Dublin 2

Background:
The Claimant contends: He commenced employment in August 1995 in a company as a sales office administrator and in December 1999 the Respondent company took over the company and there was a transfer of undertaking. The Claimant was informed his terms and conditions were transferred to the Respondent.

On or about the 27th February 2004 the Claimant transferred to the Cork depot. Circa 29th March 2004 the Claimant took up a new role as assistant manager in the Cork depot. He later received confirmation of this and that his salary increased to €35,190.00 and a payment of a bonus of €5,078.00.

In December 2004 the general manager sent correspondence by e-mail to the Claimant proposing to reduce the Claimant's salary and to link his bonus payments to performance in the Cork service station. On or about 24th May 2005 the Claimant was called to a meeting with the GM. The GM proposing to end the Claimant's role and assign him to forecourt duties, his salary to be reduced to €25,000.00 and loss of company car. Circa 17th July 2005 the new GM gave notice to the Claimant that that Claimant's post was being made redundant on grounds of staff rationalisation. The Claimant was not consulted nor given prior notice of the redundancy.

The Respondent subsequently bought another oil business in Cork. The employees of campus oil are now employed in the Cork depot. A new depot manager is employed who carries out the same

duties as the Claimant did. At the time the Claimant's notice ended there was a change in circumstance in that his position was no longer redundant.

Alternatively: the redundancy was unfair, there was a breach of fair procedures in that the Respondent did not invite voluntary redundancies, nor applied service criterion. Furthermore the Respondent did not discuss alternatives with the Claimant, or alternatively he was unfairly selected.

The Respondent contends: The Claimant is barred from pursuing the claim of unfair dismissal by reason of a full and final settlement concluded between the Claimant and the Respondent in September 2005. The settlement was negotiated by the Claimant's solicitors and had the benefit of independent legal advice at all times.

It is denied that the Claimant was unfairly dismissed. The Claimant was made redundant and was notified on 17th July 2005 and his employment terminated on 30th September 2005.

Mr. Kirrane was employed initially on a consultancy basis. He was then appointed manager of texoil division. When texoil was incorporated in 1999 he was appointed managing director and the capital of the company was divided equally between him and texoil (Ireland) Limited.

Respondent's case:
The Tribunal heard evidence from the solicitor who was retained by the Claimant in July 2005. She explained that she successfully negotiated a redundancy package for the Claimant. The claimant called to her at a later time with his family to thank her. At a later time she received correspondence from the Claimant's new solicitors to say that they were re-opening the case.

The Tribunal heard evidence from the most recent General manager. He recollected that the Claimant moved to Cork from Dublin and this was because the Claimant approached the company to say that he was getting married and was going to live in Cork. At this time the witness explained that he himself was the transport manager. He referred the matter to the then MD and the Claimant and the MD managed the situation from thereon. The Claimant always made it clear he did not want a role in sales. They came on the idea that the Claimant would manage a service station. They created a role for the Claimant because he was a, "Valid", member of the Respondent. At around the same time the company acquired the Lee Tunnel depot.

The business was not as profitable as they hoped and they had too many staff. They spoke to the Claimant and his advisor about alternative roles. They entered into negotiations with the Claimant to agree a redundancy termination package.

At the beginning of the second day of hearing it was confirmed to the Tribunal that, at termination of his employment, the claimant was to receive twenty-one-and-a-half thousand euro. However, after negotiation this figure was reduced to sixteen and a half thousand euro to allow for five thousand euro as the value of the claimant's car, which had been the property of the respondent. The respondent's representative stated that the respondent was aggrieved because it felt that the case was already settled. However, it was stated that the respondent had two witnesses present to testify that there had been a redundancy.

The claimant's representative said that there had been no settlement, that the claimant had been lied to and that a respondent witness had made a false statement of fact. It was further alleged that someone had been put into the claimant's job and that any settlement was void.

Giving evidence, a witness for the respondent (the respondent's financial controller) said that she had started in June 2005 and that she had only had two phone conversations with the claimant. She said that she had seen the respondent's accounts for the Lee Tunnel Service Station and that in May 2005 it had been in a loss-making situation.

(The Tribunal was furnished with Lee Tunnel Service Station figures to December 2004 and December 2005 for profit and loss.)

The witness continued by saying that the claimant had also done depot administration and that the respondent had looked at both the depot and the service station. The staff in the depot consisted of a manager (hereafter referred to as BB) and two sales staff and there were three drivers. There was never a manager of the service station. BB was responsible for all. For 2005 the depot made a profit of about ninety-five thousand euro. The turnover was about five or six million. The financial health of the Cork operation was a seventy-one thousand euro profit on about seven million. Asked if this was a good ratio, the witness replied: "No. We were deeply unhappy."

The witness stated that she would treat the depot as a separate business entity and expect it to prosper as if it was a separate company.

The witness said that whether or not the respondent would need an administrator would depend on the number of trucks. The respondent would need ten drivers to have an administrator. Dublin had nine drivers and was the only depot that had an administrator. The Dublin operation was three times the size of the Cork one.

The witness told the Tribunal that she would know if the respondent was pursuing acquisitions but that it would only be discussed at a senior management meeting and would not go beyond that room. The witness would not be given information until it was agreed.

Commenting on the pay figures given on the claimant's claim to the Tribunal, the witness confirmed the weekly figure of €678.23 and the "Regular Bonus or Allowances" figure of €195.34.The claimant had also had the use of a company car for which he paid tax for a benefit-in-kind. Thecar had a total net value of seven thousand euro. A bonus was paid twice yearly. Bonus paymentswere generally paid on performance. The claimant got a five thousand euro bonus in July 2005. Hegot no further bonus.

The respondent had accepted that there was three months' notice due to the claimant. The final payment to him was twenty-one-and-a half-thousand euro net of five thousand euro for his car. The Tribunal was furnished with a bank statement for October 2005 showing that a cheque for sixteen-and-a-half thousand euro had been cashed. The witness said that she had been told that this was in full and final settlement of all money for the claimant including bonus.

Under cross-examination, the witness accepted that the figures for 2005 had been produced in 2006. She said that she had not brought the figures for 2006 to the Tribunal hearing and that she did not know "off the top of my head" about the depot figures. It was put to her that the claimant had asked for accounts but had not been given them. She said that she had not known this.

It was put to the witness that the claimant had not been told that a particular oil company (hereafter referred to as Z) was being taken over by the respondent. She replied: "I knew we'd be actively looking for a takeover. However, the witness added that the respondent's managing director was himself an accountant and that he assessed a lot of bids "on his own". She confirmed that this

meant without reference to her. One other company (based in Galway) was also taken over. She had become aware of the Z takeover in August 2005. The respondent would constantly look for acquisitions but the witness only became involved when heads of agreement were signed. She conceded that she "probably knew in July 2005" but said that "we talk to a lot of companies" and that there was no need for her to be involved in "early discussion talks". She "was only new to the company".

The witness stated that there had been little need for a Lee Tunnel administrator but admitted that she had not visited while the claimant was there. It was put to her that the claimant would say that BB would be out around Cork and that the claimant had managed the depot. She replied: "A huge element of the work would be off-site". She added that the claimant had been employed in the service station and that Z had depot employees.

It was put to the witness that the claimant claimed that he was replaced the following week. She replied that the respondent had been "happy" with the claimant and therefore had offered him another job. He had been made an offer to manage the service station.

It was put to the witness that the claimant would go from Lee Tunnel manager to "pumping gas". She replied that he had been offered a manager's job and that BB had been the depot manager. She said: "We could not see a future for the service station. We did not have a job in the depot. We were not making the profit in the service station that we thought we could." She added that the claimant was offered a franchise and a bonus scheme (share of profit) for the service station; she thought the package was a €25k salary and 50% of the profits. She acknowledged that the basic salary was lower than the claimant's previous one.

(The respondent's representative interjected to say that the witness had not been involved in the negotiations. The witness said that she had only started with the respondent in June 2005 but was now there about 2.5 years.)

The witness told The Tribunal that the respondent's business was that of a wholesale supplier but that the respondent felt there was "profitability" in the service station if it had a full-time manager.

The claimant's representative put it to the witness that the respondent knew that it was thinking of taking over another company, that the respondent was offering a similar job at a similar salary and that the second job was a complete sham. The claimant was being asked to pump oil and to wash cars. He was offered this other post on the basis of accounts he had asked for but was never given. His wife had been due a baby.

The witness replied that the respondent had drawn something up to show that it did work out and that the claimant would have kept 50% of the profits even though the basic salary was lower.

Questioned by the Tribunal, the witness said that the Waterford depot had been making a loss, that the respondent made three people redundant there and that it had been closed completely. The witness said that the service station was "very much a poor relation" and that to have a person running a service station was "just an advertisement" for the respondent. The witness confirmed that the Lee Tunnel depot had made a €95k profit on a five million euro turnover and stated that the respondent now had a presence in Ballincollig.

Asked if the respondent had been right to say that the claimant could make more money, the witness replied: "Yes. Sixty thousand."

At this point in the Tribunal hearing, the respondent's representative said that the service station was now doing better than in 2005 and that BB would say that it would do better if there were a manager there. The claimant's representative stated that the respondent's figures were for 2007 rather than 2006.

Recalled to give further evidence, the respondent's general manager said that the service station had been "dragging down the Cork figures" and that the respondent had been spending a lot of money to generate a small profit. The respondent's business plan had reflected the respondent's belief that the Cork depot and service station could make money.

The witness said that the offer made was a basic €28k per annum plus a bonus. He had negotiated with the claimant's then solicitor. The respondent "did not take on a legal person". The witness told the Tribunal: "We wanted to be fair. We did not want to lose him." The witness added that the claimant's then solicitor had said that the claimant might be out of work for six months. The witness said that the respondent had "negotiated freely" with the claimant and that the respondent had written to the claimant to check if his then solicitor was acting for him. A gentleman who came with the company that was taken over replaced BB who went to the respondent's wholesale and core business. This gentleman had had years of experience managing drivers and had held such a position with the company taken over.

Under cross-examination, the witness said that it had been the claimant's decision to live in Cork. The claimant was told he could make a query. The respondent received a solicitor's letter. The witness told the Tribunal that the claimant had accepted that he could lose his car in twelve months. The witness added that the claimant should never have had a car in Cork. He was given it because he had had one in Dublin.

When the witness reiterated that the claimant had been offered a basic salary of €28k, he was asked why he had said €25k. The witness replied: "We would pay twenty-eight thousand." The witness added that the claimant "would have made good money if he took the job" and that "we believed in the Lee Tunnel".

The witness told the Tribunal that "I knew we were talking" to the company that was taken over but the witness said: "Nobody knows what will happen". He added: "We could not flag the offer because people could come to Cork to top it." The witness said that the respondent "did not want to get rid of" the claimant but the witness did confirm that a gentleman was brought from the company taken over and was put into BB's position. Asked why the claimant had not been offered that post, the witness replied that the claimant had consistently said that he did not want a sales role. BB and BB's successor (the gentleman from the company taken over) performed a "mainly sales role". The claimant's strength was "systems". On 17 July the claimant was told that the respondent did not want him to leave.

It was put to the witness that the claimant had not been offered the post that BB had held. The witness replied: "He was not at that level."

Giving evidence, the abovementioned BB confirmed that he had worked for the respondent as a depot manager. He had joined the respondent in February 2002 as depot manager for Cork. He had looked after sales. He had been out meeting customers, generating business and trying to collect money in 2005. He was in the office every morning and returned every day when he could. He could be there at lunchtimes. He had two people in the office. They took sales calls. The respondent

had three drivers in Cork. The claimant had a role in the depot and was involved in the day-to-day running of it. C was helpful regarding IT matters and he did the wages for the service station. The Cork depot was responsible for the service station. The respondent held management meetings for depot managers. It was always BB (rather than the claimant) who attended.

BB told the Tribunal that he had been responsible for getting sales money in and for "improving the margin". He said that the gentleman (from the company that was taken over) who had succeeded him would have been at the same level in the other company and would have done the same work for that company as BB had done for the respondent. If sales were down BB (and not the claimant) would be questioned. The "bottom line responsibility" lay with BB. The claimant would have been indoors all the time. The claimant "was excellent in IT." BB "was out cold calling and trying to get money off people".

In May 2005 the service station was not doing as well as the respondent liked. There was difficulty getting staff. The carwash had gone well before BB's time and sometimes during BB's time but it fell off. Asked when he had first heard of the takeover of the other company, BB said that there were always rumours. He said that he had gone on holidays for two weeks after the All-Ireland Final on Sunday 11 September 2005. Asked if his two office staff had been told about the takeover, BB replied by saying that he had been told while he was on holidays and that he knew about it on 26 September 2005.

Under cross-examination, BB said that his role had been to generate business and to collect cash. Initially when he joined the respondent he did wholesale as well but then in 2004 he moved to the Lee Tunnel site. The claimant had administered the depot with the two staff. BB returned to wholesale at the start of October 2005. Asked if he had expected the claimant to take over his role, BB said that it would not have surprised him, that he and the claimant had had a good relationship and that the claimant could have done it.

BB told the Tribunal that he himself had worked at different things that he did not like and that, in BB's opinion, the claimant "should have taken the job". BB accepted that it involved a "reduction".

Questioned by the Tribunal, BB said that he thought he had returned to wholesale at the start of November 2005 and that he thought that the gentleman from the company taken over had operated along with BB for one month.

Claimant's Case:
Giving evidence, the claimant said that having commenced an employment in 1995, he subsequently joined the respondent on a transfer of undertaking. He was happily employed in Dublin. He told the respondent he was marrying a native of Cork. He told the respondent's managing director that he could commute up and down but he was told that this was no way to embark on married life. He replied that this was none of the managing director's business but the respondent made a role for the claimant in Cork. He married in March 2005.

In Dublin the claimant had been a depot manager. He had had "a great working relationship" with the respondent's general manager from whom he had "learned a lot" even though he had been a depot manager before the general manager arrived.

On 29 March 2005 the claimant started work in Cork. He took in orders and updated the respondent's sales ledger. His role was to assist the Cork depot manager (the abovementioned BB) and to take responsibility for the Cork service station. The employees there were still being paid by

the previous owner. The claimant had to order stock. While he was in charge the respondent never ran out of stock. He and BB had "an excellent working relationship".

In May 2005 the claimant was told that his role was being ceased and that he would be offered a salary to manage the service station where he would be washing cars, putting petrol in cars and doing a small amount of administration. His salary, which had been as much as €35k (with a bonusevery January and July) in his employment with the company, was to be €25k although he couldalso earn fifty per cent of the profits. The claimant was "in shock". His wife was due a baby in August. He had a mortgage. Also, he had had a car with all expenses paid. The claimant was nowfaced with going from a total package worth some €54k in total to a salary of €25k with no certainty as to what profit (if any) of which he would receive a percentage. However, there wouldbe a decrease in basic annual pay of €10k. He was told that the depot was not prospering and thatthere was to be a staff rationalisation. He was told to take the job offered or there would be no jobi.e. that this was the only job for the claimant with the respondent. The claimant had had access tothe nominal ledger

The claimant told the Tribunal that he had sought figures as to the profitability of the carwash but had not been given them. He said that he was surprised at the level of profit in the respondent's 2007 projection and added that there was no development potential there because there was an underground pipeline going to Cobh. He had not seen himself making the profit suggested by the respondent. He had spoken to his wife. With one staff member he would be washing cars and putting petrol in cars. He "did not think this new job was a realistic option". His wife was not working. The new child would be "expensive". He could "lose the car". BB was a mature person who had spoken of having other financial interests. BB was not in the claimant's position.

The claimant went to a meeting with the respondent in mid-June 2005. He went to listen. He told the Tribunal: "I felt my hand was being forced." He went straight to his then solicitor's office. She (the solicitor) had helped with his house purchase.

The claimant told the Tribunal that his employment ended on (Friday) 23 September 2005, that he had five days' holidays and that "on the Thursday of that week a girl from XXXX (the company being taken over) came about deliveries".

The claimant stated to the Tribunal that prior to the May meeting his relations with the respondent's general manager had been good. It was put to the claimant that the respondent's general manager had said that he told the claimant that the respondent was buying the abovementioned company. The claimant replied that he would have told his then solicitor straight away.

Asked about BB's job, the claimant said that he had been a "rep" from 1996 to 1998 and that hehad never said that he would not do sales. He said to the Tribunal: "Backed into a corner I'd certainly have gone out on the road." Asked to confirm that he would have taken BB's job, he replied: "You might argue I was doing it anyway. I thought there might have been a competition."He referred to the fact that he was being offered a lower salary and said that his family had a budget, that €10k was significant, that he "did not think the lower-paid job was realistic" and thatthe respondent's general manager had never told him anything about the purchase of the othercompany.

Speaking of when he went to his then solicitor, the claimant said that she had said that she would look into the situation and negotiate for the claimant who believed that he was faced with a redundancy situation. The claimant told the Tribunal that he had "negotiated on the basis of a

redundancy situation", that he had not known about the takeover of the other company and that he would have thought there was a job that he could do.

The claimant stated to the Tribunal that there had been no negotiation done about the terms of his "new twenty-five thousand euro job" and that he had assumed that his then solicitor had negotiated for him the best termination package she could get. Asked if he had thought that there was room for re-negotiation about the alternative job, which had been offered to him, the claimant replied: "No." He agreed with the suggestion that it was a case of take it or leave it. The claimant also agreed with the suggestion that his then solicitor could not get him his job back.

Asked if he had found that the general manager had misrepresented himself in settlement negotiations with the claimant, the claimant replied that the general manager had been silent about the company being taken over and that the claimant had believed that his job was gone. He (the claimant) had believed that the redundancy talks had been based on an acceptance of a genuine redundancy situation.

Asked about the deliveries (made as the claimant's employment was ending) involving the company that was taken over, the claimant said that it had not been unusual that deliveries involving the other company could be made and that he probably only found out about the other company in the three months after his employment ended. He thought that he could have given a fair account of himself if permitted to try for the job that was given to the gentleman from the company that was taken over.

Respondent's Case (Resumed): The final witness was the respondent's general manager who was recalled to give further evidence i.e. that on 21 September 2005 he personally had not been aware of any negotiations with the company taken over.

Determination:
The Tribunal was not satisfied that there was sufficient evidence to establish a connection between the redundancy and the takeover of XXXX. Accordingly, the Tribunal determines that the redundancy settlement stands and cannot be set aside particularly in view of the independent legal advice and the negotiated nature of the settlement. The claim under the Unfair Dismissals Acts, 1977 to 2001, fails.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)